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**The fair trial of those accused of historic child sexual abuse**

**Ingrid Karmark**



**November 2017**

This thesis is submitted to the University of Kent  
for the degree of Master of Philosophy

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The officials at Ministries of Justice of European countries who provided detail about time bars for prosecutions which operate in their jurisdictions.

## **The fair trial of those accused of historic child sexual abuse**

### **Abstract**

The question which this research addresses is whether recent developments in law and practice concerning the prosecution of those accused of historic child sexual abuse (HCSA) especially taking into account the heightened public concern with this issue, may operate to compromise the right of the defendant to a fair trial in such cases, particularly with regard to the procedural and evidential safeguards which support that right.

An historical and sociological survey of the problem of child abuse and a consideration of the impact on the criminal justice system of the intense public concern about child abuse provide the context for a forensic examination of four specific areas of concern: the investigatory methods of the police in such cases; particular problems arising from the delay in the allegations being made; changes to the rules relating to 'bad character' evidence about the complainant (Youth Justice and Criminal Evidence Act 1999 and Sexual Offences Act 2003); and changes to the rules relating to 'bad character' evidence about the defendant in sexual offences cases (Sexual Offences Act 2003).

The study considers the available data and the extensive legal, historical and sociological literature concerning child sexual abuse, relevant international and municipal statute and case law and the case papers of some men convicted of historic child sexual abuse who maintain their innocence and volunteered their assistance to this study.

It concludes that heightened public concern about child abuse has played a significant role in developments of relevant law and practice which may at times give rise to significant miscarriages of justice; that a long period of delay before charges are brought presents significant evidential challenges to a fair trial; that police methods of 'dip sampling' and interviewing in the investigation of such cases may operate to compromise the reliability of the evidence obtained; that current restrictions on the questioning complainants about their past character and sexual history may hinder the proper testing of prosecution evidence; and that the current rules on the admissibility of evidence about the past character of the defendant may have an unfairly prejudicial effect. Suggestions are offered as to how the current law and practice might be improved to address some of these issues.

# The fair trial of those accused of historic child sexual abuse

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## Chapter I Introduction

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### (i) The problem of HCSA

The purpose of this thesis is to discover whether recent law enforcement practices and reforms in the law of evidence in the UK may operate to compromise the right to a fair trial of defendants in historic child sexual abuse (HCSA) cases. These cases concern claims that are not made by children contemporaneously with the alleged events, but by adolescents or adults years or even decades later. For example, the Stormont Inquiry in Northern Ireland was set up to examine claims of abuse in children's homes which date back to 1922.<sup>1</sup>

In the past twenty-five years, many countries, including the UK, have recognised that child sexual abuse exists on an unacceptable level. There is also widespread recognition that instances of such abuse that occurred years ago but were not reported or pursued at the time should, once allegations have been made, be vigorously investigated and prosecuted where appropriate. Both current and historic child abuse have been major issues of public concern for many years now. There can be no doubt that historic cases continue to impact in the present on those who suffered from them. Many public allegations have been made of HCSA, numerous high-profile investigations have often followed, and in many cases resulted in prosecutions and convictions.

It was suggested that paedophile rings were operating in the Kincora hostel for boys in East Belfast in the 1980s. Concern over organised paedophilia also resurfaced in North Wales in 1991 with the Bryn Estyn care homes cases.<sup>2</sup> Operation Rectangle, begun in 2007 and which ran for several years, was a police investigation into 1960s allegations of physical and child sexual abuse in Haut de la Garenne in Jersey which resulted in seven convictions.<sup>3</sup> Large-scale police operations, including Operation Yewtree, have been launched in the UK after hundreds of allegations of HCSA were made against the late BBC presenter Jimmy Savile

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<sup>1</sup> BBC News Northern Ireland, 'Stormont child abuse inquiry to date from 1922' 19 October 2012. Britain's oldest person to have been charged with HCSA allegations (between 1974 and 1983) is aged 101; see Press Association, '101-year-old man in court to face historical child abuse charges' *The Guardian*, 6 June 2016.

<sup>2</sup> R Webster, 'A Portuguese Kincora?' 30 Jul 2003; <<http://www.richardwebster.net/print/xportuguesekincora.htm>>

<sup>3</sup> I Cobain, 'Jersey: Haut de la Garenne children's home abuse scandal ends with one last conviction' *The Guardian* 7 January 2011.

and other former BBC employees.<sup>4</sup> More recently, the Metropolitan police have received 106 allegations of historical child sexual abuse dating from the 1970s at 32 football clubs and have identified 83 suspects.<sup>5</sup>

According to the Office for National Statistics, there were 88,106 police recorded sexual offences in the year ending March 2015, an increase of 37% compared with the previous year. This is the highest figure recorded by the police and the largest annual percentage increase since the introduction of the National Crime Recording Standard (NCRS) in April 2002.<sup>6</sup> Almost 30 000 registered offenders have been convicted of offences against children.<sup>7</sup>

While abuse scandals have surfaced and continue to surface, the attempt to quantify the amount of such abuse on a national scale is very difficult, especially as child victims will frequently not report the crime or may well be ignored or disbelieved if they do. It is estimated that 38 per cent of all rapes recorded by police are committed against children under 16 years of age.<sup>8</sup> Trends in recorded crime statistics can be influenced by whether victims feel able to and decide to report such offences to the police, and by changes in police recording practices.

For example, while there was a 17 per cent decrease in recorded sexual offences between 2005/06 and 2008/09, there was a seven per cent increase between 2008/09 and 2010/11. The latter increase may in part be due to greater encouragement by the police to victims to come forward and improvements in police recording, rather than an increase in the level of victimisation.<sup>9</sup>

There can be no doubt that child sexual abuse is a major problem in the UK and many other countries in the 21<sup>st</sup> century. The police have not been slow to respond to the heightened

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<sup>4</sup> L O'Carroll, 'Jimmy Savile row deepens after claims of abuse by another BBC presenter' *The Guardian* 17 October 2012. See also, 'The Dame Janet Smith Review Report - an Independent Review into the BBC's Culture and Practices during the Jimmy Savile and Stuart Hall Years' 25 Feb 2016; <<http://www.damejanetsmithreview.com>>.

<sup>5</sup> J Grierson and L Brooks, 'Met police receive 106 allegations of sexual abuse at football clubs' *The Guardian* 13 Dec 2016; <https://www.theguardian.com/football/2016/dec/13/met-police-106-allegations-of-sexual-abuse-at-london-football-clubs>

<sup>6</sup> Office for National Statistics, Overview of violent crime and sexual offences, 11 Feb 2016, para 8; <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2015/chapter1overviewofviolentcrimeandsexualoffences#sexual-offences>>

<sup>7</sup> <[https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/sexual-abuse-facts-statistics/? t\\_id=1B2](https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/sexual-abuse-facts-statistics/? t_id=1B2)> Accessed on the 19 Oct 2016.

<sup>8</sup> H M Government, *The Government Response to the Stern Review: An Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales*, March 2011, p.8.

<sup>9</sup> Ministry of Justice, *Home Office and the Office for National Statistics, An Overview of Sexual Offending in England and Wales* 10 January 2013, p.8.

public concern about HCSA and to the pressure on the criminal justice system to address it. There have been numerous investigations, prosecutions and convictions.<sup>10</sup>

However, a survey of the literature relating to CSA and HCSA, reveals significant concerns about the fairness of various elements of the investigation and prosecution processes involved, and also a significant incidence of miscarriages of justice in these cases, in the sense of failures of the criminal justice system resulting in the unjust conviction and imprisonment of defendants.

For instance, in *The Great Children's Home Panic*<sup>11</sup> as well as in his much more in-depth book *The Secret of Bryn Estyn*,<sup>12</sup> Webster argued that whilst a number of genuine child abuse perpetrators have been caught by police 'trawling' methods, others have been wrongfully convicted. Others have questioned whether such methods are safe.<sup>13</sup> Examples of HCSA convictions which have been overturned by the Court of Appeal include the following.

In *R v Basil Rigby Williams and Michael James Lawson*,<sup>14</sup> fresh evidence from two former care home residents directly undermined the evidence of two of the complainants. As concerns the Rigby Williams case, there had been police contamination of evidence. The sheer number of suspects of HCSA found in the police trawl into care homes which were contained in a list (which included the defendant's name) was considered by the Court of Appeal in itself to be prejudicial to Lawson's case when it was accidentally revealed to the jury, and made his conviction unsafe.

In *Anver Daud Sheikh v The Crown*<sup>15</sup> the appellant had been forensically disadvantaged at his original trial because a log book, which would have proved that he did not work at the care home at the time a resident claimed to have been sexually assaulted by him, was no longer available.

In *R. v B*<sup>16</sup> a complaint of sexual abuse had been made 30 years after incident. Whilst the Court of Appeal held that an order of a stay for abuse of process due to the delay and limited evidence available in itself was not required, the convictions were not safe. B had been

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<sup>10</sup> K Starmer, DPP 'The Criminal Justice Response to Child Sexual Abuse; Time for a National Consensus?'; <[http://www.cps.gov.uk/news/articles/the\\_criminal\\_justice\\_response\\_to\\_child\\_sexual\\_abuse\\_-\\_time\\_for\\_a\\_national\\_consensus/](http://www.cps.gov.uk/news/articles/the_criminal_justice_response_to_child_sexual_abuse_-_time_for_a_national_consensus/)> 6 Mar 2013.

<sup>11</sup> R Webster, (Orwell Press 1998).

<sup>12</sup> R. Webster, (Orwell Press 2005), p.591.

<sup>13</sup> D Rose, 'Abuser' was netted in a police trawl – but is he innocent?' The Observer 6 Jan 2002.

<sup>14</sup> [2003] EWCA Crim 693.

<sup>15</sup> [2006] EWCA Crim 2625.

<sup>16</sup> [2003] EWCA Crim 319.

unable to defend himself or effectively cross-examine the complainant. In the interests of justice, the convictions were set aside.

Despite the genuine and widespread problem of HCSA, these miscarriages of justice, and misgivings such as these about the prosecution process, show that there are cogent grounds for further research into the reliability of due process at all stages of HCSA investigations and prosecutions today.

### *The research question*

The research question which emerged was this: ‘May recent developments in law and practice concerning the investigation and prosecution of those accused of historic child sexual abuse (HCSA), especially taking into account the heightened public concern with this issue, operate to compromise the right of the defendant to a fair trial in such cases, particularly with regard to the procedural and evidential safeguards which support that right?’

### **(ii) Issues to be addressed**

The following issues emerged from the research as the most germane to this inquiry, and they are examined in this thesis.

- (a) The heightened concern about HCSA: how has the problem been perceived, and how has public pressure impacted upon the development of law and practice in HCSA cases?
- (b) Police investigations of HCSA: have the police introduced possibly unsafe methods of investigation relating to the identification of possible suspects, and maintained unsafe older procedures relating to the procedures for interviewing suspects?
- (c) Does the delay, now often of many decades in HCSA cases, in bringing charges inevitably compromise the quality of the evidence, and the opportunity properly to test the evidence in these cases?

- (d) Do the recent restrictions on the questioning of complainants about their past character and sexual history (Youth Justice and Criminal Evidence Act 1999 and Sexual Offences Act 2003) hinder the proper testing of prosecution evidence in HCSA cases?
  
- (e) Do the recent changes to the rules relating to the admissibility of evidence about the past character of defendant in sexual offences cases (Sexual Offences Act 2003) have an unfairly prejudicial effect on the trial of a defendants in HCSA cases?

### **(iii) Methodology and sources**

This study of the elements which may operate to compromise historic child abuse prosecutions – public pressure, investigatory methods, delay, questioning the complainant’s sexual history and revealing the past character of the defendant – aims to achieve an holistic and new understanding of a very particular and multi-faceted problem. Of course, many issues can be broken down and approached in similar ways, but it is submitted that the investigation and prosecution of HCSA is an issue that cannot properly be understood without analysing distinctly each of these discrete elements while bringing them all under consideration, for the purpose of assessing their impact on the process under investigation.

#### *Scholarly, governmental and wider literature*

A wide range of literature in the form of academic research in books and articles, parliamentary, governmental and non-governmental organisations reports, journalism and other papers is drawn upon in order to provide an historical and sociological context of the problem and its prosecution, including the conceptualisation of childhood and awareness of child abuse, legal reform in the 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> century, ‘moral panic’ theory, and the impact of heightened public concern on policy, law and practice. The Criminal Injuries Compensation Board provided primary data on compensation awards given to sexual offence/child sexual abuse claimants over a given period.<sup>17</sup> The impact of this context on the development of law and practice is analysed in this study with a particular focus on those developments that present a challenge to the fairness of the investigation and prosecution of HCSA defendants today.

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<sup>17</sup> <<https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority>>.

Police handbooks, government reports and scholarly literature on the psychology of police interviewing techniques are drawn upon to provide an account and analysis of the investigatory methods of police in child abuse cases, including ‘trawling’ for suspects, offering inducements and inadequate interviewing procedures, and to provide a basis for the assessment of the safety of criminal proceedings

### *Municipal law*

Municipal legislation and appellate case law relating to criminal law, procedure and evidence (in particular the Youth Justice and Criminal Evidence Act 1999, the Criminal Justice Act 2003) is subjected to a close analysis in respect of its development and application to the trial of defendants in HCSA cases for the purposes of considering its impact on the fairness of such trials.

### *Human rights law*

Three articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights 1950) are of particular relevance to this study, and a critical analysis of their application to the investigation and trial of HCSA cases shows how the imperative of maintaining a fair trial of the accused has had to compete with the increasingly recognised imperative of maintaining the rights of complainants and witnesses also to be treated fairly and with respect. These are: Article 3, ‘The prohibition of torture’; Article 6, ‘The right to a fair trial’; and Article 8, ‘Right to respect for private and family life’.

A ‘human rights’ dimension is important for any critical study that seeks to ‘get a more adequate purchase of the miscarriage-of-justice phenomenon’, and that is particularly so since the Human Rights Act 1998 came into force.<sup>18</sup>

Under Article 6 (1), defendants facing criminal charges are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal and under (6) (2) shall be presumed innocent until proved guilty. Article 6 is drawn upon in this study, with

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<sup>18</sup> M Naughton, ‘Redefining Miscarriages of Justice’ *Brit J Criminol*, (2005) 45, p.173.

regard to the analysis of the pre-trial, trial and appellate rights of the defendant and the assessment of whether or not the human rights of the defendant may have been compromised under English law.

Article 3 has been construed so as to minimise psychological harm, humiliation or degrading treatment to vulnerable victims. In this respect, the rights of victims, including at the trial stage, have been recognised by the European Court of Human Rights.<sup>19</sup> The Victims' Directive 2012/29/EU concretised and imposed on signatory states the positive obligation indicated in Article 3. The significance of this Directive and how it may impact on the fairness of proceedings is discussed in Chapter V.<sup>20</sup>

A sexual offence trial may involve Article 8 issues where the defence applies to cross-examine the complainant on an aspect of his/her prior sexual conduct.<sup>21</sup> The Youth Justice and Criminal Evidence Act 1999 restricts the cross-examination of complainants on their sexual lives, and further restrictions were introduced under the Criminal Justice Act 2003. Directive 2012/29/EU mandated special recording measures for *all* vulnerable victims. However, the prosecution may place a defendant's sexual life under full scrutiny before the court (if he is accused of sexual offences). The current position is that there has to be a fair balance struck between a victim's personal integrity and the defendant's right to a fair trial.<sup>22</sup>

Scholarly literature on the law and procedure concerning evidence in criminal trials in England and also other common law jurisdictions (Australia, Ireland and the USA) is drawn upon in analysing specific issues in relation to the impact upon fairness of delays in bringing proceedings in HCSA cases, such as statutes (and bars) of limitation, abuse of process, reasons for complainants' delay, prohibition, corroboration, forensic disadvantage and recovered memory and multiple allegations.

#### *Comparison regarding delay in prosecution with other EU jurisdictions*

Also in relation to the issue of delay, enquiries were made of ministries of justice and embassies of the other twenty-seven members of the European Union, as to their current law

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<sup>19</sup> *Mihova v Italy* 25000/07, Second Section, 30/03/2010; see also *Doorson v. the Netherlands* (26 March 1996, para.76 and 71-75) and *Van Mechelen and others v. the Netherlands* (23 April 1997), paras 56-65.

<sup>20</sup> Chapter V: 'Developments concerning the complainant's bad character evidence and the impact on the fairness of proceedings', p.170.

<sup>21</sup> *Stubing v Germany* No. 43547/08, 12 April 2012, para 55.

<sup>22</sup> *Y v Slovenia* (Application No. 41107/10), 28 May 2015, para 105.

in relation to delayed complaints of child sexual abuse, ‘bad character’ evidence in such trials, time bars etc. Respondents helpfully provided relevant sections of their criminal codes which governed the time bars used in sexual offence cases.

As a result comparison was enabled between the situation in English law and that of several other European Union jurisdictions. EU member states are all party to the Convention on the Rights of the Child (CRC). The CRC may be said to form part of a constitutional tradition common to the member states and thus constitutes also a general principle of EU law by virtue of Article 6(2) of the EU Treaty.<sup>23</sup> These countries are also, like the United Kingdom, party to the European Convention on Human Rights. In addition, lengthy delays between the offence and trial of child abuse also occur in these jurisdictions.

While comparing the position in England and Wales with other EU jurisdictions, it must be recognised that comparative research between common law and civil law systems has inherent problems. However, these issues are not considered to present obstacles to this study. The aim was to inform the study of the criminal justice system in England and Wales with regard to the processing of HCSA cases, with a consideration of how these matters are approached in jurisdictions with similar problems and a common overarching system of values and rights.

Differences between the inquisitorial civil law and adversarial common law systems are more in styles of argumentation and methodology than in the content of legal norms, but similar results are often obtained by different reasoning.<sup>24</sup> Neither system is inherently superior. The European Union is becoming a mixed jurisdiction overall – there are many legal systems under a single EU legal framework which have adopted laws and directives taking precedence over national laws.<sup>25</sup> Therefore, there is a growing convergence within the EU between the two legal traditions of civil and common law.<sup>26</sup> By comparing other jurisdictions, the legal mindset (*mentalité*) which characterises other cultures informed the study of the domestic situation.<sup>27</sup>

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<sup>23</sup> European Union Agency for Fundamental Rights, *Child Trafficking in the European Union Challenges, Perspectives and Good Practices*, Office for Official Publications of the European Communities, 2009, p.10.

<sup>24</sup> C Pejovic, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ *Victoria University Wellington Law Review* (2001), p.840.

<sup>25</sup> W Tetley, ‘Mixed Jurisdictions; Common Law v Civil Law (Codified and Uncodified)’, *Louisiana Law Review*, Spring 2000, Vol 60, No 3, p.679.

<sup>26</sup> W Tetley, ‘Mixed Jurisdictions – Common Law v Civil Law’ *Unif Law Rev* 1999-3), p.591.

<sup>27</sup> G Samuel, ‘Comparative Law and its Methodology’ in *Research Methods in Law* (edn) Watkins, D. and Burton, M., (Routledge, London and New York, 2013), p.103.



Although the survey was limited in scope and response it did provide valuable information that helped to bring into focus the challenges (and different possible responses) facing prosecutions of this sort face when brought many years after the matter complained of.

*Case details of those convicted of HCSA but who protest their innocence*

The details of recorded cases in law reports, official and non-governmental organisation publications, journalism, scholarly and other literature and other sources are analysed for the purpose of identifying areas of concern for this study, and drawn up throughout the study. These include high profile and less well known cases. Discussion of miscarriages of justice in HCSA cases has often focused on exceptional cases rather than what might be called more routine miscarriages.<sup>28</sup> Miscarriages of justice may arise due to human error, malpractice or corruption; they may also be facilitated by specific procedures of the investigation and prosecution of offences in the criminal justice system.<sup>29</sup>

However, many defendants who have been convicted of HCSA and have subsequently complained that a miscarriage of justice has occurred, do not in fact succeed in establishing that a miscarriage occurred. Copies of the original case papers of such defendants were also considered to be a valuable source for the identification and analysis of concerns at the heart of this study.

Contact was made with a law firm which deals in HCSA cases and some volunteers came forward as a result. An advertisement in the inmates' magazine *Inside Time*<sup>30</sup> (a Prison Service-approved publication which has a circulation of 40 000 and is available to the general inmate population) was used to identify potential volunteers. The advertisement, which had been placed in *Inside Time*, elicited a large response. Whilst more than 110 responses from prospective volunteers had been received, it would not have been practicable to have perused all the cases. The sample had to be reduced to a total of 20 cases. Only cases that had been appealed, and where the judge's summing up at the original trial and counsel's opinion on appeal were in the file. In the end, a small sample, six cases, raised issues of law and

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<sup>28</sup> Fn 18, Naughton, p. 167. He argues that by looking at all types of cases which are routinely successfully appealed (rather than the exceptional ones) we can get a more accurate picture of where 'justice in error' lies in the criminal justice system.

<sup>29</sup> Ibid, p.172.

<sup>30</sup> <<http://www.insidetime.org>>

procedure for discussion which helped to inform the chapters of this thesis. The cases and issue arising are itemised in Appendix D.<sup>31</sup>

### *Police Commissioner for Kent*

Ann Barnes, then Police Commissioner for Kent, also provided information concerning HCSA investigations recorded by Kent Police, and this informs the consideration of police investigation methods in Chapter III.

## **(iv) Ethical considerations**

### *Safeguarding subjects from harm*

A number of ethical considerations arose concerning the acquisition and use of volunteer data. The research partly involved the examination of copies of appellants' case files. Such cases are confidential and of a highly sensitive nature for both complainants, defendants and witnesses. Documents pertained to trials involving living people, the evidence of victims, defendants, witnesses and the casework of their legal representatives and the police. No party at any point was harmed by the research.

It is clearly in the interests of those who claim to be victims of a miscarriage of justice to be able to participate in studies where areas of potential miscarriages of justice have previously been overlooked by legal practitioners and academics.

### *Confidentiality and anonymity*

The complainants of sexual offences, where a conviction has been obtained, have victim status and the right to anonymity for the rest of their lives under section 1 of the Sexual Offences (Amendment Act) 1992. There was no breach of anonymity in reviewing or commenting on these cases, or at all. The research was seeking to identify legal issues only.

Consideration must also be given to the fact that inmates convicted of HCSA offences are termed vulnerable prisoners because they are segregated from the main wings where bullying has been known to occur.<sup>32</sup> Any human party or identifiable source therefore had to be securely anonymised, and was.

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<sup>31</sup> Appendix D, pp.331-332.

<sup>32</sup> E Kingham, 'How the Prison System fails 'Vulnerable' Prisoners' 6 Feb, 2006.

### *Confidentiality*

It was imperative that no human subjects would be harmed by the publication of case materials or by any identification of the parties involved. This was achieved by substituting names of parties with letters of the alphabet not connected with their names.

The purpose of the study was to identify and discuss possible defects in due process, including points of law which had already been raised at the Court of Appeal. Much of the data to be perused was already in the public domain.

The University of Kent Research Ethics Advisory Group approved contact with potential volunteers and their case files. The advertisement placed in the publication *Inside Time* stated what was being sought - volunteers who claimed to have been wrongfully convicted of HCSA offences, be willing to put this to proof and to contact this study via a University mailing address.

### *Other ethical issues*

Provision was made to enable the volunteers to be able to withdraw from the study in writing. The prisoners were responding to the advertisement placed in *Inside Time* - a general appeal for volunteers. Prisoners therefore initiated contacting this study via the University address given therein.

Case files and correspondence were stored on secure premises. There was also a *poste restante* base at the University for correspondence to and from volunteers and their legal representatives so as not to give out any personal address. Case files were returned by recorded delivery to the volunteers' legal representatives after perusal. The time frame for acceptance of volunteer documentation was two years.

## Chapter II The heightened concern in society about child sexual abuse and the impact of that concern on the law and criminal process

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Clearly, one important factor in the background of all investigations and prosecutions of child abuse is the heightened atmosphere of public anxiety, fear and outrage in which they take place. This chapter addresses the question: ‘Has this affected the development of policy and law, and the practice of police officers and prosecutors, in such a way as to compromise the fairness of the process?’

Under the heading, ‘Construct of child abuse’, it provides an historical and sociological account of the conceptualisation of childhood and the growing understanding of, and concern about, child abuse over recent centuries. It explores the ways in which that state and society at large have dealt with the increasing recognition of the need to protect children and young people from harm both by means of moral condemnation and the creation of and/or improvements in sexual offence laws designed to protect minors and prosecute offenders.

Under the heading ‘The heightened concern about CSA’ the chapter explores the intense modern focus on child sexual abuse as expressed by the public, the media, commentators, and politicians. It considers first the extensive study of those other instances of heightened public anxiety, fear and outrage that have been characterised as ‘moral panics’. There will be a brief review of the literature, - Cohen<sup>1</sup> then Goode and Nachman,<sup>2</sup> - focusing in particular on the conceptual framework of ‘moral panic’. This will be followed by a consideration of the evidence that such ‘panics’ do, in areas other than CSA, influence the development of legislation, the incidence of prosecutions and the conduct of legal process in such a way as to compromise fairness to those accused of crimes.

The chapter will then explore the application of ‘moral panic’ theory to CSA itself. It will assess the usefulness of the ‘moral panic’ category for our understanding of the heightened concern specifically surrounding CSA today. It will then consider whether any evidence has emerged showing that the heightened atmosphere in relation to CSA has influenced the development of legislation, the incidence of prosecutions or the conduct of the legal process

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<sup>1</sup> S Cohen, *Folk Devils and Moral Panics* (Routledge, 2006).

<sup>2</sup> E Goode and B-Y Nachman, *Moral Panics: The Social Construction of Deviance* (Blackwell, 2001).

in such a way as to compromise fairness to those accused of CSA offences. Both evidence from the literature and further evidence relating to this area will be examined.

**(a) Construct of child sexual abuse**

**(i) On childhood**

Laws concerning the protection of children and childhood are manifestations of how society regards its young. Childhood policies and practices are shaped by competing images and discourses of the child.

The concept of the child and childhood has been shaped by developmental markers - biological, psychological as well as cultural, economic, and social changes. A 'child' can be based on physical development and is therefore a young person between the stages of birth and puberty.<sup>3</sup> Adolescence as a concept - the post-puberty but not fully mature phase of teenagers - only dates back from the early 1900s.<sup>4</sup> In legal systems in many countries, a child is below the age of majority, under the age of full legal responsibility. Once sh/e has reached majority, childhood officially ends and the person becomes an adult.

The United Nations Convention on the Rights of the Child defines childhood as 'below the age of 18 years'.<sup>5</sup> The UNCRC wording intentionally does not specify when childhood begins. Being more precise would have threatened universal ratification because of the implication for moral and cultural debates surrounding abortion and related issues,<sup>6</sup> At the same time, Article 6 of the Convention on the Rights of the Children refers to his/her inherent right to life and to the States Parties' obligation to ensure, to the maximum extent possible, the survival and development of the child. States Parties are urged to take all possible measures to improve perinatal care for mothers and babies.<sup>7</sup> Thus children are now protected by human rights legislation - which gives them a status with entitlements. These are modern understandings of what a child may be, but it will be seen that it is not a static concept.

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<sup>3</sup> Oxford Dictionary online: <<http://www.oxforddictionaries.com/definition/english/child?q=child>>.

<sup>4</sup> Jenkins, P., 'Watching the Research Pendulum' *Sexual Development in Childhood* edited by J Bancroft, (Indiana University Press 2003), p.8.

<sup>5</sup> United Nations Convention on the Rights of the Child, 1989, Part I, Article 1 ;< <http://www.ohchr.org>>.

<sup>6</sup> R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Third Edition), United Nations Children's Fund 2007, p.1.

<sup>7</sup> Ibid, p.84.

Childhood, as it is now understood, has only existed for a few hundred years. As far as can be discerned from the medieval period, children were treated like adults as soon as they were no longer dependent on their mothers, from about the age of seven.<sup>8</sup> Life was shorter then. Between the ages of 14 and 40 - the childbearing years - a woman's life expectancy was half that of a man's. Antenatal care was certainly less efficient than it is now. Childbirth was less sanitary, and put the mother at a high risk of fatal infection. Complications in birth were more frequently fatal too, as, although midwives existed, they had little medical knowledge and their hygiene was poor.<sup>9</sup>

Children were regarded as assets for the family, whatever the social class. Girls would be expected to marry early for their security and for the economic advantage of the family and bear children to continue the bloodline. Boys would be trained to work at family trades or learn how to manage estates. Adults and children occupied the same worlds and spoke the same language to each other. The union of young people of the opposite sex would have been decided by the family or tribal custom at the onset of their puberty.<sup>10</sup> There were sound reasons for the social acceptance of adolescent pregnancies in the Middle Ages; girls were less likely to miscarry or die from childbirth at that age because they had more iron in their blood.<sup>11</sup> In their twenties, however, the risk of mortality in childbirth was higher. Other practical reasons for early marriage included acquiring estates and family alliances.<sup>12</sup>

Whilst early marriage was the norm, there were still laws protecting girls from predation, from the medieval era onwards. Regulation of sexual activity with minors in England dates as far back as 1275, when a Westminster statute made it a crime to 'ravish a maiden within age whether with or without her consent' - the first rape law. Edward Coke later interpreted 'within age' as 'the age of marriage' which was then 12 years of age. The first law prohibiting child sexual abuse was made in 1576, which made it a felony to 'unlawfully and carnally know and abuse any woman child under the age of 10 years'.<sup>13</sup>

Significantly, most people were unlettered during the medieval era, time was spent developing children for their adult roles. With the arrival of the printing press, adulthood became a symbolic rather than biological achievement.<sup>14</sup> Broader political and cultural

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<sup>8</sup> H Guldberg, *Reclaiming Childhood – Freedom and Play in an Age of Fear* (Routledge) 2009, p.47.

<sup>9</sup> BBC News, Health: A Millennium of Health Improvement, Dec 27, 1998.

<sup>10</sup> Bullough, V. L., 'Age of Consent' *Journal of Psychology & Human Sexuality*, (2005), vol 16, Iss 2-3, p.26.

<sup>11</sup> Bullough, p.27.

<sup>12</sup> Bullough, p.32.

<sup>13</sup> Robertson, S., 'Age of Consent Laws', *Children and Youth in History*, Item #230,

<http://chnm.gmu.edu/cyh/case-studies/230>.

<sup>14</sup> Fn. 8, Guldberg: op. cit., p.49.

changes in the 18<sup>th</sup> century such as the Enlightenment conceived human beings as autonomous and rational and distinguished adults from children. The philosopher Locke agreed with Plato's ideal that adults were responsible for imprinting values on the *tabula rasa* of the child's mind - values such as literacy, education, reason, self-control and shame - to form the civilised adult. Rousseau, by contrast, regarded children as being inherently virtuous and requiring protection from the corrupting influence of adult society. The former emphasised nurture, the latter nature. Their philosophies, emphasising the needs to educate children, persist into modernity.<sup>15</sup>

Childhood was therefore emerging as a concept, but children continued to be treated as adults in practice until the 1870 Education Act which made rudimentary education compulsory for them.<sup>16</sup> Until then, children were more likely to be found working all day in dangerous, dirty and exhausting places of industry for the survival of themselves and their families.

Whilst the welfare needs of children were beginning to be addressed by the late 1800s, their moral and sexual welfare would emerge around this time as well. It was not until 1875 that the age of consent was raised to 13 years. This was because 19<sup>th</sup> century moral reformers drew the age of consent into campaigns against prostitution.<sup>17</sup>

Western concepts of childhood are derived from romantic notions of inherent innocence which persists into modernity.<sup>18</sup> Sexuality has become the exclusive realm of adults, whereas the innocent child is asexual, vulnerable, naïve and requires protection from this realm. This perceived vulnerability of children to sexual danger has caused a permanent state of heightened concern around children ever since child sexual abuse emerged as a major social problem from the 1980s onwards. Where legislation prolongs childhood,<sup>19</sup> it also denies children personhood and citizenship, thereby privileging adults over children.<sup>20</sup>

Policy development within the UK - a highly industrialised and urbanised western democracy - has been strongly shaped by welfare perspectives rooted in philanthropic and charity work, founded on discourses around children's needs and of desirable outcomes in terms of health, development, and education.<sup>21</sup> The British government embarked on a fundamental reform of

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<sup>15</sup> Ibid, pp.50-51.

<sup>16</sup> Ibid, p.51.

<sup>17</sup> S Robertson, 'Age of Consent Laws', Children and Youth in History, Item #230, <<http://chnm.gmu.edu/cyh/teaching-modules/230>>.

<sup>18</sup> K H Robinson, 'In the Name of Childhood Innocence' – a Discursive Exploration of the Moral Panic Associated with Childhood and Sexuality' Cultural Studies Review, (2011), vol 14 iss 2, p.116.

<sup>19</sup> Ibid, p.115.

<sup>20</sup> Ibid, p.272.

<sup>21</sup> M Woodhead, 'Changing perspectives on early childhood; theory, research and policy' (United Nations Educational, Scientific and Cultural Organisation 2006), p.25.

children's services, under the headline 'Every Child Matters', including major legislation, (Children Act 2004). In the UK there is still ambivalence towards making children's rights explicit - the UK is a signatory to the UN Convention on the Rights of the Child (UNCRC 1989), though reforms embracing rights principles are now found, such as the appointment of a Children's Commissioner. Arguably, the paradigm of childhood has now shifted from one where the child was perceived as a human 'becoming' to one where sh/e has human rights, where the default has changed from being a considered a worthy cause to exercising inherent rights as a worthy citizen; from being a subject of study and concern to being one with concerns.<sup>22</sup>

In the Western world paradigm, children's potential is realised through education. Yet, ethnographic studies of children's lives throughout much of the developing countries still show how certain societies place a value on their early integration into work and economic contribution.<sup>23</sup> The Western view of child development places psychological rather than economic value of the child to parents, socialisation goals associated with separation and independence, and a style of rearing encouraging autonomy and social development. In traditional agrarian societies, the emphasis is on obedience training with little scope for play, choice or the modern exploration of ideas and interdependence and respect for parental authority.<sup>24</sup> A child's development is affected by microsystems - their everyday settings and relationships in home, school and community - mesosystems - which are relationships between micro-systems such as home and school, and exosystems which are influences impacting on the quality of childhood e.g. political issues, such as inequalities in resources, provisions and opportunities.<sup>25</sup>

Childhood is a series of interacting systems which are socially constructed. There are variations in how childhood is understood and experienced and how it is applied to individual and groups of children in relation to their age, gender, maturity and social status and cultural background. Childhood entails being socially and culturally processed by nurture, communication and education - to acquire cognitive and social skills perceived as culturally relevant and valuable to the community.<sup>26</sup> Society has artificially prolonged childhood by

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<sup>22</sup> Fn 6, R Hodgkin, and P Newell, op cit, pp 28-30.

<sup>23</sup> Fn 21, Woodhead, p.17.

<sup>24</sup> Ibid, p.19.

<sup>25</sup> Ibid, p.18.

<sup>26</sup> Ibid, p.21.



extending education. Young people are now mandated to participate in some form of education or training until the age of 18 in the UK.<sup>27</sup>

### *Society's ambivalence towards the young*

A bifurcated view of children persists. Children of today may be viewed as requiring special care and attention, but there is also a tendency at times to treat children as adults. This occurred when two-year-old James Bulger was killed by two ten-year-old boys, Robert Thompson and Jon Venables.<sup>28</sup> Social outcry over such an unusual tragedy led to the abolition of *doli incapax*<sup>29</sup>, the presumption that a person aged fourteen or under does not understand that what they have done is seriously wrong. Public outrage was followed by the government's immediate reaction to the two accused being found guilty. The minimum children's tariff for murder was raised from 8 years to 15 - which the European Court of Human Rights overturned in 1999.<sup>30</sup>

The Council of Europe's 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>31</sup> criminalises child prostitution and child pornography. The definition of 'child' - aged up to 18 - is broad, because it includes sexually immature, pubescent as well as sexually mature beings. Raising the threshold of 'child' to 18 is a policy designed to protect children from the predations of adults who organise and consume child pornography, yet it has also been argued that this legislation is difficult to implement and repressive because it compromises the right of an adolescent to have respect for his privacy under Article 8 of the European Convention on Human Rights. This issue arose in Austria, where the age of consent to sexual intercourse is 14, and age for purchasing pornography is 16,<sup>32</sup> but this country had signed the agreement concerning the European Union Council Framework Decision 2004/68/JI "on combating the sexual exploitation of children and child pornography" which defines 'child' as below the age of 18. The 2004 Decision has been criticised on the basis that it may incriminate young people who create, disseminate and

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<sup>27</sup> Cabinet Office, Department for Education, *2010 to 2015 Government Policy: Young People*; <<https://www.gov.uk/government/publications/2010-to-2015-government-policy-young-people/2010-to-2015-government-policy-young-people>>.

<sup>28</sup> *Re Thompson and Venables* (tariff recommendations) - [2000] All ER (D) 1534.

<sup>29</sup> Abolished by s.34 of the Crime and Disorder Act 1998. This was done without a review of the law relating to children's behaviour, which had been recommended by the Law Lords in *C v DPP* 1995 2 All E R 43.

<sup>30</sup> A Hill, 'James Bulger Killing: 20 Years On' *The Guardian*, 11 Feb 2013.

<sup>31</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25/X/2007, Chapter 1, Article 3.

<sup>32</sup> L Hofmeister, JD, '14 to 18 Year Olds as "Children" by Law? Reflections on Developments in National and European Law', *Journal of Psychology & Human Sexuality*, (2005), vol 16, iss 2-3, p.66.

access pornography but not reach the perpetrators and disseminators of child pornography.<sup>33</sup> Member states in the EU found it difficult to harmonise their national legal orders with the new definition of ‘child’ under the 2004 Framework Decision. Judge Hofmeister considered the consequences of the Framework decision as retrograde:

*To treat adolescents suddenly as “children” in the legal sense, and to combine this with serious consequences according to criminal law is a clear contradiction...in case of the so-called protection of adolescents against depictions it may happen that adolescents might be offenders and victims at the same time.*<sup>34</sup>

The Decision was replaced by the more comprehensive Directive 2011/93 of the European Council and Parliament which provided a new framework for dealing with sexual abuse, the sexual exploitation of children and child pornography but the provision of the Decision relating to the definition of a child remains.

Anti-abuse measures may therefore compromise the sexual autonomy of these young people and be punitive on those whom the law was designed to protect. In England, child protection measures have already adversely affected the sexual autonomy of young people where one party is over-age and the other a minor where the age gap between them is slight. A reluctant Judge Sylvia de Bertodano placed a 17-year-old male for a short term on the sex offenders register. He had consensual sex with a girl who was almost 16 but the judge had no choice but to convict him of a sexual offence with a minor.<sup>35</sup> The judge was also aware of the social stigma attached to him being classified as a sex offender and she apologised to him in court for being legally compelled to sentence him thus.

It is paradoxical that children may be criminalised under measures designed to protect children and childhood, as illustrated in the cases discussed above. It has to be remembered, however, that it has only been relatively recently that children have been afforded rights and protection from economic and sexual exploitation. Whilst the new legislation against sexual exploitation may be perceived as being somewhat overprotective of the young, in general, modern child protection measures and sexual offence laws serve to address the prior inadequate safeguarding of children from sexual abuse. The concept of child abuse and the evolution of child abuse sanctions are discussed next.

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<sup>33</sup> Ibid, p.639.

<sup>34</sup> Fn 32, Hofmeister: op cit p.67.

<sup>35</sup> Agency, The Telegraph, 10 Apr 2015, ‘Judge in underage sex case says she feels ‘extremely sorry’ for defendant’.

## (ii) Typology of child abuse

The concept of child abuse has been shaped by several perspectives including social, penal, medical and social welfare.

Child abuse is the way in which certain kinds of action are understood and to be regarded as a serious social problem demanding action.<sup>36</sup> It is a concept based on community standards of appropriate and reasonable child care. Child abuse or child neglect in any particular society is a product of social negotiation between individual values and beliefs, social norms, and professional knowledge about children, child development and family relationships.<sup>37</sup> Child abuse may involve harm inflicted by a perpetrator who may be held morally accountable for the following types of abuse - sexual, physical, emotional abuse and physical neglect.

Child sexual abuse - intergenerational sex - is of the greatest concern to the public and welfare professionals.<sup>38</sup> Sexual abuse is now a widely recognised problem, but the legal protection of minors and the pursuit of offenders only fully developed in the latter part of the 20<sup>th</sup> century. Children making claims of abuse to family, friends, law enforcement and in court were often disbelieved. Spencer points out the incongruity of the former judicial warning to juries about the danger of convicting an accused of a sexual offence on uncorroborated evidence, whilst there was no duty to warn about the danger of convicting on the evidence of madmen, convicts or recidivist perjurers.<sup>39</sup> Until recently, public knowledge about sexual abuse was minimal.<sup>40</sup>

Words such as 'child abuse' 'child neglect' and 'sexual abuse' have no commonly accepted meanings, but are 'evocative terms which appeal as much to the emotions as to the intellect'.<sup>41</sup> Child abuse is multi-faceted: facts and figures on child abuse will therefore be dictated by the kinds of abuse that are included. Data may be based on any report of abuse whether or not a prosecution leads to a conviction, e.g., as recorded by the Crown Prosecution Service. Researchers may include any combination of these facts; estimates of abuse that go unreported may also feature in statistics.

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<sup>36</sup> M L Worrell, 'The Discursive Construction of Child Sexual Abuse. PhD thesis' (Open University 2001), p.2.

<sup>37</sup> M Robin, *Assessing Child Maltreatment Reports; the Problems of False Allegations* (Haworth Press 1991), p.3.

<sup>38</sup> K Klein, 'The Reality of Child Sexual Abuse: A Critique of Arguments Used by Adult-Child Sex Advocates' 2010, CMC Senior Theses, Paper 53, p.11.

<sup>39</sup> J Spencer, and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd edn Blackstone Press 1993), p.214.

<sup>40</sup> Fn 38, Klein: op cit, p.11.

<sup>41</sup> Fn 37, Robin: op cit, p.6.

The concept of child abuse may also include newly identified areas of the problem, although the existence of this problem is longstanding e.g. genital mutilation. It is estimated that 750 million males have been circumcised worldwide for cultural, religious and medical reasons, and it is often done at birth.<sup>42</sup> Female children are circumcised for cultural reasons: about 140 million girls worldwide, usually performed on girls from the age of three onwards. This practice was outlawed in the UK under the Prohibition of Female Circumcision Act 1985.<sup>43</sup> It is now a criminal offence for teachers, social workers or healthcare workers who suspect a case of female genital mutilation of any child in their care to fail to report it under s.5B of the Female Genital Mutilation Act 2003. There is also a duty to prevent the children from being radicalised by terrorist ideology.<sup>44</sup>

The practice of ‘breast ironing’ - a tradition in Cameroonian society, where puberty-aged girls have their developing breasts permanently flattened with hot objects to ‘protect’ young females from unwanted male sexual attention and advances - has been highlighted by officials and the media in the UK as a newly recognised form of child abuse.<sup>45</sup>

Social policies can also lead child abuse and neglect and suffering. Recent government welfare cuts measures have led to the eviction and removal of more than 64 000 homeless families from London, relocating them to cheaper areas irrespective of the consequences this may have on family welfare. Some councils threatened to remove into care children of parents reluctant to move out. Newly relocated children lose continuum in their education, there have also been cases of child deaths and neglect which occurred post-relocation which might have been prevented had these vulnerable children remained monitored by social services at their former address.<sup>46</sup>

*Who are the child abuse offenders?*

According to the National Society for the Prevention of Cruelty to Children, based on reports of children aged 11-17 years, 4.8% have experienced contact abuse,<sup>47</sup> of these children 90% were abused by someone whom they knew, 34% of the children who had experienced contact abuse by an adult did not tell anyone about it. Child abuse may also be defined according to

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<sup>42</sup> P U Matinga, ‘Male Circumcision for HIV Prevention’ Exchange on HIV/AIDs, Sexuality and Gender, (3) 2009.

<sup>43</sup> Tracy McVeigh, ‘Female circumcision growing in Britain despite being illegal’, *The Observer*, Sunday 25 July 2010.

<sup>44</sup> See s.26 of the Counter-Terrorism and Security Act 2015.

<sup>45</sup> E Dugan, ‘Breast Ironing’: Girls have chests flattened out’ to disguise the onset of puberty’, *The Independent* 26 Sept 2013.

<sup>46</sup> D Smee, ‘Homeless children are dying from neglect and abuse after families moved out of their local areas’ *The Independent* 25 Mar 2016.

<sup>47</sup> L Radford, *et al*, *Child abuse and neglect in the UK today* (London: NSPCC, 2011), p.88.

the context in which it is found. Most victims of CSA are acquainted with their abusers: 30% have been abused by relatives, including brothers, fathers, mothers, uncles or cousins, called familial abuse. Only 5 % of CSA is committed by a biological father or stepfather; 60% of CSA is perpetrated by acquaintances such as friends, babysitters or neighbours and may be termed extra-familial abuse.<sup>48</sup> Most sexual abusers are therefore not strangers.<sup>49</sup> The extra-familial abuse cases also include intra-familial cases, where the caregivers are unrelated, such as children in day care centres, foster care or similar settings. Abuse by caregivers occurring in care homes and schools may also be described as institutional child abuse. This thesis will be examining cases which may be either familial or extra-familial, though all cases will have the commonality of being historic.

### *Ideology of child abuse*

The 19<sup>th</sup> century UK's Medical Women's Federation - an early feminist movement began to argue that all forms of adult-child sexual contact, not just rape, could be harmful, including touching and exhibitionism.<sup>50</sup> Child sexual abuse was also publicised by the feminist anti-rape movements of the 1970s. Public figures and non-feminists then campaigned against CSA in the 1970s and 1980s. Politicians subsequently created government policy to protect children.<sup>51</sup> Feminists had also exposed the problem of incest in the patriarchal family, they also challenged: prior legal definitions of abuse which downplayed or ignored non-penetrative acts, the complicity of children being sexually abused, the consent of children to being party to prostitution, pornography, and intergenerational sex and victim blaming.

Radical feminists thought that the State embodied the interests of men. It was men who held power (Marxist feminists emphasized economic power, too) and control over other members of society - therefore, legislative and policy responses to child sexual abuse were enforcing patriarchal familial relations.<sup>52</sup> Men also account for the vast majority of sexual offences, therefore feminists thought that either men were inherently more likely to offend for

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<sup>48</sup> M R Bolen, 'Extra-familial Child Sexual Abuse: A Study of Perpetrator Characteristics and Implications for Prevention' Violence against Women, Sage Publications, Oct 2000; vol 6 no 10, p.1137.

<sup>49</sup> D Finklehor, 'The Prevention of Childhood Sexual Abuse' 2009 The Future of Children, vol 19, no 2, p.169.

<sup>50</sup> C Smart, 'A History of Ambivalence and Conflict in Discursive Construction of the 'Child Victim' of Sexual Abuse' Social and Legal Studies' Sage Publications Sept 1999, vol 8, no 3, p.398.

<sup>51</sup> S Angelides, 'Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality' GLQ: A Journal of Lesbian and Gay Studies, 2004, vol 10, no 2, p.141.

<sup>52</sup> M Purvis and T Ward, 'The role of culture in understanding child sexual offending: Examining feminist perspective' Aggression and Violent Behavior, vol 11 iss 3 (May-June 2006), p.301.

biological reasons (radical view) or at least due to normative masculine gender practices structured by reference to the masculine ideal (moderate view).<sup>53</sup>

Post-modern feminists later contended that whilst cultural explanations explaining the phenomenon of CSA should be acknowledged, the approach of this theory was too narrow. For example, it does not explain why only a small minority of men as a whole are offenders, it was neither informed by adequate empirical research nor explanatory depth; nor did it provide a framework for changing the dispositions and behaviour of sex offenders.<sup>54</sup> Sexual offenders are heterogeneous, with psychological variables in impulsivity, deviant sexual preferences and intimacy deficits.<sup>55</sup> Whilst the feminist perspectives had utility in articulating the external influences which accounted for the diversity of offenders and offences, justifying social policies aimed at preventing the sexual abuse of children, they did not offer guidance on causation and treatment of sex offenders and tended to be dismissive of the value of psychological research.

### *Child welfare*

UK legislation now responds to child abuse through personal violence and sexual offences statutes. The Children Act 1989 protects children specifically from being abused in institutions, particularly residential care, foster homes and day care centres. The provisions neither explicitly uses the term ‘child abuse’ nor defines what constitutes this, but it does offer mechanisms for removing children ‘at risk’ (of abuse) e.g. court orders can be made c.41, Part 1, section 1(3)(e) concerning the welfare of the child.

The UK has issued guidance for professionals in its papers, *Keeping Children Safe in Education*<sup>56</sup> and *Working Together to Safeguard Children*<sup>57</sup> with definitions of specific aspects of child maltreatment. They both describe four distinct categories of maltreatment:

Physical abuse: including the hitting, kicking, baby shaking or other physical aggression likely to hurt or cause significant harm to a child;

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<sup>53</sup> A Cossins, ‘Masculinities, Sexualities and Child Sexual Abuse’, British Criminology Conference: Selected Proceedings’, (2000) vol 3 p.4.

<sup>54</sup> Fn 52, Purvis and Ward: op cit, p.304.

<sup>55</sup> Ibid, p.310.

<sup>56</sup> Department for Education, *Keeping Children Safe in Education – Statutory Guidance for Schools and Colleges*, July 2015.

<sup>57</sup> Department for Children Schools and Families, *Working Together to Safeguard Children* (2015), pp 92-93.

Emotional abuse: the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child's emotional development;

Sexual abuse: forcing or enticing a child or young person to take part in sexual activities, not necessarily involving a high level of violence, whether or not the child is aware of what is happening. It may involve physical contact, non-contact activities, encouraging children to behave in sexually inappropriate ways, prostitution and sexual exploitation of a child for financial or commercial gain.

Neglect: A persistent failure to meet a child's basic physical or developmental needs in terms of health, education, emotional development, nutrition, clothing, shelter, safety and safe living conditions.

### *The European dimension to the child abuse problem*

Keir Starmer, the former Director of Public Prosecutions advocated that all professionals should be required by law to report child sexual abuse, making non-reporting a crime. But the department for Education ruled out introducing comprehensive mandatory reporting and insisted that existing professional guidelines were adequate.<sup>58</sup>

But as confirmed by the decision of *A v United Kingdom*,<sup>59</sup> member states which adhere to the European Convention on Human Rights are under a positive duty to protect children from physical and sexual abuse where such harm amounts to torture, cruelty, is inhuman or degrading under Article 3.

Concerted efforts by EU member states to agree to sanction child abuse are evidenced in Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse, the sexual exploitation of children, and child pornography which aims to harmonise legislation of these types of offences throughout the European Union. This Directive sets out twenty types of sexual offence under four categories - sexual abuse, sexual exploitation, child pornography and the online solicitation of children for a sexual purpose.

There is scope for legislators in the UK to mandate the reporting of all types of child abuse to law enforcement, otherwise the state may be breaching its duty to prevent harm to children under Article 3 of the ECHR. In *E and Others v. the United Kingdom*<sup>60</sup>, the Court determined

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<sup>58</sup> John Bingham 'Failing to report child abuse should be a crime, says Keir Starmer' The Telegraph 4 Nov 2013.

<sup>59</sup> No. 95599/94, 23 September 1998.

<sup>60</sup> No. 33218/96, 26 November 2002.

that prolonged sexual abuse of the applicants met the threshold of an Article 3 violation by the State. The Court was satisfied that the social services should have been aware that the children in that case had been at risk of sexual and physical abuse. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. In *E.S. and Others v. Slovakia*,<sup>61</sup> the Court extended this liability to cover not just inaction by individual social workers, but also procedures within the system that lead to inadequate protection.

EU member states are under a duty to cooperate with each other in prosecuting child abuse cases.<sup>62</sup> Legislative harmonisation can also be seen – all member states now have in common a minimum age of consent and are obliged to impose legal sanctions on those who commit sexual offences against children.<sup>63</sup>

#### *Domestic measures to safeguard children from abuse*

In the UK, the Children Act 1989 was considered to be “the most comprehensive and far reaching of child law.”<sup>64</sup> Children may be protected by multi-agency services from child abuse and neglect where such reports come to their attention under section 10 of the Children Act 2004. Such agencies include district councils, police, probation, youth offending teams, health agencies, service providers under section 114 of the Learning and Skills Act 2000 and the Learning and Skills Council for England. Section 11 of the same places safeguarding of children duties on these agencies, to promote child welfare, safe staffing procedures, share appropriate information, undertake relevant staff training, and comply with any other relevant government guidance.

However, there may also be vulnerable children who have not yet been noticed by child protection services. Despite the fact that the UK is a signatory to the United Nations Convention on the Rights of the Child 1989, which includes the right to special protection for refugee children under Article 22, there are still children of asylum seekers being held in UK detention centres. Since 2010, at least 127 minors have been wrongly classified as adults and held in these centres.<sup>65</sup>

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<sup>61</sup> No. 8227/04, 15 September 2009.

<sup>62</sup> I Rusu, ‘Preventing Offences of Sexual Abuse, Sexual Exploitation of Children and Child Pornography in the European Union’, *Acta Universitatis Danubius: Juridica*, (2012) vol 8, iss 2, pp 44-52

<sup>63</sup> H Graupner, ‘Sexual Consent: The Criminal Law in Europe and Overseas’ *Archives of Sexual Behavior*, 2000, vol 29 (5), p.415.

<sup>64</sup> *Per* Lord Mackay, Children Bill (Hansard, HL vol 502, col 488; 6 December 1988).

<sup>65</sup> M McClenaghan, ‘Vulnerable Children Locked up in Immigration Centres for Adults due to Home Office Blunders’, *The Bureau of Investigative Journalism*, June 22, 2015.



### *Child neglect is the commonest type of abuse*

Poverty in households causes children to suffer from neglect, wilful or otherwise. Schools in the UK may provide breakfast clubs<sup>66</sup> to undernourished children where the household is on the breadline, but there will be families where the parents do not accept that such measures are needed or do not know that they can prevent the neglect of their children.

The medical journal, *The Lancet*, published figures on child abuse and neglect in high-income nations showing that child neglect is at least as damaging as physical or sexual abuse in the long term, but receives the least scientific and public attention. Eighty per cent of neglect cases are due to parents or parental guardians. Children who are exposed to one form of abuse are often subjected to others on multiple or continuous occasions. In low-income nations, the same problems exist, but girls are at higher risk of infanticide, sexual abuse and neglect, whereas the boys appear to be at greater risk of physical punishment.<sup>67</sup>

Finkelhor found that, in the United States, child neglect featured as the most frequent kind of child abuse; 47% of cases were substantiated, physical abuse comprised 25% and sexual abuse, 15%.<sup>68</sup> He estimated the prevalence of child sexual abuse (adults who disclosed that they had been sexually abused in childhood) to be about 20% of women and 5-10% of men.<sup>69</sup> Most perpetrators are men: 90%.<sup>70</sup>

This section has served to illustrate that child abuse does not appear to have socio-economic or cultural boundaries; nor are the doors closed for previously overlooked or novel kinds of child abuse.<sup>71</sup> It will now be shown how child abuse is connected with historical values and how the concept has evolved from society regarding children as property subject to the power of their families and society, to one where children have acquired rights by law designed to protect their childhood.

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<sup>66</sup> H M Treasury, *Every Child Matters*, 2003 Cm 5860, p.35.

<sup>67</sup> Prof R Gilbert, (MD) *et al*, 'Burden and Consequences of Child Maltreatment in High Income Countries' *The Lancet*, (vol 373, 3.01.09), pp.68-81.

<sup>68</sup> D Finkelhor, 'Current Information on the Scope and Nature of Sexual Abuse – the Future of Children' Summer/Fall 1994, p.33.

<sup>69</sup> *Ibid*, p.36.

<sup>70</sup> *Ibid*, p.31.

<sup>71</sup> A Cossins, 'Masculinities, Sexualities and Child Sexual Abuse', *British Criminology Conference Selected Proceedings* 2000, vol 3, p.4.

### **(iii) Historical development of the awareness of child sexual abuse as a problem meriting legal reform**

This section illustrates that child abuse has only been recognised from the late 19<sup>th</sup> century onwards as a distinct phenomenon from which children have a right to be protected.

The past reveals how much the concept of child abuse has evolved as well as how it has been dealt with. The 21<sup>st</sup> century saw the codification of sexual offences and the creation of laws which recognised newer types of child sexual abuse.

#### **19th century**

Child sexual abuse in the 19<sup>th</sup> century was ‘discovered’ by people concerned about the treatment of thousands of underage and girls just over the age of consent who worked in brothels. Philanthropists were showing an ongoing heightened sense of concern for the moral welfare of children.<sup>72</sup> Child abuse was not a new discovery at that time, but was being highlighted and addressed in a more organised way. In Pollock’s review of *The Times* of child cruelty reports, out of 385 tried cases of neglect, physical and sexual abuse, only 27 per cent of those accused thereof had been found not guilty, indicating, that law and society was aware of and condemned child abuse long before the Prevention of Cruelty to Children Act 1889.<sup>73</sup>

The sexual abuse of boys had been identified in France by research conducted in 1850s; however, these findings were never translated into English. From the 1860s onwards, child sexual abuse was discovered by the coalescence of the interests of social purity and child welfare movements.<sup>74</sup> Prosecutions of child sexual abuse by the Associate Institute for the Protection of Women and Children were recorded in the 1860s.<sup>75</sup> Child abuse, as viewed by the Victorians, was premised on the Christian moral economy of social purity which included the eradication of prostitution and pornography and saving ‘fallen’ girl children.<sup>76</sup>

In 1885, the Society of Friendless Girls was set up in England, consisting of 160 branches aiming to abolish prostitution. The purity campaigners later lined up with progressive

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<sup>72</sup> Fn 50, Smart, op cit, p.395.

<sup>73</sup> B Corby, *Child Abuse: Towards a Knowledge Base* (OUP, 2006), p.20.

<sup>74</sup> L A Jackson, ‘Child Sexual Abuse in Victorian England’ (Routledge, London and New York, 2000), p.4.

<sup>75</sup> Jackson: op cit p.52.

<sup>76</sup> Ibid pp.52-53.

feminist organisations to lobby for raising the age of consent in Britain and other Anglophone countries.<sup>77</sup>

Child prostitution also was publicised in *Pall Mall Magazine* when a journalist, William T. Stead, wrote a series of articles on the existence of juvenile prostitution in London as well as the state-controlled trafficking of young working class English girls to brothels on the continent.<sup>78</sup> Public outcry ensued in 1885. Disparate groups such as Anglican bishops and socialists joined together to protest against the sexual abuse of children. Religious philanthropic pressure groups had also played a vital role in bringing to the fore concerns about welfare of street children, young offenders, children at work and those looked after by Poor Law authority institutions, giving rise to government intervention and state legislation.<sup>79</sup>

Cases of child sexual abuse were also documented around the same time in the United States by workers of the Society for the Prevention of Cruelty to Children (SPCC) from 1880 - 1910.<sup>80</sup> Records showed that SPCC workers were more prepared to accept allegations of sexual abuse than before. The work of the SPCC sufficiently impressed upon visitor Thomas Agnew, a banker, who subsequently set up the Liverpool SPCC in 1881 and the London Branch in 1884.<sup>81</sup> Another SPCC member, Samuel Smith, successfully advocated for the abolition of the oath for girl victims of sexual assault as part of the criminal law amendments.<sup>82</sup> Previously, it had been accepted that adult witnesses understood the nature of oath, but in the case of children, the trial judge would question them on whether they understood what this would involve.<sup>83</sup>

Victorians, who idolised the concept of the family unit, were less certain about the nature of childhood and adolescence and their developmental phases.<sup>84</sup> The child had an inferior status compared with an adult: it was not defined by sexual development. In the Victorian era, working class girls were seen as morally inferior and seductive beings, by those who opposed raising the age of consent.<sup>85</sup> They feared that by late adolescence, girls were physiologically

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<sup>77</sup> D R Egan and G Hawkes, 'Producing the Prurient through the Pedagogy of Purity; Childhood Sexuality and the Social Purity Movement' *Journal of Historical Sociology*, vol 20, No 4, December 2007, p.446.

<sup>78</sup> D Gorham, 'The "Maiden Tribute of Modern Babylon" re-examined: Child Prostitution and the Idea of Childhood in Late Victorian England' *Victorian Studies* (Indiana University Press 1978 vol 21 iss 3), p.354.

<sup>79</sup> B Corby, and D Shemmings, *Child Abuse: An evidence base for confident practice* (4th edn OUP 2012), p.26.

<sup>80</sup> *Ibid*, p.32.

<sup>81</sup> *Ibid*, p.27.

<sup>82</sup> G K Behlmer, 'Child Abuse and Moral Reform in England 1870-1908' (Stanford University Press 1982), p.76.

<sup>83</sup> J R Spencer and R Flin, *The Evidence of Children the Law and the Psychology*, (Blackstone Press 1990), p.44.

<sup>84</sup> Fn 78, Gorham: *op cit*, p.356.

<sup>85</sup> *Ibid*, p.354.

mature and possessed sufficient understanding about how to use the law to blackmail unwary men.<sup>86</sup>

Sexual activity of adults with children was also condoned on erroneous medical grounds. It was also believed that having sex with virgins was a cure for impotence and depression; therefore, brothels could be seen as being advantageous to men.<sup>87</sup> The myth about the curative property of sex with virgins for VD sufferers persisted in both literate and comparatively illiterate societies.<sup>88</sup>

Middle class parents were concerned about the welfare and moral upbringing of their daughters, but the children of working class parents who themselves were put out to work from the age of twelve upwards, could not be watched over in this way, as they were often away from their families in servile posts. Middle class males perceived working class girls as adults, whereas their own daughters of the same age were not afforded this status.<sup>89</sup>

The Criminal Law Amendment Act 1885 raised the age of consent from thirteen to sixteen, However, there had been objections and it took four years for the Bill to become enacted. Stead had conducted investigative journalism by purchasing a girl and prepared her for export to the Continent.<sup>90</sup> The child was turned over to the Salvation Army instead and Stead exposed the trade in girls in Pall Mall Gazette. The publicity spurred further debate of The Criminal Law Bill by Parliament in July 1885.

Alfred Dyer, an evangelist and publisher specialising in pamphlets and books advocating social purity<sup>91</sup> had gathered evidence from licensed brothels in Belgium that young girls were being held against their will. Prostitution of young English girls abroad was permitted, due to a legal loophole which did not make it illegal to induce a girl over thirteen to become a prostitute. Moreover, Somerset House was known to have forged birth certificates for girls under twenty-one.<sup>92</sup> The National Vigilance Association which featured prominently in 1885 in the year of legislative change, also made the sexual exploitation issue wide-ranging when

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<sup>86</sup> Fn 17, Robertson, see webpage.

<sup>87</sup> Channel 4 Monday 22 June 2009, 'Virgin Trade'.

<sup>88</sup> R Davidson, "'This Pernicious Delusion': Law, Medicine, and Child Sexual Abuse in Early Twentieth-Century Scotland' *Journal of the History of Sexuality* Jan 2001, vol 10, no 1, p.63.

<sup>89</sup> Fn 78, Gorham: op cit, p.356.

<sup>90</sup> O Mulpetre, 'W. T. Stead Resource Site, The Great Educator: A Biography of W. T. Stead'; <[www.attackingthediabol.co.uk](http://www.attackingthediabol.co.uk)> accessed on 18 Feb 2014.

<sup>91</sup> Fn 78, Gorham: op cit, p.357.

<sup>92</sup> Ibid, p.359.

it branched out in 1899 to form the International Bureau for the Suppression of Traffic in Persons.<sup>93</sup>

The Criminal Law (Amendment Act) 1885, created and extended a particular, historically and culturally specific type of childhood much in the same way that the Education Acts aimed to do, so that by 1899, children to the age of 12 were mandated to attend state schools.<sup>94</sup> Critics of this law who had been against the raising the sexual age of majority, argued that patriarchal society was attempting to control the sexuality and maintain the purity of females, as similar provisions did not apply to males. Those who advocated raising the age of consent to 16, primarily the Social Purity movement, sought to tighten moral controls on sexuality as well as the desire to prevent child prostitution. The boundary of 16 was designed to protect women, rather than being viewed as the age when they had the ability to reach their own decisions.<sup>95</sup> It was not until 1979 that a Policy Advisory Committee on Sexual Offences justified retaining the age of consent at 16 on other grounds; the physical harm a potential pregnancy or abortion could have on an underage girl, psychological harm, damage to her education and her immaturity. The retained age of consent also offered legal certainty about the time she was deemed capable of consent.<sup>96</sup>

The Offences Against the Person Act 1861 made it a felony for a man to have sexual intercourse with a girl under ten, but a misdemeanour if aged between ten and twelve, with special provisions allowing parents to charge a girl's 'abductor' for loss of her services if she were under sixteen. Debate about reforming the age of consent laws included those who thought that the law should have stayed at twelve and those who would have accepted twenty-one. The age of sixteen was therefore a compromise between the two extremes.<sup>97</sup> Although many girls had been coerced into prostitution, for most of them it was voluntary, a way of life given the limited life chances and choices before them. Users of prostitutes - middle and upper class men, would have preferred to have kept the *status quo* of the prior lower age of consent to prevent themselves and their sons from being criminalised by the proposed raising of the age of consent. Hopwood, M.P., and social reformer Josephine Butler thought that the *status quo* of the lower age should be retained because prostitute girls would lose their freedom of choice and their economic livelihood.<sup>98</sup> There was thus a growing

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<sup>93</sup> Ibid, pp.361-362.

<sup>94</sup> Fn 50, Smart, p.392.

<sup>95</sup> S Knight, 'Libertarian Critiques of Consent in Sexual Offences' UCL JL and J 2012, 1(1), p.159.

<sup>96</sup> Fn 95, Knight, op cit, p.157.

<sup>97</sup> Fn 78, Gorham: op cit, p.363. The consensual age of twelve dates back from the thirteenth century, but was not raised to thirteen until 1875.

<sup>98</sup> Gorham, p.367.

awareness that children should be legally protected from certain types of abuse, but the reforms had focused on eradicating prostitution and trafficking of girls and women and were therefore not comprehensive.

## 20th century

The first half of the century was notable for the consolidation of the law relating to children and their protection. The Children and Young Persons Act 1933, following the Children and Young Persons Act 1920 and the Children Act 1908, brought together the relevant provisions and represented a landmark with regard to a basic framework regarding the law in relation to the children and their protection.

The framework had many problems to deal with. It was clear, for example, that child sexual abuse is not only limited to child prostitution. Adult-child sexual contact was also occurring in the home. Sexual intercourse between parents and their children became a criminal offence in the Punishment of Incest Act 1908. Sexual abuse was also occurring in institutions such as care homes, hospitals and schools. In 1916, a Royal Commission on Venereal Diseases stated that outbreaks of venereal disease (VD) were frequent in institutions.<sup>99</sup>

Venereal disease in children was discussed in the medical journal *The Lancet* in 1925: it disclosed that seventeen girls aged 6-10 were living at a well-administered care home and suffering from gonorrhoeal vulvo-vaginitis.<sup>100</sup> However, the paper concluded that the VD was due to innocent transmission or by a fomite (accidental transmission) by sitting on unclean toilet seats, towels, baths and rectal thermometers. Doctors knew, in reality, that such infections were passed on by adult sexual intercourse with children, but they were complicit in finding excuses for their diagnosis or concluded that the child had contracted the VD before entering the institution.<sup>101</sup> Clinical diagnosis of sexually transmitted diseases in children was not new: in Denmark from 1871-80, 803 children under the age of one and 535 between one and 15 had been infected, mainly with syphilis. A study there a decade later found 17 children hospitalised with gonorrhoea. A Danish Commission found it difficult to determine the source of these infections, even though nowadays there would be the automatic assumption that they had been sexually transmitted.<sup>102</sup> Ill children were not yet viewed as

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<sup>99</sup> C. Smart, 'Reconsidering the Recent History of Child Sexual Abuse 1910-60' 2000, *Jnl Soc Pol*, 29, (vol 29, iss 1) p.57.

<sup>100</sup> *Ibid*

<sup>101</sup> *Ibid*

<sup>102</sup> N de Coninck-Smith, 'Children's Talk and Parental Fear' Cases of Sexual Misconduct in Danish State Schools, 1900-1970, *Journal of Historical Sociology*, Dec 2008 (vol 21, no 4), p.519.

victims of sexual abuse, but as vectors of venereal disease (VD).<sup>103</sup> There were some who spoke up against the ‘misguided medical efforts’ of men who claimed to have sex with virgins merely to rid themselves of VD. Early feminists regarded these men as culpable of committing morally indefensible acts.<sup>104</sup>

The Royal Commission had given rise to the setting up of VD clinics that were accessible to the public in the 1920s. Doctors also had child patients living with their parents who also had contracted VD, but their hands were often tied in reporting the abuse, as it was the right of the father to refuse to have the child treated.<sup>105</sup> The National Society for the Prevention of Cruelty to Children (NSPCC) did not have the power to investigate the rape of a child without her father’s consent. Fathers convicted of child abuse could also make their children live with them when they were released from prison.<sup>106</sup>

At a Joint Select Committee in 1920, it was stated that Salvation Army care homes with children aged 13 to 16, were rife with sexual abuse.<sup>107</sup> The NSPCC, over 29 years, had dealt with over 32 000 cases of girl ‘victims of immorality’ with 119 cases in London alone. There had hitherto been concern over the law which offered immunity to men accused of rape who assaulted girls, but whose defence was that they believed the girl to be over 16. Also, charges of rape would often be reduced to indecent assault or not prosecuted at all.<sup>108</sup>

In 1922, following pressure from child protection lobbyists and feminists, the Criminal Law Amendment Act was brought in to penalise assaults on girls aged 16 and under.<sup>109</sup> Section 1 of the Criminal Law Amendment Act (CLA) 1922 first provided that it should be no defence to a charge or indictment for an indecent assault on a child or young person under the age of 16 to prove that he or she consented to the act of indecency.<sup>110</sup>

Under Section 2 of the CLA 1922 the time bar for prosecuting sexual intercourse with a girl under 16 had been extended. Originally in 1885, section 5 of the CLA had limited prosecutions to three months; section 27 of the Prevention of Cruelty to Children Act 1904 had extended this to six months. The CLA 1922 further extended the limitation period to nine

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<sup>103</sup> Fn 50, Smart: op cit, p.395.

<sup>104</sup> Ibid, p.398.

<sup>105</sup> Fn 99, Smart, p.60.

<sup>106</sup> Ibid.

<sup>107</sup> Joint Select Committee of the House of Lords and House of Commons Report (Hansard 1920), p.222.

<sup>108</sup> Fn 99, Smart, p.60.

<sup>109</sup> Ibid

<sup>110</sup> *R v J*, [2004] UKHL 42 para 13. *Per* Lord Bingham of Cornhill.

months. Section 1 of the Criminal Law Amendment Act 1928 made a further increase to 12 months.<sup>111</sup>

The law gave girls under 16 a legal victim status not seen before, but its protection did not extend to girl prostitutes and it had to be balanced with criminalising girls and women over 16 who sexually assaulted boys under 16. Furthermore, there was even a Home Office Departmental Committee on Sexual Offences against Young Persons in 1924-25, which made recommendations on how to deal with the sexual abuse of young people, but it was deemed too radical to be implemented at that time.<sup>112</sup>

Feminists and social purity movements pressed on with advocating raising the age of consent from 16 to 18 years. The National Vigilance Association collected newspaper cuttings of trials showing how trivially the courts were treating victims of rape and sexual assault and how leniently they were dealing with offenders. Campaigners also wanted to have loopholes in the law closed due to political compromise or unforeseen consequences, such as the lack of an offence covering the situation where a man obliged a child to touch his genitals, (which was not criminalised until after 1959). They were also dissatisfied with the loophole where a man could be exempt or acquitted with his justification that he believed that an under-age girl he had intercourse with was over the age of consent.<sup>113</sup>

The criminal justice system was criticised at the Departmental Committee on Sexual Offences against Young Persons in 1925 for failing to consider the problems that victims of sexual abuse encountered.<sup>114</sup> The judiciary, magistrates, probation officers, police, moral purity and rescue movements and feminists such as the Six Point Group and the National Council for Women, debated on how to reconcile the rights of the accused with securing higher conviction rates for sex offenders. Some progressive recommendations were made at this Committee, such as using specially trained women to deal with victims. It was at this time that campaigners exposed how victims were being further victimised by the criminal justice system and therefore they needed special protections and procedures;<sup>115</sup> they also advocated that women doctors should perform examinations and a woman should be with the victim at court. The Committee's Report also addressed the psychological trauma young complainants underwent when they had to go court to give evidence and retell their

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<sup>111</sup> Ibid *R v J*, para 8 of judgment.

<sup>112</sup> Fn. 99, Smart: op cit, p.60.

<sup>113</sup> Fn 50, Smart, p.399.

<sup>114</sup> *Departmental Committee on Sexual Offences against Young Persons (1925)* Hansard, Cmd 2561.

<sup>115</sup> Fn 50, Smart, p.400.



experiences as well as face the accused.<sup>116</sup> However, it was not until the 1990s, that modifications were made by the criminal justice system to make it victim-friendly.<sup>117</sup> The reluctance of the court to facilitate legal changes may be ascribed to divisions within moralist and feminist coalitions who focused on the controversial issue of advocating harsh punishment by redefining sexual offences as serious criminal acts.<sup>118</sup>

Smart asserts that the legal profession itself was an obstacle to the reconceptualisation of child sexual abuse. An editorial in a 1926 edition of the *Law Journal* criticised the Committee Report's recommendations based on the fallacy that children may lie or make false allegations. Additionally, it was not content with the idea of having female-only medical and support staff for complainants, as this would disadvantage a falsely accused man, since they 'would be determined to convict him'.

Senior legal establishment figures also opposed the changes, including the then Lord Chief Justice and the Director of Public Prosecutions.<sup>119</sup> Lawyers saw proposed changes as an assault on civil liberties and on the rights of the accused to an adversarial trial which required corroboration and the right to face the accuser in open court.<sup>120</sup> Judge Cecil Whitely had initially been prepared to argue for changes in procedure, including the relaxation of corroboration rules, and a tribunal system of questioning, but finally he also demurred. The court system itself was biased in favour of male defendants, according to this 1925 Report, because female magistrates and jurors were deliberately being excluded from sexual assault cases.<sup>121</sup>

Appeals against sexual abuse convictions were commonplace and were held against the backdrop of the evidential requirement for corroboration and the mind-set that children who make such allegations should be disbelieved, even among professionals such as psychoanalysts.<sup>122</sup> Psycho-analysis was a new science to in the 20<sup>th</sup> century. In 1916, Sigmund Freud had stated that:

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<sup>116</sup> Fn 99, Smart, p.63.

<sup>117</sup> Victim-centred measures were not enacted until 1999, under the Youth Justice and Criminal Evidence Act.

<sup>118</sup> Fn 50, Smart, p.399.

<sup>119</sup> Fn 99, Smart, p.65.

<sup>120</sup> Fn 50, Smart, p.401.

<sup>121</sup> C Hooper, 'Child Sexual Abuse and the Regulation of Women: Variations on a Theme' in C Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (Routledge 1992), pp. 65-66.

<sup>122</sup> Fn 99, Smart, p.66.

*You must not suppose, however, that sexual abuse of a child by its nearest male relatives belong entirely to the realm of fantasy. Most analysts will have treated cases in which such events were real and could be unimpeachably established.*<sup>123</sup>

However, Litin stated in the 1950s that:

*We can see now that in years past patients were lost or driven into psychosis by our failure to believe them because of our conviction that much of their accounts must be fantasy.*<sup>124</sup>

From the 1930s onwards, two feminist associations - the National Vigilance Association and the Association for Moral and Social Hygiene - found ways of countering the perception that abused children were devoid of innocence and unworthy of protection because violating a 'knowing' child was regarded as a lesser offence than violating an 'innocent' child.<sup>125</sup>

Therefore, the NVA focused on the plight of very young girls under 10 who could be viewed as wholly 'innocent' victims of abuse as opposed to being authors of their own misfortune. The AMSH labelled adult sexual wrongdoers as 'repeat offenders with serious medical conditions' but their efforts to redefine the sexual abuse of children were curtailed with the onset of war in 1939.<sup>126</sup>

The culture of disbelieving children who reported being abused and women, who made allegations of rape, persisted until late in the 20<sup>th</sup> century. In the UK, very young children's testimony about sexual abuse they had suffered was deprecated. In *R v Wallwork*<sup>127</sup> Lord Goddard stated that it was 'ridiculous' to suppose that any value could have been attached to the value of a five-year-old's evidence. The policy of *Wallwork* was reiterated in the *R v Wright and Ormerod*,<sup>128</sup> where Ognall J. said that the validity and good sense of the judgment remained untrammelled and that '...it must require quite exceptional circumstances to justify the reception of this kind of evidence'.<sup>129</sup>

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<sup>123</sup> P Robinson, *Freud and His Critics* (University of California Press 1993), p.85.

<sup>124</sup> Fn 99, Smart, citing these psychoanalysts' comments at p.66.

<sup>125</sup> J Kitzinger, 'Defending Innocence: Ideologies of Childhood', January 1988, *Feminist Review*, p.80.

<sup>126</sup> Fn 50, Smart, p.405.

<sup>127</sup> (1958) 42 Cr. App. R. 153; (1958) 122 J P 299.

<sup>128</sup> *R v Wright and Ormerod* [1987] 90 Cr App R 91.

<sup>129</sup> *Per Ognall J., Wright and Ormerod*, p.94.

Arguably, this cultural attitude still exists. For instance in 2010, only 2,135 people were convicted of child abuse, although police had been notified of more than 23 000 alleged offences.<sup>130</sup> Kelly holds the view that even today, legacies remain sedimented into institutional cultures and practices, creating a risk of over-identification of false allegations by police and prosecutors.<sup>131</sup> Feminists have previously pointed out that according to the historical construction of rape in law, the words of a woman alone were not considered reliable and required special evidentiary rules.<sup>132</sup> Judges in sexual offence trials would warn juries about the dangers of convicting the accused where the complainant's testimony was the sole piece of evidence. In most other cases, there was no need for corroboration. It was not until 1994, that the decision was taken to abrogate the mandatory requirement for corroboration in sexual offence trials when it passed the Criminal Justice and Public Order Act under section 32 (1) (b).

### *Physical assaults on children as a modern social concern*

Child welfare groups did exist in the 19<sup>th</sup> and early 20<sup>th</sup> century to combat delinquency, neglect and the 'problem' family, but child abuse welfare groups were set up much later. Victorian doctors might see cases where the child has actually been severely battered when chastised, with evidence of bruising to the body, but which they passed off as being symptomatic of 'rickets.'<sup>133</sup>

By the mid-20<sup>th</sup> century, the NSPCC started to bring prosecutions against people who beat children. Socio-legal reactions which prevailed in this era, were piecemeal, and did not recognize the concept of child abuse as a definite social problem. US paediatricians discovered parental physical abuse by means of X-ray technology from the 1940s onwards. Dr Caffey showed the relationship between two conditions of multiple fractures to the long

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<sup>130</sup> Y Roberts, 'Nothing Should Distract Us from the Victims of Child Abuse' *The Observer*, 11 Nov 2012. Recent figures show a trend in higher police recordings of offences over the past five years. The total number of recorded sexual offences against under 16s has risen sharply by 38 per cent in the past year (from 22,294 in 2013/14 to 30,698 offences in 2014/15). It has increased by 85 per cent over a five-year period (from 16,627 in 2010/11 to 30,698 recorded sexual offences in 2014/15) See Bentley, H. *et al*, NSPCC 'How Safe are our Children?' 2016 ,p.26; <<https://www.nspcc.org.uk/globalassets/documents/research-reports/how-safe-children-2016-report.pdf>>.

<sup>131</sup> L Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' *Violence Against Women* (December 2010 vol 16 no 12), p.1345.

<sup>132</sup> Dr J Scutt, 'The Incredible Woman: a Recurring Character in Criminal Law,' p.10. <[http://aic.gov.au/media\\_library/publications/proceedings/16/scutt.pdf](http://aic.gov.au/media_library/publications/proceedings/16/scutt.pdf)>.

<sup>133</sup> N Parton, 'The Natural History of Child Abuse: A Study in Social Problem Definition' *Br. J. Social Wk.* 1979, vol 9 (4), p.435.

bones and inflammation around the skull which were signs of trauma. In 1955, Woolley and Evans were prepared to ascribe this damage to children to parental indifference, alcoholism, irresponsibility, and immaturity caused by uncontrolled aggression. By 1962, Dr Kempe had publicised this type of damage in the *Journal of the American Medical Association* by calling it ‘battered child syndrome’.<sup>134</sup> Dr Kempe’s article, according to Robin, is often associated with the rediscovery of child abuse as it was validated as a serious concern.<sup>135</sup>

Apart from raising the profile of abused children, Dr Kempe also advised doctors to breach patient confidentiality and report their suspicions to law enforcement and child protection agencies. ‘Battered baby syndrome’ received attention in 1963 in Britain when Griffiths and Moynihan pointed out in the *British Medical Journal* that diagnosed brutal violence against children is almost always inflicted by parents; that doctors were failing to detect this through erroneous diagnosis. Physical child abuse was also highlighted by paediatricians and forensic pathologists who published a number of articles in *Medicine, Science and the Law*. The British Paediatric Association published the memorandum *The Battered Baby*. It argued that a purely punitive attitude towards violent parents was not wholly helpful, and that other interventions, such as medical and welfare agencies, should also be involved.<sup>136</sup> Doctors in casualty departments who suspected sexual abuse in young patients by a parent were reluctant to violate the principle of doctor/patient confidentiality and report this to police and become involved in a criminal justice process that would forfeit their time and ability to control the outcome of diagnosis.

Forensic pathologists could be more proactive, as their work was court and criminal justice based anyway. Paediatricians were more involved than doctors, as the health of children was their specialism, and they were able to raise the profile of their profession by attracting resources and status to the physical abuse in an era where they were being side-lined by the popularity of drug treatments for serious or fatal diseases and the falling birth rate in the late 1960s and early 70s. In the 1970s, the NSPCC set up a battered child unit, diffused child abuse as a social problem, and moved away from its punitive, legalistic role and assumed a professional role geared towards the treatment and rehabilitation of families who battered children. The NSPCC looked to the US abuse detection/prevention models to help it, even bringing Dr Kempe from the US who spent a year researching there from 1969-70.<sup>137</sup> The focus on violence towards children may also have galvanised the feminist movement to

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<sup>134</sup> Ibid

<sup>135</sup> Fn 37, Robin, op cit, p.3.

<sup>136</sup> Fn 133, Parton, op cit, p.438.

<sup>137</sup> Ibid, p.439.

highlight the cause of domestic violence inflicted on women by their partners and spouses from the 1970s onwards.

Despite the diffusion role the NSPCC played in highlighting child battery as a major issue, central and local governments were not paying much attention to it. It took a *cause célèbre* to consolidate the problem. A child, Maria Colwell, had been killed by her stepfather. The Press took an interest in this case, mainly due to an official enquiry set up by Sir Keith Joseph, who blamed the cycle of poverty for such abuse. The enquiry sparked campaigning on other issues affecting child welfare: concern over the reorganisation of social services, and the difficulty of prospective carers and parents in being able to foster and adopt children. By 1974, Government interest - the report on Maria Colwell - had firmly placed child abuse as a major social concern. Subsequent scandals and reports helped to consolidate and reify the child abuse problem,<sup>138</sup> which led to greater co-operation between professionals and agencies to identify children at risk of abuse. Reification is the final stage of the development of a problem as a recognised social concern. Central government was now more involved. It published the Department of Health and Social Security circular, *The Non-Accidental Injury to Children*, which was concerned with individual cases and the local organisation of services. A 1976 DHSS circular recommended the involvement of senior police officers to share confidential information with other agencies on abuse cases.<sup>139</sup>

Psychological studies from the 1970s onwards indicated that children making allegations about sexual matters were less likely to lie and were also capable of providing much more reliable evidence than had previously been assumed.<sup>140</sup>

### *Institutional child abuse*

Whilst venereal disease diagnosed by doctors had brought attention to sexually abused children in charity-run homes in the 1920s, the care homes environment came to public attention again in the 1980s because of allegations of physical and sexual abuse of child residents.

From the 1960s, there had been a change in the way care homes were managed as social work and new ways of thinking dominated welfare, especially in child care law, policy and practice, until the 1980s. Society at that time labelled children in care as being either passive

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<sup>138</sup> Ibid, p.432.

<sup>139</sup> Ibid, p.443.

<sup>140</sup> Ibid.

children/victims or as adults/villains.<sup>141</sup> Such children had difficulties within their families leading to their truancy, running away or criminality; some were disabled, had emotional and/or behavioural difficulties and could not be cared for by their own families. They were therefore emotionally and welfare-dependent on the care homes and their providers.

Complainants of child abuse in these homes had difficulty in persuading police to take the matter further, because they were perceived as quasi-delinquents whom the police initially assumed were telling lies. Social workers were informed by psycho-analytic theory and behavioural psychology ‘contributed in their own way to the abuse of children in care’.<sup>142</sup>

From the 1983-89, one hundred and thirty-two children in care homes in Staffordshire had been subjected to ‘pindown’ which was a form of solitary confinement which could last for days or even months. This regime included humiliating the child with baths on admission, special clothing, a strict routine, and inappropriate bed times. Pindown was then an accepted method of dealing with delinquent children, as the practice was routinely recorded in log books.<sup>143</sup>

In Leicestershire, care homes owned by Frank Beck were investigated for physical, sexual and emotional abuse of the children from 1973-86. Beck and his colleague, Colin Fiddaman, were tried and convicted of sexually abusing children under their care.<sup>144</sup> Beck had initially received support from two successive directors of social services, senior management, field and residential social workers as well as three psychiatrists.<sup>145</sup> Stein argues that pindown at the Staffordshire homes, regression therapy in Leicestershire and ‘confrontational’ physical restraint methods at Aycliffe, were sanctioned forms of child abuse.<sup>146</sup> The Beck trial ‘came to be regarded as the model on which all future care home police operations should be based.’<sup>147</sup>

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<sup>141</sup> M Stein, ‘Missing Years of Abuse in Children’s Homes’ *Child & Family Social Work* (2006, Vol 11 Issue 1), p.12.

<sup>142</sup> *Ibid*, p.13.

<sup>143</sup> *Ibid*, p.12.

<sup>144</sup> Beck denied abusing children in his care. A legal executive, Ian Henning, and a policy adviser to the Liberal Party, were preparing Beck’s appeal but Beck died of a heart attack in prison before that time; Henning died in a motorbike accident soon after. According to Webster, Henning and Greaves had been persuaded by documentary evidence which confirmed that Beck had not committed the offences in question. For more information, read Richard Webster’s ‘Crusade or Witch Hunt?’ *Times Literary Supplement*, 22 January 1999.

<sup>145</sup> Fn 141, Stein: *op cit*, p.13.

<sup>146</sup> *Ibid*, p.16.

<sup>147</sup> R Webster, ‘Crusade or Witch Hunt?’ *Times Literary Supplement*, 22 January 1999.

Another major inquiry, the Waterhouse Report - centred on the North Wales care homes - concluded that widespread abuse of boys had occurred in children's residential establishments in Clwyd between 1974 and 1990.<sup>148</sup> Fifteen convictions of care home staff were obtained following a police inquiry. Care homes in Gwynedd had been criticised, mainly for the level of physical cruelty inflicted on the child residents. Stein argues that it was not conclusive that there had been paedophile rings operating in children's homes, but investigating police officers found that there were paedophiles at senior management level who employed other paedophiles and other adults outside of the care homes. Child abuse could also be found in the form of 'system outcome abuse' which is the failure of the law, policies, practices and procedures to protect and promote looked-after children.<sup>149</sup>

By the mid-1980s, some well publicised surveys of the general public and health service professionals suggested that many more sexual offences had been committed than had generally hitherto been recognised. There was heightened awareness of this possibility in light of the Cleveland abuse scandal.<sup>150</sup> Cleveland social services had a good track record in response to issues of child care. In 1987, a new social worker, Susan Richardson, was appointed as a child abuse consultant. She worked with Dr Higgs, a consultant paediatrician, on suspected child abuse case referrals. Dr Higgs was convinced of the validity of an anal dilatation test to diagnose suspected child abuse, which had been clinically researched by Dr Wynne and Dr Hobbs.<sup>151</sup> The research of these latter doctors had been published in *The Lancet*. However, Dr Irvine and Dr Roberts were not convinced of the validity of this test and advised that police surgeons should be allowed to give second opinions.<sup>152</sup> The inquiry found that Dr Higgs 'lacked appreciation of the forensic elements of her work' and too fixed in her belief in separating children from their parents to permit 'disclosure' under place of safety orders. The Cleveland report recommended, *inter alia*, that children suspected of being abused should not be subject to repeated examinations or confrontational 'disclosure' interviews for evidential purposes. It also advised that social services, police and the medical profession should work collaboratively when assessing child abuse cases and permit medical diagnosis and physical signs that led to it to be the prime consideration except in straightforward cases. It also highlighted the problem of the lack of help for adults who had

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<sup>148</sup> Sir Waterhouse, *et al*, *Lost in Care Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974*, (February 2000 HC 201), p.197.

<sup>149</sup> Fn 141, Stein: *op cit* p.16.

<sup>150</sup> 'Summary of the Cleveland Inquiry', *British Medical Journal*, 1988, July 16; 297. pp.190-191.

<sup>151</sup> *Ibid* p.190.

<sup>152</sup> *Ibid* p.190.

been abused as children and abusers who wished to confess to such offences but hitherto had been prevented from so doing.

Two extreme cases of physical abuse of Jasmine Beckford and Kimberley Carlisle had also been well publicised.<sup>153</sup> The Pigot Committee<sup>154</sup> had the impression that the incidence and severity of all types of child abuse had increased in recent years. The NSPCC had been tracking child abuse cases through its own child protection register research. From a survey, *Child Abuse Trends in England and Wales 1983-1987*, which was published in 1989, cases of sexual abuse had increased eightfold from 0.08 to 0.65 per thousand. The Department of Health issued figures in 1988: 25 000 children had been placed on child protection registers because of various types of abuse and a further 14 400 registered cases were of ‘grave concern’.<sup>155</sup>

The Conservative government thought that it had already addressed concerns these inquiries raised when it implemented the Children Act 1989 (in the same year that the Convention of the UNICEF Rights of the Child was signed), but by 1997 William Hague set up a review of the safeguards for looked-after children in England and Wales.<sup>156</sup> By 2000, there were 32 separate police investigations of care homes across England and Wales. From 1997, the new Labour Government modernised children’s services once it had accepted the ideas of the Utting Report (*People like Us*) which advocated for greater supervision of care homes and the accountability of staff working therein.<sup>157</sup> These measures allowed outside bodies to monitor the care homes environment with the creation of Commission for Social Care Inspection for England and the revision of the Children Act in 2004, led by the Office for Standards in Education.<sup>158</sup>

## 21st century

In 1989, the Pigot Committee recommended modernising and improving the way in which child victims of sexual offences could give their evidence, by video-recorded interviews

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<sup>153</sup> *Report of the Advisory Group on Video Evidence*, Home Office, London December 1989, of Report para 1.2., p.1.

<sup>154</sup> Named after Thomas Pigot, J QC, *Report of the Advisory Group on Video Evidence*, Home Office, London December 1989.

<sup>155</sup> *Ibid* para 1.3, p.2.

<sup>156</sup> <<http://www.careleavers.com/abuse/history>>. The Care Leavers’ Association.

<sup>157</sup> The Stationery Office, *The Government’s Response to the Children’s Safeguards Review*, November 1998, Cm 4105, para 3.2.

<sup>158</sup> Fn 141, Stein: *op cit*, p.16.



conducted with them by police, social workers, doctor or other appropriate interviewers; these recordings would then be substituted for use as evidence-in-chief at trial. The Committee had to consider the implications of the proposed changes: the extent to which they would conflict with the hearsay rules - recorded testimony as an out of court statement - as well as maintaining the robustness of testing the evidence against defendants by means of the cross-examination in order for them to have a fair trial.<sup>159</sup> It was proposed that interviews should be conducted to conform to evidence-in-chief rules: namely, that they should avoid asking questions which suggest the answer and not assume that facts are established that are likely to be in dispute.<sup>160</sup> The Committee agreed that it was possible to make use of out-of-court testimony of children in this manner, because provision had already been in place to accept the evidence of children out of court under the Children and Young Persons Act 1933 under sections 42 and 43 which permitted a magistrate to accept a sworn deposition from a medical practitioner in cases where a child claimed to have been sexually or physically assaulted but was physically or mentally unfit to give evidence in court.

Social services and police officers had already been running joint schemes to interview children soon after an alleged assault, video-record it and present it as the child's evidence in chief in court.<sup>161</sup> These measures had the advantage of presenting fresher evidence at trial and spared child complainants from the trauma of having to give evidence in court in person or from being intimidated by the presence of the defendant and the courtroom ambience.<sup>162</sup> The Pigot Report thought it paradoxical that child victims who seemed to give perfectly clear accounts of abuse against them were not permitted to do so in court. Those victims who were permitted to give evidence in court faced the further obstacle of their credibility, because of the rules on uncorroborated evidence (evidence that is supportive of, but independent of, the complaint that a sexual offence took place) which defaulted in favour of the defendant due to a special judicial care warning issued to them.<sup>163</sup>

The Committee thought that judges should be disinclined to issue such a warning unless they were absolutely convinced that their reasoning is unassailable.<sup>164</sup> To jurors, the warning might be construed as official information that women claiming to have been raped and children making allegations of sexual abuse were far more untruthful than the jury's own

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<sup>159</sup> Fn 153, *Report of the Advisory Group on Video Evidence*, para 2, p.i.

<sup>160</sup> *Ibid* para 4.20, pp.41-42.

<sup>161</sup> *Ibid* para 1.15, p.7.

<sup>162</sup> *Ibid* para 2, p.i.

<sup>163</sup> *Ibid* para 6.11, p.63.

<sup>164</sup> *Ibid* para 5.17. pp.51-52.

experience and knowledge might indicate; that at best, the warning would be ignored by juries and at worst, they might acquit defendants who might have been convicted had they been permitted to evaluate the evidence in the usual way.<sup>165</sup>

The reasons for this care warning had been articulated in *R v Henry*.<sup>166</sup> Judges had to use clear and simple language that would without doubt convey to the jury that in cases of alleged sexual offences it was really dangerous to convict on the evidence of the woman or girl alone. The Pigot Committee realised that the corroboration rules in their current state would dilute the value of the proposed out-of-court video testimony of child complainants because of the question of whether such testimony would be regarded by the court as hearsay as well as possibly being uncorroborated and therefore subject to the mandatory care warning.<sup>167</sup>

The Law Commission also recommended reform to mandatory care warnings. The Criminal Justice and Public Order Act 1994 abolished the corroboration rules under section 32 (1). The Youth Justice and Criminal Evidence Act 1999 (YJCEA) was based on the findings of the Pigot Report 1989.<sup>168</sup> Most of this Report's recommendations were finally enacted, except for the recommendation that cross-examinations of such witnesses should be conducted by a neutral specialist interviewer as occurs in most of continental Europe.<sup>169</sup>

This legislation gave special treatment for complainants aged 18 or under and witnesses under section 16, which sets out the measures available to eligible witnesses. Included in the YJCEA special measures are witness screenings from the accused (section 23), live link evidence (section 24) video-recorded evidence-in-chief (section 27), video-recorded cross-examination or re-examination (section 28) and examination of witnesses through intermediaries (section 29). Furthermore, complainants are no longer permitted to be cross-examined in person by the accused (sections 34 and 35).

Whilst the YJCEA made proceedings less daunting for vulnerable or intimidated witnesses, including children, allowing evidence from victims to be given behind a screen, pre-recorded video or live video link had serious implications for the right of the defendant to a fair trial under Article 6 of the European Convention on Human Rights. It is a principle of criminal law that a defendant has the right to face his accusers literally. Verbal answers of victims and

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<sup>165</sup> Ibid, para 5.25, p.55.

<sup>166</sup> [1969] 53 Cr App R 150.

<sup>167</sup> Fn 153, *Report of the Advisory Group on Video Evidence*, para 5.17, p.51.

<sup>168</sup> Ibid.

<sup>169</sup> E Henderson, 'Reforming the Cross-Examination of Children the Need for a New Commission on the Testimony of Vulnerable Witnesses' Archbold Review 2013, p.9.

witnesses and analysis of the way in which a witness responds to questioning are important to the case.<sup>170</sup>

### *Background to the Criminal Justice Act 2003*

The Labour Party's White Paper *Justice for All* proposed changes to the law which would make it easier to convict criminals by relevant inferential evidence.<sup>171</sup> The rationale underpinning these changes was that the rights of the defendant needed to be counterbalanced with the competing rights of the victim. Considering the rights of victims and defendants as a balancing act was misleading and inaccurate, as increasing the rights of one party does not necessarily decrease the rights of the other. Was the Paper really about victims' rights or victims' interests?<sup>172</sup> Victims' rights, as envisaged by the proposed Victims' Charter, to be enforceable, needed to be underpinned by legislation.

Liberty, a human rights organisation, conceded that taking away protections for defendants could well lead to more convictions of the guilty, but expressed concern that it would also lead to a greater number of innocent people being convicted. The cornerstone of the legal system was protection against wrongful conviction. However, the Government decided that juries were being prevented from hearing evidence that was relevant to facts in issue under the similar fact principle and it proposed a much wider ranging application thereof, even creating a special statute for its terms of use under the Criminal Justice Act 2003, which extended the use of bad character evidence. This type of evidence covers a wide range of conduct, not just previous convictions or strikingly similar prior conduct which was the test under *DPP v Boardman*.<sup>173</sup>

Furthermore, any prosecution case relying on previous convictions was less likely to have other and sufficient evidence established the guilt of the accused; yet the jury would then be tempted to convict on the basis that the previous convictions stereotyped the defendant and made it more likely that he was guilty.<sup>174</sup> Whilst bad character evidence had already been used against defendants, such as strikingly similar conduct or if the defendant claimed to be

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<sup>170</sup> Liberty's Response to the Home Office Paper *Justice for All* October 2002, p.7.

<sup>171</sup> *Justice for All* (HMSO July 2002 Cm 5563).

<sup>172</sup> Fn 170, Liberty: op cit, p.6.

<sup>173</sup> *The Government's Reply to the Fourth Report from the Home Affairs Committee Session 2001-2002* (HC 836 April 2003 Cm 5799), paras 55-56. *R v Boardman* [1975] AC 457 cited.

<sup>174</sup> Law Commission No.273, *Evidence of Bad Character in Criminal Proceedings* (Cm 5257, 2001), para 6.50, p.107.

of good character in court, the proposed reforms would include ‘other misconduct’ or ‘anything suggesting a criminal tendency’ including charges or previous arrests to impute unwholesomeness of character.<sup>175</sup>

The Criminal Justice Act 2003 created a shield for complainants and non-defendants from attacks on their credibility by forbidding the use of evidence which is deemed to be irrelevant under s.100 (1), (2) and (3). The CJA 2003 also permitted juries to hear about the prior misconduct of defendants in a wider variety of contexts under s.101 (1), including any prior sexual misconduct deemed to be ‘reprehensible’ behaviour under s.112 (1). Reprehensible behaviour also included charges that were being tried concurrently to the trial in question. In sexual offence trials, the prosecution may wish to establish that the defendant has a propensity to commit similar sexual offences under section 103 of the same Act.

Judges were entrusted with the task of deciding whether or not to allow juries to hear bad character evidence and assessing whether the probative value of the evidence would outweigh its prejudicial effect. Revisions to bad character deployment were designed to secure more convictions, particularly in sexual offence cases. The Law Commission was aware of the prejudicial nature of previous convictions against children, given the findings of a jury study, the Lloyd-Bostock Report.<sup>176</sup> One Q.C., who wrote that it was insulting to juries to assume they cannot be trusted to evaluate the worth of previous convictions, was unsurprised by the results of the study, explaining that: ‘Any criminal hack could have told you that he was letting his client’s character in, whatever the nature of the offence, when it included a conviction for indecent assault on a child.’<sup>177</sup>

There had already been codification of the law by the Sexual Offences Act (SOA) 1956 but the Labour Government also reformed the SOA in 2003, which radically overhauled existing legislation and it also introduced new sexual offences. The legal definition of ‘child’ has now been extended the age of 16 to 18 under section 45(1) of SOA 2003. Specific legislation on child rape at section 8 also makes it an offence to cause or incite a child under 13 to engage in sexual activity. There is now an offence of causing a child to watch a sexual act under section 12. Section 15 covers sexual grooming of a child and is designed to prohibit the befriending or establishment of an emotional connection of a child to encourage them to have

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<sup>175</sup> Fn 170, Liberty: op cit, p.18.

<sup>176</sup> S M A Lloyd-Bostock, ‘The effects on juries of hearing about the defendant’s previous criminal record: A simulation study’ Crim L R. 2000 Sep, pp.734-755.

<sup>177</sup> Fn 174, Law Commission, *Evidence of bad character in criminal proceedings*, para 6.38, p.91.

sexual activity with the offender or to be trafficked for such purposes. Sections 45-51 also cover indecent photographs of children aged 16 or 17. The question of whether a photograph is decent or not is still governed by earlier legislation -section 1 of the Protection of Children Act (PCA) 1978 - and it is for the jury to determine whether or not an image is indecent. PCA 1978 also prohibits the making, distribution, showing and advertisement of indecent photographs. It also extends to pseudo-photographs: 'an image, whether made by computer graphics or otherwise, which appears to be a photograph,' and can include any image where the dominant impression conveyed is that the person shown is a child, notwithstanding that some of the characteristics are those of an adult (Archbold 31-107). This legislation was not superseded by section 160 (1) of the Criminal Justice Act 1988 which prohibits possession of indecent photographs or pseudo-photographs of children. The offence of abuse of position of trust is found in sections 16-24; abuse of children through prostitution and pornography in sections 47-51. The SOA has also extended checks for convictions to a wider range of offences to vet those who care for or supervise children.<sup>178</sup> There are still gaps in child protection – the SOA 2003 did not mandate or even provide for the non-reporting of sexual abuse as occurs in other jurisdictions<sup>179</sup>. There have been plans to mandate teachers to report child abuse and to sanction those with imprisonment who 'wilfully neglect' to do so.<sup>180</sup> Child abuse detection rates have improved with child protection measures. The reporting of sexual offences increased by 9% in all sexual offences for the year ending June 2013 compared with the previous year: from 51 252 to 55 812. The spike in reports may be due to Operation Yewtree investigation connected with allegations made against Jimmy Savile. These figures include rape and all other sexual offences. There are crimes which continue to go unreported or unrecorded; therefore caution is needed when offering these figures. The Office for National Statistics suggests that the Yewtree Operation had a wider effect in encouraging both current and historical complaints to be filed, even though the data excluded the Metropolitan Police (London) area. Ten per cent of all reported sexual offences for that period were historic – alleged offences that were 20 years old or more; but also, there was a five per cent increase in reports of allegations that were less than a year old from the date of commission.<sup>181</sup>

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<sup>178</sup> Fn 141, Stein: op cit, p.17.

<sup>179</sup> NSPCC Policy Briefing, *Strengthening duties on professionals to report child abuse*, Sept 2014 <<http://www.nspcc.org.uk/globalassets/documents/information-service/policy-briefing-strengthening-duties-professionals-report-child-abuse>> p.3.

<sup>180</sup> R Vaughan, 'Jail threat for teachers who 'neglect' to report child sex abuse suspicions' *Times Educational Supplement* 3 Mar 2015.

<sup>181</sup> Office for National Statistics released 17 Oct 2013: <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-june-2013/info-sexual-offenses.html>>.

Professionals handling suspected cases of child abuse are encouraged to work together to share intelligence. Every local authority must now have a Local Safeguarding Children Board as required under s.13 of the Children Act 2004. Each Board comprises a representative of the area and a Board partner of that authority, which may include a district council, a chief police officer, staff from the probation board, a member of the Strategic Health Authority or any other type of partner prescribed by the Secretary of State. The Board is entrusted to safeguard and promote child welfare under s.11 of the Children Act 2004.

Undoubtedly, children are now better safeguarded from sexual predation and exploitation than ever in the UK. Mandatory criminal background checks are made by the Disclosure and Barring Service (DBS) on adults working with and caring for children as professionals and volunteers. However, until 2013, any caution or non-custodial offence of a non-sexual and irrelevant nature had to be declared by the applicant as well, which gave employers the option of refusing to hire or dismissing an employee with such a background, affecting 6000 people. It was held that neither the Police Act 1997 nor the Rehabilitation of Offenders Act 1974 were compatible with Article 8 of the ECHR which guarantees a right to respect for a private and family life.<sup>182</sup> Four million adults now have to apply for DBS checks;<sup>183</sup> until an employer is satisfied with the results of a police check, *prima facie*, any non-vetted potential employee could be regarded as a risk (in terms of abuse) to children. Whilst the DBS does help to eliminate those who may have a sexual offences record who may pose a risk to children, it has its limitations as children can still be abused by those who pass DBS checks.

Child protection measures have more than likely caused a decrease in physical and sexual abuse. According to NSPCC figures, the average rate of child homicides has decreased by 30 per cent in England and Wales since 1981.<sup>184</sup> However, in 2015-16 there were 41 homicide prosecutions in child sexual abuse cases, a rise from 17 in the previous year.<sup>185</sup>

The overall reduction in reports of child abuse is also borne out in US research.<sup>186</sup> From 1993 to 2004, there was a 40-70% reduction in various forms of child maltreatment and child victimisation, including sexual abuse, physical abuse, sexual assault, homicide, aggravated assault, robbery and larceny. Finkelhor and Jones point out that that the decline of reported

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<sup>182</sup> C Hope, 'CRB changes mean thousands of teachers and doctors will not have to disclose minor criminal convictions' *The Telegraph* 26 Mar 2013.

<sup>183</sup> Disclosure and Barring Service, Application Form Guidance'; <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260701/e-guide\\_v1.1\\_PDF.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260701/e-guide_v1.1_PDF.pdf)>

<sup>184</sup> NSPCC: <[http://www.nspcc.org.uk/Inform/research/findings/howsafe/indicator01\\_wdf95539.pdf](http://www.nspcc.org.uk/Inform/research/findings/howsafe/indicator01_wdf95539.pdf)> p.1.

<sup>185</sup> Crown Prosecution Service (CPS): *Violence against Women and Girls Crime Report 2015-16*, p.10.

<sup>186</sup> D Finkelhor, D. and L Jones, 'Why Have Child Maltreatment and Child Victimization Declined?' (2006) *Journal of Social Issues* vol 62 no 4, p.686.

sexual abuse (in the US) could also be due to changes in investigatory standards, decreased reporting to agencies and reduced funding. However, they also think that there is an actual decrease in reports of CSA, as the decline in agency statistics is paralleled by declines in victim self-reports from at least two other sources: data on sexual assault to teens by known persons and a state-wide survey of students in Minnesota.

Successful CSA prosecutions in 2015-2016 rose from 5,387 to 6,217 and is the highest volume the CPS has ever recorded.<sup>187</sup> Critics of the criminal justice system will argue that the conviction rate is still low, but these figures should be contrasted with rape prosecutions. In 2014-15, out of 4536 prosecutions for rape in England and Wales, 56.9% resulted in a conviction. In 2015-16 the rape conviction rate rose slightly to 57.9%<sup>188</sup>

### *False allegations*

There are indications that false allegations (those where no offence is found to have occurred) have increased recently, particularly in the institutional setting. The Coalition Government obtained data from 116 out of 150 local authorities in England. It found that 12,086 allegations of abuse had been made by schools in 2009-10. The Department for Education found that around 44 per cent of claims made by pupils and their parents were 'unsubstantiated, malicious or unfounded'. Less than 1 in 20 allegations resulted in a criminal conviction.<sup>189</sup>

The Crown Prosecution service conducted research for the first time to attempt to quantify false allegations in rape allegations.<sup>190</sup> Its Report also acknowledges the very damaging impact that a false allegation can have on the person falsely accused. Reputations can be ruined and lives can be devastated as well.<sup>191</sup> During the period of the review 2011-12, there were 5 651 prosecutions for rape as well as 35 prosecutions for making false allegations of rape.<sup>192</sup> The CPS had discounted possibly true allegations that were subsequently retracted as had occurred in the case of one complainant in 2010.<sup>193</sup> Accepting that the percentage of false allegations revealed in this study appears to be small, the CPS recommended urgently

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<sup>187</sup> CPS Report *Violence against Women Crime Report 2015-16*, p10.

<sup>188</sup> *Ibid*, p.7.

<sup>189</sup> G Paton, 'Teachers' lives 'ruined' by false allegations, warns minister,' *The Telegraph* 15 October 2011.

<sup>190</sup> Crown Prosecution Service Equality and Diversity Unit and Levitt, A., Q.C., *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*, March 2013.

<sup>191</sup> *Ibid*, p.2.

<sup>192</sup> *Ibid*, p.3.

<sup>193</sup> *Ibid*.

informed national debate about the proper approach to the investigation and prosecution of sexual offences. The debate needs to extend well beyond the CPS and police'.<sup>194</sup>

## **(b) The heightened concern about CSA**

It may be helpful, before exploring the relevance of moral panic theory to public concern about CSA, to mention some instances of that concern, and reactions to it.

In the 1990s, the UK government revealed plans to create a sex offenders' register which, in turn, led to media and social demands for community notification. The tabloid paper *News of the World* launched an outing of paedophiles by naming and showing photographs of them as well as where they lived, which led to vigilantes' attacks on some individuals. The government was forced to reconsider how to monitor, supervise, treat and house sex offenders as well as what policy and legislation to adopt.<sup>195</sup>

The 'paedophile' concept implies that child sex offenders are lonely, outcast and predatory, locating the threat on the individual rather than in social, cultural or bureaucratic institutions. The result is that debate and policies which would be deemed unacceptable if applied to 'ordinary' men, have become allowable notwithstanding that most children are assaulted by people whom they know.<sup>196</sup> Kitzinger contends that it is unhelpful to dismiss the media as interfering and sensationalist or even blame the press for media hype; the media are merely a forum for public debate. Media coverage occurs because individuals or collectives have a motive in seeking out media publicity.<sup>197</sup>

For instance, Sarah Payne, an eight year old girl, was found murdered in Sussex in July 2000.<sup>198</sup> Roy Whiting, who had previously been convicted and imprisoned for abducting and indecently assaulting a nine-year-old girl in 1995, was found guilty of Sarah Payne's murder.<sup>199</sup> The then Home Office Minister Beverley Hughes, responded to the conviction by agreeing with Mrs Payne's call for a 'Sarah's Law' which would involve parents if paedophiles moved into their neighbourhoods.<sup>200</sup> Her mother consistently campaigned for the tightening of sex offender monitoring and supervision via the tabloid *News of the World*

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<sup>194</sup> Ibid, p.4.

<sup>195</sup> J Kitzinger, 'The Ultimate Neighbour' (1999) in C Critcher's, *Critical Readings: Moral Panics and the Media* (OUP, 2006), p.135.

<sup>196</sup> Ibid, p.146.

<sup>197</sup> Ibid, pp.144-146.

<sup>198</sup> D Sapsted, 'Sarah: Body is Found 12 Miles Away', *The Telegraph*, 18 July 2000.

<sup>199</sup> M Oliver, 'Whiting Found Guilty of Sarah Payne Murder', *The Guardian*, 12 December 2001.

<sup>200</sup> Ibid



newspaper's *For Sarah* campaign.<sup>201</sup> The popular press acts as a mirror of public concern as well as being an advocacy organ. Whilst the media does not act alone in being a driving force for social and legal change, it unquestionably plays a prominent part.

However, popular journalism tends to oversimplify issues, which leads to the stereotyping of the issue or class of person who is considered to be a threat to the fabric or morals of society.<sup>202</sup> It may also mislead the addressed audience. Tabloid journalism has used the concept of the 'paedophile' for commercial gain, presenting stories to readers that are sensationalised and personalised and, at times misinforming them and hindering sensible discourse on the subject.<sup>203</sup> It is now known that the media actively exploited the family of Sarah Payne, when private investigators working for the *News of the World* were found to have hacked into a mobile telephone given to Mrs Payne over an 11-year period.<sup>204</sup>

According to the newspaper's *For Sarah* website, most of the campaign aims of greater child protection against sex offenders set out by the newspaper materialised in laws and measures over recent years. These were aims which Mrs Payne advocated, though the paper's campaign further called for general disclosure to the community about the whereabouts of sex offenders. Mrs Payne herself stated publicly that she preferred controlled access to information about sex offenders, particularly knowledge of the whereabouts of predatory paedophiles and how they were being supervised.<sup>205</sup>

The risks of full notification became apparent in light of the vigilantist attacks that occurred subsequently to the tabloid paedophile outing campaign as well as the publicised attacks on innocent parties such as the paediatrician Yvette Cloete,<sup>206</sup> who had been wrongly identified as a paedophile.<sup>207</sup> Several years prior to this incident, the release of Robert Oliver, who had sexually assaulted and killed Jonathan Swift, had been given widespread publicity by newspapers which took a proactive role in public safety. This had led not only to the outing of genuine paedophiles, some of whom were beaten up and driven away from their homes, but also not less than 30 cases of men wrongly suspected of child abuse underwent the same treatment. In one case in 1997, a young girl died after the house in which she was staying was

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<sup>201</sup> BBC News, 'The Campaign for 'Sarah's Law'', 10 April 2007.

<sup>202</sup> S Thompson, 'Pedophilia in the News: How Sensationalism in the media creates moral panic' November 8 2006 Helium online.

<sup>203</sup> Ibid.

<sup>204</sup> P Griffiths, 'Sarah Payne's mother on hacking list charity', Reuters, 28 July 2011.

<sup>205</sup> BBC News, 'Paediatrician attacks 'ignorant' vandals', 30 August 2000.

<sup>206</sup> Brendan O'Neill, BBC News, 'Whispering Game,' 16 February 2006.

<sup>207</sup> The Telegraph, Comments, 'Should parents be told about paedophiles living nearby?' 10 April 2007.

burnt down.<sup>208</sup> Restricted community notification was therefore an attempt to avoid vigilante action which might drive offenders underground and endanger innocent parties.

Intense media coverage in the 1990s stereotyped sexual abusers of children as being outsiders; the media and social policy makers focused disproportionately on ‘stranger danger.’<sup>209</sup> More recently, there has been a shift in policy and law in the UK which acknowledges that CSA is far more likely to occur in the family setting; hence, the right of female parents to obtain knowledge from the police as to whether a new partner may have sexual offence convictions.<sup>210</sup> Politicians have a vested interest in meeting popular demands as voiced in the media to placate and attract voters; but has the constant spotlight over paedophiles been at the expense of other facets of child welfare? Jenkins states that 1990s US lawmakers who were most keen to implement predator statutes and Internet regulation also cut back on social welfare programmes that actually increased child and family poverty with the concomitant effects of youth crime, substance abuse and domestic violence. He states with irony that Congress had already dealt with ‘real’ child abuse in its overhaul of the sex offender laws.<sup>211</sup> Prioritisation when dealing with specific types of child maltreatment does appear to be influenced by media highlighted extreme cases. In the UK in 2000, there were 30 300 child protection plans in place. This had declined to 25,700 in 2002. Some commentators, including Finkelhor and Jones, thought that the decline in child protection activity (also a trend in a number of industrialised nations) could be ascribed to some success in child protection policies.<sup>212</sup> However, since the high profile killing of Peter Connolly in 2007, there has been increase in the implementation of child protection plans, from 26,400 in 2006 to 29,200 in 2008, 34,100 in 2009 and 39,100 in 2010.<sup>213</sup>

The heightened public concern over paedophiles may also have impacted on the upbringing of children, including a decrease in the number of male role models for boys. Children’s charities such as the National Children’s Homes and Chance UK stated in 2007 that one in five men did not want to volunteer to work with children in case they were labelled as paedophiles.<sup>214</sup> The education sector likewise witnessed a sharp decline in the number of

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<sup>208</sup> Fn 195, Kitzinger, op cit, pp.138-139.

<sup>209</sup> Ibid pp.144-145.

<sup>210</sup> A Travis, ‘Test schemes offer mothers right to sex offender checks on partners’, *The Guardian* Monday 15 September 2008.

<sup>211</sup> P Jenkins, *Moral Panic, the Changing Concepts of the Child Molester in Modern America*, (Yale University 1998), p.238.

<sup>212</sup> <[http://www.nspcc.org.uk/Inform/research/findings/child\\_abuse\\_neglect\\_research\\_PDF\\_wdf84181.pdf](http://www.nspcc.org.uk/Inform/research/findings/child_abuse_neglect_research_PDF_wdf84181.pdf)> p.17.

<sup>213</sup> Ibid.

<sup>214</sup> BBC News, ‘Men Helpers ‘fear paedophile tag.’’ 31 May 2007.

early years (to age 5) male teachers in schools, particularly primary schools. In 2008, only two per cent of this workforce was male.<sup>215</sup> A *Daily Telegraph* article suggested why this may be so: ‘Critics say men are deterred from working with young children because...they may be branded paedophiles... the absence of male influence in classrooms means that many pupils grow up without important role models, and can lead to problems with discipline.’<sup>216</sup>

In 2013, only 21 per cent (4 100) of teachers training to work in the primary (5-11 years) sector were men. Research conducted by Nottingham Trent and Bedfordshire Universities still indicates that men fear being falsely labelled as paedophiles, one reason for the reluctance of men (in this highly feminised occupation) to work with children.<sup>217</sup>

The fear of paedophilia has therefore not only created palpable social angst, but may also have dissuaded significant numbers of adults, particularly males, from working with children. This crisis may be described by some commentators as being a ‘moral panic.’ Phenomena do not arise spontaneously, but are a combination of interweaving factors. There have always been social and moral crises, and commentators have attempted to find ways of explaining them by identifying any common and recurring features which bear the hallmarks of crises in general. It will be seen, however, that notwithstanding considerable research in the area of social crises, earlier conclusions require revision; but still, ‘moral panic’ theory still retains the value of offering a background as to how and why crises occur in the first place.

### **(i) The theory of ‘moral panics’ in relation to CSA**

How does a problem achieve problem status in the first place?<sup>218</sup> Social constructionism is useful for analysing the rhetoric of claims makers, their vested interest and power in society,<sup>219</sup> but ‘moral panic’ theory takes this idea a step further, because it also takes on board the dynamics which lead to social reaction to a perceived problem. Stanley studied the effects of the reportage of Mods and Rockers hooliganism at Clacton in the 1960s to find out whether the phenomenon was a ‘moral panic’. The fact of an altercation was not in dispute; however, it was considered that the public and politico-legal reaction to a minor incident was immoderate, hostile, volatile, repressive and often irrational.<sup>220</sup>

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<sup>215</sup> M Beckford, ‘Just 2pc of early years primary teachers male,’ *The Telegraph*, 6 August 2008.

<sup>216</sup> Ibid

<sup>217</sup> G Paton, ‘Just a fifth of new primary teachers are men’ 26 November 2013.

<sup>218</sup> E Goode, E. and B-Y Nachman, *Moral Panics: The Social Construction of Deviance* (Blackwell, 2001), pp. 88-89.

<sup>219</sup> J S Victor, ‘Moral Panics and the Social Construction of Deviant Behaviour: Theory and Application to the Case of Ritual Child Abuse’ (1998) *Sociological Perspectives*, vol 41 no 3, p.544.

<sup>220</sup> M De Young, *The Day Centre Ritual Abuse Moral Panic* (Jefferson N.C: McFarland 2004), p.2.

When Cohen investigated the media-reported incident of hooliganism at the Clacton seaside during Whitsun in 1964, he noted that newspapers exaggerated and distorted facts about the extent of violence and damage the offenders had caused.<sup>221</sup> The media had sensitised the public to the events; there was the impression that the hooliganism would occur again and needed to be contained. One consequence of sensitisation is that public hysteria is hyped up and a 'wrong' stimulus may be chosen as the object of attack or fear. The scuffles and vandalism, which broke out between certain Mods and Rockers one Bank Holiday week-end, were reported in such a way that subsequently tarnished the reputation of youths who looked like Mods and Rockers.

Future outbreaks of trouble were pre-empted in English seaside resorts elsewhere as a result of the media coverage, with disaster containment tactics being employed by the authorities, the police and the lawmakers. Future expected week-end/holiday gatherings of youths at these other seaside places were monitored by the police who despatched arriving youths back home (placing them effectively on curfew) and had police wagons and dogs ready to deal with anyone who looked like trouble. Undoubtedly, there were some who did fall into this category and did cause physical harm and criminal damage.

However, the press employed hyperbole and repeated false stories to provoke mass hysteria which in turn influenced society's attitude towards what Mods and Rockers symbolised and how they should be dealt with in the future.<sup>222</sup> Many law-abiding youths who merely enjoyed the fashion of the Mod and Roker culture, were stigmatised as troublemakers. Any rumour of future youth gatherings at resorts would lead to a warning phase as, if an impending disaster were due to occur.<sup>223</sup> Accordingly, the public and the public authorities expected that violence and destruction were more likely than not to take place if nothing were done to pre-empt it. Thus, certain civil liberties were suspended and/or eroded for an apparent benefit of youth crime prevention: young people were placed under local authority and police curfew, depriving them of freedom of movement; the freedom of expression and to gather for a cultural purpose (enjoying peer company and music), was disrupted; police enhanced powers and tactics were heavy-handed and a number of youths complained that they had been rough-handed, and remanded for offences they had not committed.<sup>224</sup> This begs the question of whether clampdowns are a typical result of heightened concerns generally.

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<sup>221</sup> Fn 1 Cohen, op cit, pp.19-26.

<sup>222</sup> Ibid, pp.20-21.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid, pp.71-81.

Sociologists have researched why and how certain matters caused social alarm and attempted to find a pattern of behaviour for crises originally coined as ‘moral panic’. It may be helpful to dissect the elements of Cohen’s definition to see if they reflect the characteristics of social concerns. The concept of moral panic was expanded by Stanley Cohen from the original use of the term by Jock Young<sup>225</sup> who described it as being:<sup>226</sup>

1. A condition, episode, person or group of persons defined as a threat to societal values and interests;
2. (a) Its nature is presented in a stylised or stereotypical fashion by the mass media;  
(b) The moral barricades are manned by editors, bishops, politicians and other right-thinking people;
3. Socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.
4. Sometimes the object of the panic is quite novel and at other times it is something that has been in existence long enough, but suddenly appears in the limelight.
5. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce changes in legal and social policy or even in the way society conceives itself.

The term ‘moral panic’ is strictly sociological, comprising specific criteria which attempt to explain and analyse the occurrence of marked eras of crisis. In the past, the term has been used to capture reactions to the anti-social behaviour of teenagers (anti-hooligan drives), political extremism (McCarthyism), religious cults (witch-hunts), alcoholism (temperance movements), drug misuse (vigilantism), pornography (censorship campaigns), heightened perception of criminality (law and order crusades), and public health issues which have the effect of defining and defending the moral boundaries of society, establishing or tightening moral certainty in times of perceived moral decline.

## **(ii) How ‘moral panics’ shape law and legal processes**

Acute societal disapproval can of course lead to responses that are not only predictable, but also appropriate and acceptable from the informal to the legislative. They can equally well

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<sup>225</sup> C Critcher, *Critical Readings: Moral Panics and the Media*, (OUP 2006), pp.25-28.

<sup>226</sup> Fn 2, Goode and Nachman: op cit, p.24.

provide a fertile soil for less healthy or constructive responses. In the past ‘moral panics’ have led to false accusations of crime against innocent people stereotyped as deviants, e.g., the Nazi programmes of extermination against the disabled, gypsies, communists, and of course Jews in the Holocaust. These have been attended by and promoted through legitimising juridical procedures, from those persecuted in religious witch hunts, or anti-Communist persecution to those in satanic cults accused of ritual child abuse.<sup>227</sup> In some instances, the subject-matter of a ‘moral panic’ may cause social outrage and raise enough emotion to impair the judgment of ostensibly impartial decision-makers such as the judiciary. For instance, the way in which the media portrays terrorism and terrorists may have contributed to unnecessary levels of panic and fear, targeted at the general public’s consciousness and the development of legislation with negative social ramifications.<sup>228</sup>

A domestic moral panic can also become international. On September 11, 2001, New York buildings Twin Towers and Washington D.C.’s headquarters of the US Department of Defence, the Pentagon, were attacked by al Qaeda terrorists, killing 2,996 people. In the US and elsewhere, widespread condemnation of terrorism and terrorists were publicly stated; State criminality and/or encouragement for human rights allegations was neutralised and even disappeared through discursive strategies.<sup>229</sup>

Rather like wartime policy and legislation, human rights may be compromised in the interest of the state and the nation. For example, in November 1974, the Provisional Irish Republican Army was accused of being responsible for the bombing of a pub in Birmingham by explosion devices. These explosions at that time were the most injurious and serious blasts caused by terrorists acts in Great Britain.<sup>230</sup> The public mood in the aftermath of the bombing was such that it placed great pressure on law enforcement and political and legal authorities to find the perpetrator(s) and therefore they had to be seen to be addressing the issue as a matter of urgency.<sup>231</sup>

The historian and writer, Ruth Dudley Edwards, later recalled

“As an Irish immigrant working in London I had marvelled too that no one was unpleasant to me at this time, but all the same the Birmingham bombs caused an

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<sup>227</sup> Fn 219, Victor, op cit, p.541.

<sup>228</sup> D Rothe, D. and S Muzzati, ‘Enemies Everywhere: Terrorism, Moral Panic, and US Civil Society’ *Critical Criminology* 12, 2004, p.327.

<sup>229</sup> *Ibid*, p.338.

<sup>230</sup> <<http://www.innocent.org.uk/cases/birmingham6>> accessed on 5 November 2012.

<sup>231</sup> M Marshall, M. and J Oxley, (Editors), *Aspects of Explosives Detection*, (Elsevier, Oxford, 2009), p.47.

eruption of public fury. The ripple effect of such events is usually underestimated. As well as the sorrow of family, friends and colleagues of the dead and injured, there's the anger and fear that grips communities that now feel nowhere is safe. Allied to that, the escalating violence had led to a perception that the liberal Labour government was soft on terrorism. There were attacks on Irish bars, businesses and community centres, protest strikes in Midlands factories and a refusal by airport workers in Manchester and Liverpool to handle flights bound for Ireland. Within a few days, the Home Secretary, Roy Jenkins, had introduced a Prevention of Terrorism Act with powers he described as "draconian" and "unprecedented in peacetime.

The ripple effect was also to be seen in the actions of the police, who were so desperate to be seen to be nailing the killers that they would charge the wrong people over the M62, Guildford and Birmingham bombs. And a flawed justice system would find them guilty."<sup>232</sup>

Some men, known as the 'Birmingham Six', were detained. A local forensic scientist swabbed the detainees' hands with ether (Griess test) to try to find explosive traces. Two of the suspects tested positively, were interrogated extensively and several of them signed a confession after being beaten and tortured and threatened by the investigating police. The prosecution case was mainly based on the forensic results of the Griess test, the confessions and a dearth of circumstantial evidence. Moreover, the Six were beaten and tortured by prison warders and inmates whilst they were on remand; their injuries were examined and reported by a doctor who made a guarded statement as to how these had been inflicted. The trial proceeded on the basis on dubiously obtained confessions and flawed forensic evidence of explosives supposed to have been handled by the Six which was possibly contaminated by the pathologist.<sup>233</sup> Moreover, the accused were also convicted on circumstantial evidence. Lord Denning doubted whether the police had sufficient evidence on which to charge, let alone convict the men.<sup>234</sup> The Six were convicted and sentenced to life imprisonment.<sup>235</sup> Their first appeal failed, as did their attempt to sue the authorities for their beatings by both police and prison officers. They were freed at a much later date, after a long public campaign.

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<sup>232</sup> Ruth Dudley Edwards, 'The Birmingham bombings 40 years on: what can we learn from IRA terror?', *The Telegraph*, 21st November 2014; <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11245150/The-Birmingham-bombings-40-years-on-what-can-we-learn-from-IRA-terror.html>

<sup>233</sup> B Woffinden, 'Miscarriages of Justice: the Birmingham Pub Bombs', p.5.

<sup>234</sup> *Ibid*, p.6.

<sup>235</sup> Fn 231, Marshall and Oxley: *op cit*, p.47.

In 1973 the Irish Republican Army was reported to have had been actively targeting civilians in England in a bombing campaign, one hallmark of which was the use of nitro-glycerine explosives.<sup>236</sup> Bombs had been placed at the Old Bailey; the Ministry of Agriculture and an army recruiting office, Great Scotland Yard, Whitehall; New Scotland Yard; and the BBC's armed forces radio studio in Dean Stanley Street, killing one and injuring 215.

Against the backdrop of fatalities and injuries in pubs in Guildford, Woolwich, and Birmingham in October and November 1974<sup>237</sup> it is not difficult to see why the public authorities were under intense pressure to prevent future attacks and bring the perpetrators to book. At the end of 1974, seven Irish people (Maguire Seven) had been accused of supplying nitro-glycerine explosives to the Guildford pub bombers (Guildford Four). Paul Hill, Gerard Conlon, Patrick Armstrong and Carole Richardson spent 14 years in prison before their convictions for two IRA bomb explosions in Guildford on October 5 1974 were quashed by the court of appeal in 1989.<sup>238</sup>

Judith Ward was also tried and convicted of murder in respect of the Euston, army bus and defence college bombings.<sup>239</sup> Apart from Ms Ward, the other prisoners unsuccessfully appealed their sentences immediately. The appellants continued to protest their innocence. Information then accumulated, partly from IRA sources, that they were innocent. Chris Mullin, then a Labour MP, wrote a book that also added to the public campaign. In 1985, *World in Action* made a documentary which highlighted the forensic aspects of their cases.<sup>240</sup> Fresh evidence was obtained in order to launch new appeals on their behalf. A litany of complaints was levelled at the way the investigating police had gathered their evidence and how expert witnesses had represented their findings to the jury.<sup>241</sup>

In summary, the appeals were allowed on the following grounds:

Guildford Four: *R v Richardson & Ors*<sup>242</sup>

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<sup>236</sup> The Guardian, 'Ten held after Provo bombs blast London' 9 March 1973.

<sup>237</sup> Miscarriages of Justice – the Irish Cases- Background and the arrests, p.1; <<http://innocent.org.uk/cases/guildford4/guildford4.pdf>>.

<sup>238</sup> M Oliver, 'Miscarriages of Justice', *The Guardian*, 15 January 2002.

<sup>239</sup> <[www.innocent.org.uk/cases/judithward/index.html](http://www.innocent.org.uk/cases/judithward/index.html)>.

<sup>240</sup> Fn 231, Marshall and Oxley, op cit, pages 47 and 48.

<sup>241</sup> Beverley Schurr. "Expert Witnesses And The Duties Of Disclosure & Impartiality: The lessons of the IRA cases in England." Sydney: NSW Legal Aid Commission. Retrieved 2010-09-1.

<<http://www.aic.gov.au/conferences/medicine/schurr.pdf>>.

<sup>242</sup> The Times, 20.10.89:33.



Evidence of police witnesses relating to the ‘contemporaneous’ notes allegedly made during the interrogation and ‘confessions’ of the appellants was held to be false following examination of the documents on which the notes were made.

Birmingham Six: *R v McKenny & Ors*<sup>243</sup>

Both the scientific evidence of contamination by nitro-glycerine and the evidence relating to the confessions obtained by the police were held to be unreliable following the admission of fresh evidence.

Maguire Seven: *R v Maguire & Ors*<sup>244</sup>

The failure of forensic science witnesses (bound by the same common law duty of disclosure as the prosecution) to disclose relevant test results was found to be a material irregularity in the course of the trial.

Judith Ward: *R v Ward*<sup>245</sup>

The shortcomings that contributed to a miscarriage of justice in this case were: the suppression and misrepresentation of test results by the forensic scientists, fresh evidence on the unreliability of the scientific tests, the failure of treating psychiatrists to reveal the appellant’s true mental condition, fresh evidence on her personality disorder, and the suppression and misrepresentation of evidence by prosecution lawyers.

All these appeal cases illustrate how the British legal system was capable of causing injustice and imprisoning innocent people. In a climate of heightened social fear, the principles of human rights and the fair trial of the accused had been compromised, on more than one or two occasions.

The Irish appeal cases showed that it was time to reappraise and improve the justice system. The Birmingham Six trial defendants had originally complained of police and custody brutality; photographs of the accused as remanded inmates taken by a doctor bore out this complaint.<sup>246</sup> In 1984, Parliament introduced the Police and Criminal Evidence Act (PACE)

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<sup>243</sup> (1991) 93 Cr App R 287.

<sup>244</sup> (1992) 94 Cr App R 133.

<sup>245</sup> (1993) 96 Cr App R. 1.

<sup>246</sup> Fr D Faul and Fr R Murray, ‘The Birmingham Framework: Six Innocent Men Framed for Birmingham Bombings; <<http://cain.ulster.ac.uk/events/other/1974/raul76.htm>> accessed on 11 Jan 2014.

and PACE Codes of Practice<sup>247</sup> which were designed to avoid police malpractices. PACE had not issued from the injustice to the Birmingham Six, but other issues concerning the later 1981 Brixton riots where ‘complex political, social and economic factors’ created a ‘disposition towards spontaneous violent protest’ by ethnic minorities.<sup>248</sup> The riots led to the Scarman Report. Racial disadvantage and inner city decline played a part in creating conditions for the riots; but also the public’s loss of confidence, mistrust in the police and their methods of policing. The PACE was implemented to set out the way police officers were to carry out their duties. It stated specific codes of practice for police procedures and established the rights of people detained by the police for a specific offence.<sup>249</sup>

The Irish cases also highlighted a defect in the appellate system: that judges may overlook legitimate points of law and therefore deprive the appellant of his right to re-appeal such as had occurred in the Birmingham Six appeal case. Without independent reviewers, these appellants might never have been freed on a re-appeal. In 1997, the Criminal Cases Review Commission (CCRC) was set up to review cases to refer them back to the Court of Appeal on the grounds of overlooked or ‘fresh’ evidence.<sup>250</sup> The establishment of this body represented a formal acceptance that miscarriages of justice can and do occur in the UK. Additionally, the CCRC is independent of the judiciary, which is particularly relevant when the court system itself is accused of causing injustice in the execution of its duties.

The Irish prisoners’ cases are a clear instance of ‘folk devils’ (alleged IRA bombers who allegedly threatened the peace and safety of British society) who eventually became ‘folk heroes’<sup>251</sup> for many people and not only in the Irish community in Britain. They were seen as victims of miscarriages of justice engendered by the British justice system itself. In terms of Cohen’s ‘moral panics’ model, many criteria were met: the real threat and harm caused to society by the 1970s bombing campaigns; the need for society to hold someone accountable for this act (the demonisation of terrorists); successful appeals were brought against convictions and legal proceedings were brought against police and prison officers, less successfully. The problem was supposed to have been resolved when the authorities tried to deal with those accused of the crimes (the law enforcement/legal system was the coping mechanism). Progressive legal and institutional changes did follow in the long term, (such as

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<sup>247</sup> <<http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code>>.

<sup>248</sup> BBC News Channel, Q and A: the Scarman Report, Tuesday 27 April, 2004.

<sup>248</sup> Ibid

<sup>249</sup> Ibid

<sup>250</sup> <<http://www.ccrcc.gov.uk>>.

<sup>251</sup> E Goode, E, and B-Y Nachman, *Moral Panics: The Social Construction of Deviance* (Wiley 2nd edition 2009), p.38.

the PACE and its Codes and the institution of the CCRC) but only after the vindication of the prisoners in the above Irish cases. The ‘moral panic’ over IRA terrorism did not recede after the release of the prisoners; if anything, these prisoners may have symbolised the blatant prejudice faced by the Irish in Britain and caused lingering resentment until the Belfast Agreement in 1998 was brokered and signed.<sup>252</sup>

### **(iii) Problems with ‘moral panic’ models**

One problem with Stanley Cohen’s concept of ‘moral panic’ according to Goode and Ben-Yehuda is that his definition lacked precision.<sup>253</sup> They distinguished separate elements in the original Cohen definition and it will be argued in this chapter that the five criteria this subsequent ‘moral panic’ model proposed still show that certain modern concepts of CSA do not fit squarely in the ‘moral panic’ paradigm. The five key elements are:

1. Concern - (rather than Cohen’s ‘fear’) about the potential or imagined threat.
2. Hostility - moral outrage towards the folk devils who embody the problem and agencies who are ultimately responsible.
3. Consensus - widespread agreement that the threat exists and something should be done. Influential groups and the media should share this consensus.
4. Disproportionality - an exaggeration of the number or the strength of the cases in terms of the damage caused, moral offensiveness and potential risk if ignored.
5. Volatility - the panic erupts and suddenly dissipates without warning.

It will be argued later in this chapter that the child abuse problem does not answer all of the fluid criteria of the Cohen model nor the more rigid ones of Goode-Ben-Yehuda, principally because CSA is a problem that is unlikely to disappear. Some ‘moral panics’ have disappeared entirely in the sphere of sex and sexuality. For instance, in the UK there is no longer a ‘moral panic’ over the availability of contraceptives to unmarried women;<sup>254</sup> nor is homosexuality a crime (decriminalised under the Sexual Offences Act 1967). Other ‘panics’, however, such as the Mods and Rockers’ phenomenon, have disappeared, though the theme of youth crime appears at later dates. For instance, Antisocial Behaviour Orders used to be

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<sup>252</sup> <<http://cain.ulst.ac.uk/events/peace/docs/agreement>>.

<sup>253</sup> Fn 219, Victor: op cit, p.542.

<sup>254</sup> <<http://www.motherandbabyhomes.com/#lunw3ed-motherhood/c1alk>>. Accessed 23 Aug 2016.

meted out to offenders aged 10 or above whose ‘harassing’ (a flexible definition) behaviour could be controlled by a magistrate on a lesser standard than required by criminal law.<sup>255</sup> ‘Moral panics’ over youth therefore do re-emerge in the media.

The term ‘moral panic’ is also fraught with ambiguity and also gives the impression that society is ‘fending off more demons than hell can hold’ and has been used casually by press and social commentators, thereby digressing from its value as a tool for analysing and explaining social concerns.<sup>256</sup> The phrase ‘moral panic’ appears to contain an evaluative judgment, but it is not clear whether the term is necessarily pejorative. It might connote a reaction to a non-existent problem, an inappropriately strong reaction to a problem that does exist, or simply any reaction to an emotionally fraught problem. In short, it is ambiguous whether the term conveys a judgment about the truth and proportionality of the concerns that engender the ‘panic’.<sup>257</sup>

The Cohen theory may be too limited to be used as a tool for modern social theoreticians analysing the latest social concerns. Some authorities treat the ‘moral panic’ concept as a product of its time because Cohen was analysing a social problem particular to the 1960s, the Mods and Rockers phenomenon, even though he was seeking to prove the universality of the concept.<sup>258</sup> In Critcher’s words, the ‘world has moved on while the (‘moral panic’) model has not.’<sup>259</sup> Having said that, the ‘moral panic’ model still serves as a useful tool for analysing social phenomena, because it ‘reminds us of the cultural contingency of notions of criminal justice and criminal deviance.’<sup>260</sup>

Cohen himself admits that his seminal work *Folk Devils and Moral Panics* was informed by the sixties fusion of labelling theory, cultural politics and critical sociology.<sup>261</sup> Cohen’s narrative of ‘moral panic’ also appears to be more concerned with the creation of laws and policies of social control that bring folk devils to trial rather than what goes on in trial itself. De Young argues that sex offender trials are a constituent part of the ‘moral panic’ rather than the result of it which previous ‘moral panic’ analysts have overlooked.<sup>262</sup> With hindsight, it is seen in certain ‘panics’ such as the day-care child abuse in the 1990s (U.S.), that the legal

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<sup>255</sup> <homeoffice.gov.uk>.

<sup>256</sup> Fn 220, De Young: op cit, pp.2-3.

<sup>257</sup> S Bandes, ‘The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process’ (2006) Association for the Study of Law, Culture and the Humanities, p.9.

<sup>258</sup> Fn 225, Critcher: op cit, pp.253-254.

<sup>259</sup> Ibid p.253.

<sup>260</sup> Fn 257, Bandes: op cit, p.4.

<sup>261</sup> Fn 1, Cohen: op cit, p.xxii.

<sup>262</sup> Fn 220, De Young: op cit, p.115.

system, far from being a rational and calming force which transcends passion and prejudice, acquiesced thereto. The ‘moral panic’ model is also retrospective in nature and therefore addresses the oversights of legal action in the past and cannot serve to address current defects in a given legal system.

Best argues that one should distance oneself from inappropriate use of the term ‘moral panic’ or ‘media hysteria’ and discern the motives of any ‘claims making’.<sup>263</sup> Claims makers take a certain stance of an issue and attempt to present their argument authoritatively using ‘grounds, warrants and conclusions’.<sup>264</sup> The rhetoric that prevails has the power to govern our outlook on an issue, how we feel it affects us and how it should be dealt with.

There is scope for saying that Cohen’s ‘moral panic’ theory is limited in its analysis and outdated. That is not to say, however, that the theory has no place in social theory; rather, it is of greater complexity than the original research revealed.<sup>265</sup> McRobbie and Thornton agree that the original balance or relations which ‘moral panic’ sociologists saw existing between media, agents of social control, folk devils and moral guardians, have given way to a much more complicated and fragmented set of connections; the term’s ‘anthropomorphism of society as a single person experiencing sudden fear about its virtue’ obfuscates rather than enlightens on the underlying causes of social phenomena.<sup>266</sup> Many ‘moral panics’ remain preoccupied with moral values, social regulation and boundary demarcation, but modern ‘moral panics’ are not monolithic and are continually contested.<sup>267</sup>

Watney criticises the ‘moral panic’ model for its emphasis on the state as a prime mover in social panics, thereby overshadowing grassroots movements.<sup>268</sup> For instance, the Portsmouth community itself initiated protested against the relocation of paedophiles on the Paulsgrove Estate in 2000.<sup>269</sup> But Marsh and Melville point out that the vociferous campaigning for hardline measures to be taken against criminals by News International via its UK tabloids the *Sun* and the *News of the World* encouraged an atmosphere that sparked a series of brutal attacks on suspected paedophiles both in Paulsgrove and elsewhere in the UK.<sup>270</sup>

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<sup>263</sup> Best, J., ‘Rhetoric in Claims about Missing Children’ (1990), p.198. In Critcher (fn 225), *Critical Readings, Moral Panics and the Media*.

<sup>264</sup> Ibid

<sup>265</sup> Fn 220, De Young: op cit, p.115.

<sup>266</sup> A Mc Robbie, A. and S Thornton, ‘Re-Thinking ‘Moral Panic’ for Multi-Mediated Social Worlds’ (1995) *The British Journal of Sociology* vol 46, no 4, p.271.

<sup>267</sup> Fn 225, Critcher, op cit, p.252.

<sup>268</sup> Ibid Critcher, p.251.

<sup>269</sup> I Marsh, I. and G Melville, ‘Moral Panics and the British Media – a look at some contemporary folk devils’, *Internet Journal of Criminology* March 2011, p.14.

<sup>270</sup> Ibid.

Moral panics may overlap and reinforce each other. For instance, the 1980s US day care panic collapsed, but the issue of child abuse was put firmly on the agenda.<sup>271</sup>

*Does Cohen's 'moral panic' model transpose to the child abuse problem?*

In the Cohen list of qualifiers for a 'moral panic', the CSA problem still answers many criteria:

*Is the child sex offender a person who threatens society?*

It is generally accepted by most societies that intergenerational sexual intercourse with minors is taboo or illegal or both.<sup>272</sup> The sex offender is a recognised deviant or folk devil according to the Cohen definition. Sex offenders are sometimes mislabelled paedophiles in the press e.g. the *Daily Mirror* carried the headline 'Jailed Paedophile Jeremy Forrest attacked by another inmate' Forrest had abducted and had sex with an underage teenage girl for which he had been convicted.<sup>273</sup> Strictly speaking, a paedophile is a sex offender against prepubescent children.<sup>274</sup> The word 'paedophile' is not used in UK statutes on sexual offences against children; the term has been defined in psychiatry by Glasser, as being 'a perversion in which an adult has a sexual interest in children...there is quite a degree of diversity in what is considered to be the upper age limit of 'children' and the lower age limit of the 'adult'.<sup>275</sup>

The concept of the paedophile has become the dominant way through which sexual threats to children are articulated, but the concept is laden with ideas and assumptions which confine thinking about this issue to a very narrow focus.<sup>276</sup> The term sex offender is more accurate since it embraces all kinds of offence. Sex offenders did not achieve their distinct or especially menacing status until the late nineteenth century when sex crimes formed part of the new Western episteme.<sup>277</sup>

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<sup>271</sup> Ibid.

<sup>272</sup> Fn 2, Goode and Nachman: op cit, p.72.

<sup>273</sup> E Stretch, 'Jailed Paedophile Jeremy Forrest attacked by another inmate' *Daily Mirror*, 24 June 2013.

<sup>274</sup> World Health Organisation, 1993, Geneva, *The ICD-10 Classification of Mental and Behavioural Disorders, Diagnostic Criteria for Research*, F65.4, B and C: A persistent or a predominant preference for sexual activity with a prepubescent child or children. The person is at least 16 years old and at least five years older than the child.

<sup>275</sup> M Glasser, (1990) "Paedophilia", in R Bluglass and P Bowden, (eds) *Principles and Practice of Forensic Psychiatry*, Edinburgh: Churchill Livingstone, p.739.

<sup>276</sup> Fn 195, Kitzinger: op cit, p.144.

<sup>277</sup> Fn 211, Jenkins: op cit, pp.26-27.

Children have in more recent times been accorded the status of ‘vulnerable’ and they are regarded as if they are innately so from their physical and other perceived immaturities.<sup>278</sup> The concept of children as a vulnerable group dates from the 1980s and 1990s.<sup>279</sup> In terms of legal personality, children were recognised as a distinct group by the Prevention of Cruelty to and Protection of Children Act 1889. This was the first Act for the prevention of cruelty to children and it enabled the police to enter homes if a child were in danger or arrest anyone who was ill-treating one.<sup>280</sup>

However, young people have at times, especially teenagers, have also been perceived as folk devils. Critcher recalls the threat of binge drinking from the 1990s which was subsumed into a wide panic over ‘yob culture’ which led to the Violent Crime Reduction Bill 2006.<sup>281</sup>

In Cohen’s study of Mods and Rockers, the folk devils were young people who had committed acts of violence and criminal damage.<sup>282</sup> Hier notes however that the portrayal of children as victims of folk devils have appeared at a growing rate alongside more traditional images of harmful youth as ‘folk devils’.<sup>283</sup>

Throughout the ages, media and society have been concerned over children, the next generation, what they are doing, or what is being done to them. In Webster’s view:

*If we briefly survey the role which has been played in medieval and modern history by collective fantasies, one fact which will almost immediately become apparent is that many of the most powerful historical fantasies involve children and the need to protect them. For although we sometimes assume our own anxieties about the vulnerability of innocent children are distinctively modern, this is very far from the case.*

He cites the examples of allegations of ritual murder against the Jews in Norwich in 1144 who were alleged to have tortured and murdered a Christian child.<sup>284</sup> The element of an ascertained person (the ‘paedophile’) who poses a threat to society (children in particular) is therefore satisfied in the Cohen moral panic theory.

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<sup>278</sup> F Furedi, ‘The only thing we have to fear is the ‘culture of fear’ itself’ April 2007, *Spiked Journal*.

<sup>279</sup> Fn 219, Victor: op cit, p.541.

<sup>280</sup> [52 & 53 Vict.] Prevention of Cruelty to and Protection of Children Act 1889, s. 6 (1). [CH.44].

<sup>281</sup> Fn 225, Critcher: op cit, p.6.

<sup>282</sup> Ibid, p.128.

<sup>283</sup> S Hier, ‘Thinking beyond Moral Panic’ *Theoretical Criminology*, (2008), vol 12 no 2, pp.173-190.

<sup>284</sup> R Webster, *The Great Children’s Home Panic* (Orwell Press 1998), p.35.

There is evidence of social concern over child abuse as being a significant issue. For instance, the Howard review of state monitoring sex offenders in 1996 showed concern at elite-level;<sup>285</sup> the broadsheets published this information to the public and the tabloids became proactive. Jenkins states that from 1986 the British news media reported almost daily on sexual abuse and sexual assaults against children.<sup>286</sup> Whilst it was possible that there was an upsurge of the occurrence of these crimes, the press coverage may have represented a sudden exaggeration and discovery of phenomena that had long been in existence. The media focus attracted public interest which gave the child abuse problem the status of a 'moral panic'.<sup>287</sup> Public demonstrations about community-based offenders showed a clear social movement to address the problem.<sup>288</sup>

Child abuse was, and still is, a definite social concern. There are hard facts to support the complaint that children have been abused and that until better scientific techniques were adopted, the problem often went undetected. Child sexual abuse started to become a concern for professionals in 1857, when Ambrose Tardieu researched thousands of such cases. However, his successors criticised his findings on child sexual abuse. Freud was also criticised for acknowledging CSA when presenting his seduction theory to psychiatrists in Vienna in 1896, hence abandoning his theory for another which proposed that children were traumatized by projections of their own fantasies, not sexual abuse.<sup>289</sup> Technology assisted the diagnosis of physical abuse as a major social problem in the 1960s, though the problem had existed for millennia. From the late 1970s onwards, the nascent social problem of child sexual abuse gradually appropriated the generic term child abuse.<sup>290</sup> Child abuse as a real problem was not necessarily prompted by an increase in abuse but an awareness of it borne out by medical evidence.<sup>291</sup> Child abuse is a definite problem that is interlaced with phases of 'moral panic'. The child as a victim of abuse has been imbued with a universality that makes it powerful and a strong symbol in the language and rhetoric of crime control policy;<sup>292</sup> even

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<sup>285</sup> C Critcher, *Critical Readings: Moral Panics and the Media* – J. Kitzinger, 'The Ultimate Neighbour from Hell? Stranger Danger and the Media Framing of Paedophilia' (1999), p.136.

<sup>286</sup> P Jenkins, *Intimate Enemies; Moral Panics in Contemporary Great Britain* (Aldine de Gruyter 1992), p. xiii.

<sup>287</sup> <<http://www.helium.com/items/87747-pedophilia-in-the-news-how-sensationalism-in-the-media-creates-moral-panic>>.

<sup>288</sup> Fn 195, Kitzinger: op cit, p.60.

<sup>289</sup> A Lawrence, *A Principles of Child Protection: Management and Practice* (OUP 2004), p.17.

<sup>290</sup> Fn 211, Jenkins: op cit, p.118.

<sup>291</sup> Fn 2, Goode and Nachman: op cit, p.93.

<sup>292</sup> D Altheide, 'The Lens of Fear' (2002) in Critcher, C., *Critical Readings: Moral Panics and the Media*, (OUP 2006), p.247.



to the extent that international press discourses on child sexual abuse have more frequently juxtaposed the image of the habitual paedophile with the symbolic figure of the victim to denote a spectrum of harm facing children in the modern world.<sup>293</sup>

*Has there been a stylisation of the child abuse problem in the media?*

There is evidence to suggest that the media have stimulated the fear of child sexual abuse which has been gleaned from academic study of the language employed in newspaper headings and articles. This has been discussed earlier, but essentially there is a high degree of stylisation employed by some tabloids to out the 'paedophiles'. Kitzinger studied 1990s headlines in some of the tabloids at the height of paedophile scares where the tone is at times 'overtly provocative' and emotionality-loaded, at others, sloganized. She does give the *caveat* however, that 'it is fundamentally unhelpful to discuss media and community reactions as a 'moral panic', because the concept implies that the panic is totally unjustified...' The theory fails to pay attention to the processes through which a 'moral panic' is engendered and therefore offers a way of glossing over rather than truly investigating public reactions. To accuse the media of fomenting hysteria and creating 'lynch mob' violence is equally inadequate and ignores key issues through which community reactions evolve.<sup>294</sup> Problems arise when the media present certain myths related to sex offenders that run contrary to the data supported by empirical research e.g. identifying sex offenders as being compulsive, homogeneous, specialists and incapable of benefiting from treatment.<sup>295</sup> In fact, they are heterogeneous, with a number of subgroups, including adolescents, males and females, offenders with learning disabilities and mental health problems<sup>296</sup>. Past myths about sex offending have also arisen from high profile cases of child murder and 'stranger danger' such as the Sarah Payne murder which are rare occurrences. The murder of April Jones in 2012 was committed by an acquaintance of her family.<sup>297</sup> The most common form of CSA is considered to be father-daughter, followed by offences committed by uncles and brothers.<sup>298</sup>

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<sup>293</sup> Fn 283, Hier, op cit, p.184.

<sup>294</sup> Fn 195, Kitzinger: op cit, pp.138-140.

<sup>295</sup> M A Galeste *et al*, 'Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S Newspapers' 2012, *Western Criminology Review*, 13 (2), p.4.

<sup>296</sup> A R Beech, L A Craig, and K D Browne, *Assessment and Treatment of Sex Offenders: a Handbook* (John Wiley and Sons 2009), p.2.

<sup>297</sup> S Morris, 'Parents of murdered five year old April Jones call for help for paedophile', *The Guardian*, 9 April 2015.

<sup>298</sup> A Seymour, 'Aetiology of the Sexual Abuse of Children: an Extended Feminist Perspective' 1998 *Women's Studies International Forum*, vol 21, no 4, p 415.

A third of all sexual offences are committed by juveniles from 13 to 17 years who commit illegal sexual acts. Within this category, offences against children under twelve years of age are typically committed by boys aged between twelve and fifteen years.<sup>299</sup> Are young people who commit these offences perceived as ‘paedophiles’ by the media and the public despite the official starting-point for a ‘paedophile’ being aged 16 or more?<sup>300</sup> The image of the paedophile is infinitely malleable and will remain so while we are told what they are rather by the media, rather than finding out about them for ourselves from more accurate sources.<sup>301</sup> These myths affect the public’s overall perception of sex offenders and their crimes, which, in turn can affect public policy. Coverage of violent and sensational crimes that are disproportionate to their levels in official data also exaggerates public fears of victimisation, especially for sex crimes.<sup>302</sup>

*Have socially accredited experts pronounced their diagnoses and solutions to child sexual abuse and what kind of coping mechanisms have emerged?*

The media coverage and public debate about child abuse has sometimes stemmed from solutions offered by public officials. When Michael Howard proposed legislation in 1996 to monitor sex offenders in the community, the media reported the proposal. Whilst the broadsheets published the details that the paedophile register information would be restricted to certain professionals/law enforcement personnel, the tabloids detailed the deficiency of the monitoring system since it denied the same information to the public. The *News of the World* campaigned for the outing of paedophiles in the community following the death of Sarah Payne in 2000.<sup>303</sup>

The public itself became proactive in discovering the identity and whereabouts of sex offenders. The fear of paedophiles in the community was acted upon by the government in its review of monitoring of child sex offenders and piloting of the sex offender disclosure scheme in 2011, with the concession to the public that parents could consult police about the criminal backgrounds of their partners.<sup>304</sup> Though the media played a proactive role in the campaign to ‘out’ sex offenders, the public had already become concerned, its awareness of

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<sup>299</sup> Fn 296, Beech *et al op.cit.*

<sup>300</sup> World Health Organization, The ICD-10 Classification of Mental and Behavioural Disorders Diagnostic criteria for research World, 1993, section F65.4 A. The general criteria for F65 Disorders of sexual preference must be met. B. A persistent or a predominant preference for sexual activity with a prepubescent child or children. C. The person is at least 16 years old and at least five years older than the child or children in B.

<sup>301</sup> D Howitt, *Paedophiles and Sexual Offences against Children*, John Wiley and Sons, New York 1996, p.249.

<sup>302</sup> *Ibid*, p.5.

<sup>303</sup> D Wilson, ‘The New of the World shouldn’t claim Sarah’s law was a success’ *The Guardian* 11 July 2011.

<sup>304</sup> BBC News, ‘Sex offender disclosure scheme to go nationwide’ 3 March 2010.

child abuse heightened by policy and procedures set out by Michael Howard. The grassroots response to sex offenders - public campaigns and demonstrations following media publicity - signified how insecure the people felt about sex offenders known by officials in their neighbourhood but unknown to them.<sup>305</sup> The campaigns for wider disclosure arguably became part of a coping strategy which ostensibly afforded greater ownership of child protection to parents than as presented to them by the politico-legal system. The radical overhaul of the law by the Sexual Offences Act in 2003 met some of the demands of sex offender monitoring and tougher laws on sex crimes generally; it was therefore a formal means of addressing and assuaging public concern.<sup>306</sup>

*Is the child abuse phenomenon novel or has it been in existence long enough but suddenly comes into the limelight?*

Child abuse is universal in time and place, but key events/panics do raise its profile. The ill-treatment of children by adults has been well documented in history and was regarded as novel then. New technology has helped to identify child trauma. In the US, Kempe's medical research on battered children firmly placed child abuse a social concern in the 1960s.<sup>307</sup> There is therefore no exact time when child abuse became recognised; because of different definitions of the phenomenon, it is now perceived as an evolving social construction.<sup>308</sup>

'Moral panics' of child abuse are concerned may they arise serially. A new kind of abuse restarts the cycle until a new law is introduced, reform of an existing one or change in the activities in law enforcement agencies until the topic is re-raised.<sup>309</sup> The child abuse phenomenon therefore has not appeared spontaneously: it has been kept alive by a combination of 'moral panics' over the years involving facets of CSA and key events of real cases which heighten public awareness that have triggered strong public reaction and administrative action.

*Does the concern about CSA have serious and long-lasting repercussions so as to produce such changes as those in legal and social policy or even in the way society conceives itself?*

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<sup>305</sup> Fn 195, Kitzinger, op cit, pp.136-137.

<sup>306</sup> See, for instance, the provisions of the Order restricting travel of offenders to ensure maximal monitoring under police and probation services under the Sexual Offences Act 2003 (Amendment of Schedules 3 and 5) Order 2007.

<sup>307</sup> Kempe's research, discussed in previous chapter.

<sup>308</sup> Fn 289, Lawrence: op cit, p.8.

<sup>309</sup> Fn 225, Critcher: op cit, p.12.

The ways in which laws are conceived, crime is reported and stories are constructed are not neutral, but rely on unacknowledged assumption regarding social issues such as sexuality, gender, race, ability, and in respect of child abuse, childhood. These unacknowledged assumptions reinforce normative categories of identity regarding the proper roles of men, women and children and structure the ways in which we can understand sexual abuse.<sup>310</sup>

The reality of CSA as portrayed by the mass media is less important in determining public attitudes and actions taken toward the deviance than the rhetorically constructed panic over it.<sup>311</sup> Society has mainly been preoccupied with extra-familial CSA such as ‘stranger danger’ and institutions such as care homes and schools and of all the possible responses to this issue - psychological, educational, social or welfare-oriented - official action will inevitably take the form of penal sanctions imposed by the criminal justice system on these outsider figures.<sup>312</sup>

There have been numerous legislative changes which indicate great strides in child protection, including the Children Act 1989 stemming from issues in the management of child protection articulated in the Cleveland Report.<sup>313</sup> The Sexual Offences Act 2003<sup>314</sup> included closing legal loopholes as caused by the abuse of new technology (the Internet).<sup>315</sup> Government policy also attempted to monitor children in its policy document *Every Child Matters*<sup>316</sup> which aimed to combine services in social care, welfare and wellbeing as well as create statutory local child protection boards. The phrase ‘child protection’ is multi-layered with complex rhetorical implications for family control and individual responsibility.<sup>317</sup>

#### *Impact on society caused by attenuated concern over child abuse*

The concern over extra-familial abuse may have the knock-on effect that more professionals working with children may suffer false accusations. The vulnerability of professionals has been highlighted by the teaching union NASUWT that false allegations made against them by children have become commonplace.<sup>318</sup>

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<sup>310</sup> J Turton, *Child Abuse, Gender and Society* (Routledge 2008), p.7.

<sup>311</sup> C Krinsky, *Moral Panics over Contemporary Children and Youth* (Ashgate UK and USA 2008), p.96.

<sup>312</sup> Fn 211, Jenkins: op cit, p.236.

<sup>313</sup> *Report of the inquiry into child abuse in Cleveland 1987* Cm 412 London: Her Majesty’s Stationery Office.

<sup>314</sup> <<http://www.opsi.gov.uk/acts/acts2003/20030042.htm>> Sexual Offences Act 2003 Chapter 42.

<sup>315</sup> Communications Act 2003 also criminalises child pornography (the transmission thereof): s.127 improper use of public electronic communications network.

<sup>316</sup> <<http://www.everychildmatters.gov.uk/>>.

<sup>317</sup> Fn 310, Turton: op cit p.7.

<sup>318</sup> BBC News ‘Teacher abuse anonymity call’ 21 Sept 2003; <<http://news.bbc.co.uk/1/hi/education/3126370.stm>>. See also, *Daily Telegraph*, Paton, and G., ‘Prosecute children over false allegations, say teachers’ 9 April 2012.

A 2011 census survey for the Department for Education, provides some insight into the types of allegation reported to Local Authority Designated Officers. In the reporting period April 2009 - March 2010, 116 local authorities had received 12,086 allegations of abuse, of which 2,827 had been made against school teachers. 56% of these allegations were physical in nature. About one third of allegations were found to be substantiated, however, 19% were unfounded, 2% malicious, 25% were unsubstantiated (neither implying guilt nor innocence) and the outcomes of the remaining 21% of cases were unknown.<sup>319</sup>

The sacralisation of children and public fear and revulsion over paedophiles allow for a rare moment of consensus in morally uncertain times. Human rights issues such as whether to mandate the issuing of citizens' identity cards or introduce new anti-terrorism laws can erode civil liberties in the interests of child protection, e.g., the mandatory databasing of children admitted to accident and emergency hospital wards to identify potential victims of abuse and the policing by vetting of millions of people who work with or who come into contact with children.<sup>320</sup> Apart from civil liberties issues surrounding child protection rhetoric and policy, there is now a climate that is inhospitable to intergenerational encounters; with professionals and adults in contact with children now having to weigh up how their interaction with children will be interpreted by others, anxious that this interaction should not be misconstrued.<sup>321</sup> There have therefore been considerable and durable changes in social awareness and policymaking issuing from child abuse discourse.

*Does the Goode/Ben-Yehuda model transpose successfully to the child abuse concern?*

It would appear that the fourth and fifth elements, of the Goode/Ben-Yehuda moral panic model - disproportionality and volatility - are lacking in the general social concern of child abuse. On the subject of disproportionality, one cannot argue that a given episode of fear or concern represents a case of a 'moral panic' if empirical information attests to the existence of a problem. Even though knowledge acquisition may be flawed and facts gleaned may not be absolutely certain, where available information points to the existence of the problem (such as CSA), there will be confidence that it is an area of concern.

In 'classic' Cohen 'moral panic' theory, there is also the expectation that the claims makers, such as the media, have exaggerated and distorted facts and figures to gain support for their

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<sup>319</sup> Department for Education, Research Report DFE RR192 'Allegations of abuse against teachers and non-teaching staff' pages i and ii, paras 5-8.

<sup>320</sup> F Furedi, 'Using Children as a Moral Shield' *Spiked* online, Jan 2013.

<sup>321</sup> *Ibid.*

argument that something must be done to resolve the occurrence of a given concern. Since the actual numbers of abused children are difficult to prove, it is difficult to state with certainty that the claims makers have distorted facts to suit their agenda which would negate the argument that child abuse is pure ‘moral panic’. It would seem however, that child protection legislation has issued from ‘atmospheres of panic’ such as that caused by the Cleveland affair or ‘notoriously unrepresentative cases’ such as the death of Sarah Payne.<sup>322</sup> In other words, such legislation can stem from claims making which appeals to emotion rather than rationality. Moral panics cloud the truth about the dimension of child abuse in the UK. It is the most difficult of all areas to capture in rational debate. Even allowing for cases that will be dropped or acquitted or appealed, as well as the fact that other cases may go unreported, thousands of children in the UK will have been sexually abused.<sup>323</sup> The NSPCC states that there were 47 008 police-recorded sexual offences against children in the UK in 2014-15.<sup>324</sup> In 2015, of 49 690 of children in England had been subject to child protection plans.<sup>325</sup>

Yet, other aspects of child abuse have been overshadowed, such as child welfare cuts.<sup>326</sup> On the topic of volatility, if one applies the Goode and Ben-Yehuda criteria which attempted to refine Cohen’s model, it is found that the child abuse problem lacks the volatility of previous ‘moral panics’, as it currently shows no sign of abatement in either the UK or US whence much of the child protection lobbying derives. In a classic ‘moral panic’, the fever pitch which characterises a society is not typically sustainable over a long stretch of time.<sup>327</sup> The fear of child abuse is a ‘more or less constant and abiding element in society and therefore it lacks volatility.’<sup>328</sup> The child abuse problem is constant and unlikely to diminish in the future.<sup>329</sup>

The modern concepts of child abuse have a durable quality. Society in the 1990s became more sensitive to sexual violence and exploitation, rape, incest and child abuse and sexual

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<sup>322</sup> Fn 225, Critcher: op cit, p.19.

<sup>323</sup> Attorney-General – Offences against Children, 20 November 2013: Column 5MC.  
<<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131120/corrtxt/131120c0001.htm>>.

<sup>324</sup> S Jutte *et al* (2016) *How safe are our children? The most comprehensive overview of child protection in the UK*. London: NSPCC, p.26; <<https://www.nspcc.org.uk/globalassets/documents/research-reports/how-safe-children-2015-report.pdf>>.

<sup>325</sup> *Ibid*, p.53.

<sup>326</sup> The Guardian/The Observer, ‘Child abuse: let’s replace moral panic with mature reform’ 10 November 2012.

<sup>327</sup> E Goode, and B-Y Nachman, ‘Moral Panics: an Introduction’ (1994), p.55. Paper from C Critcher, *Critical Readings: Moral Panics and the Media* (OUP 2006).

<sup>328</sup> *Ibid*

<sup>329</sup> Fn 211, Jenkins: op cit, p.234.

harassment as women became more active in working and political life than before.<sup>330</sup> It is likely that threats to children will remain a central social issue however reconceived and seemingly irrespective of errors caused by the credulity of non-existent or unfounded problems such as ritual satanic abuse or unreliable therapeutic techniques or the forensic failings of the ritual abuse cases in the US and the misdiagnoses in the period of organised abuse allegations in Cleveland and Orkney in the UK.

In America, there were visible patterns of concern about sex offenders in the 20<sup>th</sup> century which peaked and troughed with peaks of interest in sex offenders and the demand for legislation occurring every thirty-five years. It has been said that since 1995 in America, the child abuse phenomenon has become part of its enduring political landscape, a meta-narrative with the potential for explaining all social and personal ills.<sup>331</sup>

De Young regards Cohen's description of 'moral panic' as being somewhat literary and incomplete for her analysis of the US day centre ritual sexual abuse trials. De Young is surely right that the theory is in need of a makeover if it is to retain its explanatory and analytical power in a complexly differentiated, multi-mediated, late-modern world. De Young's research into successful appeal cases of convicted day centre providers in the late 1980s/early 1990s revealed a significant number of serious technical irregularities that resulted in the appeal court quashing the convictions.<sup>332</sup> Points of law which had been successfully argued in those cases included the following:

1. A conviction was overturned because the trial judge had disallowed the cross-examination of a child witness about a manifestly false allegation of CSA against the care centre provider's wife;
2. In another case, the state investigators had improperly destroyed audiotapes of the early interviews with some of the alleged victims, depriving the defence of evidence to be used to cross-examine them;
3. A juror disclosed that she wanted to convict X because she did not want to be seen as condoning CSA;
4. A retrial was ordered where children's testimony was allowed other than the alleged victim, thereby prejudicing the jury;

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<sup>330</sup> Ibid, p.232.

<sup>331</sup> Fn 211, Jenkins: op cit, p.232.

<sup>332</sup> Fn 220, De Young: op cit, pp.154-156.

5. A trial judge in another case had disallowed the defence to have access to discovery sanctioned documents;
6. One accused's conviction was overturned because the trial judge had allowed prosecutors to introduce unrelated, irrelevant and inadmissible evidence, thus depriving her of her due process rights.<sup>333</sup>

### *Limitations of U.S. research in 'moral panic' analysis*

American sociologists like Jenkins and de Young have made great inroads in attempting to analyse child abuse 'moral panics' which occurred there. However, their research on child abuse 'moral panics' tends to be US centred rather than comparative. Sociologists attempt to use a universalistic science and avoid theoretical ethnocentrism but their research will be constrained by different national conditions leading to differences of theoretical emphasis.<sup>334</sup>

An instance of such difference is illustrated here: the US ritual satanic abuse cases were influenced in part by evangelical beliefs that children were being subjected to such abuse by day centre providers. American 'moral panic' theory in general is also focused on the psychological impact such as anxiety and stress, portraying interest groups as just another form of collective behaviour, whereas British 'moral panic' analysis particularly focused on Marxist influenced economic factors especially the 1970s.<sup>335</sup> De Young and Bandes argue convincingly that attending to the psychological impact is vital in questioning whether apparently rational institutions such as the justice system may let emotionality rule their critical faculties in criminal trials involving child abuse.

### *Psychological and legal impact resulting from moral panics*

Child abusers are perceived as a symbol of the deepest evil; in societies such as the US and the UK, the use of ever more stringent measures by legislators and politicians is designed to contain and destroy the threat.

*To fail to convict such a person, or to fail to punish him adequately, is a symbolic act: a sign of disrespect to the victims and a failure to protect society. In such cases, the*

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<sup>333</sup> Ibid.

<sup>334</sup> K Thompson, 'The History and Meaning of the Concept' in Critcher, C., *Critical Readings: Moral Panics and the Media*, (OUP 2006), pp.60-64.

<sup>335</sup> Fn 257, Bandes: op cit, p.8. See fn 34 of her paper.



*drive to convict and punish colours every aspect of the legal process, often in ways that are difficult to detect.*<sup>336</sup>

Jenkins describes how a demagogic bidding war takes place to impose the harshest penalties for the condemned behaviour. In times of enhanced awareness of the most extreme forms of CSA such as child murder, ‘there were even dividends in proposing laws so extreme that the courts would find them unconstitutional, as judges could then be left with the stigma of having failed to defend children.’<sup>337</sup> Society’s attitude towards the sex offender may also have the effect of enlarging the control culture and infringing constitutional protections afforded to ‘normal’ violent criminals. Existing research tends to provide evidence that suggested that the public were punitive in their views towards sex offenders; that they felt sentences given for convicted offenders were too lenient; consequently, there was a gap between the public, and, for example, judges in terms of views on appropriate sentences.<sup>338</sup> For example, legislation in the UK was passed that allowed indeterminate sentencing for ‘dangerous’ offenders which extends in its remit both dangerous sex and non sex offenders.<sup>339</sup>

In the US day care cases that de Young analysed, Cohen’s ‘moral panic’ ingredients are essentially present: a perceived threat (child abuse), the identification of a folk devil responsible for the threat (the accused day care providers), the rapid build-up of public concern, official response and resulting social change. However, she argues that there were special features of the day centre panic such as its virulence and the reification of ritual satanic abuse, even though there was no evidence to corroborate the existence and therefore the reality of ritual satanic abuse, which had to be considered beyond the Cohen ‘moral panic’ explanation.<sup>340</sup>

It seems clear that there are similarities with research into ritual satanic abuse cases and HCSA cases. Although the US day centre complainants were actual children whose statements were contemporaneous rather than adults complaining many years later, there are

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<sup>336</sup> Ibid.

<sup>337</sup> Fn 211, Jenkins: op cit, p.238.

<sup>338</sup> C McNaughton *et al* ‘Sentencing Council Attitudes to Sentencing Sexual Offences, Centre for Gender and Violence Research’ University of Bristol, March 2012, p.15.

<sup>339</sup> Automatic Life Sentence – For a second serious violent or sexual offence but an offender aged 18 or over. Replaced in April 2005 by the indeterminate sentence for Imprisonment for Public Protection (IPP).

Imprisonment for Public Protection (IPP) – Applies to offenders convicted of a specified sexual or violent offence carrying a maximum penalty of 10 years’ imprisonment or more (called “serious specified offences”) and who are considered by the courts to be dangerous. Applies to adults and young offenders.

<sup>340</sup> Fn 220 De Young: op cit, p.8.

similar procedural and legal points that emerged pre-trial, during trial and *post*-trial which did call into question the safeness of trying and convicting the accused on the available evidence. In both the ritual satanic abuse cases and many historic ones, there was a lack of forensic evidence to bolster the allegations; both the UK and US allow oral testimony whether corroborated or not, to try to convict an accused for serious offences. This clearly facilitates prosecutions where there is no possibility of obtaining forensic evidence and such testimony is useful where it can be shown that the witness is competent, truthful, and reliable. False allegations do occur, however, some of which may stem from the witness interviewing process itself, as had occurred in the US. The child complainants in the day centre prosecutions were sometimes interviewed by therapists who believed that any conflicting statement made by a child meant that s/he was ‘in denial’ and was suffering from sexual abuse accommodation syndrome and numerous therapists and parent-experts subscribed to the ideology of credulity because children could neither lie nor fantasise about something they had not experienced.<sup>341</sup>

De Young analysed not only what the day centre abuse defendants were charged with and convicted of, but also that ‘moral panic’ inevitably influenced the way the police and courts handled the accused. She analysed appeal court rationales for overturning most of the convictions of convicted day-care providers and found out that most of the original trials suffered serious procedural and legal flaws which rendered them unsafe. In a similar vein, it is necessary to assess whether UK historic convictions of CSA are more likely to contain serious procedural and legal errors against the backdrop of the moral panic of past and present CSA in UK society.

#### **(iv) Heightened concern about child abuse and its impact on policy and law**

Concerns over child abuse require contextualisation as well as an explanation as to why it has been high-profile in recent decades. As we have seen, the term ‘child sexual abuse’ did not acquire its present cultural and ideological significance until the mid-1970s, even though the term has a long history.<sup>342</sup> The child abuse problem has received various degrees of attention in different eras, sometimes for logical and comprehensible reasons; at other times, the perceived significance of the threat grows and diminishes without any change in the real threat potential of the condition itself. The profile of child abuse has at times been raised by ‘quiet’ construction such as through the medical research findings of Kempe or the rhetoric of

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<sup>341</sup> Fn 220, De Young: *op cit*, p.18.

<sup>342</sup> Fn 211, Jenkins, p.xi.

claims makers, or ‘noisy’ ones such as media-exposed extreme cases such as the deaths of Megan Kanka<sup>343</sup> or Sarah Payne.<sup>344</sup> Zgoba goes as far to state that child predation cases are the most vilified in both the media and the criminal justice system, as cases of child abduction, molestation and homicide consistently receive media prominence, unlike similarly violent cases and have risen so high on the agenda that they have all but eclipsed neglect, deprivation and cruelty of children.<sup>345</sup>

The papers in one of the cases provided by a convicted person for this research study show that his trial was contemporaneous with the news of Sarah Payne’s death.<sup>346</sup> S was tried in June 2001 and convicted of sexual assaults against his two biological children (rape on three occasions and cruelty on four occasions all occurring between 1977-1985). A character witness statement obtained as part of an appeal, suggests that one of the reasons that S was convicted may have been the media vilification of S before his trial. Sarah Payne’s death had been highly publicised in July 2000. It was claimed that this extreme, high profile case of child abuse was still fresh in the minds of the media and the general public, and told against him at trial. The convictions were not overturned.

#### *Examples of classic ‘moral panics’ in child abuse allegations*

There have been cases in recent history which demonstrate that clinical and psychological misdiagnosis led Western society to believe that there were outbreaks of ritual satanic sexual abuse (RSA) and organised abuse which were not substantiated.<sup>347</sup> These cases were classic ‘moral panics’ which had far-reaching policy consequences for both alleged victims and accused alike. They may be deemed classic ‘moral panics’,<sup>348</sup> because, with hindsight, reactions to the discovery of RSA were not merely disproportionate, they were also unwarranted.

#### *A true ‘moral panic’ -the USA ritual satanic abuse of children in McMartin daycare centre trials*

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<sup>343</sup> Megan Kanka was a seven year old girl who was raped and murdered by a convicted sex offender Jesse Timmendequas in New Jersey, US in 1994. Within a month of this highly publicised case, the New Jersey General Assembly passed bills proposed by Paul Kramer to mandate the registration of sex offenders to be tracked by database by the State, as well as community notification popularly called ‘Megan’s Law’ and life imprisonment for repeat sex offenders.

<sup>344</sup> Fn 1, Cohen: op cit, p.xxiii.

<sup>345</sup> K M Zgoba, ‘Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation’ December 2004, *Criminal Justice Studies*, vol 17, no 4, p.385.

<sup>346</sup> Appendix D, case of S, p.331.

<sup>347</sup> M De Young, *Moral Panics and the Media* ‘Another Look at Moral Panics’, (OUP 2006), p.278.

<sup>348</sup> M De Young, *The Day Care Ritual Abuse Moral Panic* (MacFarland and Co. USA3 2004), p.115.

There were fifteen child day-care centre investigations in the US and the trials of 38 defendants from 1983 (the first of which took place at the McMartin day care centre) to 1991. Whilst many of the charges were dropped or the jury gave not guilty verdicts, subsequent trials of the 14 remaining allegations often ended in very long sentences.<sup>349</sup> Many of these childcare providers were incarcerated based on unsubstantiated allegations and most were released on appeal. It was only in November 2013 that the Kellers (convicted in 1992, sentenced to 48 years in prison) were released when the prosecution doctor from that trial subsequently recanted his testimony.<sup>350</sup> Frank Fuster, was convicted in 1985 and sentenced to 165 years in prison and is the last person convicted of CSA at a day centre to remain in prison.<sup>351</sup>

Both the UK and US are countries where there is a higher percentage of women in the employed sector than before, with many families leaving very young children in nurseries, and older children are often left at school longer to participate in after-school activities where available.<sup>352</sup> Inevitably, this leads to the greater institutionalisation of children with teachers and carers being left in charge and care of the child's education and socialisation. It is therefore logical that the time at which the fear of child abuse is manifest should also coincide with social upheaval in the shape of change within the family as mothers participate more in the employed sector.

America's mass panic over child abuse commenced in the 1980s, when a combination of factors kindled hysteria more akin to a classical 'moral panic' with a few qualifications. The number of social, ideological, professional and political forces had contributed to a growing cultural anxiety about satanic menaces to children. A series of mini-panics was precursory to the infamous McMartin Preschool trials and not less than 15 other day care centre investigations (1983-1991) in its wake.<sup>353</sup> This included fear of demonic influences in heavy metal music, fortune-telling, urban legends about Satanist child abductors, satanic child pornography rumours and satanic child sex rings, against the backdrop of Christian evangelism that was popular then. In 1983, a preschool child was said to have made a statement 'vaguely suggestive of sexual abuse'. Social workers became involved who had

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<sup>349</sup> Fn 347, De Young: op cit, p.278.

<sup>350</sup> L R McRobbie, 'The Real Victims of Satanic Ritual Abuse' Slate 7 Jan 2014; <[truthinjustice.org/satanic-abuse.htm](http://truthinjustice.org/satanic-abuse.htm)>; <[http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/01/fran\\_and\\_dan\\_keller\\_freed\\_two\\_of\\_the\\_last\\_victims\\_of\\_satanic\\_ritual\\_abuse.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/01/fran_and_dan_keller_freed_two_of_the_last_victims_of_satanic_ritual_abuse.html)>.

<sup>351</sup> Fn 350, McRobbie, see webpage, above.

<sup>352</sup> Ibid

<sup>353</sup> Fn 347, De Young: op cit, p.278.

also been claims makers about child satanic abuse. The allegation became infused with Satanism as well sexual abuse. Social workers using repetitious suggestive interviewing techniques, discovered 369 more past and present alleged victims who had been enrolled at McMartin. They also had great influence on lecture circuits and as expert witnesses in trials.<sup>354</sup> The allegations did not cease and extended to accusations against those wholly unrelated to the day school as well. An accusatorial atmosphere had emerged which was spread by the news media which reported stories which evoked strong emotional responses and vilified the day nursery staff. In the prevailing atmosphere, numerous trials against day care staff took place which led to lengthy sentences against them, some being multiple life-sentences for individuals. In many cases, the courts overturned convictions and ordered retrials. The appeals indicated a scepticism for the claims makers of ritual satanic abuse; the radical change may well have led to the creation of a new folk devil: the overzealous, short-sighted professional bent on proving sexual abuse of any kind leading to a new ‘moral panic’ - ‘the backlash’.<sup>355</sup>

*Ritual satanic abuse of children ‘moral panic’ in Orkney and the Cleveland forensic fallibility scandal*

In 1980s England, child abuse also became a visible issue when it was profiled by the media: television programmes such as Esther Rantzen’s *Childwatch*. Between 1985 and 1987, the broadsheet newspaper *The Times* gave a fourfold increase in coverage of CSA, became a regular topic for documentaries and soap opera storylines.<sup>356</sup> The media therefore enhanced social awareness about CSA. It was therefore not surprising that a greater awareness of CSA among professionals would galvanise them into investigating cases of CSA. The zeal of well-intentioned professionals, combined with the limitations of their training, would result in accusations against a number of innocent people and removing their children from them in familial abuse allegations: the infamous Cleveland affair. The latter part of the 1980s saw a ‘moral panic’ which centred on child abuse within the family, especially within Cleveland, where social workers sought the removal of many children from their parents in light of a disputed diagnosis of sexual abuse by two paediatricians.<sup>357</sup> Claims and counterclaims by professionals and parents were presented to politicians and ultimately concluded at the judicial (‘Cleveland’) inquiry. This is an example of a ‘moral panic’ in cases which were

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<sup>354</sup> Ibid p.284.

<sup>355</sup> Ibid.

<sup>356</sup> Fn 195, Kitzinger: op cit, p.136.

<sup>357</sup> Fn 1, Cohen: op cit, p.xv.

never substantiated; but they had dire consequences both for alleged victims. Children had also been removed by social services from their families in Broxtowe, Nottingham in October 1987 because of allegations that children were being systematically subjected to ritual satanic abuse. Ten men and women were convicted of sexual, physical abuses and neglect supported by medical evidence. However, allegations of organised ritual satanic abuse made by the children placed in foster care were unsubstantiated by the fact that their foster carers had contaminated their accounts.<sup>358</sup> 1990-1991 had also seen ritual satanic abuse cases across Britain, from Rochdale to the Orkney, leading to dozens of children being taken into care and parents being accused of bizarre crimes; yet nobody was convicted of any crime related to Satanism. Growing media scepticism into ritual satanic abuse, a subsequent inquiry conducted by Jean La Fontaine for the Government in 1994, supported the findings of a Joint Enquiry Report which found that there was no evidence of RSA either in the Broxtowe cases or in the satellite cases.<sup>359</sup>

### *The Cleveland child abuse scandal*

At times, claims makers with esteemed clinical credentials have been persuasive about children being sexually abused, with serious consequences for the accused and the child - only to have their research counterclaimed. An outstanding example of this is to be found in the 1980s Cleveland sexual abuse investigations which led to the Butler-Sloss Inquiry<sup>360</sup> to seek the truth about the extent of abuse as diagnosed. The intensity of the Cleveland affair in terms of the investigation itself and media coverage, impressed upon leading academic authors on child abuse to neologise the term *post-Cleveland* to describe the aftermath years of ‘the first mass sexual abuse case in British history’<sup>361</sup> One hundred and twenty one cases of suspected child abuse were diagnosed by Dr Higgs and Dr Wyatt. Children were placed in foster care or removed from their families permanently. Dr Higgs continued to examine the children regularly and based on her findings, she had some of the foster carers arrested for CSA as well. Cases involving 96 alleged child victims were dismissed at court trials; 26 cases involving children from twelve families were found by judges to have been misdiagnosed.

However, there remained the question as to whether any of the suspected cases of CSA turned out to be true. In *The Times* it was reported that Wyatt and Higgs confirmed that 5 of

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<sup>358</sup> Nottinghamshire County Council, Joint Enquiry Report 7 June 1990 revised 16 May 1997; <<http://www.users.globalnet.co.uk/~dlheb/jetrepor.htm>>.

<sup>359</sup> Ibid, see section *The Broxtowe Files*.

<sup>360</sup> E Butler-Sloss, *Report of the inquiry into child abuse in Cleveland 1987*, HMSO.

<sup>361</sup> Fn 211, Jenkins: op cit, p.133.

the 121 children whose cases were considered by the public inquiry under Lord Justice Butler-Sloss had since been referred to the social services on suspicion of having been sexually abused again.<sup>362</sup> Senior Cleveland council officials had been concerned about the aftermath of the public inquiry and believed that a ‘roller coaster’ of public opinion had helped to sway decisions by courts and that some children who had been abused were being returned home without any legal protection and could face further abuse. It is significant that the public mood, after the Cleveland revelations, heavily supported parents whose children had been removed from them and most children had been returned to them. Therefore, social services had to be cautious when re-referring the five cases in question and made investigations without immediate removal of the alleged victims or else they would risk another outcry that their intervention was unwarranted.

Whilst the reflex anal dilatation (RAD) technique had been an important but relatively unexplored sign of possible sexual abuse by its proponents; for those not directly involved or alienated from the sites where the knowledge of RAD was obtained, the sign and the technique came to be seen as part of a web of practices for illegitimately policing the family.<sup>363</sup> The Cleveland cases in the UK were brought about by professional over-reliance on the uncorroborated results of the RAD test for sexual abuse.<sup>364</sup> Until the clinical diagnosis was challenged by professionals, the findings were sufficiently authoritative to incriminate parents of sexual abuse. Since RAD appeared to have no evidential basis, the reaction to professional diagnosis and serious consequences for the families involved (removal by social services of children from their families) the incident can be justly classified as a ‘moral panic’. Cohen supports this view, stating that a whole gamut of professionals ranging from ‘social workers, police, paediatricians, doctors, lawyers, parents, local and national politicians, and then a judicial inquiry - lacked minimal consensus as to what the whole episode was about.’<sup>365</sup>

#### *Tainted investigations of allegedly sexually abused children in Oude Pekela, Holland*

‘Moral panics’ of this kind issuing from the findings of professional claims makers have also happened in other countries, such as clinical misdiagnosis of child abuse in Oude Pekela,

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<sup>362</sup> Peter Davenport, ‘Doctor’s concern as five Cleveland cases are reopened’ *The Times*, 8 May 1989.

<sup>363</sup> A Collins, ‘Resisting a diagnostic technique: the case of reflex anal dilatation’, *Sociology of Health and Illness* vol 20 no 1, 1998, p.4.

<sup>364</sup> *Ibid*, p.3.

<sup>365</sup> Fn 1, Cohen: *op cit*, p.xv.

Holland in the 1980s.<sup>366</sup> This triggered a panic and pursuit of more potential alleged victims of abuse and of alleged child abusers by a significant section of the community there.

In the small Dutch town of Oude Pekela, two young boys had engaged in sex play in which they had caused some anal damage to each other. One of the boys was examined by the family physician, Dr Jonker, who proclaimed that the child had been sexually abused by a stranger, notwithstanding the explanation offered that one child had pushed a twig into the anus of the other. Dr Jonker proclaimed to an audience of 300 in a public house, as well as in a follow-up meeting, that there were child molesters at large who may well have abused their own children as well. The doctor informed the audience about possible signs of abuse in their children and ‘urged parents to question their children’. Subsequently, hundreds of reports of child abuse were given by parents, teachers, and social workers. The methods used by the interrogators to elicit these reports may be gleaned from the comment of one infant school teacher: ‘We put them at ease, came up with examples of what we did as we go away with someone and sometimes put words into their mouths.’ Parents had become persuaded that there were masterminds of child pornography who were abusing the children. The Dutch police thought otherwise and declared the episode to be a burst of mass hysteria. No physical damage had been found on any child, apart from the two who had reportedly sustained their injuries in mutual sex-play and the accounts given by the children under interrogation were confused and discrepant. The police were placed in the awkward position of having to account for the investigation outcome. A public announcement that they had failed to find the perpetrators would have exposed them to public criticism of being inefficient, but equally, a public declaration that there had been no abuse would have led to accusations of a cover-up. To deflect criticism and in an effort to search for the truth, the Dutch government appointed a psychiatrist, Dr Mik who employed dubious questioning techniques and elicited results which led to him publicly concluding that the reports were true. The findings made headlines for several weeks and he was honoured by politicians and the Dutch Queen. But others, such as a university professor were incredulous of Dr Mik’s methods which were published in *De Telegraaf* on the 22nd January 1988.

Both the UK and Dutch cases of clinical misdiagnosis illustrate that moral panics, initially localised, can become matters of national and international importance. The erstwhile champions of child protection - the clinicians - became the new ‘folk devils’ - the personification of evil, stripped of all favourable characteristics and imbued with exclusively

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<sup>366</sup> B Rossen, ‘Mass Hysteria in Oude Pekela’ (Vol 1, 1989) <[http://www.ipt-forensics.com/journal/volume1/j1\\_1\\_6.htm](http://www.ipt-forensics.com/journal/volume1/j1_1_6.htm)>.



negative ones, once their rhetoric had been challenged and displaced. The UK media, as a result of the Cleveland scandal drew the community's attention to the fact that the child protection system that had been set up to tackle child abuse appeared to have as many negative consequences for children and their families as it did positive ones.<sup>367</sup> One of the negative consequences included the intrusive anal dilatation test which had been challenged by a US study which indicated that more than results half of non-abused children also showed positive in the test,<sup>368</sup> therefore most cases of CSA would go undetected on such a limited and dubious test. The results of the (sometimes repeated testing) caused distress to children and their families. Whilst the Cleveland Report discussed false allegations of abuse made against the parents and scrutinising the doctors involved, there was also concern that there would be a renewed denial that children were actually being abused and harmed.

The Cleveland affair was pivotal in changing who would be in charge of child protection in the future as critics of the prevailing system advocated reform in social and legal services. From 1984 onwards, the Department of Health set up an intergovernmental working party to review public child law as it then stood, following a critical report by a House of Commons Select Committee. Its recommendations were published in a 1985 *Review of Child Care Law*. The Law Commission reviewed private law concerning children and produced four discussion papers between 1984-88, followed by the report *Review of Child Law: Guardianship and Custody*. The Children Act 1989 was based on the draft Bill that was designed to encapsulate both the Commission's own proposals and many of those contained in the 1987 Government White Paper *The Law on Child Care and Family Services*.<sup>369</sup> This Act was designed to recast existing law for children into a single, coherent instrument. It included children living in families, in need of local authority services or in want of protection from abuse. It was designed to be intelligible to parents, relatives, foster carers, child minders, child care professionals and judges to further the best interests of children in their care.

Apart from establishing more concretely what the rights and roles of children and parents were, this legislation also had the effect of lessening the role social workers and medics played in determining who was a 'child at risk' and offered a framework determining the roles of the police, courts and social services. Some social workers had already come to

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<sup>367</sup> Fn 289, Lawrence: op cit, p.73.

<sup>368</sup> B Deer, 'Why we must now start listening to the children' *The Sunday Times*, 10 July 1988.

<sup>369</sup> N Allen, *Making Sense of the Children Act 1989* (Fourth Edition, John Wiley and Sons England 2005) p.3.

prominence over their lack of diligence in identifying child abuse which had dire consequences in the 1980s, as the following inventory shows:

In the Tyra Henry case, (1984) Lambeth council social workers had been found to be too trusting of the family, where the father had battered and bitten her. By the time she was identified as a victim of child abuse, she died in care from the injuries inflicted by the father. In that same year, Heidi Koseida was starved to death by her parents, despite a neighbour complaining about abuse to an NSPCC inspector, the inspector refused to intervene and pretended he had visited the child in a cover-up. Kimberley Carlisle was starved and beaten to death by her stepfather and mother in 1986. Four key social work and health care staff were found to have failed to apply the necessary skills, judgement and care in her case. Sixteen-month-old Doreen Mason's mother and her boyfriend were imprisoned for manslaughter and neglect; from the child's birth she was deemed 'at risk' but placed under the supervision of an inexperienced and untrained social worker.<sup>370</sup> The legal discourse shifted to accommodate the evidence, feelings and wishes of children.<sup>371</sup> The Cleveland 'moral panic' therefore left some positive and durable outcomes legacy in terms of social and legal reforms.

In the UK in the 1990s, there were mass investigations of historic allegations of CSA in youth residential care homes. Social workers, child protection workers and journalists thought that residential care homes for young people had been infiltrated by paedophile rings.<sup>372</sup> This concern was given wider currency in the press and broadcasting media in the mid-1990s. The police were briefed to accept the possibility that there was widespread abuse as narrated by the media: their operations expanded from North Wales to Cheshire and Merseyside. The concern over organised abuse influenced the ways in which the police conducted their investigations. If a complaint had been made by a former resident, the police would seek corroboration by interviewing other residents as possible contemporaneous witnesses, but this included actively seeking more complaints against the accused by other residents as well.

By 2000, about a hundred investigations of child abuse were in progress. Hundreds of complaints were made.<sup>373</sup> There was a fashion in child protection services to apply the

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<sup>370</sup> D Batty, 'Catalogue of Cruelty' *The Guardian* 27 January 2003.

<sup>371</sup> Fn 289, Lawrence: op cit, p.100.

<sup>372</sup> R Webster, 'Bryn Estyn: the Making of a Modern Witch Hunt' 2005  
<[www.richardwebster.net/print/xbrynestynintro.htm](http://www.richardwebster.net/print/xbrynestynintro.htm)>.

<sup>373</sup> Ibid.

‘gradual disclosure model’ or California model to elicit allegations from witnesses with the result that certain witnesses interviewed on several occasions eventually ‘disclosed’ abuse.<sup>374</sup> As Webster points out, there is no empirical evidence for the validity of the model; he agreed however that such a technique may facilitate genuine disclosure, but the witnesses were also suggestible and liable to make false allegations.<sup>375</sup> As had occurred in the US day-care cases in the 1990s, an increasing number of those UK care workers imprisoned in the era of fear of institutional abuse have had their convictions overturned in the early 2000s.<sup>376</sup> This begs the question of whether the heightened concern of CSA in approved schools and community homes<sup>377</sup> affected the judgment of law enforcement and legal institutions which set aside objectivity as a result of intense public pressure to convict the guilty.

It also calls into question whether the mode of police investigations and interrogations during the residential care homes panic may have had a lingering wider impact on the present way in which trials of historic CSA are still being conducted.

One official response to the heightened concern of HCSA in England, which acts as a coping mechanism for dealing with the problem, has been the public inquiry.<sup>378</sup> Consider recent examples. An inquiry was set up into police and council cover-ups of widespread historic and recent perpetrations of child abuse as evidenced by the discovery of mass organised child sexual exploitation in Rotherham.<sup>379</sup> An inquiry has been launched by the Metropolitan police into allegations of HCSA in football clubs in the UK.<sup>380</sup> The Football Association plans to conduct its own internal review to determine if more could have been done to prevent alleged abuse.<sup>381</sup> The Independent Inquiry into Sexual Abuse has been set up to examine claims made against local authorities, religious organisations, the armed forces,

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<sup>374</sup> R Webster, *The Secret of Bryn Estyn* (Orwell Press 2005), p.85.

<sup>375</sup> Ibid.

<sup>376</sup> E.g., see *R v Basil Rigby Williams and Michael James Lawson* [2003] E.W.C.A. Crim. 693. *Anver Daud Sheikh v The Crown* [2006] EWCA Crim 2625.

<sup>377</sup> Webster. Bryn Estyn, approved schools became community homes in 1974 when responsibility for them passed from the Home Office to social services departments.

<sup>378</sup> S Cohen, *Folk Devils and Moral Panics*, (Routledge Classics 2011) p.90.

<sup>379</sup> House of Commons, Communities and Local Government Committee - Third Report of Session 2014-15 ‘Child Sexual Exploitation in Rotherham: some issues for local government’ 11 Nov 2014, HC 648, para 15, p.3. See also, A Jay, *Independent Inquiry into Child Sexual Exploitation in Rotherham* (1997-2013) Rotherham Metropolitan Borough Council 17 Mar 2015.

<sup>380</sup> BBC News ‘Met football abuse inquiry covers four Premier League clubs’ 13 Dec 2016; <http://www.bbc.co.uk/news/uk-38308502>

<sup>381</sup> BBC Sport Football child sex abuse claims: What has happened so far? 15 Dec 2016; <<http://www.bbc.co.uk/sport/football/38211167>>

public and private institutions and people in the public eye.<sup>382</sup> This official reaction indicates that the heightened concern about HCSA in the UK currently shows no sign of abating.

In *Justice for All*, the paper stated that the views of victims would inform any further changes to limiting the questions a rape victim could be asked under cross-examination about their previous sexual history.<sup>383</sup> This document predates the passing of the Criminal Justice Act 2003 which restricted the circumstances in which a complainant's bad character/previous sexual history could be explored in cross-examination.

## **(v) Conclusion**

We have seen how the intense contemporary concern with child abuse has deep roots. With the growing understanding of childhood as a distinct stage of human development came a conception of the legal personality of the child, with its attendant status and entitlements. In particular, the vulnerability of the child was recognised and the need for its protection. Furthermore, as the understanding grew of how children could, and should, be recognised as being subject to abuse, the recognition of different types of abuse proliferated, such as sexual, physical, emotional, neglectful and genital mutilation.

The campaigning of religious bodies, philanthropic groups, the press, politicians and women's groups responding to the changing attitudes in society to children, played a major part in the arrival of legislation to protect children from the second half of the 19<sup>th</sup> century onwards, for example from prostitution, or with respect to the age of consent as in the Criminal Law Amendment Act 1885. It was in the 1880s that the NSPCC first developed.

In the 20<sup>th</sup> century continuing concern from these quarters and also feminist organisations about the moral and physical welfare of poor children, and about the conduct of Poor Law institutions, led to government intervention and more legislation, such as the Criminal Law Amendment Act 1922 which penalised assaults on girls aged 16 or under. The Children and Young Persons Act 1933 consolidated the existing provisions with respect to the legal framework concerning children and their protection.

It was in the later 20<sup>th</sup> century, however, that the pressure increased in particular with regard to the processes of the investigation and prosecution of offences involving children. Concern

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<sup>382</sup> BBC News, What is happening with the child sexual abuse inquiry? 18 Nov 2016;

<<http://www.bbc.co.uk/news/uk-34965912>>

<sup>383</sup> *Justice for All* (CM 5563 July 2002), para 2.29, p.45.

shifted from the existence of substantive legal protections, to the processes by which the problem was identified, investigated and prosecuted. From the 1970s onwards there were many high profile individual cases of abuse and neglect, such as the Maria Colwell, Jasmine Beckford and Kimberley Carlisle cases. There were also burgeoning investigations of institutional abuse as in North Wales, and the Cleveland Inquiry and the Orkney ‘satanic abuse’ affair, both reasonably seen as instances of the appearance of ‘moral panic’.

The Times coverage of CSA cases quadrupled in the 1980s. This continued through the 1990s. By 2000 there were 32 separate ongoing police investigations of care homes across England and Wales. Sarah Payne was murdered in 2000. In 1989 the Pigot Committee reported on its consideration of the rules of evidence in cases involving children, and the Youth Justice and Criminal Evidence Act 1999 was based on its report.

The 1999 Act marked this shift of the focus of concern in the history of the prosecution of CSA cases in terms of the impact of the reforms on the safeguards available to defendants in such cases. For example, the 1999 Act made it more difficult for defendants to confront and cross-examine complainants in CSA cases. This Act and the Criminal Justice Act 2003 are considered in detail in Chapters V and VI of this study. This legislation can be seen to have emerged after an intense period of media and political pressure.

As is clear from the Cleveland and Orkney cases, public concern can reach an intense pitch, and it is also clear that such an atmosphere can drive policy and legislation. ‘Sarah’s law’ is such an example. But does the sociological category ‘moral panic’ helpfully characterise such public concern about CSA, at least over the last 40 years or so? To a limited extent only. As explained above, it may be useful in terms of identifying particular moments in that history, but it may be more appropriate to talk about ‘heightened concern’. A moral panic may suggest, and sometimes usefully suggest, that public opinion has been roused on a mistaken basis. There can be no doubt however that CSA exists and on a large scale. A very concerned or even angry reaction may be appropriate, and may not fairly be characterised as ‘panic’. Furthermore, the category also seems to have a tighter application to more isolated or infrequent instances of anti-social or deviant behaviour. CSA is a sustained and endemic problem.

Having said that, it is also clear from the examples given in this chapter that whatever label is attached to it, heightened public concern can drive not only policy and legislative change as may well be natural and appropriate, but can also in individual cases put excessive pressure

on the procedures and safeguards which exist to do just to those accused of criminal offences. This is clearly demonstrated, for example, in De Young's studies, as described above, of the prosecutions of the 'day care' cases in the United States. It is clear too from the accounts given above that public pressure caused the unjust investigation and prosecution of those imprisoned for the IRA bombings in Birmingham and Guildford in the 1970s.

The story leading up to the present prosecution of HCSA cases is a fraught one. It is the story of the changing conception of childhood, of the recognition of child abuse, protective legislation, increasingly intense public concern about the issue, occasional panics, investigations, public inquiries, and further legislation focusing on the criminal justice procedural issues of investigation and prosecution. It is the story too of the emergence of miscarriages of justice when public feeling is running high, in other sorts of cases and in HCSA cases too.

It is a story that engages deep feelings for children and for their protection, fears about the threats that they face, and dark suspicions of others. The perception of its incidence within the family is particularly challenging. It is striking that sexual intercourse between parents and their children became a criminal offence only in the Punishment of Incest Act 1908. This heightened awareness about CSA has rendered society and the criminal justice system ever more vigilant about the problem, and ever ready to suspect or conclude that abuse has occurred. Some now some feel there is a 'climate of mistrust'<sup>384</sup> surrounding the many people who care for or educate children. This too should put us on our guard when considering matters of due process for defendants in HCSA trials.

It is not surprising that the issue has put considerable pressure on the fair investigation and trial of those suspected of crimes against children. Indeed that is the conclusion which emerges from this exploration and analysis of the history and the relevant literature. The heightened public concern about child sexual abuse, which has been prominent at certain periods since at least the late 19<sup>th</sup> century, and has been intense for more than thirty years in this and other countries, has undoubtedly played a significant role not only in the development of law and practice concerning both the law relating to children and their protection generally but also in the investigation and prosecution of these offences, and furthermore has also undoubtedly contributed to miscarriages of justice of the sort noted above for example in this country, in Holland and in the United States of America.

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<sup>384</sup> B O'Neill, 'Welcome to the Trust No-one Society', Spiked online 21 Oct 2013; <[http://www.spiked-online.com/newsite/article/welcome\\_to\\_the\\_trust\\_no\\_one\\_society/14175#.VuRPruY3HQI](http://www.spiked-online.com/newsite/article/welcome_to_the_trust_no_one_society/14175#.VuRPruY3HQI)>.

An awareness of the roots and development of the recognition and reaction to the incidence of CSA, and of the pressures that can be, and have been, exerted in this area (and in other areas where public concern is heightened and engaged) is crucial to a full understanding and consideration of the detailed issues concerning the prosecution of HCSA cases which are raised in this study in relation to methods of investigation, delay in bringing charges and the rules relating to the admission at trial of bad character evidence relating to both complainants and defendants.

One scholar, Zuckermann, has commented that in criminal cases the roots of miscarriage of justice usually lie in the police investigation; and that any form of legal process is bound to remain vulnerable to errors made by the police.<sup>1</sup> This chapter sets out to explore whether the past and current methods of the police for pursuing historic allegations of CSA are procedurally and evidentially sound, and whether any shortcomings can be identified in the present system that may compromise the defendant's right to a fair trial.

In historic allegations, notably in the pursuit of child sexual abuse in the care homes across England and Wales from the 1990s onwards, the police were briefed to seek out potential victims of CSA by the innovative and extant method termed 'dip sampling'. This chapter will focus on dip sampling - the method, its merits and demerits - and the related area of the interrogation process of potential prosecution witnesses. The problem of unregulated interviewing techniques applies not only to dip sampled prosecution witnesses, but also to any point of contact between police and prosecution witnesses in any criminal investigation, and will be considered in both dimensions.

The issue of dip sampling, also referred to as 'trawling', is a method often encountered in complex abuse cases, which may be institutional or non-institutional. Complex abuse can occur in families and day care, as well as in other provisions such as youth services, sports clubs and voluntary groups and via the use of the internet.<sup>2</sup>

The investigation of HCSA cases in this manner has often been termed 'reverse policing',<sup>3</sup> as there is usually no crime scene, no witnesses, and perhaps a single complainant. On receipt of an allegation or suspicion, the police identify the cohort of likely victims and interview a considerable number of ex-residents of the care homes.

Concern about the dip sampling method was expressed in relation to the high-profile case of David Jones. Jones was a football manager, who, before this career, worked in a Merseyside residential care home in the 1980s. In 1999, he faced 20 charges of historic child neglect and

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<sup>1</sup> A S Zuckermann, 'Miscarriage of justice: a root treatment' [1992] Crim L R 323.

<sup>2</sup> Home Office: *Complex Child Abuse Investigations: Inter-agency Issues*, May 2002.

<sup>3</sup> R Webster, 'New Statesman Special Report: How the police trawl the innocent' 19 July 1999.



sexual abuse.<sup>4</sup> The allegations had been elicited by the police dip sampling witnesses whom they interviewed from his former workplace. He initially had two accusers: a convicted arsonist and a convicted armed bank robber. The police found four more former resident complainants subsequent to this. Two of these dropped out as the trial began. One of the accusers admitted, when being cross-examined, that he had concocted his story and claimed he had been given guidance by the police to plug holes in his testimony. Jones' case collapsed in 2000. Prior to the ACPO Handbook 2009 revisions designed to improve HCSA investigations, raise a concern about how many defendants, other than David Jones, might have been subject to a miscarriage of justice?<sup>5</sup>

As part of its terms of reference, a Home Affairs Select Committee (HASC) was asked to look at whether police methods of trawling for evidence involved a disproportionate use of resources and produce unreliable evidence for prosecution; and whether there was a risk that the advertisement of prospective awards of compensation in child abuse cases encouraged people to come forward with fabricated allegations.<sup>6</sup>

The HASC concluded that there was a strong argument for introducing a general requirement to record police interviews of complainants and other significant witnesses on video or audiotape, with audio-taping of interviews as a mandatory requirement where videotaping was not practicable.<sup>7</sup>

It was no coincidence that at the time of the HASC inquiry there followed the publication of two major guidance documents,<sup>8</sup> which demonstrate that child protection agencies were cognisant of past shortcomings in investigatory methods. These documents were: the ACPO Handbook on *The Investigation of Historic Institutional Child Abuse*, issued in March 2002 and the Home Office's *Complex Child Abuse Investigations: Inter-agency Issues*, May 2002. The 2002 ACPO Handbook not only reveals the dip sampling method, and the police's own assessment of the efficacy of the method, but also responses to past criticism about aspects of operational methods, such as the poor recording of meetings with potential witnesses about

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<sup>4</sup> BBC News, Sept 27 1999, 'UK Premiership manager on child abuse charges'.

<sup>5</sup> Fn 3, Webster. By 1999, the number of care workers implicated by trawled allegations exceeded 3000 suspects.

<sup>6</sup> Home Affairs Select Committee *The Conduct of Investigations into Past Cases of Abuse in Children's Homes* Fourth Report of Session 2001-02, vol I, (HC 836 - I), p.7.

<sup>7</sup> *Ibid*, vol I, para 45, p.19.

<sup>8</sup> The Senior Investigating Officer Handbook clarified that justification should be made before an investigation using the dip sample method is launched. The Association of Chief Police Officers (ACPO) does not produce prescriptive guides but guidance demonstrating recommended or good practice. Changes were made to the SIO manual which included 'safeguards recognising the needs of those who may have been accused but as yet have not been charged'.

what was stated by the parties. Some police officers had been criticised for mentioning the prospect of compensation to interviewees as an inducement to obtain the allegations. In the 2009 version of the ACPO Handbook, it was recommended that police personnel keep logs of every encounter with interviewees. Notably, however, it still fails to offer guidance on the mode of questioning the police should adopt in these interviews.

Whilst the dip sampling method employed by investigating police and the interviewing methods they use may be viewed as two separate issues, they are also interlinked. Firstly, dip sampled witnesses do not come forward of their own accord; secondly, their statements have often been obtained by opaque interrogatory methods.

In 1991, the North Wales police initiated investigations into cases of alleged HCSA in care homes. Webster states that the police began to look for allegations actively from former residents rather than wait for allegations to be made spontaneously and invite them to make complaints, sometimes against specific workers. By 1994, the North Wales investigation had spread to Cheshire, then Merseyside. By 1998, investigations using this *modus operandi* had spread to South Wales; by 2000, almost a hundred investigations were in progress using this method.<sup>9</sup>

The 2002 HASC was tasked with examining problem areas for potential miscarriages of justice in HCSA investigations, including police dip samples. It concluded that the adopted police dip sampling method *per se* should not be prohibited, but it was concerned about how investigations were conducted in terms of the approach of and interview techniques with potential complainants and witnesses.<sup>10</sup>

At the time of the HASC inquiry, 34 of the 43 police forces in England and Wales had been involved in investigations into allegations of child abuse in children's homes and other institutions. All of the allegations related to historical abuse, said to have occurred several years - often decades - ago. In Merseyside alone, the police investigated 510 former care workers suspected of child abuse. Of those, 67 individuals were charged, resulting in 36 convictions and nine acquittals. In the remaining 22 cases, the prosecution was either discontinued or dismissed by the judge.<sup>11</sup>

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<sup>9</sup> R Webster, *The Secret of Bryn Estyn*, (The Orwell Press, 2005), pp.3-4.

<sup>10</sup> Home Affairs Select Committee, Fourth Report, Session 2001-2002, *The Conduct of Investigations into Past Cases of Abuse in Children's Homes* HC 836 I, para 27.

<sup>11</sup> *Ibid*, para 1 of Introduction.

More recently there have been 63 police investigations of HCSA in Britain in schools, children's homes and churches dating back to the 1950s involving 133 arrests of alleged perpetrators.<sup>12</sup> In 2014, a Labour MP, Barry Sherman, claimed that the National Crime Agency was still using the dip sampling method under Operation Pallial; it is therefore an extant practice<sup>13</sup> and therefore an ongoing concern to critics of the method.

In the 1990s, thousands of care homes ex-residents were interviewed, having been canvassed under the dip sampling procedure. Did the police efforts show that child abuse occurred frequently in this context - BBC radio suggested in 1996 that abuse therein was the norm rather than the exception<sup>14</sup> - or was the investigatory process itself also generating questionable accounts of abuse?

There is a dearth of literature on aspects on the trawling method; however, lawyers and researchers have previously paid particular attention to the issues surrounding the taking of witness statements. Heaton-Armstrong advocated the audio taping and videotaping of prosecution complainants witnesses as far back as the early 1990s; they continue to do so.<sup>15</sup> Summers argues that in most cases, multiple complaints normally serve as powerful corroboration which indicate that a crime was committed, but with the *caveat* that cases which have suffered from evidential contamination by the dip sampling interviewing process are devalued and may be unsafe.<sup>16</sup> In Webster's book, *The Secret of Bryn Estyn*<sup>17</sup>, he explores in detail the mass scale police investigations of alleged abuse in care homes which took place from 1991 onwards.

This chapter seeks to draw together available literature in order to look at the specific elements of dip sampling, including past problems with the ways in which the police have interrogated potential victims and prosecution witnesses. There are a number of problems associated with the trawling technique of investigation:

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<sup>12</sup> M Beckford, '63 police enquiries, 2100 victims...the child abuse dossier that shames Britain after horrific explosion of historic sex cases since Savile' *The Mail on Sunday*, 5 April, 2015.

<sup>13</sup> <<http://www.itv.com/news/calendar/update/2014-02-04/huddersfield-mp-questions-police-trawling>>.

<sup>14</sup> R Webster, *The Secret of Bryn Estyn*, (Orwell Press 2005), p.601.

<sup>15</sup> A. Heaton-Armstrong, A. *et al.*, *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006), para 19.01, p.346.

<sup>16</sup> M Summers and J Winship, 'Cross-Contamination: Time to Extend the Abuse of Process Doctrine?' *Crim LR* 2003, Jul, p. 449.

<sup>17</sup> R Webster, fn 14, (Orwell Press 2005).

- Whilst it may be common for police to appeal to witnesses to recent accidents involving victims, in HCSA investigations, the police may use dip sampling try to identify a cohort of possible victims from residential care homes where decades may have passed and the witnesses are regarded as vulnerable by nature of their looked-after status. What are the implications of this alternative method of seeking potential complainants and witnesses?
- Interviewing witnesses: there are several aspects to this. Sexual assault victims are interviewed on police premises in most cases, yet they may be interviewed virtually anywhere in HCSA investigations; nor does the interview have to be electronically recorded. How do interview questions impact on the evidence of prosecution witnesses? Also, does repeat interviewing occur in historic CSA investigations and if so, what are the risks?
- Can police evidence gathered by the dip sampling and interviewing methods also become contaminated and/or affected by collusion between the witnesses whom they canvass?
- How do police record interviews, when an electronic method is not used, and what happens when the interview is subsequently recorded as a witness statement?
- Are there grounds for arguing that the police offer inducements, coaching or pressure on witnesses?

This chapter's contents are:

- (i) Description of the dip sampling technique
- (ii) Type of evidence police seek by using the dip sampling method
- (iii) The Government's reply to concerns raised by the HASC Report 2002
- (iv) Case study of 'H' illustrating the pitfalls of the dip sampling method
- (v) Problems arising from police interviewing techniques
- (vi) Repeat interviewing
- (vii) Comparing police interviewing techniques with children and adults
- (viii) Collusion issues: accidental and deliberate collusion
- (ix) Contamination of the evidence through other investigatory methods
- (x) Inducements
- (xi) Audio-recording
- (xii) Addressing the problem
- (xiii) Conclusions

**(i) Description of the dip sampling technique**

In complex investigations of HCSA, the police often use dip sampling to seek witnesses. This may occur where there are no records of former child residents in institutions. Webster was critical of the way in which police gathered evidence for such prosecutions under the dip sampling method.<sup>18</sup>

The Home Affairs Select Committee offered a definition of dip sampling (or trawling) as it was asked to consider whether this particular method used by police to investigate historic institutional CSA cases produced unreliable evidence which could lead to miscarriages of justice. Trawling is not a technical term but is used pejoratively by its critics to describe the police practice of making unsolicited approaches to former residents from many of the institutions under investigation, but refers to the process when the police contact potential witnesses who have not been named or even mentioned. In a trawl, the police will contact all, or a proportion of, those who were resident at the institution under investigation during the period when the abuse was alleged to have occurred.<sup>19</sup>

The 2002 Association of Chief Police Officers' Handbook acknowledged that the method was innovative:

*Historic and institutional child abuse enquiries differ considerably from the normal major investigations undertaken by forces. The importance of the approach to potential and actual witnesses necessitates the development of skills and techniques not normally associated with major enquiries.*<sup>20</sup>

Claire Curtis-Thomas MP complained about police interviewing methods of potential witnesses at the HASC in 2002:

*The police will plant suggestions producing narratives that fit their case rather than the truth. ... a kind of indirect collusion develops through witnesses' unrecorded contact with members of the same police team.*<sup>21</sup>

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<sup>18</sup> Fn 3, Webster.

<sup>19</sup> HASC Report 2001-02, vol I, para 12, p.8.

<sup>20</sup> Association of Chief Police Officers *The SIO Handbook – The Investigation of Historical Institutional Child Abuse*, (ACPO, March 2002), p.24.; hereafter, for footnotes, the ACPO Handbook (2002). Now superseded by the National Policing Improvement Agency, (2009), *Guidance on Investigating Child Abuse and Safeguarding Children, Second Edition*.

<sup>21</sup> HASC Report, vol I, para 35.

At the HASC, David Rose, then Special Investigations Reporter for *The Observer* newspaper, complained that trawling for potential victims was an absolutely unregulated process, almost tailor-made to generate false allegations.<sup>22</sup>

Dip sampling involves going through the available records at care homes to see who was on the roll following a complaint or referral to the police. It is a random sampling of 10 percent or 50 names of potential witnesses, whichever is the greater number, of those who lived together at the care home or who were roughly the same age.<sup>23</sup> There are several ways in which the dip sampling method can be applied. The records may be used to select witnesses randomly or in a more targeted manner: by age group of the witness, his/her period of residence or the period of employment of the suspected offender. Those targeted under the dip sampling method could be approached by a letter drop as the quickest and most cost-effective way of seeking them.

The dip sampling method was used for the first time in 1990 by Leicestershire police to follow up allegations of HCSA that had been made against Frank Beck, who had been officer-in-charge of several Leicestershire children's homes between 1973 and 1986. It was subsequently used by North Wales, Cheshire and Merseyside police. By the end of the 1990s, two-thirds of the country's police forces used this method; dozens of care workers were convicted.<sup>24</sup>

Under normal police methods of investigation, the police receive a crime complaint and then find out whether the suspect has committed any crimes.<sup>25</sup> The dip sampling method employed by the police in investigations of HCSA involved a suspect or an allegation, followed by an attempt to find the crime, often in a random fashion. In sexual offence cases, which normally occur in private, there is less chance of an interviewee being an eyewitness, although in close-knit environments, such as care homes, where many people shared the same accommodation, including communal bedrooms, there could have been opportunities for contemporaries to have heard or seen something in this proximity. Instead, the police may interview former residents to find out whether they were also victims of other incidents of abuse which they have not previously disclosed. It is, of course, possible that some suspects were serial offenders who abused other children as well as the primary complainant. In the

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<sup>22</sup> Ibid, Vol I, Ev 15 at para 63.

<sup>23</sup> ACPO Handbook, (2002), p.26.

<sup>24</sup> Fn 3, Webster.

<sup>25</sup> R Webster and B Woffinden, 'Trawling for crimes: the Danesford two and the case of Terry Hoskin' *Guardian Weekend* 8 May; 1998.

care homes environment, Birch and Taylor suggest that successful paedophiles are likely to have manipulated their victims and therefore it would have been difficult to find corroboration either then or now.<sup>26</sup>

The issue is whether other interviewees were making valid, corroborative complaints, or whether they were encouraged to make unreliable or false allegations. False allegations in this context may issue from narrative constructed by the police investigatory methods or it may even be a combination of police and interviewee narratives. Where the investigatory process itself has affected the quality of evidence, this is called contamination. The elicited evidence may not necessarily be false in the sense of being perjurious. The contamination may be insubstantial or substantial: it is a question of degree whether a flawed investigation has crossed the threshold of denying the accused a fair trial.

## **(ii) Type of evidence police seek by using the dip sampling method**

### *Corroborative evidence*

In HCSA cases, a successful prosecution outcome may depend on witness corroboration of the alleged abuse which can be done by combining complaints obtained by the dip sampling method. It is already known that interviews occurring sometime after an event are prone to errors when biased questioning procedures are used.<sup>27</sup>

The ACPO Handbook 2002 itself also criticised aspects of the dip sampling method, as it could be rather hit-and-miss as it had the potential to miss either witnesses or offenders.<sup>28</sup> Other shortfalls of this method set out in the Handbook included letters posted by the police which might breach confidentiality or which failed to reach their intended recipient. It also raised the issue of the impersonal nature of the method, the welfare of the recipient upon reading the letter and whether the recipient would have the requisite degree of literacy to understand its contents and his honesty of response. This latter concern expressed in the Handbook shows that the police themselves were aware that false allegations could be generated by the letter-drop method.

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<sup>26</sup> D. Birch, and C Taylor, 'People like us? Responding to allegations of past abuse in care' [2003] Crim L R, p.828.

<sup>27</sup> G S Goodman, and J Quas, 'Repeated interviews and children's memory: It's more than just how many', *Current Directions in Psychological Science*, (2008) 17, pp.386-390.

<sup>28</sup> ACPO Handbook (2002).

In the ACPO revised 2009 Handbook, operations now involve setting up a Strategic Management Group to monitor approaches in contacting further potential witnesses and the conduct of any subsequent interviews to ensure that any doubts about the validity of the evidence are fully addressed. Also, it oversees the overall process for gathering corroborative and additional evidence. The revised Handbook acknowledges that there have been prior concerns about the dip sampling method. It advises Senior Investigating Officers (SIOs) to record the rationale for making approaches in this manner in the SIO policy file, having a clear witness/victim approach protocol; accurately recording conversations with potential witnesses and victims (electronically recorded at the earliest possible stage) and consulting the Crown Prosecution Service with regards to the use of these methods.<sup>29</sup> These revisions to the guidebook indicate that the police are cognisant that past investigations were fraught with problems.

One concern for past criminal investigations generally, revealed in the 1990s study Research paper No. 4 *Supervision of Police Investigations in Serious Criminal Cases*<sup>30</sup> was that, sometimes, senior police officers supervising junior officers, had adopted a *laissez-faire* attitude as to how junior officers would conduct interviews (with suspects) and they did not bother to listen to the interview tapes.<sup>31</sup> Thus, if taping of the complainant's interviews were to be made mandatory, (the electronic recording is still prescriptive in the 2009 Handbook) it would be of little value where those who are supposed to listen to, or view the tapes, fail to do so. According to a 1991 study *Preparing the Record of Taped Interviews*,<sup>32</sup> it was confirmed that both prosecutors and defence lawyers rarely listen to the tapes, preferring the prepared summaries instead. Baldwin assessed the accuracy of these summaries by listening to 200 tapes from four police districts and compared them with prepared summaries. He found that about half of them were misleading and even if not misleading, many of them were prolix, because young officers were not trained in the art of précis writing. They had a tendency to focus on incriminating statements and to omit exculpatory material, making it unsafe for defence lawyers to rely on summaries. Arguably, best practice involves lawyers

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<sup>29</sup> National Policing Improvement Agency, (2009), *Guidance on Investigating Child Abuse and Safeguarding Children, Second Edition*, p.167.

<sup>30</sup> J Baldwin, J. and M Molony, Royal Commission on Criminal Justice, *The Conduct of Police Investigations: Records of Interview, the Defence Lawyer's Role and Standards of Supervision*, Research Studies No. 2, 3 and 4 (HMSO, 1992).

<sup>31</sup> Editorial, 'The conduct of police investigations,' [1993] Crim L R pp 161-162.

<sup>32</sup> J Baldwin, *Videotaping police interviews with suspects – an evaluation. Police Research Series Paper 1* (Home Office London 1992).



listening to the tapes before reading the summaries even though it takes time and has financial implications.

Although the Police Handbook 2009 intended to bring in safeguards to prevent innocent people from being accused of HCSA, most of the following conditions can apply to such investigations before and *post*-2009:

- Witnesses/possible victims of historic CSA can still be interviewed in places other than police interview suites;
- There may still be no record of what was said between the police and the approached witness/the witness who approached the police at the very first encounter, as it is not a mandatory requirement;
- Investigations of child abuse may be carried out by either the police or social services or both. In the past, in some cases, the investigators were not trained in how to conduct child abuse case interviews. Some police officers were not even child protection unit (CPU) trained. Even where officers were CPU trained, they focused on video recording children and interviewing them, using child psychology techniques they had been taught. Whilst this afforded the police some procedural guidance, they were not offered guidance on the legal principles which formed the basis for the protocol.<sup>33</sup> The law of evidence was not particularly stressed in the training which they and other child protection personnel received.

The police can also make repeat visits to witnesses/complainants without recording the specific reasons why additional approaches were necessary enabled them to draft and redraft MG11s (witness statements taken by the police). This begs the question of whether the police on repeat visits were seeking clarification of prior statements/additional information. The witnesses or records of their accounts may be deliberately doctored by the police in cases where the officer firmly believes a particular person to be guilty and he perceives the existing evidence to be insufficient to secure a conviction. Falsification of evidence and manipulation of witnesses by the police in this context is known as ‘noble cause corruption’.<sup>34</sup> Yet the police are under a duty to presume the innocence of the accused from the outset of the investigation. The European Court of Human Rights stated in *Hajnal v Serbia*<sup>35</sup> that:

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<sup>33</sup> G Davis *et al*, *The Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions*, Home Office Research and Statistics Department, *Research Findings Number* (1999), 100, p.1.

<sup>34</sup> D Wolchover and A Heaton-Armstrong, *Analysing Witness Testimony* (Blackstone 1999), p.228.

<sup>35</sup> App. No. 36937/06 (19th June 2012). See, among other authorities, *Deweert v. Belgium*, 27 February 1980, § 56, Series A no. 35; *Minelli v. Switzerland*, 25 March 1983, §§ 27, 30 and 37, Series A no.62; *Allenet de*

*The Court reiterates that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law.*

McConville and Hodgson looked at interviews between the police and suspects; their study indicated that the police sought to elicit confessions of guilt, rather than to elicit information or seek evidence as to the commission of an offence. That the police may proceed in a way that distorts the account given by a suspect or imprints their bias upon it cannot be discounted.<sup>36</sup>

### **(iii) The Government's reply to concerns raised by the HASC report 2002**

The Government, in its Reply to the HASC report in 2002, disagreed with the claim that there were significant numbers of people who had been subjected to a miscarriage of justice because of defects in police investigatory methods, mainly because of a lack of hard and consistent evidence to substantiate the assertions. It did not think that significant numbers of complainants or law enforcement/prosecuting bodies were fabricating or conspiring to make allegations or that fabrications were going undetected; nor that significant numbers of complainants as prisoners or ex-offenders were making false allegations. Meanings of false allegation and miscarriage of justice had not been properly discussed and defined either. Discussion about the extent of miscarriages of justice caused by false allegations had been unbalanced and failed to use facts where possible.<sup>37</sup>

It is submitted that miscarriages of justice may be latent, because the degree of evidential taint arising from the methods used by the police to investigate historic cases may never come to light where the interview was not properly recorded. Until investigations are properly recorded from the outset, one cannot determine whether an allegation was made by the complainant independently or whether it was triggered by flaws caused by collusion and /or contamination. Nor can it be ascertained whether the allegations came to light through the witness' free narrative or a specific mode of interrogation; or whether the complainant subsequently visited the police or *vice versa* or what was said by the parties in these subsequent interviews.

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*Ribemont v. France*, 10 February 1995, §§ 35-36, Series A no. 308; and *Karakaş and Yeşilırmak v. Turkey*, no.43925/98, § 49, 28 June 2005; and *Matijašević v. Serbia*, cited above §5). Article 6 §2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution."

<sup>36</sup> M McConville, and Hodgson, J., 'Silence and the Suspect' *New Law Journal*, Vol.143, 7 May 1993,

<sup>37</sup> *The Conduct of Investigations into Past Cases of Abuse in Children's Homes* April 2003, Government Reply Cm 5799.

The HASC recommended a clear set of prescriptive guidelines for such investigations and subsequent prosecutions; in particular, there was an urgent need for the proper recording, either audio or visual, of police interviews of complainant and other significant witnesses.<sup>38</sup> Notwithstanding the criticism of the dip sampling method by concerned participants in the HASC in 2002, the Government decided dip sampling should continue to be permitted but that the police should justify their decision to use it.<sup>39</sup> The Government also placed trust in inter-agency Strategic Management Groups (SMG) to safeguard against the risk of eliciting allegations against innocent people. An SMG is normally convened within one working day of referral of a case of complex child abuse and is normally chaired by the police.<sup>40</sup> The SMG's task is to act as a steering group, formulate policy and procedure. The SMG will normally set and record the terms of reference for, and lead the investigation. Members of the SMG may include a core membership of a director or deputy director of children's services, commander, police senior investigating officer, local authority head of service/child protection manager, local authority legal adviser, senior health representative, press officer, probation, NSPCC and third sector organisations.<sup>41</sup>

The SMG should ensure that investigators have full access to information held by individuals and agencies affected by the investigation; ensure staff safety, support, collaboration and that agencies commit sufficient resources; have in place safeguards for the innocent, as well as securing and accessing expert legal advice. The SMG must monitor carefully any approaches used in the contacting of further witnesses and the conduct of any subsequent interviews and to ensure to address any doubts about the validity of evidence, as well as scrutinising the overall process of gathering corroborative and additional evidence. It must consider further issues about the complexity of the investigation, the time lapse since the alleged offences occurred as well as the motivation of and the vulnerability of potential witnesses.

Interviewers may not raise the issue of compensation during interviews with possible victims; nor must they discuss it when the witness volunteers it. SMGs must have in place a suitable venue and interviewing procedures in accordance with *Achieving Best Evidence* used for gathering and recording evidence to prevent criticism that police officers prompted the witnesses.<sup>42</sup>

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<sup>38</sup> HASC Report (2001-02), vol I, para 47, p.41.

<sup>39</sup> <<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/836/83609.htm>> accessed on 10 November 2012, Summary of Key Conclusions and Recommendations, Point 1.

<sup>40</sup> London Safeguarding Children Board, *London Child Protection Procedures*, 5<sup>th</sup> edn 2016, para 8.5.2.

<sup>41</sup> *Ibid*, para 8.6.1.

<sup>42</sup> *Ibid*.

#### **(iv) Case study of ‘H’ illustrating the pitfalls of the dip sampling method**

H was a care home employee, arrested by police in 1995 and charged with historic allegations of CSA alleged by six former care home inmates.<sup>43</sup> He was convicted on some allegations and acquitted on others. The jury accepted the allegations of three out of the six complainants and delivered a mixed verdict for which received a four-year prison sentence. The complainants had been identified by the police investigation method of dip sampling, which H maintained had tainted the presentation of the case against him.

The police not only contacted the care home where H used to work, but also advertised for more witnesses on radio and at a public meeting of parents whose children attended the Boys’ Brigade of which H had been an officer. Out of the vast pool of 2000 people whom the police could have contacted, only six people made allegations against him, all of whom had criminal records and knew each other contemporaneously at the care home. Although six witnesses might appear to be a large number, the apparent corroborative value is questionable.

One of the six complainants contacted a former colleague of H and explained to her that the police had persuaded him to sign the witness statement, which he now wished to retract. H’s colleague advised him to see a solicitor about the retraction. The communication made to her by the complainant had also been recorded and sent to H’s solicitor. There was therefore no doubt about the existence of the phone call and its contents.<sup>44</sup>

Two of the other complainants were discredited by the jury at trial. One of the complainants admitted in court that he was lying under cross-examination.

The reveals that the interviewing officer of a potential witness was attempting to elicit allegations by psychologically pressurising the interviewee to make corroborative allegations by suggesting that he was suppressing his victimhood. The witness - R - was contacted by police via a card sent to him in his letterbox. R arranged for a police officer to visit him. R was interviewed by the police and he spoke favourably of H.

R stated that H was the only care worker he had time for. However, the police said that others had been abused by H; also the others had said that R was the favourite of H.

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<sup>43</sup> Appendix D, case of H, p.332.

<sup>44</sup> From the original case files sent to this study. Case of H, Appendix D, p.332.

The officer told R that H had been accused of CSA. The officer suggested R was a victim, as he was H's favourite, H would repair his bicycle for him, but that perhaps R was not his type, maybe he preferred blue-eyed blond haired boys.

R denied this. The police repeated that there was something that R was not telling them. H made a statement to the contrary, that nothing had ever happened. This is evidenced in a witness statement made after H's conviction in 2003 to support his grounds of appeal. He continued that:

*The worst kind of treatment that anyone would have got was a box round the ears. X got compo (compensation) and somebody suffered to make that possible. Young people were abused by whom I don't know but H was alright for me.*

#### **(v) Problems arising from police interviewing techniques**

The interview technique employed above is not only designed to lead the witness to make specific allegations, but also the repetition of the same leading question shows the tenacity of the interviewing officer to obtain a positive finding of abuse. It has been suggested that repetition within and between interviews is a potentially suggestive interviewing technique, on the grounds that repetition can sometimes constitute a form of negative feedback indicating to the interviewee that previous answers to a question are unacceptable.<sup>45</sup>

It has been shown that accuracy of recall of interviewee reporting is reduced where choice questions, rather than open ended questions, are used.<sup>46</sup> It is accepted that there will be occasions when leading questions may be inevitable, particularly in the non-contentious context e.g., asking for the name, address and age of the interviewee. Sometimes a question cannot be framed in any way other than a leading question if it is a relevant matter in dispute. However, given the gravity of the allegations the police were following up, biased questioning techniques risked generating false charges against the accused.

Interviewee R, above, had denied that H had abused him, but the police were insistent that there was something he was not telling them. This is known as the 'asked and answered' technique.<sup>47</sup> This is where the interviewee has responded to a question that s/he has unambiguously answered in the immediately preceding part of the interview. This should be

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<sup>45</sup> N Schreiber, *et al*, 'Suggestive interviewing in the McMartin Preschool and Kelly Michaels day-care abuse cases: a case study', *Social Influence*, 2006 1, (1), p.22.

<sup>46</sup> *Ibid*, p.20.

<sup>47</sup> *Ibid*, p.28.

contrasted with simple repetition of a question that has not yet been answered. The aim of the former technique is to suggest that the firm answer (in this context, a denial of being a victim or a favourite) is somehow inadequate or wrong.<sup>48</sup> The interviewee is also being led into thinking that he was a victim (of child abuse) by inference, because he was a favourite of H. This technique has been categorised as ‘introducing information’ that was not previously offered by the interviewee.<sup>49</sup> It has been suggested that a witness with no stake in the outcome of an inquiry may not be susceptible to answering in the way the interviewer wishes, evidence that would be favourable for a prosecution. However, even a witness who intends to be fair and honest, may, it was stated by Beck J in *Maves v Grand Trunk Pacific Rail Co*:

*...due to a lack of education and exactness of knowledge of the precise meaning of words or appreciation at the moment of their precise meaning, or of alertness to see what is implied in the question requires modification, honestly assent to a leading question which fails to express his real meaning, which he would have completely expressed if he were allowed to do so in his own words.*<sup>50</sup>

The judge also offered other reasons for acquiescence: suggestibility, inexperience and human laziness.<sup>51</sup> Witnesses may also be psychologically inclined to agree with a police officer during an investigation or counsel in the courtroom during a trial, on the basis that such professionals would not assert something unless s/he believed it had occurred.<sup>52</sup> In either context, interviewees may also be nervous and prefer to give a definite and inaccurate answer than be seen to faltering or foolish.<sup>53</sup>

Leading questions can have a negative impact on the fairness of proceedings for defendants. Research on leading questions has indicated that when one half of the subjects had heard biased questions about a defendant which implicated him to a greater degree of seriousness for a violent offence and another half heard unbiased questions, 41 per cent of the subjects who heard the questions returned a guilty verdict, compared with 22 per cent of subjects who heard the unbiased questions.<sup>54</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid, p.29.

<sup>50</sup> (1913) 14 D.L.R.

<sup>51</sup> *Maves* supra.

<sup>52</sup> A Keane and R Fortson, ‘Leading questions – a critical analysis’ [2011, 4] Crim L R, p. 284.

<sup>53</sup> Ibid.

<sup>54</sup> D Kasprzyk, D E Montano and E F Loftus ‘Effect of Leading Questions on Jurors’ Verdicts’ (1975-76) 16 *Jurimetrics J.*, p.48.

Criticism over the possible coaching of prosecution witnesses and complainants could be remedied by introducing rules on how the police question them, in the same way that there are rules for controlling the way witnesses may be questioned in the courtroom.

The duty of both prosecution and defence barristers is to refrain from distorting the accounts of their own witnesses when they give their evidence-in-chief. As Keane puts it, the party calling the witness may be sorely tempted to put words into the witness' mouth, thus explaining what he wants him to say.<sup>55</sup> Evidence which is adduced by asking leading questions is inadmissible, and the weight to be attached to it may be reduced. Leading questions are phrased in such a way as to suggest the answer sought. Keane gives the context of questioning in a trial of assault in which two types of question could be asked, the former where the prosecution asks his witness: *Did X hit you in the face with his fist?* (leading), and the latter which is the proper procedure: *Did X do anything to you?* Followed up with, if the witness' reply is affirmative: *Where did X hit you? How did he hit you?* At each stage the witness is being controlled so that he answers the relevant question without being manipulated or allowed to be side tracked on irrelevant issues. The opposing side is then entitled to cross-examine this witness in a leading manner as set out in *Parkin v Moon*.<sup>56</sup> Courtroom procedures, therefore, are a means of safeguarding the contamination of testimony by questioners, but paradoxically, the same cannot be said for police questioning procedures which will produce the very first evidence that will be elicited by the prosecution at trial in the same witness' oral testimony. If the primary evidence is already flawed by procedure, this can therefore have a knock-on effect on the value of the elicited oral testimony in the courtroom. The very first encounter of the witness with the police sometimes may not even be on record.

Simple measures can be taken to avoid biased questioning of witnesses during their examinations-in-chief and re-examinations and the same safeguards can be applied to police investigations, namely, by using interrogatives. These questions are brief and give interviewees ownership of the answers: 'who' 'when' 'why' 'where' 'how' 'describe' and 'explain'.<sup>57</sup> Once the interviewee has supplied answers, then the tactic may change to more exploratory, closed questioning but without supplying information not already narrated by the witness. Alternatively, the interviewer can use cognitive interviewing techniques, which also give the interviewee ownership of his narrative.

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<sup>55</sup> A Keane, *Modern Law of Evidence* (10th edn OUP 2014), p.170.

<sup>56</sup> (1836) 7 C & P 408.

<sup>57</sup> Fn 52, Keane and Fortson: op cit, p.287.

The literature on police interviewing techniques in the UK has tended to focus on how they affect interviews with suspects due to prior concerns about police eliciting false confessions of suspects under duress. In 1981, the Royal Commission on Criminal Procedure recommended systematic reform of the criminal investigative process to strike a balance between the powers and duties of the police and the rights and duties of suspects.<sup>58</sup> As a result of the Commission's Report, the Police and Criminal Evidence Act (PACE) was passed in 1984. Prior to the passing of PACE, any unrecorded interrogations of suspects could be criticised for masking the interrogation techniques of the police and the kind of inducements or threats made to the suspect.

Prior research supports the theory that suggestible witnesses can succumb to police psychological tactics. They can be led into making allegations. The research examined the kind of pressures which might affect the reliability of what a witness says. Suggestibility relates to the tendency of people to give in to leading questions and interrogative pressures.

Research suggests that the potentially distorting influence of leading questioning is likely to be heightened when the questioner is perceived as a figure of authority (such as a barrister), when the subject experiences a high level of stress (such as that often experienced by witnesses in court), and when suggestions are subtly embedded in questions (as they frequently are during cross-examination).<sup>59</sup>

Ellison and Wheatcroft's own study of mock witnesses tallied with prior research of Gudjonsson<sup>60</sup> in suggesting that witnesses will not admit to the fallibility of their memories and are therefore susceptible to suggestion in interrogative contexts. In their study, only 17 per cent of witnesses would reply in a cross-examination that they had no recollection of an incident or did not have an answer.<sup>61</sup>

There are also problems with witness networking, which is permitted even in the 2009 Handbook. If not done carefully, the validity of the witness statements may be questioned.

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<sup>58</sup> D Brown, Home Office Research and Statistics Directorate 1997, Research Findings no.49, 'PACE Ten Years on - A Review of Research', p.1.

<sup>59</sup> A Memon, *et al* 'The Cognitive Interview: A meta-analytic review and study space analysis of the past 25 years' Royal Holloway College, University of London, (2010), p. 31. Also, *Psychology Public Policy and Law* (2010) vol 16, iss 4, Publisher: American Psychological Association, pp.340-372.

<sup>60</sup> G Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (Chichester: John Wiley, 1992.)

<sup>61</sup> L Ellison and J Wheatcroft, 'Could You Ask me that in a Different Way Please?' Exploring the Impact of Courtroom Questioning and Witness Familiarisation on Adult Witness Accuracy' [2010] *Crim L R*, p.830.



The updated version of the Handbook allows networking where registers and records are not available to locate witnesses:

*Although the enquiry team might ask witnesses about the whereabouts of other potential witnesses, they should discourage them from speaking to other witnesses on behalf of the police.<sup>62</sup>*

As long as the police are still able to interview witnesses as they see fit, the apparent corroborative value of multiple allegations, obtained by the dip sampling method, can be cast into doubt where they fail to record the interview.

Mark Merett, a former resident of a South Wales care home gave evidence to the Home Affairs Select Committee which was asked to investigate the issues regarding ‘cold-calling’ police investigatory methods.<sup>63</sup> The evidence reveals how the police attempted to lead Merett into making allegations similar to those already made by some of his peers:

*‘I was interviewed by South Wales Police on three occasions and during these interviews I was amazed that the police openly named suspects who were known to me and they confirmed that these suspects had been named by other former residents. Even though I made the police aware of my medical condition (I am epileptic), they continued to pressurise me into making a complaint, which I did not do. I found the whole experience very distressing and I felt that I was being bullied by the police into making a complaint.*

*I was horrified when I was asked during the interview, “Did Mr B touch you up? did he touch your penis? Other people have complained that he did.”*

*At this moment I was appalled and explained that nothing of that nature ever went on at the school. The police pointed out that they had been in touch with other former residents who had made complaints. After hours of questioning, I still maintained that nothing ever happened to me, which is the truth.’*

The interrogation style that was used on the interviewee is suggestive and is known as co-witness information, which involves telling a child or adult witness what has supposedly already been said or observed. It is a highly influential technique, which creates pressure to conform to what other witnesses are supposed to have said and induce stereotypes that

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<sup>62</sup> NPIA (2009), p.168.

<sup>63</sup> HASC Report, (2001-02), vol II, Memorandum 40.

influence responses to other questions.<sup>64</sup> In this particular case, this interviewee did not yield to the suggestive questions, even after hours of questioning. However, given that certain residents in institutional care were psychologically vulnerable, they were at risk of being led to make unreliable statements<sup>65</sup> whenever pressurising interviewing strategies were employed.

There are a number of contexts in which vulnerability is found (Merrett mentions his medical condition, epilepsy, which could be classified as a vulnerability): mental disorder, (such as mental illness, learning disabilities, personality disorder), abnormal mental state - anxiety, mood disturbance, phobias, bereavement, intoxication, withdrawal from drugs or alcohol), intellectual functioning (borderline IQ scores) and personality - suggestibility, compliance and acquiescence. Suspects are as vulnerable to suggestible interrogations as prosecution witnesses. Gudjonsson reviewed 34 serious crimes convictions from 1989-2009: 27 for murder, 1 attempted murder, 1 conspiracy to rob and 1 sexual assault.

The Court of Appeal heard psychological/psychiatric evidence in 23 cases, (68%); the convictions were overturned mainly on the basis of the psychological vulnerability of the defendants e.g., susceptibility to false confessions. In one case, there was evidence of police/procedural improprieties; ten other cases (29%) had been tainted by police/procedural impropriety and these convictions had been overturned. This research has helped to inform and improve the police interviewing process in the UK to identify vulnerable interviewees, but more work needs to be done.<sup>66</sup>

#### **(vi) Repeat interviewing**

Concern over police interviewing tactics surfaced after the Court of Appeal had decided to quash Engin Rahip's conviction for the murder of a policeman during the Tottenham Riots in 1985. Rahip was aged 19 at the time of his arrest; he had learning difficulties and was illiterate. He had been repeatedly questioned by police over the murder: over five days, on 10 separate occasions, lasting over 14 hours. There was also no solicitor present.<sup>67</sup> The appeal was based on suggestibility tests which uncovered a striking inability to cope with

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<sup>64</sup> N Schreiber *et al*, 'Suggestive interviewing in the McMartin Preschool and Kelly Michaels day care abuse cases: A Case Study', *Social Influence*, 2006 1, (1), p.22.

<sup>65</sup> G Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' 2010, *Legal and Criminal Psychology*, vol 15, iss 2, p.167 and p.161.

<sup>66</sup> *Ibid* Gudjonsson, p.170.

<sup>67</sup> J Pearse, G Gudjonsson, I C H Clare and S Rutter, 'Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession' (1998) *Journal of Community and Applied Social Psychology*, vol 8, p.3.

interrogative pressure.<sup>68</sup> These findings, together with confirmation of other psychological vulnerabilities, led to the Appeal Court quashing the conviction on the grounds that it was unsafe and unsatisfactory.<sup>69</sup> Suggestibility is relevant where the interviewee is placed under some pressure by the police by way of either leading questions or negative feedback.<sup>70</sup>

As regards the effects of repeat questioning on interviewees (to which Rahip had been subjected), Memon asks what kind of consequence it has whether or not the interviewee was asked leading questions. There is a lack of sufficient data on witnesses who are interviewed following lengthy delays and the effects of repeated interviews.

The ways in which the police contacted potential witnesses, by letter drops and through direct questioning, demonstrated that they were actively seeking complainants of child sexual abuse. Furthermore, once they had found potential witnesses, the 2002 version of the ACPO Handbook permitted police operatives to make repeated visits to the complainant.<sup>71</sup>

#### **(vii) Comparing police interviewing techniques with children and adults**

Prior research on interviewing potential crime victims indicates how susceptible interviewees are to having their narrative constructed by the interviewer and thus having their evidence contaminated by the interview process. This susceptibility applies whether the interviewee is an adult or a child. Garven and Wood analysed transcripts from the simulated scenario of the McMartin Preschool case.<sup>72</sup>

In the 1980s, seven teachers from McMartin Preschool, California, US, were accused of using rituals to sexually abuse children over a ten year period. It was one of the longest and most expensive trials in US history, spanning from the early 1980s and concluding only in the early 1990s. All charges were dropped against five of the teachers, but two remaining defendants Peggy McMartin Buckey and her son, Raymond were tried, with the former being acquitted of all charges and the latter being partially acquitted. Juries in two separate trials failed to reach verdicts on the remaining counts against him and prosecutors dropped all charges against him in 1990.<sup>73</sup>

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<sup>68</sup> *R v Engin Rahip and Ors* [1988] EWCA Crim J1213-5.

<sup>69</sup> T Brain, *A History of British Policing in England and Wales from 1974*, (OUP 2010), pp.185-186.

<sup>70</sup> Op cit fn 58.

<sup>71</sup> ACPO Handbook, (2002).

<sup>72</sup> S Garven, S. *et al*, 'More Than Suggestion: The Effect of Interviewing Techniques from the McMartin Preschool Case', *Journal of Applied Psychology*, 1998, vol 83, no 3, pp.347-359.

<sup>73</sup> Fn 64, Schreiber: op cit pp. 17-18.

In the US it is permitted to canvas jurors *post*-trial about their verdict. After this trial, the jurors criticised the several hundred investigative interviews conducted by the Los Angeles social service agency, (acting for the prosecutor's office) as being leading.<sup>74</sup> However, research could not be carried out to affirm this until 1997. Researchers Garven *et al* identified six problematic techniques in the original McMMartin interviews:<sup>75</sup>

- Suggestive questioning, which involves introducing new information into an interview when the interviewee has not provided the information in the same interview, e.g., one of the McMMartin scripts shows an interviewer asking a child whether the child had seen the naked pictures (the information about the naked pictures had not been supplied by the child). This tactic is evident from the papers volunteered for this study in the case of H where the police officer suggested to R that he was H's 'favourite'; as he would repair bicycles for him, therefore H must have sexually abused R. At minimum, this method risks diminishing the accuracy of any statement that R would give. Prior research by Loftus *et al*<sup>76</sup> suggests that adults are susceptible to suggestive questions, although this affects children more so.<sup>77</sup>
- 'Other people'.<sup>78</sup> this is where the child has been told that the interviewer has already heard from another person about the topic of the interview. In one McMMartin script, the interviewer told the child that everyone s/he had seen in a picture had divulged 'a whole load of yuck secrets from your old school.' This technique is also found in the H case: the police said that others had been abused by H; also the 'others' had said that R was the favourite of H. This technique is designed to pressurise the interviewee into modifying his behaviour so that it is consistent with others.
- Positive and negative consequences: not to be confused with 'yes' and 'no' answers given by the interviewer. This technique is designed to induce the child into making a statement by praising the personal qualities of the statement-maker, e.g., he is being or expected to be helpful/clever. Negative consequences were also found in one McMMartin interview:<sup>79</sup>  
  
'Are you going to be stupid or are you going to be smart and help us here?' This technique is also called reward and punishment. As far as interviews with adults are

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<sup>74</sup> Ibid, p.18.

<sup>75</sup> Fn 72, Garven: op cit, p.351.

<sup>76</sup> E Loftus, 'Leading Questions and the Eyewitness Report' *Cognitive Psychology* (1975), 7, pp.560-572.

<sup>77</sup> J L Cunningham, 'Contribution to the history of psychology: XLVI. The pioneer work of Alfred Binet on children as eyewitnesses'. *Psychological Reports*, (1988) 62, 271-277; G S Goodman and R S Reed, 'Age differences in eyewitness testimony' *Law and Human Behavior*, (1986) 10, pp.317-332.

<sup>78</sup> Fn 72, Garven: op cit, p.349.

<sup>79</sup> Ibid, p.350.

concerned, incentives for suspects could be the promise of a more lenient sentence for a guilty plea, or for complainants, it could be being informed during the interview of the prospect of compensation being for making allegations against the accused.

- Asked and answered questions.<sup>80</sup> in this instance, the interviewer is trying to force the interviewee to make a choice. E.g., a child denies remembering naked pictures, and repeatedly denies this when pressed, then the interviewer asserts that he *should* (sense of obligation) think about that for a while, as his memory will recall it. This is repetition combined with suggestive questioning which may cause a change of response.
- Inviting speculation.<sup>81</sup> the interviewee is asked to give an opinion or speculate about past events or view a simulated scenario. In one McMartin interview, a child was shown a doll and asked whether s/he thought it as possible that he had touched the doll, (which represented the victim) and the child is asked where X would have touched it. This simulation is akin to the ‘other people said’ tactic, above.

Garven and Wood examined the effect of two of the above techniques by interviewing sixty-six children of preschool age: social incentive and social control. The children were introduced to a graduate school visitor who, *inter alia*, was briefed to wear an unusual hat, make comments about it to them, read them a story for twenty minutes and place story book themed stickers on the backs of their hands afterwards. One week later, the children were interviewed about this visitor. True and false facts were told to them by the interviewer. It was found that children were twice as susceptible to making allegations of wrongdoing by the visitor in the social incentive condition as those where it had been implied by the interviewer in the suggestive control situation. Children in the social incentive condition also became more acquiescent as the interview proceeded.

Thirty-six of these children made 58% false allegations where ‘McMartin’ interviewing techniques had been used, compared with 17% for thirty children interviewed with simple suggestive questions. The McMartin techniques were found to be more effective at eliciting false allegations than simple suggestive questions.<sup>82</sup>

As a result of this empirical research into interviewing techniques, guidelines were issued in child interviewing techniques which recommended open-ended questions and advised

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid, p.351.

<sup>82</sup> Ibid, p.349.

interviewers to refrain from using suggestive techniques that introduced outside information or the negative characterisation of the alleged perpetrator.

Schreiber *et al* have also expanded research on interviewing techniques with children by analysing real transcripts of the evidence of child witnesses from the McMartin Preschool case (14 transcripts), as well as from the case of Kelly Michaels who had been convicted of sexually abusing 20 school children in New Jersey (20 transcripts); she was subsequently released on appeal in 1993. These transcripts were then compared with those conducted by child protection services (CPS) from other cases in the Western US (20 transcripts).<sup>83</sup> In both the McMartin and Michaels cases, the researchers found suggestive questioning techniques, though there was a variation between the two; whereas with the CPS cases only a few contained inappropriate suggestive techniques and this was with younger children.

It has been found that cognitive interviewing (CI) techniques are the best for eliciting the best and most evidence from interviewees. Whilst analysis of the McMartin interviews with children shed light on the quality of evidence elicited from children, Compo, Gregory and Fisher conducted a field study of real-life police interviews with adults.<sup>84</sup> The researchers listened to 26 interviews that South Florida police officers had conducted with witnesses, (57%), victims (35%) and witnesses-turned-suspects (7%) in a variety of crime cases.<sup>85</sup> They aimed to find out whether the police were putting into practice the recommendation by freely available police manuals to use cognitive interview skills. Cognitive skills comprise the following positive techniques: relaxing the interviewee at the beginning of the interview, telling him what is expected of him, i.e., the witness talks and the interviewer listens with long pauses before questioning is continued if necessary; allowing the witness to take time to answer; context reinstatement (getting the witness to visualise mentally to help his recollection of events); asking him to provide as detailed a response as possible, and allowing the witness to be non-committal by the interviewer accepting the answer 'don't know.' Negative techniques are negative rapport building, such as insulting or intimidating the witness distractions such as a noisy place where the interview takes place, incompatible questioning not in line with witness' current train of thought, suggestive questioning (introducing information not previously provided by the witness), multiple questions (several in one sentence) and complex questions (those that are incomprehensible to the witness).

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<sup>83</sup> Fn 64, Schreiber: *op cit*, p.37.

<sup>84</sup> N S Compo, A H Gregory and R Fisher, 'Interviewing behaviors in police investigators: a field study of a current US sample' (2010), *Psychology, Crime & Law*, May 2012, vol 18, no 4, Routledge Group, pp.359-375.

<sup>85</sup> *Ibid*, p.364.

Sixty-five per cent of interviewers had used some form of rapport building, 8% context reinstatement, 6% of interviewees were allowed to take their time, 4% of interviewers expressed their explicit expectations of the interview, but only 1% were allowed the 'don't know' answer option. Negative techniques were preponderant. Suggestive/leading questions were asked an average of 5.87 times per witness interview and they were interrupted on average 5.67 times. 87% of all interviews contained leading or suggestive questions, 80% interruptions, 44% negative rapport building and 26% distractions.

The implications of the findings are that police officers were not following the manuals which advise them to use generally recommended interviewing principles, such as the open-ended techniques found in cognitive interviewing and which also advise them on best evidence witness interviewing.<sup>86</sup>

It was found that the police rarely engaged in 'positive' interviewing techniques that comprise cognitive interviewing. The police used many 'negative' techniques such as interrupting the witness or asking them questions that were too complex. Most questions were closed and therefore restricted the interviewee's authentic narrative.

UK police forces have received improved guidelines on how to conduct interviews, whether generically, by attending courses on cognitive interview methods the PEACE system (Planning and Preparation, Engage and Explain, Account, Closure and Evaluation has been used since the 1990s)<sup>87</sup> or by the issuing of national guidance in structured interviews<sup>88</sup> including child abuse investigations. Since 2009, the PEACE system has become part of the Professionalising Investigation Programme (PIP) where the most basic level, Level 1 has to be taught for police investigators interviewing witnesses and victims in 'volume crimes' e.g., robbery. Level 2 is designed for interviewing witnesses in serious and complex investigations, e.g., institutional child abuse. It has not been easy for police to change from the structured interview approach (pre-determined questions) to CI, which involves listening to the free narrative of the interviewee then forming questions on the information s/he has provided.<sup>89</sup> This observation has been borne out in Compo's *et al* analysis of recordings of real interviews police conducted with witnesses, victims and suspects in the US where the

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<sup>86</sup> This US study (larger than the 1987 US sample by Fisher *et al*) was consistent with UK findings (Clarke and Milne 2001, Clifford and George 1996), and Canadian findings (Wright and Alison 2004) as well as the prior US research.

<sup>87</sup> National Policing Improvement Agency, *Briefing Paper, National Investigative Interviewing Strategy*, 2009 p.7.

<sup>88</sup> Home Office and Department of Health, *Achieving best Evidence, Guidance on interviewing victims and witnesses and guidance on using special measures*, March 2011.

<sup>89</sup> C Dando, R Wilcock, C Behnke and R Milne, 'Modifying the cognitive interview: countenancing forensic application by enhancing practicability' (2011) *Psychology, Crime, & Law*, 7:6, p.491.

police were supposed to use CI techniques for those particular cases but frequently failed to do so.<sup>90</sup>

In the UK, the ACPO Handbooks also now offer better guidance on what should be excluded from an interview e.g. mention of inducements. Methods of interviewing were not discussed in the 2002 Handbook, and the only way one can discern what kind of interviewing took place (most interviews would not have been electronically recorded at that time) is by looking at police witness statements to see if there is any indication as to how the witnesses were questioned and responded, or in the case of H (volunteered for this study), by finding out from other witnesses themselves how the police questioned them. Memon's meta-analysis of the available literature on interviewing skills indicate that only a few studies have used police officers and civilians as witnesses in real-life contexts, and only a small number of studies have used police or professional interviewers (real-life) to conduct the cognitive interviews in their studies, though there does appear to be an increase in the study of samples from vulnerable populations – children and older adults – since the meta-analysis in 1999 by Köhnken *et al* using a modified form of cognitive interviewing.<sup>91</sup>

However, as the literature on empirical studies of police interviews shows, the quality of interviewee evidence is also affected by the willingness of interviewers to adhere to the advice contained therein. If police interviews were mandatorily recorded, the contents of the recordings could be independently monitored to offer feedback to interviewers and further training, if necessary. Cognitive interviewing skills are still a valuable way of eliciting evidence from witnesses: they produce greater recall for adults and the elderly than 'standard' interviews which simply involve asking 'Tell me what happened' followed by the interviewer's questions based on the narrative, and it elicits fewer incorrect responses from children, though arguably children in past surveys were found to find answering cognitive questions difficult and this gave rise to calls for modifications to the original CI model.<sup>92</sup>

They are further enhanced by instructing interviewees not to guess or confabulate details but state that they did not know instead.<sup>93</sup> Although the benefits of cognitive interviewing decrease over time, which is obviously pertinent to historic CSA cases, 'a rather substantial

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<sup>90</sup> Fn 84, Compo: op cit, p.359.

<sup>91</sup> Fn 59, Memon, op cit, p.26.

<sup>92</sup> Ibid, pp.24 and 29.

<sup>93</sup> Ibid, p.27.



advantage for the cognitive interviewing remains in terms of correct details (recall) following the most extreme delay'.<sup>94</sup>

There are cognitive methods which allow interviewees of all ages to assist memory retrieval: one of the best is mental context reinstatement (MCR). Hershkowitz, Orbach, Lamb, Sternberg & Horowitz interviewed alleged victims (aged 4 to 13 years) of abuse using the National Institute of Child Health and Human Development protocol with or without MCR. They found the MCR resulted in proportionally more details when it was followed by an open-ended invitation to elaborate.<sup>95</sup> The MCR instruction to report everything is more effective than other cognitive interviewing techniques for all ages of interviewee whether adults or children with an age-range of 8-9 years and 5-6.<sup>96</sup>

One CI method that led to less confabulation and which was generated by the interviewee was mental context reinstatement by means of inviting him/her to draw a detailed sketch of what they saw. This enabled the interviewee to generate their own cues rather than relying on the interviewer to direct them towards relevant cues.<sup>97</sup>

Both ACPO Handbooks, 2002<sup>98</sup> and 2009<sup>99</sup> still lack model questioning techniques to be used when interviewing prospective prosecution complainants and witnesses. The witnesses and complainants in HCSA cases were, and can still be, interviewed, in the manner the police see fit. In the research case study of H, the locus of interviewing a former care home resident - R - in a HCSA investigation was his own home, not a police interviewing suite. The police made repeat visits, and persisted in so doing as they expected that he would eventually disclose abuse allegations if pressurised in this way. The police asked the witness leading questions: the name of their suspect and the specifics of prior allegations. There was no solicitor present to monitor what was said between the police and the interviewee.

Until the PACE was passed in 1984, there was a lack of regulation of the conduct of police interviewing process of suspects. Wolchover and Heaton-Armstrong argue that there are strong reasons for introducing the mandatory recording of interviews with complainants,<sup>100</sup> apart from the fact that police were poorly trained in interviewing suspects and witnesses.

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<sup>94</sup> Ibid, p.26.

<sup>95</sup> M E Lamb *et al*, Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol, *Child Abuse Negl.* 2007; 31 (11-12): pp.1201-1231.

<sup>96</sup> Fn 59, Memon, *The Cognitive Interview*, p.31

<sup>97</sup> Ibid.

<sup>98</sup> ACPO Handbook, (2002).

<sup>99</sup> National Policing Improvement Agency, *Guidance on Investigating Child Abuse and Safeguarding Children*, (2nd edn, 2009)

<sup>100</sup> Fn 34, Wolchover and Heaton-Armstrong: *op cit*, pp.222-223.

Suspects, prior to creation of the PACE codes were interrogated in custody in potentially coercive circumstances. These conditions carried the risk that suspects had made confessions under duress which were actually false, or because they were fabricated by the police.

PACE ensured that, when suspects were interrogated, any questions put to them were to be recorded on audiotape. PACE also protected the police from criticism that they could be coercing the suspect, leading him or offering him inducements. It also prevents the doctoring of the suspect's out-of-court statement, because the audiotapes are timed. The period of the suspect's detention, questioning and the names and rank of the investigating and custodial officers are logged.

Code E of PACE 1984 deals with the mandatory tape recording of interviews with suspects in the police station. Code F deals with the visual recording with sound of interviews with suspects. Under Code F, there is no statutory requirement on police officers to record interviews visually. However, the contents of this code should be considered if an interviewing officer decides to make a visual recording with sound of an interview with a suspect. There are few reasons for not changing the present system of interviewing witnesses by recording what they say under PACE conditions. There may be obstacles, such as a lack of chronology on the part of the witness' narrative; or perhaps the speaker will have a strong dialect or not be a fluent speaker of the home language. However, these problems can be remedied by the police or the Crown Prosecution Service making a résumé of the chronology along with creating a transcription of the evidence.

A Royal Commission on Criminal Justice appraised the efficacy of the PACE provisions in 1991 following several high-profile cases of miscarriage of justice.<sup>101</sup> Under PACE, police notes were to be taken simultaneously with the interview of the suspect; subsequently, the comprehensive audio-taping of interviews was rolled out. The Royal Commission found that PACE had led to a reduction in the frequency of interviews and use of unacceptable interview tactics, but some forms of questioning still led to concern about the potential for false confessions and types of person susceptible to making false confessions.<sup>102</sup> Another identified problem was the lack of supervision and monitoring of interviews, even though supervisors of interview tapes were readily available. Interviews did not always take place at the police station and these were therefore unregulated.

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<sup>101</sup> Fn 58, Brown, op cit, p.1.

<sup>102</sup> Ibid, p.3.

More positively, there was greater supervision in special squads and major enquiries and a reduction of disputes in court about what was said in a taped interview. The Crown Prosecution Service was sometimes found to be at fault for producing poor transcriptions to prepare and conduct the prosecution, which led to civilian summarisers being used.

Nowadays, The Crown Prosecution (CPS) itself has a code of practice governing the editing of witness statements so as to prevent evidence from becoming tainted. Editing may be permitted in several circumstances. The CPS may be asked to make up a composite statement where the witness was interviewed under section 9 of the Criminal Justice Act 1967. Where the CPS is combining statements,<sup>103</sup> it has to ensure that the witness signs the new statement. The drafting of composite statements under the Practice Direction must be undertaken by the CPS, not the police. The problem under the present witness-taking system, of course, is that the CPS are handling witness statements which have previously been created by the police, therefore, the CPS may at times be editing statements elicited under the opaque methods used to interview the witness. This is, therefore, not a failsafe method of preventing evidence tampering.

There are several reasons for concern about the proper recording and interviewing skills and production of hard copies of witness statements. If not properly monitored and applied, defendants in HCSA are at risk of being denied a fair trial. This encumbers the judiciary with the task of working out whether allegations have been constructed by the police and to decide what weight the jury should attach to contaminated evidence, but they may not be able to detect whether police contamination has occurred. Electronic recording of interviews would cause fewer errors when the witness statements were typed up and there would therefore be less querying of clerically generated inconsistencies. Moreover, the interviews could form the evidence-in-chief of prosecution witnesses, meaning that they would not appear in court until the cross-examination stage, which has already become permitted for trials governed by section 17 of the Youth Justice and Criminal Evidence Act 1999, which allows eligible vulnerable and intimidated witnesses to be video recorded.

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<sup>103</sup> See the redaction of composite witness statements by the prosecution— Criminal Practice Directions 2015, Division V Evidence 16 A.1, p.51.

**(viii) Collusion issues: accidental and deliberate collusion**

Interviewees solicited under the dip sampling process can be put into contact with each other via witness networking, websites and e-mails.<sup>104</sup> The ACPO Handbook allows the police to seek out possible witnesses in this manner. Another questionable method is the use of a standard letter of inquiry, to a sample of former residents to seek information. The 2002 Handbook pointed out that when using the media, the police should protect the integrity of the investigation and avoid prejudicing it.<sup>105</sup> Whilst the intention might have been to help victims to recall their accounts better by the pooling of information and to allow them to support each other, putting former care residents into contact with each other also invites the criticism that witnesses can collude with each other. This problem calls into question the validity and safety of the acquisition and use of such evidence. Whilst cognitive interviewing techniques are now recommended to investigating police officers in the UK,<sup>106</sup> evidence elicited by cognitive interviewing can still be tainted by accidental or non-accidental contamination where witnesses have been allowed to come into contact with each other. There are also complications with the use of mental context reinstatement (an element of cognitive interviewing). It is a time-consuming process, as it necessitates numerous pauses and a slow, deliberate style of presentation, with the officer providing the retrieval cues. As officers often interview witnesses of the same crime, they may subsume such information these witnesses provide into their MRC instructions, with the possibility of inadvertently introducing leading/suggestive retrieval cues during the MRC procedure.<sup>107</sup>

*Examples of police putting pressure on witnesses to make allegations of HCSA*

Some of the dangers of the dip sampling method were exemplified by solicitor Chris Saltrese at the HASC session.<sup>108</sup> In April 1996 Terence Hoskin was convicted of physically and sexually abusing former care home residents of St Aidan's, Community Home, where he had been headmaster from 1974 to 1982.

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<sup>104</sup> ACPO Handbook, (2002), p.26.

<sup>105</sup> Ibid.

<sup>106</sup> C Dando, *et al*, 'The Cognitive Interview: The Efficacy of a Modified Mental Reinstatement of Context Procedure for Frontline Officers' *Applied Cognitive Psychology* 23, (2009), p.138.

<sup>107</sup> Ibid, Dando *et al*, p.139.

<sup>108</sup> HASC Report, (2001-02), vol II, Memorandum 56.

*After studying the papers [for appeal] I formed the view that the allegations against Mr Hoskin had been fabricated. The unused statements (that is, those statements which are not relied upon by the prosecution to prove any count on the indictment) were littered with examples of police introducing to potential complainants information which was highly prejudicial to Mr Hoskin. ... the main complainant in the case alleged that he had been caned by Mr Hoskin on the bare backside after which Mr Hoskin had indecently assaulted him with the tip of the cane. A statement in the unused read, "I cannot remember Mr Hoskin touching me in an indecent manner or suggesting anything indecent to me whilst I was at St Aidan's". I traced the maker of this unused statement to HMP Liverpool where he provided me with a statement which included the following: "After such a long period of time I would not have been able to remember the name of the Headmaster or the individual names of houses without police prompting. Nor do I recall ever being caned on the bare backside. I remember the police asking if when caned by Mr Hoskin, did he ever touch me with the cane in an indecent manner, that is, did he ever put the cane between my buttocks or touch my genitals? I replied 'no' to this, jokingly asking the police would I get compensation if I said 'yes'. They replied along the lines of 'I suppose so'".*

*...Had the inmate decided to accept the invitation to make an allegation his statement would have read, "Mr Hoskin caned me on the bare backside and then put the cane between my buttocks etc". Once produced by the prosecution at trial this evidence (along with similar evidence gathered by police in a similar fashion) would appear compelling. The prosecution would present the allegations as being very similar and would, quite correctly, assert that there had been no collusion between complainants who had not been in contact with each other for more than 20 years. The jury in Hoskin, as in the great majority of multi-complainant care home trials, were faced with the question, "Why are 21 complainants alleging something very similar about the defendant?" Once collusion has been ruled out the only credible answer is that the defendant must in fact be guilty. There is very little a defendant's lawyers can do in this situation; to introduce unused statements in order to criticise police methodology is to run the risk that the jury are made aware of even more allegations against the defendant and it is a risk that most lawyers are not prepared to take. ... it should be recognised that it is extremely difficult for an officer to carry out such interviews without suggesting what the enquiry might be about.<sup>109</sup>*

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<sup>109</sup> Ibid.

Summers and Winship state that criminal cases in which there are multiple witnesses are commonplace, and in most cases there will be no argument that the statements of the witnesses are not their own accounts, as they will be wholly independent of one another, or, if not, statements will have been obtained soon enough after the event so as to negate any likelihood of cross-contamination.<sup>110</sup> However, there are instances when cross contamination can occur. For example, the witnesses may be known to each other or are from the same family. In the care homes sexual abuse context, the witnesses were often contemporaneously living in the same place. Once they are put together again, there may be deliberate collusion, or inadvertent contamination between the witnesses; or because the police have expressly permitted it, as stated in the ACPO Handbook 2002 on allowing witnesses to be put into contact with each other.<sup>111</sup> Contamination of the evidence is not only possible through witness networking, but also by the manner in which the police asked leading questions to residents of care homes subsequent to the making of a statement by the first complainant.

Webster concedes that the dip sampling method could yield genuine cases of historic CSA but warns about the inherent dangers of the method for the innocent:

*In cases where allegations are trawled, juries are not able to assess individual complaints on their own merits. The whole purpose of trawling is to try to prove that abuse has taken place not by finding supporting evidence but by multiplying the number of complaints against a particular suspect...<sup>112</sup>This method continues to be used because it works; it usually results in convictions, police forces have found a way of destroying the presumption of innocence and obscuring the weakness of individual complaints.*

#### **(ix) Contamination arising from other investigatory methods**

Contamination of evidence is not solely a problem encountered by eliciting complaints under the dip sampling method. As Wolchover and Heaton-Armstrong point out, for as long as police officers take down in writing (in their notebooks) witness statements, the content of the statement is likely to be influenced by the way in which the investigator perceives the case and receives and formulates the narrative.<sup>113</sup> They invariably exclude the questions,

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<sup>110</sup> Fn 16, Summers, M. and Winship: op cit, p.446.

<sup>111</sup> ACPO Handbook, (2002).

<sup>112</sup> Webster, R., 'End this cruel injustice' *The Observer* 10 December 2000.

<sup>113</sup> Fn 34, Wolchover and Heaton-Armstrong: op cit, pp.225-226.

which may be leading and suggestive, they can be highly selective and even quite inaccurate, and they may be seriously distorted versions of what the witness actually said.<sup>114</sup>

Accordingly, as the investigating officers control what is included in witness statements, attempts to use a statement to validate or discredit consistency ‘often degenerate into a farce’.<sup>115</sup> It may well be that the witness is a genuine victim of CSA, but a tactical defence lawyer will effectively present to the jury that there is no way of finding out this, where police constructed the case, thereby offering the defendant the benefit of the doubt. Equally, the police could have planted allegations that are false, but because of the recording methods they used, there is no way of finding out how the witness was interrogated and what was put to him.

#### **(x) Inducements**

*The issue of inducements contaminating police investigations of HCSA*

Readers of posters, websites and emails found out about child abuse investigations and compensation for making allegations of a sexual nature against staff at institutions. The police did not see a problem with seeking complainants by this means. One police force stated that while it (the mode of obtaining victims) may open the door to a false allegation, it is not an incitement *per se* to making a false allegation.<sup>116</sup>

The case studies of the two witnesses, Mr Merett and the witness R (in the case of H volunteered for this study), show that they did not succumb to police pressures<sup>117</sup> and/or inducements themselves. However, in the HASC 2002 session, Linzi McDonald, a partner solicitor at Kingsley Napley, suggested that the drafting of these letters provided a flawed basis for the investigation. She cited the David Jones case. The standard letter mentioned the subject of the police investigation:

*...really set up the problem because people know what is being investigated and what evidence the police are looking for. Certainly in my case we had evidence to suggest*

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<sup>114</sup> D Wolchover and A Heaton-Armstrong ‘A sounder system’ *The Independent* 16 April 1997.

<sup>115</sup> C Dyer, ‘Close loophole helping criminals, Brown urged’ *The Guardian* 7 May 2007.

<sup>116</sup> HASC Report, (2001-02), vol I, para 31.

<sup>117</sup> *Ibid*, vol II, Memorandum 40.

*that at least two, if not all of our complainants, were doing this for financial compensation.*<sup>118</sup>

McDonald submitted that there was a real danger in trawling for witness under the dip sampling method because inducements to interviewees had come to light:

*... We had defence witnesses willing to come forward and give evidence at our trial to the effect that complainants against Dave Jones had admitted to our witnesses that they had lied about the allegations of abuse in order to obtain financial compensation through the Criminal Injuries Compensation Scheme.*<sup>119</sup>

Birch and Taylor cite the Canadian Kaufman Report<sup>120</sup> which argues that myths and stereotypes, such as using the bad character of the inmates of care homes to rebut allegations of abuse, skew the investigative process, leading to unwarranted assumptions about whether or not abuse had occurred.<sup>121</sup> In terms of compensation pay-outs to complainants of child abuse under the Criminal Injuries Compensation Award scheme (about a third of complainants seek compensation overall), not all of them are successful, as CICA itself seeks corroboration of the complaints alleged; reasons for late disclosure and it will reduce or refuse a pay-out where the claimant has a substantial criminal record.<sup>122</sup> They also argue that the police may not be the only source about the possibility of CICA pay-outs, as the facts are freely available via the media, by publicity or by the complainant's own contact with solicitors.

The inducement factor – the availability of compensation from the CICB - will be examined in this chapter.

#### *Example of compensation being offered as an inducement*

Mark Merett gave the following evidence at the HASC:

*While being interviewed by the South Wales police, it was pointed out to me that other former residents would be receiving tens of thousands of pounds in compensation and*

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<sup>118</sup> Ibid, vol I, para 28.

<sup>119</sup> Ibid.

<sup>120</sup> F Kaufman (Judge), *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse* (2002). This review concluded that a government compensation scheme set up in Nova Scotia in the 1990s had failed to distinguish between genuine allegations of abuse and bogus claims.

<sup>121</sup> Fn 26, Birch and Taylor: op cit, p.849.

<sup>122</sup> Ibid, p.831.



*if I made a complaint I could be entitled to the same. I regarded this as a financial incentive. I still see some of my former school mates and they have confirmed that they have been offered money by the South Wales police in return for a complaint.*<sup>123</sup>

The ACPO must have accepted that investigations could be criticised in the way Merett had suggested. In April 2002, a prohibition was placed on police officers discussing compensation to interviewees.<sup>124</sup> The 2009 Handbook reiterates this prohibition:

*...criminal injuries compensation should not be discussed as there have been examples of the defence challenging complaints as being purely motivated by a desire for compensation.*<sup>125</sup>

The ACPO Handbook had been cognisant of the criticisms defence lawyers made about compensation being an inducement for the making of allegations.<sup>126</sup> In 2011, the CICA in answer to a question for this study<sup>127</sup> about the amount of compensation which had been awarded to HCSA claimants, from 1991 onwards) provided the following information:

*For applications made before 1 April 1996, the Scheme was based on the common law - cases were assessed in the same way personal injury claims were dealt with in the civil courts. In 1996, the system changed when the tariff of injuries was introduced. This is a list of fixed compensation payments for each injury.*

She was also able to obtain the *post*-1996 awards:

*[W]e do not have an award for rape or sexual abuse. We consider compensation under the terms of the Criminal Injuries Compensation Scheme (the Scheme), which is set by Parliament and pays awards based on the injuries someone sustains rather than the crime of which they were a victim. Where your request stated rape or sexual assault, I have based my search on awards paid for sexual offences (which are classed as an injury in the tariff of injuries). I can confirm from 1 April 1996 to date we have paid out £383,771,157 in awards*

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<sup>123</sup> HASC Report, (2002), para 36 vol I and Ev 74 vol II.

<sup>124</sup> ACPO Handbook, (2002), Appendix I, p.112.

<sup>125</sup> National Policing Improvement Agency, *Guidance on Investigating Child Abuse and Safeguarding Children*, (2nd edn 2009) para 8.6, p.178.

<sup>126</sup> ACPO Handbook, (2002), p.31.

<sup>127</sup> Enquiry of the CICA by email on 31 Jan 2011.

where the main award paid has been as a result of a sexual offence. This excludes any additional awards paid for pregnancy and sexually transmitted diseases directly attributable to the sexual offence.<sup>128</sup>

It is therefore difficult to compute awards given to claimants specifically in HCSA cases. What is known is that a law firm which processes CICA awards, Jordans, had been advertising in the magazine for prisoner inmates *Inside Time* from 2004-2009 with the following: ‘Compensation.’ ‘Were you in St William’s care home, Market Weighton?’ By 2010, one hundred former residents of St Williams had become clients of the law firm, claiming that they have been abused.<sup>129</sup> The police are therefore not the only source of knowledge about compensation, even though they have been criticised for inducing allegations by informing interviewees about their eligibility for CICA awards.

#### **(xi) Audio recording**

There has been prior concern over the way in which the police have contact with prosecution witnesses in sexual offence cases, not only in terms of the site of the interview and the interviewing techniques employed by the police as discussed, but also, the lack of mandatory reliable recording.

David Calvert-Smith QC (former Director of Public Prosecutions) at the HASC in 2002 agreed that doing so would avoid the risk of coaching or contamination of evidence; it would establish independently what was said between the police officer and the witness. He also encouraged the police to contact the DPP at an early stage of an investigation so that it could provide advice about the legal or evidential implications of issues arising during an investigation. This had been confirmed in the subsequently issued Home Office guidance on complex child abuse investigations, which stressed the importance of continuous advice and interaction between each agency throughout the investigation and any resulting prosecution.<sup>130</sup>

Audio taping of police interrogations of suspects is mandatory under the Police and Criminal Evidence Act 1984 (PACE). Wolchover and Heaton-Armstrong state that the wealth of

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<sup>128</sup> With thanks to Ms N. Girvan of CICA for supplying me with these data in her email dated 3 March 2011.

<sup>129</sup> D Rose, ‘The deputy head teacher falsely accused of child abuse and the ambulance-chasing lawyer who advertises for ‘victim’ in prisons’ *Daily Mail*, 1 Dec 2012.

<sup>130</sup> HASC Report, (2002), vol II, Memorandum 16.

protective formalities under PACE were designed to mitigate the adverse effects of the inherently coercive nature of custodial interrogation.<sup>131</sup> However, there is currently no requirement for the police to do likewise with prosecution witnesses. Not everyone agrees that tape recording prosecution witnesses should be mandatory. At the HASC, Peter Garsden, thought that it was a fallacy that false allegations existed in any significant numbers; that under-disclosure rather than exaggeration, is more common;<sup>132</sup> that extending taping would not be cost effective, and that complainants deserved better legal protection to spare them from the trauma of the trial process with the use of video links and pre-recorded evidence.<sup>133</sup> It has also been argued that audio and tape recording conversations with witnesses at the first instance may not always be practicable.

However, historic cases differ from police call-outs: the allegations which are made years later can and should be made by the complainant at the police station which is well equipped to record witnesses calling there. In the past, the police had been known to visit the homes of potential witnesses where the mode of interviewing them could not be scrutinised. Timothy Hackett, a solicitor who gave evidence to the HASC, believed that trawling led to unreliable evidence being obtained.

*...the police and the former resident are not tape recorded and frequently there are only limited notes on the conversation available. It would be open to any unscrupulous officer to suggest names to the residents (and) inadvertently, to give information which could help the potential complainant to identify the 'suspects' and therefore, again, could lead to false allegations.*<sup>134</sup>

The HASC 2002 recommended that interviews with complainants and significant witnesses should either be video recorded or mandatorily audio-taped.<sup>135</sup> Arguably, cases in which there have been dip sampling and witness interrogations which have not been audio or videotaped (usually both conditions are present in HCSA investigations), are inherently flawed. If one were to be able to hear or view what the police asked witnesses in a recording, one could at least discern whether there had been improper any questioning. Furthermore, it is often hard to detect whether there has been contamination because it may be unclear which interviewing method was applied.

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<sup>131</sup> Fn 34, Wolchover: op cit, p.222.

<sup>132</sup> HASC Report, (2002), vol II, Memorandum 25.

<sup>133</sup> Ibid Memorandum 25.

<sup>134</sup> HASC Report (2001-02), vol II, Ev 58.

<sup>135</sup> Ibid, vol I, para 45.

It may be argued that allowing the police to have a free rein on the questioning of complainants will enable them feel relaxed by asking them questions in an informal manner. However, any leading questions asked may result in a constructed, rather than free narrative. The comprehensive taping of interviews with complainants resolves this problem and was also suggested by the HASC in 2002:

*During this inquiry, we were given the impression that practices were gradually improving in this area. Professor Gudjonsson, a psychologist at Kings College London, cited the Independent Longcare Inquiry as one example. He said that the police arranged for potential victims of abuse to be assessed by clinical psychologists- including himself-to identify their vulnerabilities before they were interviewed. He explained that this approach enabled him to provide the police with advice about how to interview each witness, in the light of their vulnerabilities. The interviews were then conducted and recorded on video tape.*

*Detective Inspector Andrew Parker said that within his unit in the Metropolitan, first disclosures by witnesses and the substantive interview of the witness were recorded on audio tape, wherever possible.*

It would appear that the police will continue to apply different methods of recording and interviewing recent complaints disclosed by women rape complainants, children disclosing recent abuse (electronic recording) from adult HCSA complainants (manual). For this study the following question was put by email to Ms Ann Barnes, formerly a Police and Crime Commissioner for Kent:

*Electronic recording is now increasingly used for the interviewing of complainants of rape, children and other vulnerable people in sexual offence investigations. It is also a mandatory requirement when interviewing suspects under the Police and Criminal Evidence Act 1984. It is asked why (adult) complainants of historic child sexual abuse are still not being electronically recorded by statute to safeguard the integrity of the investigation and the right of the defendant to a fair trial despite the Home Affairs Select Committee's Recommendations to implement electronic recording in 2002?*

The Commissioner agreed to obtain a reply from Kent Police, but the question passed on was edited so as to read:

*I would be most interested to hear your views on the ways in which the police currently interview potential prosecution witnesses and victims of child abuse. Is this flawed?*

Ms Barnes replied:

*The police do a good job but I have taken an oath to not interfere with operational policing. It's a very complex area and I have asked the force to provide an outline of how they interview witnesses/victims. From my perspective, there are always improvements that can be made to the policing system. But they are regulated because if the Chief Constable makes a mistake then him/his team are accountable to me if they are not correctly/legally getting the information they need in the right way.<sup>136</sup>*

Kent Police responded to the question in its edited form:

*Response from Kent Police*

*The interviewing of children and vulnerable persons is a complex matter and the procedures used by all police forces to interview such persons are consistent with guidance published in 2007 by the Home office and Criminal Justice system in a document entitled - Achieving best evidence in Criminal Proceedings - Guidance on interviewing victims and witnesses and using special measures.*

*In essence the process followed is that when there is an inference or evidence that a child or vulnerable person is either the victim of criminal offences or is a child in need then a strategy meeting between the police and social services will take place and agreement will be made whether or not to conduct a joint visit.*

*Child in need visits will often result in a single agency visit (Social services) whilst those relating to the child being a victim of crime will be joint visits.*

*The purpose of the visit will be to build a rapport with the child, establish in simple terms the nature of any allegation and to make a skeleton record of any offences disclosed.*

*Permission will then be sought from any person with parental responsibility for the child to allow a video recorded interview to be conducted to secure a detailed account of any offences that may have taken place. All such interviews should be undertaken*

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<sup>136</sup> Ann Barnes' reply in an email dated 23 Jan 2013.

*by officers that have been formally trained in Achieving Best Evidence and are accredited to do so.*

*It is this record that will be used as the basis for any evidence that the child may give in court.*

*On some occasions officers may determine that a written statement is actually be a more appropriate means of proceeding but this is assessed on a case by case basis and will be based upon views as to the child's age, their ability to withstand giving evidence within a court room etc.*

*Once court proceedings take place there is a mechanism in place which allows the Prosecution to apply to the court for Special Measures to be used such as the giving of evidence in camera via video link in a room outside the court, or removal of wigs and gowns by counsel within the court room.<sup>137</sup>*

The reply from the Kent Police does not address the specific question about interview methods with adult complainants and significant witnesses in HCSA cases. The answer focuses on interviews with children, which are already video-recorded. Since the interviews of recent complainants of rape and children are already routinely electronically recorded, it does not make sense to differentiate the treatment of fresh complaints from those where allegations are stale.

## **(xii) Addressing the problem**

We have seen that there is evidence going back to the late 1980s and early 1990s that there was room for significant improvement in police interviewing techniques. As seen in Baldwin's research, in the West Midlands from 1989 indicated that half of the written records of interview did not provide fair summaries of the interview and a third of records therein were misleading or distorted in some way.<sup>138</sup>

It is not clear that the situation has changed. In 2009 the National Policing Improvement Agency published the second edition of its 'Guidance on Investigating Child Abuse and Safeguarding Children.'<sup>139</sup> Even this welcome guidance is not clear about permitted

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<sup>137</sup> Kent Police's reply was forwarded to me in Ms Barnes' email dated 23 Jan 2013.

<sup>138</sup> J Baldwin, *Preparing Records of Taped Interviews*, Royal Commission on Criminal Justice Research Study No 2 (London HMSO, 1992).

<sup>139</sup> National Policing Improvement Agency, (2009), *Guidance on Investigating Child Abuse and Safeguarding Children, Second Edition*.

interviewing conditions and interviewing techniques. Furthermore, such handbooks must actually be used by officers, not ignored, as Compo *et al* found out in some instances in their sample US study.<sup>140</sup>

From the 1990s onwards, the UK police interviewed complainants of allegations of institutional HCSA without the requirement to tape the interviews. Given that these allegations are emotionally laden, it is not unreasonable to surmise that the police would have been zealous to find perpetrators, but in so doing, were not bound by protocols to direct the interview in a transparent manner; nor were they properly instructed in how to interview complainants.

The 2002 ACPO Handbook *The Investigation of Historical Institutional Child Abuse*<sup>141</sup> now helpfully instructs officers not to mention the CICA compensation to interviewees, but fails to offer comprehensive protocols on the interviewing of potential prosecution witnesses, nor does it recommend the electronic recording of all encounters with such witnesses.

### **(xiii) Conclusions**

#### *Dip sampling*

In investigations where the police have solicited, and brought together by dip sampling, other witnesses whom they have approached, repeatedly, to ‘refine’ the witness statements to find the requisite standard of corroboration, the risk of miscarriages of justice to defendants is enhanced.

A jury hearing (cross-admissible) multiple charges against the accused may not be told about possible reasons that so many complaints have been made against the defendant. The prosecution may assert that the witnesses are independent and that their accounts are therefore their own. However, this may not be the case. The 2002 ACPO Handbook stated that police could put witnesses back into contact with each other by witness networking, websites and emails. The danger of allowing witnesses to contact each other in this way is that the witnesses may accidentally or intentionally collude on their accounts. They then are no longer independent witnesses corroborating narratives that are authentically theirs.

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<sup>140</sup> Fn 84, Compo *et al*.

<sup>141</sup> ACPO Handbook, (2002).

These methods, subsequently described as ‘trawling’ by critics, were designed to maximise the chances of finding possible complainants of HCSA, but they are also apt to encourage unreliable and even false allegations to be made.

### *Interviewing*

Without the adoption of electronic recording of all significant contact with witnesses in HCSA cases it has to be doubted that the process in such a fraught area of inquiry is as safe as it should be.

Unrecorded encounters with interviewees run the risk that the police will ask more suggestive questions and in some cases, the questions will be based on what ‘other’ complainants are supposed to have told the police, such as in the case of H. This method risks contaminating the evidence that otherwise might have had corroborative value. Prosecution (and defence) lawyers may not be able to detect how the police structured the questions put to the witness, other than from police notebooks, résumés and the subsequently typed up witness statements. In the future, should the CPS be tasked with asking the complainant or witness procedural questions about when and how they were interrogated and tape the answers at the pre-trial conference?

If police interrogations with potential prosecution complainants and witnesses were recorded from the outset, cases could be screened for the extent of procedural defects, bribes and the quality of interrogation methods as well as being useful for improving standards in police practice.

It is prosecution witness inconsistency which is the most common reason for acquittals.<sup>142</sup> Even allowing for the fading of the human memory, in crime cases, complainants and witnesses will be describing events that are completely outside the realm of their experience, and since the experience is exceptional, the central facts are likely to remain constant in their narratives; psychologists have shown that this narrative can be retrieved by using non-suggestive cognitive interviewing techniques. The use of such techniques will aid the prosecution in eliciting the veracity and reliability of the evidence.

If interviews are not electronically recorded, it cannot be known what the interviewee actually said and to what extent the police interrogation techniques shaped it. These witnesses

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<sup>142</sup> D Wolchover and A Heaton-Armstrong ‘Taping Witness Statements for Truer Verdicts’ C L & J Weekly 6 February 2009.



may be picked upon by defence counsel for apparent inaccuracies that were police-generated, but because they confirmed that they read and signed their statements, they are deemed to have endorsed the police-created statement.

The police will seldom admit that their statement taking was faulty in a trial, but may do so to facilitate a prosecution to avoid the conflict between what the witness actually said in the closed surroundings of the police station/witness' home and what the police interpreted and wrote down on his behalf.<sup>143</sup> Apart from these occasions of the police admitting errors, the window of opportunity for the defence to challenge this conflict in a cross-examination may also enable perpetrators of HCSA to be wrongfully acquitted. Wolchover and Heaton-Armstrong conjecture that many acquittals are attributed to witnesses being wrongly stigmatised as being inconsistent through the absence of an unchallengeable record of what they said to the police.<sup>144</sup>

Until the procedure for statement-taking of all complainants is regulated and comprehensibly applied, using tamper-proof recording equipment, there may be doubt about the reliability and integrity of such vital out-of-court evidence, forming as it does the basis for the potential conviction of the defendant.

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<sup>143</sup> Fn 34, Wolchover *et al*: op cit, p.229.

<sup>144</sup> Ibid, p.223.

## Chapter IV Prosecuting historic allegations: challenges to a fair trial arising from delay

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The case *R v F*<sup>1</sup> exemplifies the problems arising from a delay in a complaint being brought, in terms of the potential consequences for the prosecution of HCSA cases. F was appealing against his conviction for the sexual abuse of his daughter, N and step-daughter, K. The abuse was alleged to have occurred when the girls were aged between 2 and 13 years. However, the allegations were not reported until complainant K was in her forties and when N was slightly younger. They both claimed that the abuse took place when their grandmother was in hospital, and their allegations were supported by witnesses. F's ex-wife claimed to have personally seen F having sex with K. However, F's second wife and the complainants' younger siblings testified that F had never had inappropriate relations with them; neither did they have reason to suspect that there had been inappropriate behaviour between him and the complainants. An application to stay the proceedings against F was made at the end of the trial, owing to the long delay between the alleged offences and trial date, and the trial judge refused this. However, the Court of Appeal overturned the conviction. This case now sets out propositions for courts concerning the conduct of prosecutions brought after a long delay. For an abuse of process application to succeed, the defendant would have to show that the delay had caused incurable prejudice to his case, as the Court of Appeal held in the later case of *R v E*.<sup>2</sup> In the latter case, the complaints were some 36 years old, but it was held that the defendant, E could have a fair trial, because he had been entitled to argue that any allegations made to the police at earlier times were not pursued and as such were treated as unworthy of further action by the police at that time.

This chapter looks at the meaning of historic allegations of sexual abuse and to what extent the fairness of proceedings against the defendant may be affected by the forensic disadvantage occasioned by the late disclosure of the complaints made against him.

Criminal courts in the UK have increasingly been presented with these delayed or 'historic' cases in recent years. How old should a case be before there is consensus that a case is historic? How can defence cases be more prejudiced by an historic complaint than a recent one? After all, in delayed prosecutions, both parties and their witnesses may suffer from frailty of memory,

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<sup>1</sup> [2011] EWCA Crim 726.

<sup>2</sup> [2012] EWCA Crim 791.

the difficulty in locating eyewitnesses and character witnesses from long ago, or obtaining independent evidence to give credence to their narratives. However, it is still the defendant who stands to lose liberty, livelihood and social standing if the complaints are prosecuted, let alone result in a conviction. Forensic evidence can be a valuable tool for challenging the credibility and reliability of the detail in the opposing party's evidence. Furthermore, the lack of availability of a relevant piece of independent evidence is therefore especially problematic in sexual assault cases.

This chapter is divided into the following sections:

- (i) What is an historic case?
- (ii) Statutes of limitation and judge-ordered time bars in European jurisdictions
- (iii) Comparative study of abuse of process applications in UK and Eire
- (iv) Types of evidence that may be affected by delayed complaint
- (v) Conclusion

#### **(i) What is an 'historic' case?**

In *R v F*<sup>3</sup> the appellant had successfully argued that he had been left with no material upon which to cross-examine the complainants: all he could assert was a flat denial without evidence to support it. The Court of Appeal agreed that no jury direction could compensate him for the prejudice caused by the delay of complaints which ranged from 30 to 40 years previously.

Although there will inevitably be some delay between the report of a complaint and the staging of a trial, owing to the time it takes to process the complaint by the criminal justice system, it will be seen that historic allegations can involve complaints that involve a considerable time lapse. Some may use the term 'delayed prosecution,'<sup>4</sup> others prefer 'past' or 'historic'.<sup>5</sup> Connolly and Read define an historic case as being one where the allegation occurs at least two years after the incident. They computed this by reference to the civil law personal injury statutes of Canada (active in eight out of nine provinces) and the USA (in 21 states out of 50), where claims should be made within two years.<sup>6</sup> Some cases coming to trial can have allegations dating back more than forty years, as has happened in Irish prosecutions of physical and sexual

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<sup>3</sup> Fn 1, *R v F*.

<sup>4</sup> P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (OUP 2006).

<sup>5</sup> Home Affairs Select Committee, *The Conduct of Investigations into Past Cases of Abuse in Children's Homes* (2001-02), HC 836.

<sup>6</sup> D A Connolly, and J D Read, 'Understanding HCSA Criminal Prosecutions' (August 2006) *Law and Human Behavior*, vol 30, p.413.

abuse in State-run institutions.<sup>7</sup> English courts have not set out any definite criteria for what constitutes an historic case but it may fall into one of two categories, as set out in *R v LPB*.<sup>8</sup> The case concerned an abuse of process application to stay an indictment of alleged HCSA committed by a stepfather against a female adult complainant. The complainant had alleged that she had been persistently sexually abused by the defendant over a period of 17 years, with the abuse ending 5 years before the date of her complaint. The complainant had not made prior disclosure due to natural reticence. The defendant tried to have the proceedings stayed on the grounds that the delayed complaint was an abuse of process. His application failed on the basis that the complainant's reticence was not uncommon and was wholly understandable, and it was difficult to envisage any circumstances where such an application would be granted in advance of hearing the complainant at trial.

This judgment identified two forms of delay in criminal cases:

Type 1: between the investigation and trial of an offence. The judges in *LPB*<sup>9</sup> accepted that the police investigation had been rapid and efficient, and that therefore there was no indication of misconduct, inefficiency or delay by police or the prosecuting authorities.<sup>10</sup>

Courts abroad have previously dealt with Type 1 cases, when prosecuting Nazi war criminals, where the allegations are many decades old. For example, in 2009, Demjanjuk was charged by German prosecutors for participating in the murders of inmates of a Nazi camp which he guarded in 1943.<sup>11</sup>

Type 2: between the commission of an offence and its report by the complainant.

In *LPB*<sup>12</sup> the application for abuse of process was based on the delay which took place before the facts were reported by the complainant, a delay which it was claimed, resulted, at lowest, in the risk that any trial of the defendant on these charges would be unfair.

This thesis explores Type 2 cases, which are retrospective allegations of child sexual abuse. Historic child abuse allegations are treated differently by the courts, because even where allegations appear to be date-specific, the approach adopted by the criminal justice system is to regard the complainant as narrating an incident that occurred when s/he was a child, not as

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<sup>7</sup> S Ring, 'Justice Denied? An Analysis of the Difficulties Facing Applicants for Prohibition in Delayed Prosecutions for Child Sexual Abuse,' Criminal Law Online Service (June 2009), p.88.

<sup>8</sup> [1990] 91 Cr App R 359.

<sup>9</sup> Fn 8, *R v LPB*.

<sup>10</sup> *Per* Judge J., in *LPB*, p.360.

<sup>11</sup> BBC News, 'Demjanjuk cleared to stand trial' 3 July 2009.

<sup>12</sup> Fn 8.

the adult they are at the time of reporting the alleged offence. Child sexual abuse cases are prosecuted after years have passed, because they involve special considerations about the reasons why disclosure of offences may be late.

The reason for recent increase in prosecutions of HCSA cases stems from acceptance by the criminal justice system that many victims may conceal the abuse through a sense of fear and/or shame, being vulnerable to the dominion the adult had over them such as a family member or one who held a position of authority over them.<sup>13</sup> Research has demonstrated that late disclosure can be due to a number of reasons, such as the victim's mistaken belief that abuse is normal;<sup>14</sup> the victim may have been threatened by the assailant and or be embarrassed or feel complicit and blame himself/herself.<sup>15</sup> The social perception of the credibility the complainant is not the only reason for his/her reluctance to report an offence.

A Home Office study in 2013 on sexual offences contained feedback from 136 female volunteers aged 16 who had responded to a questionnaire about being victims of a serious sexual offence and how they had reported it. Twenty-eight per cent had left the incident wholly unreported; only fifteen per cent had reported it to both the police and another person. Fifty-seven per cent had told another person about the incident but not the police, of whom sixty-five per cent were friends, relatives or neighbours. Those who had failed to report the offence to anyone offered explanations, such as being too embarrassed to proceed; or they felt that the police would be unable to help; or the matter was too trivial to report; or that it was a 'private, family matter and not police business.'<sup>16</sup> Such factors also lead to under-reporting of sexual offences.

Murder, child sexual and physical abuse are commonly encountered historic crime cases. In other criminal cases, such as theft, it is unlikely that an historic allegation would be allowed to proceed to trial since the evidence (e.g., the item alleged to have been stolen) is likely to have disappeared or been destroyed long ago. It is perfectly possible that an historic case may involve an overlap of the two types of delay: the complainant may have made a late disclosure to the police *and* it may take months or years for this complaint to be forwarded to the Crown Prosecution Service and the criminal courts.

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<sup>13</sup> Fn 7, Ring: op cit, p.84.

<sup>14</sup> Fn 4, Lewis: op cit p.73.

<sup>15</sup> Ibid, p.7.

<sup>16</sup> Home Office, Ministry of Justice and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales* Statistics bulletin, 10 Jan 2013, p.17.

The term ‘historic’ is not set out prescriptively for UK lawyers: it would appear to be any late disclosure, ranging from a couple of years to many decades. This policy of flexibility in prosecuting old crimes can also be seen in other jurisdictions like Eire. The Irish Director of Public Prosecutions used to refuse to prosecute cases that were more than a year old in the 1980s, but policy changed and from the 2000s onwards, delays of up to forty years were not a bar to prosecution.<sup>17</sup>

The practice of staging late historic prosecutions (Type 2 cases) also may be viewed against the backdrop of victim-centred legislation in international law. In 1985, the United Nations adopted two resolutions dealing with the rights of victims: the Declaration of Basic Principles of Justice for Victims of Crime 1985 and Abuse of Power and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2006. The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The 2006 Principles were, in effect, an international bill of rights for victims.

Transnational changes in social attitudes and law in favour of victims can also be seen as having an influence on UK law: for instance, the Domestic Violence, Crime and Victims Act 2004. The language used in policy papers on sexual offences speaks of *victims* rather than complainants, e.g., a 2006 Consultation Report recommended the admission of prior consistent statements of witnesses.

*We would welcome views on whether Section 120(7)(d) of the Criminal Justice Act 2003 should be repealed in order to ensure that all relevant evidence of complaints made by victims in rape cases are admissible as evidence in a trial, irrespective of how much time has passed since the alleged conduct.*<sup>18</sup>

There is now more favourable attitude in society towards complainants, which is also reflected in policymaking and legislation governing sexual offences, but even so, there will still be those

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<sup>17</sup> Commission of Investigation Report into the Catholic Archdiocese of Dublin, July 2009, released 26 November 2009, para 5.46.

<sup>18</sup> Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims - Justice for Victims of Rape: Consultation Paper*, (Spring 2006), p.6. Section 120 (7) (d) of the CJA 2003 replaced and enhanced a former common law ‘recent complaint’ exception to the rule against previous consistent statements made by a witness claiming to be a person against whom a sexual offence was committed. As originally enacted s.120 (7) (d) also required the complaint to be made as soon as could reasonably be expected after the alleged conduct, but this provision was repealed by s.112 of the Coroners and Justice Act 2009. See also: Stockdale M. and Jackson, A. ‘Admissibility of Previous Statements of Witnesses’ C L & J, 27 April 2012;

who find it difficult psychologically to report historic offences. Therefore, even where the time it has taken to make a complaint of abuse appears to be inordinate, the criminal justice system will attempt to balance prejudice the accused might incur with the right of the complainant to have the case heard. It is now accepted that delay in reporting a complaint is a common feature in child sexual abuse cases, particularly in the familial context.<sup>19</sup>

Given that there has been a growing number of delayed prosecutions in recent years,<sup>20</sup> courts both in the UK and abroad have adopted different mechanisms for assessing whether or not a defendant has been evidentially disadvantaged in challenging delayed complaints. The UK, as a common law jurisdiction, sets no statutory limit for prosecuting delayed complaints, whereas the opposite prevails under penal code provisions in many other EU member states, as will now be seen.

## **(ii) Statutes of limitation and judge-ordered time bars in European jurisdictions**

The staleness of a complaint may be one of the reasons pleaded at an abuse of process application to stay a prosecution. Abuse of process applications occur in the UK and Eire, because these jurisdictions do not have a general rule of limitation or prescription of crimes. By contrast, other countries in the European Union operate statutes of limitation for serious crimes, including sexual offences. Officials from Embassies and Ministries of Justice of European countries, who were contacted for this study, provided more detailed information about time bars applicable to sexual offences which operate in their country.

*Examples of statutes of limitation operating in other European jurisdictions:*

### *Sweden*

Under the Swedish Penal Code, time bars are determined by the length of sentence for a given offence rather than the specifics of the offence:

*Under Chapter 35, 'On Limitations on Sanctions' Section 1, no sanction may be imposed unless the suspect has been remanded in custody or received notice of the prosecution within. There is a range from: Category (1) Two years, if the crime is punishable by at most imprisonment for one year, up to category (5) which is twenty-five years, if life imprisonment can be imposed for the crime.*

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<sup>19</sup> S. Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 2 Judicial Studies Institute Journal, p.168.

<sup>20</sup> Fn 4, Lewis: op. cit., p.1.

Norway also set up its time bar to match the severity of the offences:

### **Norway\*<sup>21</sup>**

*In most cases, the period for the statute of limitation concerning a criminal offence, starts running at the time of the criminal act. For cases of sexual abuse of children, however, the period starts running when the victim turns 18 years of age. Thus the most serious acts of sexual abuse of children will not be time-barred until 25 years after the victim has turned 18 years of age. The Ministry is currently considering the abolishment of time-bars in such cases.<sup>22</sup>*

### **Denmark**

*The Danish Ministry of Justice's reply:*

*Section 93 of the Danish Criminal Code sets out the limitation period of the various criminal offences in the Criminal Code, which varies from 2 to 15 years depending on the crime committed.*

*Section 94 of the Criminal Code regulates the date from when the limitation period is calculated. According to section 94(4) in cases of sexual abuse of children under the age of 18 years the limitation period is calculated at the earliest from the date the victim attains the age of 21 years. Section 94(4) of the Criminal Code was amended by act no. 633 of 12 June 2013, which raised the date from which the limitation period is calculated at the earliest from the date the victim attains the age of 18 years to the date the victim attains the age of 21 years.*

*It follows from the preparatory works that the Ministry of Justice found it appropriate to calculate the limitation period from the date the child becomes 21 years of age because children often do not leave their parents' home as soon as they become of legal age. It was the Ministry of Justice's view that the new limitation rules would better reflect the age at which a child who has been sexually abused will be able to separate itself from its parents.*

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<sup>21</sup> Norway is not a signatory state of the European Union but it has signed agreements on the Economic European Area and the Schengen Agreement to cooperate with the EU on foreign and security issues. Since 2014, it has been participating in a number of EU agencies, including Europol (the EU's law enforcement) agency.

<sup>22</sup> Åserudhagen, Sigurd, Adviser, the Legislation Department, Norwegian Ministry of Justice, in his email reply 24 Jan 2013.



Thus the time bar for prosecuting CSA in Denmark commences when the victim is no longer under the dominion of the perpetrator.

## **Austria**

The Austrian Federal Ministry of Justice responded with this information.<sup>23</sup>

*According to Sec. 57 para. 1 of the Austrian Criminal Code (CC), punishable actions liable to imprisonment for life or to imprisonment from 10 to 20 years or for life are not subject to the period of limitation. After a period of 20 years, the lifelong imprisonment, however is replaced by imprisonment from 10 to 20 years.*

*The punishability of other offences expires through limitation. The period of limitation depends on the respective offence.*

*...severe sexual child abuse (Sec. 206 of the CC) is to be punished with a prison sentence of a minimum of one year up to ten years, in case of aggravating circumstances (e.g. the offence caused a severe bodily injury) the penalty is between five and fifteen years. In case of the death of the victim the perpetrator is to be punished with a prison sentence from ten to twenty years or for life.*

*According to Sec. 58 para. 3 pt. 3 of the CC, the period of time until the victim of a punishable offence against physical integrity and life, against freedom or against sexual integrity has completed the twenty-eighth year of his or her life is not included in the period of limitation, in case the victim was a person under age (i.e. who did not yet complete the eighteenth year of his or her life) at the time the offence was committed.<sup>24</sup>*

This Ministry of Justice concluded by saying that collecting evidence is much more difficult years after a crime was committed, therefore wrong decisions are more likely than in a prompt judgment.’

## **France**

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<sup>23</sup> The request made for this study: *I would be extremely grateful, if you and other EU justices would comment on whether you think your jurisdiction should abolish time-bars for child sexual abuse cases or whether you think there is greater merit in retaining the legal status quo and if so, why this should be. I would also be grateful to know what the current time limit for such cases is in Austria.*

<sup>24</sup> Thanks to Martin Reichard for forwarding my email on 19 April 2012 to Austrian Ministry of Justice and for receiving this reply from them on 25 April 2012.

French criminal law distinguishes between major and minor sexual offences. For serious allegations, including rape, sexual touching of a person under the age of 15 or sexual touching committed by someone with influence or authority or by several people, the complainant can lodge a complaint until she reaches the age of 38 or 28 for other cases of sexual violation.<sup>25</sup>

## **Finland**

Janne Kanerva, Counsellor of Legislation, Ministry of Justice, replied:<sup>26</sup>

*The right to bring charges depends on the seriousness of an offence (what is the most penalty according to Penal Code concerning the offence in question). This is regulated in section 1, paragraph 2, chapter 8 of the Penal Code. However, we have in that section a special provision concerning child sexual offences, paragraph 5. In some offences, it is reasonable that right to bring charges exists at least some years after the child has reached the age of 18. In this context, paragraph 5 supplements paragraph 2. There are also international obligations concerning this issue (Article 33 of 2007 Council of Europe Convention, Lanzarote Convention). Our provision reflects that obligation.*

*The right to bring charges for sexual abuse of a child and aggravated sexual abuse of a child becomes time-barred at the earliest when the complainant reaches the age of twenty-eight years. The same applies to rape, aggravated rape, coercion into sexual intercourse, coercion into a sexual act, sexual abuse, pandering, aggravated pandering, trafficking in persons and aggravated trafficking in persons, directed at a person under the age of eighteen years. In the case of enticement of a child for sexual purposes referred to in chapter 20, section 8(b), the right to bring charges becomes time-barred when the person who was the object of the offence reaches the age of twenty-three years*

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<sup>25</sup> Délais de prescription: Les infractions sexuelles sur mineur bénéficient de délais de prescription allongés. C'est-à-dire que la plainte peut avoir lieu des années après les faits. La victime de telles infractions peut porter plainte jusqu'à ses 38 ans dans les cas les plus graves notamment s'il s'agit de : de viol, d'attouchements sexuels commis lorsqu'elle avait moins de 15 ans, ou d'attouchement commis par un ascendant, une personne ayant autorité, ou par plusieurs personnes. Le dépôt de plainte peut se faire jusqu'aux 28 ans de la victime dans les autres cas d'infraction sexuelle.

<sup>26</sup> Ms Kanerva's email reply to me dated 16 Feb 2015.

## **Estonia**

Reply from Tuuli Ploom, adviser in the Penal Law and Procedure Division Criminal Policy Department Ministry of Justice of Estonia<sup>27</sup>:

*In Estonia, the limitation period is 10 years in case of a criminal offence of a first degree and 5 years in case of a criminal offence of a second degree (Penal Code § 81).*

*All offences against sexual self-determination of minors (younger than 18) are crimes a first degree.*

*But in the case of a criminal offence against sexual self-determination against a person younger than eighteen years of age, the limitation period of offence is interrupted until the victim attains eighteen years of age unless the reason for the criminal proceedings became evident before the victim attained such age (Penal Code § 81 subsection 7 point 3).*

*This topic is actually very important to us and the Ministry of Justice of Estonia is currently analyzing the possibility of extending the limitation periods in the case of a criminal offence against sexual self-determination against a person younger than eighteen years of age.*

## **Eire**

Reply from Christopher Quattrociocchi, Private Secretary to the Minister for Justice and Equality, Eire:<sup>28</sup>

*I am directed by the Minister for Justice and Equality, Ms. Frances Fitzgerald, T.D., to refer to your correspondence.*

*The Dublin Archdiocese Report of the Commission of Investigation into the Catholic Archdiocese of Dublin and the Report by Commission of Investigation into Catholic diocese of Cloyne forms part of a broad collective examination of historical and institutional abuse in which many organisations, including agencies of the State, were found wanting in the steps to protect children and vulnerable persons. Widespread*

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<sup>27</sup> Dated 13 Mar 2015.

<sup>28</sup> Reply to email request to Ministry of Justice in Eire, 10 Feb 2015.

*recognition of these broad failings has led to significant legislative and institutional reform, including within religious organisations.* <sup>29</sup>

Whilst Eire does not have a statute of limitation for sexual offences, the Dublin Archdiocese Commission of Investigation in 2009 pointed out that bringing alleged child abusers to justice was hampered in institutions run by the Church there due to statute of limitation under canon law applying thereto:

*Many of the complaints investigated by the Commission could be classified as historical complaints. Here the canon law and the civil law differ considerably. In Ireland there is no general statute of limitations with regard to serious criminal offences. In canon law, criminal actions, even of the most serious kind, were time barred after a certain period. Under canon law, this period was five years for most of the time with which the Commission is concerned (1975-2004). This is known as the period of prescription. This meant that, in canon law, many of the complaints made to the Church were time barred and could not be properly investigated.*<sup>30</sup>

## **England and Wales**

In contrast with the continental legal systems, English trials can only be time barred by a temporary or permanent stay if the judge considers that the defendant could not otherwise have a fair trial under the circumstances. This rationale for not passing a statute of limitation under English law was explained by Lord Rodger of Earlsferry in *R v J*:<sup>31</sup>

*The law of England has no general rule of limitation or prescription of crimes. Provided that the defendant can have a fair trial, proceedings may be begun long after the alleged crime. And in recent years, especially in the area of sexual offences, there have been many prosecutions for offences that came to light only decades after they were committed when, for the first time, the victim or victims revealed what had happened. Such prosecutions are not without their difficulties but, in general, the stance of the law is that time does not run against iniquity.*

Mullis agrees with a more flexible approach to allowing late prosecutions, by reference to what happens in civil law claims involving childhood sexual abuse. He contrasts the flexible

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<sup>29</sup> Both Reports can be found on the Departments website at [www.justice.ie](http://www.justice.ie).

<sup>30</sup> Department of Justice and Equality, *Report of Commission of investigation into Catholic Archdiocese of Dublin*, 29 Nov 2009, para 4.62, p.72.

<sup>31</sup> [2004] UKHL 42 on appeal from [2002] EWCA Crim 2983, para 54.

equitable approach that the civil courts could take under the Limitation Acts, in contrast with the effect of time bars which operate cut-off points on the ‘principles of certainty, evidentiary and diligence.’<sup>32</sup> In tortious claims regarding personal and psychological injury alleged to have been inflicted on the claimant by the defendant in child sexual abuse claims, the perpetrator will have been known to the victim, the offences are sometimes continued over several years and increase in severity; the perpetrator is likely to have been in a position of dominion over him/her; in incest, the disclosure to a family member may have resulted in the *confidant(e)* disbelieving him/her. The victim may even feel responsible for allowing the abuse. These factors may lead to the victim’s psychological inability to report the abuse to the authorities much earlier or at all.<sup>33</sup>

The Home Affairs Select Committee Inquiry<sup>34</sup> in 2002 considered whether a UK statute of limitation should be imposed in historic crimes. The HASC concluded that whilst a limitation may protect innocent defendants from fabricated allegations that were difficult to refute, it would also prevent guilty defendants from being brought to justice. Instead, it was suggested that abuse of process hearings could be amended so that the prosecution would have to seek permission to prosecute and prove that the proceedings were not an abuse of process. Judges would then be in the position to impose a time limit, but that would not be an absolute bar to proceedings.<sup>35</sup>

#### *Comments on the two contrasting types of legal system*

Time bars operative in other EU jurisdictions would appear to be generous to complainants: they do not run until the complainant reaches adulthood and they do not come into force until several decades have passed thereafter, as explained by the Austrian Ministry:

*The Austrian criminal law already contains a rather long period of limitation. The abolition of time-bars for sexual abuse cases is not indicated at the moment. The lack of evidence would render a conviction almost impossible. However the re-opening of the case could lead to further victimisation of the victim.*<sup>36</sup>

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<sup>32</sup> A C L Mullis, ‘Compounding the Abuse - The House of Lords, Childhood Sexual Abuse and Limitation Periods’, 5 Med L Rev 22 (1997), p.29.

<sup>33</sup> Ibid, p.26.

<sup>34</sup> Home Affairs Select Committee, Fourth Report, *The Conduct of Investigations into Past Cases of Abuse in Children’s Homes*, 2001-02, HC 836.

<sup>35</sup> Ibid, vol I, paras 84-91.

<sup>36</sup> Email from Austrian Federal Ministry of Justice, responding on behalf of Dr Christian Manquet, 25 April 2012.

These jurisdictions are also prosecuting serious crimes decades after they were alleged to have happened; therefore the prospect of iniquity done to victims becomes infinitesimal. The next section shows how the UK and other common law jurisdictions decide when to stay an historic prosecution.

### **(iii) A comparative study of process in delay cases: Australia, Eire, UK**

Commonwealth jurisdictions in general such as Australia, do not have a time bar for criminal offences; (the exception is New Zealand, which has opted for a ten-year limit for offences involving a prison sentence of three years or less for relatively minor crimes).<sup>37</sup> There are differences in the way in which judges in Australia and the UK are asked to assess forensic disadvantage caused by a delayed prosecution in abuse of process applications. In Australia, it is a presumption where it is alleged, whereas in the UK, loss has to be proved.<sup>38</sup> Another difference is that preliminary hearings on abuse of process are also heard in civil courts in Eire. They have evolved from being a party fault-based test, to one that now solely addresses whether delay and missing or lost forensic evidence prejudices the accused to the extent that he cannot have a fair trial,<sup>39</sup> which is more akin to UK court guidelines for determining abuse of process.

The UK case *Attorney-General's Reference (No 1 of 1990)*<sup>40</sup> sets out the principles which underpin an abuse of process application:

- (i) *proceedings may be stayed on the grounds of prejudice resulting from delay in the institution of those proceedings, even though delay has not been occasioned by any fault on the part of the prosecution;*
- (ii) *if the answer to (i) is in the affirmative, what is the degree of (a) the likelihood of and (b) the seriousness of any prejudice which is required to justify a stay of such proceedings?*

Lord Lane in this decision said that a permanent stay of proceedings should be the exception, not the rule, and should be applied even more rarely to cases where the delay was caused by the prosecution or the complainant, and never exercised merely due to the complexity of the case or where the defendant was to blame. The discretionary power of the court to stay

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<sup>37</sup> A Mason, Solicitors' Journal, 'Should there be a statute of limitation for criminal offences?' vol 159, no 33 08-09-15

<sup>38</sup> D Hamer, 'Trying Delays, forensic disadvantage in child sexual assault trials' Crim L R 671, 9, 2010 p. 675.

<sup>39</sup> Fn 19, Ring, op cit, p.170.

<sup>40</sup> [1992] QB 630; [1992] 3 W L R 9, para 1.

proceedings should only be exercised in the most exceptional of circumstances as reaffirmed in the *Attorney-General's Reference (No 2 of 2001)*.<sup>41</sup>

The leading case on the tests for abuse of process is still *Bennett v Horseferry Magistrates; Court and Another*.<sup>42</sup> A stay can only be ordered where firstly, under the circumstances, it would be impossible to give the accused a fair trial, and secondly, where it would amount to a misuse of process because it offends the court's sense of justice and propriety for them to be asked to try the case in the circumstances, although there can be an overlap of both considerations. Before ruling on a stay of proceedings, the courts need to ask whether the trial could be continued by means of excluding specific evidence or by giving directions to the jury. The evidence which is allegedly prejudiced by delay can also be adduced as a fact in issue for the jury to consider. If a case is stayed due to unfair prejudice caused to the accused, this is likely to be exercised after all the evidence has been given, as had occurred in *R v Smolinski*.<sup>43</sup> In *Smolinski*, the appeal was against a conviction for one count of indecent assault upon a female, but the jury had been unable to reach a verdict on the other counts. The allegations had been reported to the police about 20 years after they were said to have been committed. The two complainants involved were sisters who had been about six and seven-years-old at the relevant time. The offences alleged in the first and second counts, one in respect of each complainant, were said to have taken place on one occasion. Despite the complainants' accounts agreeing in relation to those two counts, the jury had only convicted on one of the counts. At the trial, S had made an unsuccessful application to stay the proceedings for abuse of process on the basis that the lapse of time would prejudice the trial.

The Court of Appeal held that it was right for the trial judge to leave the case to the jury but the conviction was unsafe. There had been discrepancies in the evidence and inconsistencies between the witnesses and it appeared that the older sister had needed reminding of alleged events by the younger sister. However, the most significant factor was that the jury had been unable to reach a conclusion as to the second count despite convicting on the first count, even though the complainants' accounts had agreed. It also stated that applications to stay for abuse of process should be discouraged in cases of this type where it was sometimes very difficult for young children to speak out and where it could take many years before matters came to light. Where evidence was given after many years had passed by, trial judges should exercise

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<sup>41</sup> [2004] 2 AC 72 (HL), para 25.

<sup>42</sup> [1993] 3 All ER 138.

<sup>43</sup> [2004] EWCA Crim 1270.

very careful scrutiny at the end of the evidence to determine whether cases were safe to be left to juries.

*Fair trial issue – ‘reasonable time’ - concerning delayed prosecutions*

The UK courts may still try a case even if the time lapse breaches Article 6(1) of the European Convention on Human Rights. Defendants do have the right to have the case heard within a reasonable time under Article 6(1) of the European Convention on Human Rights. They have to show the duration of delay, based on when they were formally charged,<sup>44</sup> the reasons for the delay; whether the right was asserted (i.e., the applicant must have made an effort as timely as possible to complain about the delay), and whether the applicant has suffered prejudice thereby. However, these criteria form a high threshold to cross for applicants even where it appears that Article 6(1) has been violated.<sup>45</sup>

The UK courts are reluctant to stay proceedings temporarily or permanently, unless there could no longer be a fair trial. In cases where there has been or could be a breach of the defendant’s rights under this Article, the UK courts would prefer to offer alternative remedies This was discussed by Lord Bingham in the *Attorney-General’s Reference No 2 (of 2001)*:<sup>46</sup>

*It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant’s Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant.*<sup>47</sup>

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<sup>44</sup> *Attorney General’s Reference (No. 2 of 2001)* [2004] 2 A C 72 (H.L.), at para 27 time runs at date of formal charge.

<sup>45</sup> *Supra*, para 22.

<sup>46</sup> [2003] UKHL 68.

<sup>47</sup> *Attorney General’s Reference (No 2 of 2001)* [2004] 2 A C 72 (HL), para 24.



This approach is consistent with the ruling in *Environment Agency v Stanford*,<sup>48</sup> where Lord Bingham LCJ said that: ‘The question of whether or not to prosecute is for the prosecutor. Most of the points relied on in support of an argument of abuse are more profitably relied on as mitigation.’<sup>49</sup>

Thus the main reason for staying or dismissing proceedings is that either there can no longer be a fair hearing, or it would otherwise be unfair to try the defendant.<sup>50</sup> The defendant has to show on a balance of probabilities that he would not get a fair trial if it went ahead.<sup>51</sup> The only way in which a time bar can operate is by a judge authorising a stay of proceedings at an abuse of process hearing or if the trial judge decides to order one at some stage in the trial.<sup>52</sup> Abuse of process applications normally fail for defendants, because current UK legal doctrine maintains that trial judges already have the power to stay the trial where such an abuse becomes transparent.<sup>53</sup>

Judges are also entrusted with giving juries instructions on delay so as to remedy forensic disadvantages suffered by the accused. Current UK judicial practice adheres to the view that the rights of both the complainant and the defendant to have a fair trial can be protected by use of judicial directions to the jury.<sup>54</sup> Judges are also empowered to exclude problematic evidence such as by using the Police and Criminal Evidence Act 1984. Section 78 of PACE also provides a discretion for the court to exclude evidence against the defendant which would be unfair to adduce. The Codes of Practice issued under sections 66 and 67 of PACE 1984 have a similar function in criminal trials. The courts have an overriding duty to promote justice and prevent injustice through the mechanism of stay of proceedings, but the prosecution has to be so unfair and wrong for the courts to exercise this discretion. The decision of what is unfair and wrong turns on the facts of the individual case. Any decision must be made in fairness to the prosecution, the public and the defence, as set out in *DPP v Meakin*.<sup>55</sup> Delay *per se* is not a sufficient ground for a trial or retrial to be stayed: it must affect the ability of the defendant to prepare for his case; *R v Dunlop*.<sup>56</sup>

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<sup>48</sup> [1999] Env L R 286.

<sup>49</sup> *Supra*, p.287.

<sup>50</sup> *Attorney General's Reference (No 2 of 2001)* [2004] 2 A C 72, para 24.

<sup>51</sup> *R v F* [2011] EWCA Crim 726, para 29.

<sup>52</sup> *Ibid*, para 37.

<sup>53</sup> *Ibid*, para 24.

<sup>54</sup> Judicial Studies Board; <[http://www.jsboard.co.uk/criminal\\_law/cbb.index.htm](http://www.jsboard.co.uk/criminal_law/cbb.index.htm)> para. 37.3 on Delay.

<sup>55</sup> [2006] EWHC. 1067.

<sup>56</sup> [2006] EWCA Crim 1354.

The UK courts initially adopted a fault-based approach to abuse of process applications starting with *LPB*.<sup>57</sup> The Court of Appeal stated that the delayed complaint was justified, as it could be ascribed to the offender's conduct, the relationship between the victim and the family and other relationships within the family.<sup>58</sup>

The problem with allowing a victim-centred approach to abuse of process applications is that where the defendant is complaining about the late disclosure, the judge may make the assumption that the delay is ascribed to the defendant's conduct himself, that therefore he must be guilty, which may subvert the presumption of innocence. Mullis and Lewis point out that this presumption may not be completely eroded, because it is the judge and not the trier of fact (the jury) who has to consider the fairness of proceedings. However, they also conclude that, 'if the overriding consideration for a stay is truly to be the fairness of the trial, then examination of the complainant's lack of fault, or the defendant's culpability, should be avoided.'<sup>59</sup>

The Court of Appeal reviewed the case law on abuse of process in *R v F*.<sup>60</sup>

The Court of Appeal quashed the convictions for sexual offences which were said to have taken place between 30 and 40 years ago. The mother of the complainant had stated that she had confronted the defendant 27 years prior to the allegations being reported to the police. The Court of Appeal accepted the points that there had been opportunity for the complainants and other witnesses to collude; one of the defendant's witnesses had died, and relevant documentary evidence was no longer available to the defence. The Court issued five propositions for assessing abuse of process applications:

- (i) Stay of proceedings may be temporary or permanent on some or all counts on the indictment only if it is satisfied on a balance of probabilities that a fair trial would not be possible;
- (ii) The proper time for making an abuse of process application is after all the evidence has been called at the trial;
- (iii) Where prejudice is alleged to have been caused by the delayed prosecution, the court should consider what evidence directly relevant to the defence case has been caused through the passage of time. Vague speculation about whether a lost document or deceased witness might have assisted the defendant is not helpful, and

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<sup>57</sup> Fn 8, *supra*.

<sup>58</sup> *Ibid LPB*, p.361.

<sup>59</sup> A Mullis and P Lewis, 'Delayed Criminal Prosecutions for Childhood Sexual Abuse: Ensuring a Fair Trial' (1999) L.Q.R., p.278.

<sup>60</sup> [2011] EWCA Crim 726.

the court should consider what evidence has survived the passage of time and then examine the importance of the missing evidence in the context of the case as a whole;

- (iv) Where prejudice has been actually caused by reason of delay, the court should consider whether the trial judge can compensate for this by emphasising guidance to the jury in standard directions or by formulating special directions to the jury. Where important evidence has been lost over time, it may not be known which party that evidence would have supported. There may be cases in which no direction to the jury can dispel the resultant prejudice which one or other of the parties may suffer, depending on the facts of the case.
- (v) The court may take into consideration whether the complainant was at fault in coming forward so late, but when considering whether or not the complainant's delay is justified, it must bear in mind that victims of sexual abuse are often unwilling to reveal or talk about their experiences for some time and for good reason.<sup>61</sup>

The question of whether or not the defendant can have a fair trial when delay and forensic disadvantage are pleaded is usually approached in two ways: the judge either looks at the specific complaints of disadvantage and rebuts them as was done in *R v Wilkinson*<sup>62</sup> or determines whether the delay was justified, as set out in *Attorney-General's Reference (No 1 1990)*.<sup>63</sup>

In *Wilkinson*<sup>64</sup> the appellant had tried to argue that his work records were no longer available and that these would have proved that he was not alone with the complainant on Sundays, however, this evidence was inconsistent with his out-of-court statement to investigating police officers that he had been at home most Sunday afternoons. Secondly, he argued that the lorry in which some of the assaults were said to have taken place, was unavailable, but the Court of Appeal thought that it was not impossible to discover what the nature of the lorry was. Thirdly, the Court was not persuaded that delay had caused medical evidence to be lost; as such evidence was only of relevance if obtained directly very shortly after the alleged incident.

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<sup>61</sup> *R v F* points (i) to (v) at para 37.

<sup>62</sup> [2006] All ER (D) 135 (May).

<sup>63</sup> [1992] QB 630.

<sup>64</sup> *Wilkinson*, fn 62, *supra*.

An unjustified delayed complaint is not necessarily a bar to prosecution. In *R v F*,<sup>65</sup> during the course of the original trial, the respondent, F, was being tried for sexual offences against the complainant, C, when she would have been aged six. The trial judge heard the reason for the complainant's delay during the cross-examination and ordered a stay of the trial. The Crown appealed and the Court of Appeal held that an unjustified delay might make the judge more certain of prejudice, but that was a long way from the proposition that unjustified delay was by itself a sufficient reason for a stay. It was established in the *Attorney-General's Reference (No 1 of 1990)*<sup>66</sup> that a stay of proceedings on the ground of unjustifiable delay will only be granted by the courts in exceptional circumstances where the defendant can prove that he would suffer such serious prejudice that a fair trial cannot be held.

The victim-centred approach used to be part of the formula for assessing abuse of applications in Eire. In Irish HCSA cases which Ring analysed from 1997 to 2006, the reviewing courts heard applications which routinely included the factor of whether it was the accused's misconduct itself which had led to the late report of the offence, when deciding whether or not to stay a trial. The Irish High Court adopted the *PC*<sup>67</sup> test, which came to be used as the standard means of assessment. If the judge thought that the delayed report was the fault of the accused's misconduct, implicitly he had assessed that the complaint was true, but if the defendant could show that he had suffered actual prejudice, the judge could still stay the trial.<sup>68</sup> Since the test involved making a prejudgment of the accused, it risked violating his presumption of innocence. The abuse of process test was then revised so as to exclude the fault of the accused as a reason for the report being delayed under the new actual prejudice-based test in *SH v DPP*.<sup>69</sup>

*In this case, the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the Court. The Court is satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial.*<sup>70</sup>

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<sup>65</sup> [2011] EWCA Crim 1844.

<sup>66</sup> [1992] QB 630.

<sup>67</sup> [1999] 2 IR 25.

<sup>68</sup> Fn 19, Ring: op cit, p.169.

<sup>69</sup> [2006] IESC 55.

<sup>70</sup> *SH v DPP*, Murray C J

### *Treatment of delay in comparable legal jurisdictions*

Under the newer test in *SH v DPP*, the defence must show on a balance of probabilities that the delay has resulted in prejudice that would give rise to a real and serious risk of an unfair trial. This is not a presumptive prejudice: the accused is required to offer details of the facts of the case which would give rise to prejudice.<sup>71</sup>

Whilst the UK and Irish criminal justice systems are now geared towards accommodating complainants, by contrast, in the Commonwealth country Australia, Hamer shows that some state legislatures there still take on anachronistic view of complainants who make late disclosure.<sup>72</sup> This is because judicial directions to juries may persuade them to acquit, given the strength of the recommendation, couched in terms similar to the former corroboration warnings on the danger of convicting the accused on the sole evidence of the complainant addressed to juries in sexual offence trials in the UK.<sup>73</sup>

According to Hamer, the strength of the direction known as a *Longman*<sup>74</sup> warning, favours the accused, and therefore issues arising from forensic disadvantage are mitigated thereby. However, some jurisdictions have become victim-focused. The *Longman* warning has been replaced by Section 165(B) 4 Evidence Law applications to the judge. Defendants can still plead delay or forensic disadvantage, but it is no longer a presumption. The judge may use words informing the jury of this/these problem(s), but he must not suggest to the jury that it is dangerous to convict the defendant solely due to these issues.

Hamer looked at the disparate state legal systems in operation in the states of Victoria and New South Wales in Australia. Some of them still automatically presume that the accused suffers prejudice in historic cases, New South Wales has maintained the orthodox position that '*delay ... cause[s] actual prejudice, rather than possible prejudice*';<sup>75</sup> the Victorian Court of Appeal indicated the warning [on delay] must be unequivocally favourable to the accused.<sup>76</sup> Hamer thought, however, that this stance does not take into consideration the possibility that not all defendants suffer this prejudice. This presumption allows judges at trial to point out the possible drawbacks the accused may encounter on what Hamer regards as unduly favourable terms in the applicable jurisdictions. He argues that delay and forensic drawbacks should form

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<sup>71</sup> Fn 19, Ring op cit, p.172.

<sup>72</sup> Fn 38, Hamer, op cit, pp.671-689.

<sup>73</sup> Hamer, p.673.

<sup>74</sup> [1989] Crim LR 168.

<sup>75</sup> Fn. 38, Hamer: op cit, p.683.

<sup>76</sup> Ibid.

a separate application at a preliminary hearing, and if the judge rules affirmatively that the defendant may suffer prejudice, this can be readily remedied by neutral and balanced directions to the jury at the end of the trial.

By contrast, Ring's analysis of prohibition applications in Eire subsequent to the *SH v DPP*<sup>77</sup> ruling show that defendants' cases have to meet a very high threshold of showing prejudice 'where the risk of an unconstitutionally unfair trial is raised to an unacceptably high level, because the Irish justice system places an over-reliance on trial judges to ensure due process and the role of the jury as an arbiter of fact, with little assistance from the appellate courts as to how to deal with evidential and procedural problems.'<sup>78</sup> Ring questions whether directions to the jury safeguard the rights of the accused, as judges may be uncertain about how adequate their warnings are when having to instruct juries on delayed reporting, issues of balance of power in the relationship between the accused and the complainant, the inhibition of the complainant, corroboration and admissibility of evidence.<sup>79</sup>

In the UK, it is not mandatory for judges to give directions to juries regarding delay. The decision to give directions is governed by the length of the delay, the cogency of the evidence and the circumstances in the case. It cannot be said that judicial directions are special in historic cases, because the judges have a general duty to ensure that proceedings are fair, though they may be more likely to give a direction where the complaint's evidence is uncorroborated.<sup>80</sup>

Where a judge should have included a judicial direction, or the direction was inadequate, a defendant may use this as a ground of appeal, though he may fail where the complainant's evidence was corroborated at trial, as had occurred in *Hickson*.<sup>81</sup> It is not sufficient for judges to leave it to defence counsel in their closing speeches to plead the difficulties the defence had encountered owing to delay and forensic disadvantage.

#### **(iv) Types of evidence that may be affected by delayed complaint**

Historic allegations may be fraught with difficulties: there may be instances where a material witness or document may no longer be available or, in a less technological age, no proof of the whereabouts of the defendant. In date-specific allegations, independent evidence may resolve

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<sup>77</sup> Fn 69, *supra*.

<sup>78</sup> Fn 19, Ring: *op cit*, p.163.

<sup>79</sup> Ring, p.164.

<sup>80</sup> *H (Henry)* [1998] Crim L R 409; [1998] 2 Cr App R 161.

<sup>81</sup> [1997] Crim L R 494.

an issue definitely, particularly in recent complaint cases. In 2001, the politician Neil Hamilton and his wife, Christine, were accused of sexually assaulting a woman in May of the same year. Telephone, credit card records, as well as closed-circuit television of the places where the couple were located at the time of the alleged crime provided an *alibi*.<sup>82</sup> The Metropolitan police found no evidence to support the allegations that has been made against the couple and the investigation was dropped.<sup>83</sup>

Had the sexual complaints against the Hamiltons been made years later, they might have been forensically disadvantaged, e.g., the telephone records might have been deleted after X years, the credit card details likewise, and the video showing their true *alibi* might have long been erased. A jury might be told on behalf of the defence that these independent data once existed, but not anymore. The jury would then have to consider whether the defendants were telling the truth about the existence of the independent evidence, even before being asked to consider whether it was relevant and material to an issue in dispute.

The passage of time can affect the quality of evidence in a number of ways. For instance, the complainant may narrate that s/he was afraid of the defendant when s/he was young, which was the reason for the late report of the allegation: the defendant may want to correct an impression by the complainant that the relationship between them was abnormal. In *R v Dutton*,<sup>84</sup> allegations of indecent assault had taken place over a four year period when the complainant was 10/11 years old. No complaint was made until the complainant was 29 years old. The Court of Appeal said that such cases inevitably involved substantial delay. The Court said that the judge, having decided there was no abuse of process, misdirected himself in failing to point out to the jury what was said by the defence about possible prejudice caused by the delay.

The defendant may also be unable to call witnesses due to their death, unavailability or poor memory either to contradict the complainant's testimony or to corroborate his own; *R v F*<sup>85</sup> and *R v King*.<sup>86</sup> If the court considers that other witnesses could have been called instead, it will consider this point at an abuse of process session; *R v B*.<sup>87</sup> Important locations may have been changed, sold or destroyed as had been an issue in *R v Dutton*.<sup>88</sup>

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<sup>82</sup> BBC News, 'Evidence Proves Hamiltons Innocent' Monday 13 August 2001.

<sup>83</sup> BBC News 'Police drop Hamilton sex case' 28 August 2001.

<sup>84</sup> [1994] Crim L R 910.

<sup>85</sup> [1996] Crim L R 257.

<sup>86</sup> [1997] Crim L R 298.

<sup>87</sup> [1996] Crim L R 406.

<sup>88</sup> [1994] Crim L R 910.

Documentary evidence may have been lost or destroyed. In *Dutton*, relevant social services records had been destroyed. Missing documents may also improve or diminish the credibility of other complainants. In *R v Joynson*,<sup>89</sup> documentation was missing which might have proved whether the complainant had been abused by a person other than the complainant as attested to by the complainant's mother at trial. *Joynson* was also important in highlighting the fact that no judicial warning to the jury was a substitute for missing records. The courts should therefore be careful to consider whether missing or unavailable independent evidence is more than speculative in assisting a defence case.

Sometimes the courts will decide that ostensibly relevant evidence is too speculative to be of value to rebut evidence. In *R v B*,<sup>90</sup> the defendant faced multiple allegations from several complainants. One had claimed to have been assaulted by B when he had absconded, but had been returned to the care home by police; the other two claimed that the defendant had assaulted them on a minibus. A register, the only record available to assist the defence, proved the boys had been registered at the centre. The defendant, on appeal, argued that incident books, medical records and staff records were no longer available and this had caused him prejudice and his subsequent conviction. The appeal was allowed in part. The court quashed the conviction in relation to one of the complainants, because the defendant did not have the rota book available to establish his whereabouts on one particular night. However, the argument about whether potential witnesses who could have challenged the narratives of the other two complainants in the alleged minibus incident was regarded as being too speculative and the appeal judges thought the jury would have convicted B anyway. In *Wilkinson*,<sup>91</sup> work records which might have proved *alibi* had been destroyed. Defendants may also try to argue that medical evidence was no longer available to disprove a rape or buggery as had been argued at the *R v R* appeal.<sup>92</sup> Alibis for particular times and dates may be difficult to show; as in *R v R* and *Wilkinson*.

Evidence that was available to the defence, unused evidence from the police investigation/held back by the Crown Prosecution Service or evidence found *post*-trial may equally be supportive of prosecution evidence as well as for the defence. In *R v Ely*,<sup>93</sup> a document which was used to support the appeal actually supported the evidence of one complainant, who had been adamant that he had been allowed to join a scout group early upon his arrival at the care home, even though the defendant denied this point at trial.

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<sup>89</sup> [2008] EWCA Crim 3049.

<sup>90</sup> [2005] EWCA Crim 29.

<sup>91</sup> Fn 62, *supra*.

<sup>92</sup> [1994] Crim L R 948.

<sup>93</sup> [2005] EWCA Crim 3248.



Hamer argues that defendants are not unduly prejudiced when a delayed prosecution is staged, because the credibility of the complainant is already placed in doubt by their late disclosure, and that lost evidence may be just as likely to be inculpatory as exculpatory,<sup>94</sup> (as *Ely*<sup>95</sup> shows). The UK criminal courts have acknowledged that missing evidence can have an adverse impact on the rights of the accused to exculpate him. In *R v Burke*,<sup>96</sup> the appellant, a worker in a children's home, argued that it had been impossible for him to have a fair trial, because day book records which would have proved that the appellant had not been on duty on a particular morning when the complainant alleged the defendant had abused him, had been lost. The Court of Appeal quashed one count of a buggery charge dating from 1971, made by a 15-year-old care home resident based on the said argument.<sup>97</sup>

Unlike the other counts involving the other complainants in that case, K. made only one allegation against the appellant. Crucial to the evidence of K. was that the offence occurred after he had been returned to Penhill at about midnight having earlier absconded and having been caught by the police. There was no real dispute that he had absconded at some time during the relevant period (more than once) – that was confirmed by contemporary social services files. If the appellant was on night duty when K was returned, then that would be powerful evidence in support of K's evidence. If, on the other hand, he was not on duty that night, then sensibly no jury could properly convict. Absent contemporaneous records from Penhill or elsewhere meant that, it was not possible to tie down the exact date of the absconding and return (although K sought to do so). Even if that had been possible, the crucial documents which would have existed and would have shown whether the appellant was on duty (i.e., the duty rota and/or the form which would have been signed by whoever was on duty to acknowledge receipt of the boy) are missing.<sup>98</sup>

The Court of Appeal has also been known to hold that the defendant or his defence team had overlooked locating alternative independent evidence such as the fact that there were probably other witnesses whom the accused could have called or whom his defence team elected not to call and that therefore he suffered no prejudice in presenting his case as in *Ely*.<sup>99</sup> This decision placed the evidential burden on the defendant, not the prosecution.

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<sup>94</sup> Fn 38, Hamer, op cit p. 671.

<sup>95</sup> Fn 93, *supra*.

<sup>96</sup> [2005] EWCA Crim 29.

<sup>97</sup> *Burke* judgment, para 61.

<sup>98</sup> *Burke* para 35.

<sup>99</sup> Fn 93 *supra*.

Hamer goes as far to argue that in England and Australia, most delayed prosecutions have so far favoured the defendant, not the prosecution. There may also be cases where there may be few or no consequences caused by the delayed report, in which case, delay directions to the jury would be redundant, and in Australia, some jurisdictions specify that a defendant must actively complain of detriment due to delay for a judicial direction to be given.<sup>100</sup>

Furthermore, he contends that prosecutions are based on the strength of the prosecution evidence, not its completeness. However, defendants who claim to be forensically disadvantaged are in the invidious position of being prejudiced by the lack of something that is no longer available to use.<sup>101</sup>

It is submitted that in institutional settings, documentation would have been a normal part of the care home system and the presence or absence of a defendant at a date specific alleged event or engagement of service at the care home/school can be an effective *alibi*. Ring, citing the US case of *Barker v Wingo*,<sup>102</sup> argues that there will be obvious prejudice to the accused where witnesses die or disappear through delay, and prejudice where witnesses are unable to recall accurately events of the distant past; but loss of memory is not always reflected in the record, because what has been forgotten can rarely be shown.<sup>103</sup> Since the defendant is unable to produce the forensic evidence, it is presumed that there is no prejudice and the trial then proceeds, with the trial judge being left to direct the jury on delay issues.<sup>104</sup>

Ring analysed reasons for granting stay of process in Eire; her conclusion illustrates how arbitrary the judicial decisions may be as to what constitutes a hindrance to a fair trial.

In *CK v DPP*<sup>105</sup> the death of three witnesses and the destruction of a van (the *locus* of an alleged assault) and its insurance records, were insufficient reasons for arguing prejudice through delayed report; yet in a case not involving delayed report, the issue of missing mobile phone call records was held to be a sufficient ground for halting the trial; *R C v DPP*.<sup>106</sup>

In the UK, the Court of Appeal has had to consider whether missing records prevented the fair trial of the appellant. In *R v Sheikh*,<sup>107</sup> the appellant had been convicted of indecent assault and buggery of two boys when he was a housemaster of a care home 26 years earlier. Sheikh had

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<sup>100</sup> Fn 38, Hamer: op cit, p.675-676.

<sup>101</sup> Fn 19, Ring: op cit, p.165.

<sup>102</sup> [1972] 407 U.S.

<sup>103</sup> *Barker v Wingo*, Powell J., p.532.

<sup>104</sup> Fn 7, Ring: op cit p.83.

<sup>105</sup> [2007] IESC 5.

<sup>106</sup> [2009] IESC 32.

<sup>107</sup> [2006] EWCA Crim 2625.

already been convicted of these offences in 2002, had his convictions overturned 2004 and was retried for the same offences in convicted in 2005.

The defendant had tried to argue at both trials that the staff roll and day book were missing, both of which would have been able to show that the opportunity for the defendant being able to abuse the children at the duty times alleged by them would have been minimal:

- (i) The appellant and (the complainant) MG were both present at the Home only during a specific and limited period, 1st-31st August 1980.
- (ii) The offences were shown to have been committed within a very narrow time frame on 29th or 30th August 1980.
- (iii) On the evidence of MG, the appellant was on duty during the evening preceding the alleged offences.
- (iv) The particular circumstances of the termination of the appellant's employment gave rise to a real possibility that he was on leave at the time of the offences.
- (v) It had been demonstrated by reference to other documents which survived, (day books etc.) that the missing documents would have been likely to include information directly bearing on opportunity or the lack of it.

The judge at the retrial had refused to stay the proceedings after an abuse of process submission by the defendant's barrister. He thought that the trial, up to that point had been fair, because the defence had conducted a thorough cross-examination of the available evidence. The judge had overlooked the point defence counsel had tried to make about the unfairness of proceedings through forensic disadvantage suffered by the defence. The Court of Appeal overturned the latter conviction:

*In these circumstances, we have grave doubts whether a judge who properly analysed the consequences of the missing documents would conclude that the trial was fair. If we are wrong, we have no doubt that a judge who carried out such an analysis would not necessarily reach the conclusion that the trial was fair.*<sup>108</sup>

The Court of Appeal had decided that the window of opportunity for the offences to have been committed was minimal.

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<sup>108</sup> *Sheikh per Hooper LJ*, para 47.

The research volunteer case of *F* highlights how delay may lead to loss of evidence.<sup>109</sup> *F* had been accused and convicted of anally raping *X* as a minor. This case was referred to the Criminal Cases Review Commission. The CCRC noticed that the original police notebooks were missing, mislaid over the years, so the contents of the notebooks could not be used to challenge prosecution witness inconsistencies.

Issues arising from trying historic allegations have been acknowledged by the judiciary, but appeals on the grounds of the paucity of evidence do not necessarily succeed, since the judiciary does not wish to usurp the decision the jury reached if due process had been followed. Take the example of the *R v W*<sup>110</sup> appeal case. Moses LJ stated that:

*Of course, all these cases are worrying. They are particularly worrying when they relate to events long ago and when the truth or otherwise of the allegations depends, at the end of the day, upon which of two people are believed. But there is no principle that where historic allegations of abuse have no supporting evidence and depend only on one witness, this court is bound to reach the conclusion that they are unsafe or that the case should not proceed at trial.*<sup>111</sup>

In this appeal case, the only point of law which was accepted by the Court of Appeal was appeal against sentence, where the trial court had erred in sentencing the defendant on a charge of producing indecent photographs. In the original trial, it was alleged as part of the case against him that he had made indecent photographs of his partner's natural daughter, even though those photographs were said no longer to exist 'after so great a distance in time'. It is possible that the uncertainty of the existence of the alleged photographs persuaded the Court of Appeal to reduce the sentence; the defendant had originally been sentenced based upon the jury's acceptance that they actually existed. The existence of the photographs was based on the *ipse dixit* of a prosecution witness. It is possible that the indecent photographs were indeed made and destroyed/lost/unavailable. Alternatively, the alleged existence of the photographs might have been complete fabrication, but the defendant was unable to persuade the jury that they never existed. The problem of lack of availability of forensic evidence in delayed prosecutions thus also affects sentencing decisions.

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<sup>109</sup> Appendix D, case of *F*, p.331.

<sup>110</sup> [2006] EWCA Crim 1359.

<sup>111</sup> *R v W* above *per* Moses LJ, para 10.

Where the accused asserts that he cannot or did not have a fair trial because of a loss of forensic material or witnesses, the judiciary is reluctant to accept this, unless it can be proved that lack of forensics would have been sufficient to counter a material fact in dispute.

As Lord Bingham pointed out in *R v Pendleton*,<sup>112</sup> the question the Court of Appeal has to decide is whether the conviction is safe, and not whether the accused is guilty, and in a difficult case it is often wise for this court to test its provisional view by asking whether the fresh evidence if given at trial might reasonably have affected the decision of the trial jury to convict.<sup>113</sup>

Unsafe convictions (miscarriages of justice) arise in a number of circumstances in criminal trials generally and sexual/HCSA cases specifically and these are identified next.

When a defendant appeals his case, two issues now arise – not only must the appeal court consider whether he was wrongfully convicted, but also whether he received a fair trial<sup>114</sup> – two similar, though not identical, logics. Procedural requirements of a fair hearing will differ according to the jurisdiction, but to determine whether the standard of fairness has been applied, the trial itself must be fair as a whole.<sup>115</sup> Under the equality of arms principle, parties involved in the trial may not be privileged over other parties in the process. This is a concept in criminal and civil law whereby ‘everyone who is party to such proceedings shall have a reasonable opportunity of presenting his case under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent’.<sup>116</sup> Under Article 6 (2) the defendant is entitled to be presumed innocent until found guilty pre-trial, during the trial and even post-trial if he makes an appeal.<sup>117</sup>

#### *A study of appeal decisions involving sexual offences*

It is very difficult to have a conviction overturned. Most appeal cases are referred to the Criminal Cases Review Commission which has been extant since 1997.<sup>118</sup> Out of 17 210 applications to the CCRC from 1997-2013, only 353 had been quashed at the Court of Appeal.<sup>119</sup> Under section 13(1) of the Criminal Appeal Act 1995, any conviction, verdict,

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<sup>112</sup> [2002] 1 Cr App R 441 at p. 454.

<sup>113</sup> *R v Pendleton* [2001] All E R (D) 180 (Dec).

<sup>114</sup> P. Mahoney, ‘Right to a Fair Trial in Criminal Matters under Article 6 ECHR’ (2004), p.129; Under the Human Rights Act 1998, domestic law of criminal procedure must now integrate Article 6 ECHR.

<sup>115</sup> *Ibid*, p.111.

<sup>116</sup> *Bulut v Austria*, 22.02.96, ECHR, No. 17358/90, para. 47.

<sup>117</sup> *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, 2003, p.219.

<sup>118</sup> <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>

<sup>119</sup> Criminal Cases Review Commission, ‘About the CCRC’ see webpage.

finding or sentence shall not be referred under any of sections 39 to 12 unless - (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.<sup>120</sup>

CCRC-referred cases constitute only about three per cent of applications of any kind which were successful on appeal.<sup>121</sup> Seventy-five per cent of applications over the period 1997-2013 involved non-sexual offences against twenty-five per cent involving a sexual offence. The Court of Appeal quashed most of the sexual offence convictions.

All cases on Westlaw<sup>122</sup> since 2000 to 2013 were analysed for this study, and also those referenced by solicitors and barristers who habitually handle HCSA trials and appeals. In a total of 23 appeal cases found on this search, the convictions of 25 men were quashed. Therefore, issues arising from at least a couple of cases per year are sufficiently serious for the Court of Appeal to agree that the convictions were unsafe. Here are examples of successfully appealed HCSA cases.

Complainant retraction and fabrication: *R v Smolinski*;<sup>123</sup>

Judicial misunderstanding of joinder and severance under the old similar fact evidence rules; *R v O'Brien*;<sup>124</sup>

Recent complaint evidence that was not recent enough to qualify; *R v Birks*.<sup>125</sup>

Included in the appeals are some cases where the defendant was forensically disadvantaged by the delayed prosecution and he had suffered a miscarriage of justice thereby:

*R v Sheikh*<sup>126</sup> missing documents;

*R v Chapman*<sup>127</sup> deceased key defence witnesses;

*R v Joynson*<sup>128</sup> allegations were over 35 years old, perpetrator might have been someone else according to a complainant's mother but impossible to ascertain after such a long passage of

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<sup>120</sup> Criminal Appeal Act Chapter 35, section 13 (1) (a); <<http://www.legislation.gov.uk/ukpga/1995/35>> accessed on 4 Feb 2014.

<sup>121</sup> Based on the data supplied by the CCRC on their website under Case Library. See Appendix A, pp.303-308, for a list of all referrals to the Court of Appeal involving any sexual offences from 1997 to 2012.

<sup>122</sup> <<http://www.westlaw.co.uk/>>; see also Appendix B, pp.309-326.

<sup>123</sup> [2004] EWCA Crim 1270.

<sup>124</sup> [2000] Crim L R 863.

<sup>125</sup> [2002] EWCA Crim 3091.

<sup>126</sup> [2006] EWCA Crim 2625.

<sup>127</sup> [2006] EWCA Crim 1656.

<sup>128</sup> [2008] EWCA Crim 3049.

time without key documents. Neither a good cross-examination by the defence, nor a judicial direction to jury regarding effects of delay could cure the disadvantage caused to the defendant.

In *R v Clark*,<sup>129</sup> complaints issuing from hypnosis should have been challenged by a defence expert witness;

In *R v H*,<sup>130</sup> the judge's directions to jury on the effects of delay on a defendant's case had been inadequate;

*R v Robson*;<sup>131</sup> complainants' testimonies were so discrepant that the judge should have ruled that this testimony was no longer safe to be left to the jury;

*R v Siddall and Brooke*;<sup>132</sup> the complainant had made so many allegations of sexual offences against so many other people at various times, that the jury should have heard about them;

*R v Basil Rigby Williams and Michael James Lawson*<sup>133</sup> new witnesses for the defendant. As concerns Rigby Williams' case, there had been concern about police contamination. The sheer number of suspects of HCSA found in the police trawl into the care homes by a restricted list was considered by the Court of Appeal to be prejudicial to Lawson's case when it was accidentally revealed to the jury. It made his conviction unsafe'.

In *R v T*<sup>134</sup> the trial judge had not summed up properly on the use of bad character evidence by means of hearsay admitted under s.120(4) and s.120(7) of the CJA 2003, some of which had been inadmissible for certain complainants; the standard good character direction for the complainant was required.

The CCRC's figures do not factor failed applications to the Court of Appeal or Court of Appeal hearings. Being conservative about the extent of miscarriage of justice in HCSA cases, there ought to be concern that cumulatively, it is not just one or two people who have been wrongly convicted, but dozens. It must be remembered that those convicted of HCSA are convicted for years, sometimes more than a decade.

Hamer argues that, especially in cases of familial abuse, few defendants can establish *alibi* by relying upon independent evidence.<sup>135</sup> By contrast, in the context of the mass investigations of

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<sup>129</sup> [2006] EWCA Crim 231.

<sup>130</sup> [2006] EWCA Crim 994.

<sup>131</sup> [2006] EWCA Crim 2754.

<sup>132</sup> [2006] EWCA Crim 1353.

<sup>133</sup> [2003] EWCA Crim 693.

<sup>134</sup> [2008] EWCA Crim 484.

<sup>135</sup> Fn 38, Hamer: op cit, p.687.

HCSA in institutions, independent evidence is a key defence stratagem. Publicly-run institutions routinely keep records showing the admission of children (registers), where children were at a particular time or which school trip they were on (log books). Staff enrolment too would have been on record. Reformatory institutions would also have logged the conduct of the children whilst residing at the home. Some children may have suffered abuse and neglect in their family, and this may have been logged in social services records which may have been lost or destroyed over time.

That may be true, but independent evidence of this sort is often missing or unavailable, and yet the Courts have been reluctant to give the benefit of the doubt to defendants. In *R v Gillam*,<sup>136</sup> the Court of Appeal thought that missing records would not have resolved the central issue of whether the offence was committed. However, if a complainant can be shown to have been lying about the facts recorded in independent evidence, that evidence would cast doubt on the reliability and honesty about the offences s/he alleges.

‘Missing’ evidence may be either inculpatory or exculpatory, therefore it is an unknown quantity about whether a party has been disadvantaged.<sup>137</sup> Hamer argues that the presumption of innocence is still retained by balancing summing up directions to the jury on forensic disadvantage,<sup>138</sup> because the prosecution still has to prove the case against the accused, who need not prove anything. He reckons that the legal system and juries favour the accused in historic trials, given that the complainant’s credibility is already affected by the tardiness of the disclosure and that where it is claimed that a defendant has been disadvantaged by the death/unavailability of his witnesses and independent forensic evidence, juries are more likely to give the accused the benefit of the doubt.

Ring argues, however, that the prosecution should be asked to show why an alleged missing/lost/unavailable piece of independent evidence for the defence is not sufficiently relevant and should be disregarded.<sup>139</sup> Also, the onus should be on the prosecution to show that the ‘relevant aspect of a given defence can be proven by alternative means,’ in order to safeguard the defendant’s right to a fair trial. This study concludes that adopting Ring’s proposals would enhance the fairness and safety of the trial of these cases.

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<sup>136</sup> [2008] E.W.C.A. Crim 756.

<sup>137</sup> Fn 38, Hamer, op cit pp.685-686.

<sup>138</sup> Hamer, p.687.

<sup>139</sup> Fn 19, Ring: op cit, pp.184-185.



## (v) Conclusion

Given the challenges to the safety of the criminal process in HCSA cases that are discussed in this chapter, the question obviously arises: ‘Should the UK introduce time bars to criminal offences, especially HSCA cases, as prevails under some European jurisdictions using legal codes?’

It should be noted that some of these bars are operative only after decades have passed since the alleged incident, and that time only begins to run for sexual offences once the complainant reaches adulthood, thereby further extending the time limit. It seems unlikely that the UK will introduce statutes of limitation of the sort that currently exist in continental Europe. In any event, most delayed prosecutions would still occur under those regimes, because the most serious sexual offence crimes would fall under the category of longest prosecutable period.

Whilst time bars do exist for summary offence in the UK, they are not used for serious offences such as child sexual abuse and are antithetical to the traditional legal maxim *nullum tempus occurrit regi*, - time does not run against the Crown (usually represented by a State) which allows it to start a criminal prosecution against anyone for such crimes at any time.<sup>140</sup> Civil claims have statutes of limitation in the UK where the burden of proof is ‘balance of probabilities’ and has been so since the 1600s, yet not where the standard of the criminal proceedings is ‘beyond reasonable doubt’.<sup>141</sup>

Time bars are frequently encountered in civil law jurisdictions on the Continent. The UK was, and remains, the sole country within Europe which does not operate time bars for serious crimes such as sexual offences. The UK legal system determines whether a time bar should apply according to the merits of the individual case.

Advocates of victims’ rights may contend that the criminal justice system in the UK is fully capable of prosecuting HCSA allegations as long as care is taken to be mindful of the deleterious effects on the quality of case evidence caused by long lapses of time. In this study it has been shown that there have been successful appeal cases in which it was accepted that a fair trial had been impossible in consequence of the delay in bringing the proceedings. Such examples present strong grounds for implementing a statute of limitation.

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<sup>140</sup> Mason, A., Solicitors’ Journal, ‘Should there be a statute of limitation for criminal offences?’ vol 159, no 33 08-09-15

<sup>141</sup> Ibid.

For advocates of victims' rights (of those sexually abused) in England, introducing a statute of limitation would signify creating legal loopholes for sexual offenders, thus undermining the work of recent governments who have tightened up rules and laws designed to apprehend and convict them. However, procedural safeguards protecting the right of a defendant to a fair trial must not be discounted on the basis of providing 'loopholes'.

A 'conditional' time bar, where there is re-activation of the prosecutable period, subject to the discovery of a suspect's deoxyribonucleic acid (DNA), could also be considered. In the United States, 27 states can suspend and therefore extend their statute of limitation where a perpetrator is identified through his/her DNA. For example, in Washington, statutes of limitation already apply to all categories and levels of sexual offence. If DNA is found and can be conclusively traced to a perpetrator, the legal authorities have one year by which they can prosecute him.<sup>142</sup>

Notwithstanding these drawbacks and difficulties, and giving proper weight to the serious problems deriving from delay which are revealed in the appealed cases discussed above, it is submitted that serious consideration be given to introducing some sort of limitation period (perhaps qualified) in these cases. There is obvious merit in this context in the Danish time bar which only begins once the complainant is out of the dominion of the alleged perpetrator.

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<sup>142</sup> Wash. Rev. Code § 9A.04. (3) In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing or by photograph as defined in RCW 9.68A.011, whichever is later.

## **Chapter V    Developments concerning the complainant’s bad character evidence and its possible impact on the fairness of proceedings**

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This chapter will discuss whether recent legislative changes in the admissibility conditions of evidence of the complainant’s bad character (BCE) can hamper the rights of the defendant to a fair trial in sexual offence cases. BCE may be sexual or non-sexual conduct, but in sexual offence trials, it is usually the former.

Historic sexual offence cases often lack hard evidence. In the absence of contemporary real or documentary evidence, oral testimony will be the focus of the trial and its outcome. Traditionally parties seek to demonstrate that the other’s testimony is not creditworthy by bringing in collateral issues, such as the opponent’s past misconduct. The relevance of BCE is often contested and under the current statutory regime, applications are considered by judges at the pre-trial stage, where they must decide whether the BCE is likely to be relevant to a fact in issue and therefore admissible. If such evidence, believed by the defence to be key, is excluded, miscarriages of justice can occur.

The question is whether statutes protecting complainants and witnesses from ostensibly irrelevant and intrusive questioning can lead to wrongful convictions when such evidence is withheld from the jury. This chapter examines the effects and deficiencies of section 2 of the Sexual Offences (Amendment) Act 1976; some of these defects were subsequently remedied by the Youth Justice and Criminal Evidence Act 1999, followed by further reform under section 100 of the Criminal Justice Act 2003.

This chapter will finally examine the reinforcement of rights for victims of sexual offences under the EU’s Victims’ Directive 2012/29/EU. Whilst England already permits special protective measures for interviewing and cross-examining child complainants under the Youth Justice and Criminal Evidence Act 1999 (and also victims of sexual assault under s.17(4)), the Victims’ Directive (adopted by the UK in 2012) broadens eligibility for special measures where any victim is regarded as ‘vulnerable’ (para 38 of the Directive). This categorisation has significant implications for extending special pre-recording measures to adults reporting HCSA allegations. Does this Directive also affect the quality of the defendant’s rights to examine or have cross-examined these allegations made against him Article 6 (3) (d) of the European Convention on Human Rights?

This chapter is set out as follows:

- (i) Social and professional attitudes towards complainants
- (ii) The common law position of complainants in sexual offence cases
- (iii) S.2 of the Sexual Offences (Amendment) Act 1976
- (iv) Background policy which shaped the Youth Justice and Criminal Evidence Act 1999
- (v) Section 41 of the YJCEA 1999 and its remit
- (vi) Appeals referring to use of section 41 YJCEA 1999
- (vii) Is there still justification in allowing similar fact evidence against complainants?
- (viii) Is there still a place for section 41 of the YJCEA 1999 *post* section 100 of the CJA 2003?
- (ix) Prior research on the judicial approach to section 41 of the YJCEA 1999
- (x) Comments on section 100 CJA 2003
- (xi) Child sexual abuse appeal case involving non-disclosure of the complainant's alleged bad character
- (xii) Disparities between the complainant's and defendant's BCE rules
- (xiii) Human rights issues arising from the restrictions on the use of BCE of the complainant
- (xiv) Applications and implications of Directive 2012/29/EU ('Victims' Directive')
- (xv) Conclusion

**(i) Social and professional attitudes towards complainants**

‘Bad character’ of the complainant covers a wide range of conduct: it can mean a previous conviction, discreditable conduct, bias, corruption or untruthfulness, provided that the evidence is relevant to the issue of the witness’ credibility. In sexual offence trials, ‘bad character’ can also comprise lifestyle conduct, in terms of the sexual history of the complainant, whether with the accused or a third party.

There are well-founded as well as anecdotal reasons for stating and suggesting that historically and even now, complainants of sexual offences have faced, and may still encounter, unequal and maltreatment by society and the criminal justice system. Women, who reported being raped, used to be viewed as *agents provocateurs*<sup>143</sup> and therefore the authors of their own misfortune. Those reporting a rape faced being disbelieved or were dismissed as being delusional. Concrete examples of this attitude in legal circles have been noted. In one contested rape trial, a UK judge as late as 1990 directed a jury:

*As the gentlemen of the jury will understand, when a woman says ‘no’ she does not always mean no.*<sup>144</sup>

A New Zealand judge had exposed his similar view on rape complainants in a courtroom as recently as 1996.<sup>145</sup> However, there has been a widespread recognition in legal circles that the criminal system was heavily and unfairly weighted against rape complainants and favoured the accused. That this was largely due to the fact that there were a whole range of assumptions and myths which underpinned not only social attitudes about sexual violence, but also the response of the criminal justice system itself.<sup>146</sup>

Complainants who went to trial, often faced being debased by the exposure of their private lives where this evidence was raised by the defendant. This latter problem was acknowledged by Lord Clyde in *R v A*:

*The intent of section 41 is to counter what have been described as the two myths. One is that because a woman has had sexual intercourse in the past she is more likely to*

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<sup>143</sup> N Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005), p.24.

<sup>144</sup> The Scotsman, ‘Judge calls abuse victim aged 13 a sexual predator’ 5 February 2014 – Comments made in court revealing ‘out of touch’ attitudes have sparked criticism before; Judge Raymond Dean at 1990 Old Bailey trial in April 1990.

<sup>145</sup> Fn 1, Gavey: op cit, p.23.

<sup>146</sup> Ibid, p.24.

*have consented to intercourse on the occasion in question. The other is that by reason of her sexual behaviour in the past she is less worthy of belief as a witness.*<sup>147</sup>

The judiciary is encumbered with deciding whether BCE is of sufficient and admissible standard for a jury trial. But that decision may influence or even predetermine the verdict if it causes pivotal evidence to be withheld from the jury.<sup>148</sup> Juries can only decide cases based on the admissible evidence presented to it. Is truth finding compromised by protecting complainants and witnesses in criminal trials? The reality is, that whenever allegations of a sexual nature are made, the sexual history of the complainant will be investigated by the police and the case papers viewed by lawyers on both sides at the pretrial stage. As Birch points out:

*In many cases, it will also happen that, however sensitive the investigation, and however well treated the complainant, at the end of the trial, a jury has little more to go on than one person's word against another's. Even if all the popular stereotypes of 'real' rape could be debunked at once, the need to satisfy the criminal burden of proof will ensure that the outcome of cases turning on credibility remains inherently unpredictable.*<sup>149</sup>

It will be shown in this chapter, that the presumption of innocence of defendants has been seriously eroded in sexual offence trials based on the following line of reasoning adopted by policymakers in the 1990s.

From the 1970s onwards, successive governments have consistently followed a policy of creating and maintaining a victim-centred criminal justice system; evidence concerning victims of miscarriages of justice was overlooked to accommodate this stance. Can justice be done to both complainants and defendants where victim-oriented legislation under both section 41 of the YJCEA 1999 and section 100 of the CJA 2003, narrowly determine the occasions when a complainant's BCE can be used as defence material? Are statutory victims' shields helpful in redressing the balance of injustice caused by the defendant's shield at common-law, or do they defeat the object of the fact-finding process?

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<sup>147</sup> *R v A* (No.2) [2001], para 1 UKHL 25. [2002] 1 AC 45, para 147.

<sup>148</sup> R Pattenden, 'Pre-verdict Judicial Fact-finding in Criminal Trials with Juries' *Oxford J. of Legal Studies*, (2009) 29 (1), p.24.

<sup>149</sup> D Birch, 'Untangling Sexual History Evidence: a Rejoinder to Professor Temkin' [2003] *Crim L R*, p.372.

## (ii) The common law position of complainants in sexual offence cases

Historically sexual offence trials typically included evidence of the complainant's sexual history with the accused or a third party, until Parliament intervened. It has passed three complainant/witness protection statutes. The first complainant protection statute was section 2 of the Sexual Offences (Amendment) Act 1976, hereafter, the SO(A)A, followed by section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) and in rapid succession, section 100 of the Criminal Justice Act 2003 (CJA).

The common law rules on BCE were defendant-centred: they afforded a virtual *carte blanche* in allowing the BCE of a complainant as part of his defence. In essence, complainants in sexual offence cases at common law were often subjected to irrelevant intrusion into their sexual history as a defence tactic to discredit her complaint when she was being-cross examined. Judges were powerless 'to prevent counsel insisting on a witness being compelled to answer a scandalous question wholly irrelevant to the issue and barely relevant to the credibility of the witnesses.'<sup>150</sup> But after 1898, if the defendant gave evidence, he was afforded considerable immunity by the Criminal Evidence Act.

The common law rules on the complainants' BCE in sexual offences were shaped around the crime of rape. A 17<sup>th</sup> century writer, Hale, defined rape as 'unlawful intercourse with a woman without her consent, by fear, force or fraud.' Sexual intercourse becomes unlawful when the woman does not consent.<sup>151</sup> The cross-examination on the sexual history of the complainant at common law had a dual purpose: in rape cases, evidence of the complainant's notoriously bad character as an unchaste woman was both admissible and relevant to the issue of consent and the collateral issue of credibility. Past sexual behaviour revealed in open court could cause the jury to be morally indignant and prejudge the witness.<sup>152</sup> However, as long as the revelation of past sexual conduct was relevant to an issue such as credibility, it was permissible.<sup>153</sup>

The earliest recorded case where the complainant's sexual past was sought to be used is found in *R v Hodgson*:

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<sup>150</sup> *R v Orton (Castro)* 1874, Cockburn C. J., vol 2, pp.720-722.

<sup>151</sup> Hale 627 1 East P. C. 434.

<sup>152</sup> S Uglow, *Evidence* (2nd edn Sweet and Maxwell 2006), p.379.

<sup>153</sup> Fn 10, Uglow: op cit, p.380.

*There, counsel for the accused sought to ask the complainant if she had previously had intercourse a) with other men, and b) with a person named. Counsel offered to call evidence to show that the girl “had been caught in bed a year before (the) charge with a young man”, and further offered the young man to prove he had had intercourse with her. The trial judge ruled that the complainant was not bound to answer the questions because they “tended to criminate and disgrace” her. He excluded the evidence, but referred the issue to the rest of the judges who confirmed the correctness of his decision.*<sup>154</sup>

In *R v Clarke*,<sup>155</sup> evidence that a woman was a prostitute ‘a woman of abandoned character’ was considered to be relevant to the issue of consent. This was confirmed in *R v Tissington*<sup>156</sup> which included ‘solicitation’.

Under the ruling in *Barker*,<sup>157</sup> evidence such as prostitution, bad sexual reputation or prior consensual relations with the defendant could be adduced as being relevant to the woman’s credibility and consent in rape cases.<sup>158</sup> In other words, the complainant had a propensity to consent to sex in general and her bad character made it more likely that she was a liar.

In *R v Clay*<sup>159</sup> evidence that the complainant was a reputed prostitute was admissible to show ‘general bad character’; also was evidence of common prostitution in *R v Riley*.<sup>160</sup> Evidence that the complainant was a mercenary prostitute or a woman of ‘notoriously loose morals’ was admitted in later cases such as *Greatbanks*,<sup>161</sup> *Bashir*,<sup>162</sup> and *Krausz*.<sup>163</sup>

The common law criteria and judicial interpretation were considered to be too lax and were widely regarded as an important factor inhibiting complainants from pressing their allegations, and from being prepared to testify in support of them.<sup>164</sup> There was clear inequality of treatment between the parties as concerns the use of BCE to discredit each other at trial. However, in the latter part of 20<sup>th</sup> century, victims’ rights campaigners successfully

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<sup>154</sup> (1812) *Russ and Ry* 211.

<sup>155</sup> (1817) 2 Stark 241.

<sup>156</sup> (1843) 1 Cox 48.

<sup>157</sup> (1829) 3 C & P 589.

<sup>158</sup> Fn 10, Uglow: op cit, p.378.

<sup>159</sup> (1851) 5 Cox 146.

<sup>160</sup> (1887) 18 QBD 481.

<sup>161</sup> [1959] Crim L R 450.

<sup>162</sup> (1969) 3 All E R 692.

<sup>163</sup> (1973) 57 Cr App R. 466.

<sup>164</sup> R Cross and C Tapper, *Cross and Tapper: on Evidence* (11th edn OUP 2007), p.360.



influenced social attitudes which were considered to be a barrier to the reporting of sexual offences.<sup>165</sup>

Campaigners wanted witness protection in the form of restraints on the admissibility of the complainant's sexual past. There was a growing consensus that the law hitherto unduly favoured the defendant's rights over that of the victim; also, that cross-examination of a woman about her private life made the trial an ordeal for her.<sup>166</sup>

Concern over the treatment of victims of sexual offences came to the forefront following the House of Lords' decision in *DPP v Morgan*.<sup>167</sup> The ruling was that in a rape trial, if the defendant genuinely believed that a woman was consenting to sexual intercourse, he should be acquitted, because the lack of belief was a constituent element of the offence which the prosecution had to prove.

The Heilbron Committee<sup>168</sup> set up to examine the implications of this decision, was of the opinion that it paved the way for juries to accept bogus defences. The Committee also decided to include in its remit the treatment of rape complainants under cross-examination, particularly on whether the use of sexual history evidence between the complainant and the defendant or a third party was still relevant. The Committee was dubious about whether the personal history and character of a rape victim could be of very much relevance; often it clouded real issues. The admission of sensitive personal material in a cross-examination was inimical to the fair trial of the essential issues and could cause humiliation and distress to the complainant, yet it conceded that relevant and proper cross-examination, even though it distresses, must be permitted to ensure a fair trial.<sup>169</sup>

The Heilbron Committee concluded that questions ought not to be asked, nor evidence admitted, except with the leave of the trial judge, but it conceded that there would be certain types of case where a total ban would be unjust to the accused.<sup>170</sup> Its report was the precursor of section 2 of the Sexual Offences (Amendment) Act 1976. It specifically addressed the problems which rape complainants encountered, including the use of irrelevant sexual history evidence of the complainant's relationship with third parties by the defendant. The

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<sup>165</sup> *Departmental Committee on Sexual Offences against Young Persons (1925)*, Report, Hansard, Cmd 2561.

<sup>166</sup> S. Adler, *Rape on Trial*, (Routledge 1987), p.33.

<sup>167</sup> [1976] AC 182. Contrast this decision with s.1 (1) (c) of the Sexual Offences Act 2003 which abolishes honest belief- must be reasonable instead.

<sup>168</sup> *Home Office, Report of the Advisory Group on the Law of Rape (HMSO London December 1975)*, Cmnd 6352, sometimes known as the Heilbron Report, as the Group was chaired by Justice Heilbron.

<sup>169</sup> *Ibid*, at para 91.

<sup>170</sup> *Ibid*, at para 135.

Committee also examined areas of evidence, practice and procedure followed in rape cases generally.<sup>171</sup> It accepted that women were being subjected to searching, irrelevant cross-examinations but it saw no merit in eliciting evidence which sought to stigmatise the complainant in terms of her credibility or to infringe her right to protection, i.e., the victim's right to a fair trial of the allegations.<sup>172</sup>

In the 1970s, social *mores* had changed; there was a much greater acceptance of sex outside marriage and a woman's choice of partners.<sup>173</sup> The Heilbron Committee officially recognised that a complainant's promiscuity neither reflected on a complainant's truthfulness nor her willingness to consent when she was making allegations of rape. It also considered that society had progressed from being judgmental about extramarital sex;<sup>174</sup> it was also unnecessary to adduce the complainant's relationships with third parties, unless the trial judge determined otherwise.<sup>175</sup> The Group agreed, however, that the relationship of the complainant and the accused would remain relevant to facts in issue and therefore should still be admissible. They argued against the use of evidence of the complainant's sexual past with third parties, unless it was strikingly similar to the complainant's behaviour before or soon after the alleged offence; or that to exclude such evidence, would be unfair to the accused.<sup>176</sup>

The Report recommended some legal restrictions to admitting the complainant's sexual history<sup>177</sup> which were contained in the passing of the Sexual Offences (Amendment) Act 1976.

### **(iii) S. 2 of the Sexual Offences (Amendment) Act 1976**

The Heilbron Committee's recommendations were largely taken on board in the shape of the 1976 Sexual Offences (Amendment) Act. Cross and Tapper comment that this legislation (SO(A)A 1976) had not precisely followed the prescription of the Committee, especially in allowing a greater discretionary element, which empirical studies subsequently suggested was being applied too leniently.<sup>178</sup>

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<sup>171</sup> Ibid, at para 85.

<sup>172</sup> Ibid, at para 91.

<sup>173</sup> Ibid, at para 131

<sup>174</sup> Ibid, at para 131.

<sup>175</sup> Ibid, at para 3 of page 36 part VIII Summary of Recommendations.

<sup>176</sup> Ibid, at page 36 para 4 (a) and (b) part VIII Summary of Recommendations.

<sup>177</sup> Ibid, at para 132.

<sup>178</sup> Fn 22, Cross and Tapper: op cit, p.360.

S. 2 (1) of the Sexual Offences (Amendment) Act 1976 comprised the following terms:

*If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with leave of the judge, no evidence, and no question in cross-examination shall be adduced or asked at the trial, about any sexual experience of a complainant with a person other than that defendant.*

S.2 (1) prohibited the use of a rape complainant's sexual history with a person other than the accused, but did not affect cases where the accused adduced evidence of his own relationship with the complainant on the issue of consent.<sup>179</sup> It has been argued that allowing cross-examination of a complainant about any sexual relationship the parties may have had with each other gives the wrong impression to the jury on the grounds that acquaintance sexual liaison was more likely to have been consensual than intercourse with a stranger.<sup>180</sup>

Under section 2, judges had the discretion whether to exclude the complainant's BCE and in *R v Lawrence*,<sup>181</sup> it was held that questions about her relationships with other men should be allowed only where they might reasonably, properly directed, in the summing up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed. But for complainants, the law was still not shielding them enough from scrutiny of their private lives; defendants could still besmirch the complainant's character by using irrelevant collateral evidence to win over the jury.

Whilst section 2 of the 1976 Act was designed to equalize the privileges of 'shield' that defendants accused of rape had previously enjoyed as concerns their sexual history and character, its remit did not include other sexual offences, such as those committed against minors. It was therefore limited in scope:

*(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.*

Clearly, there were deficiencies in the provisions of the SO(A)A 1976:

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<sup>179</sup> P Murphy and R Glover, *Murphy on Evidence*, (OUP 2008), p.195.

<sup>180</sup> J Temkin, 'Sexual history evidence – beware the backlash', [2003] Crim L R p.233.

<sup>181</sup> *Per* May J. [1977] Crim .L .R. 492, this decision was approved by the Court of Appeal in *Mills* (1978) 68 Cr App R 327.

- the restrictions on sexual history did not cover the complainant's relationship with the defendant;
- the Act only applied to rape cases and this meant could create a lack of congruence with for sexual offences not covered by the Act;
- the Act was concerned with sexual history rather than the complainant's sexual behaviour and created a loophole to admit the complainant's personal evidence that was not, *stricto sensu*, related to prior sexual history;
- the intention of section 2 of the SO(A)A 1976 also was thwarted by judicial leniency - for example allowing evidence that a complainant was promiscuous as relevant to the issue of the defendant's belief in consent
- the lack of a blanket ban on such evidence inevitably gave rise to appeals against conviction as the appellant could argue that judicial discretion had been improperly exercised.<sup>182</sup>

**(iv) Background policy which shaped the Youth Justice and Criminal Evidence Act 1999**

Between the passage of SO(A)A 1976, and the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), victims' rights campaigners advocated for an even more restrictive approach to the use of the complainant's sexual history evidence, whether concerning third parties or her prior relationship with the accused. There had already been a policy change in legal proceedings due to the interpretation of a positive obligation to include the protection of victims and vulnerable witnesses due to a 1996 landmark European Court of Human Rights case, *Doorson v The Netherlands*.<sup>183</sup>

*It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [everyone has a right to respect for his/her private life]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also*

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<sup>182</sup> Ibid.

<sup>183</sup> [1996] 22 EHRR 330, para.70.

*require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.*

The YJCEA 1999 was created against the backdrop of political manifestos which aimed to give more rights to more classes of complainant. In the 1980s, researchers, practitioners and politicians offered a platform to the treatment of victims in general within the legal system.<sup>184</sup> Information packs for families of victims of homicide, for example, came to be issued by the Home Office in 1990 under a Conservative government as a result of campaigning by Victim Support. In 1996, they had also created Victims' Charters, which the subsequent Labour Government adopted.<sup>185</sup> The Labour Party manifesto had stated that greater protection would be provided for victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses.<sup>186</sup> The criminal justice system, henceforth, would be shaped to accommodate victims.<sup>187</sup> A Victims' Code of Practice in 2006 was a product of the Domestic Violence, Crime and Victims Act 2004 - the first statutory rights for victims. The Code of Practice was designed to enhance the experiences of victims within the criminal justice system; police and probation services were also bound by the Code's stipulations. Court officials were mandated to be sympathetic towards the victim's ordeal, particularly in rape and sexual offence trials.

*Justice for All* stated that the government had passed the Youth Justice and Criminal Evidence Act 1999 to implement the recommendations of the *Speaking Up for Justice* Report in 1988.<sup>188</sup> The Executive Summary included, *inter alia*, rebalancing the criminal justice system in favour of the victim and giving the police and prosecution the tools to bring more criminals to justice.<sup>189</sup>

Home Office-commissioned research conducted by Professor Temkin,<sup>190</sup> discussed the outdated and deficient section 2 of the Sexual Offences (Amendment) Act 1976. The Working Party concluded that the law should be amended to provide a more structured approach to (judicial) decision-taking and set out more clearly when evidence of previous

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<sup>184</sup> M. Wright, M., *Justice for Victims and Offenders*, (Waterside Press 1996, reprinted 2002), p.24.

<sup>185</sup> *The Victim's Charter (1996): A statement of service for the victims of crime*, Home Office, London at p.2.

<sup>186</sup> <[www.labour-party.org.uk/manifestos/1997](http://www.labour-party.org.uk/manifestos/1997)>.

<sup>187</sup> Marsh, M. C., *Criminal Justice*, (Routledge 2011), p.333.

<sup>188</sup> CJS White Paper – *Justice for All* (Cm 5563, 2002), para 2.30.

<sup>189</sup> *Ibid*, p.11.

<sup>190</sup> L Kelly, J Temkin and S Griffiths, *Section.41 , an evaluation of new legislation limiting sexual history evidence in rape trials* Home Office Online Report 20/06;

<<http://collection.europarchive.org/tna/20090120202659/homeoffice.gov.uk/rds/pdfs06/rdsolr2006.pdf>> accessed on 7 Feb 2014.

sexual history could be admitted in cases of rape and be extended to cover a much wider range of serious sexual offences.<sup>191</sup>

The same Report was mindful of the risk of compromising the defendant's right to a fair trial under proposed reforms to restrict the complainant's BCE: thus it suggested that judicial discretion to admit such evidence should not be abolished altogether (to this extent it agreed with the Heilbron Report's recommendations back in 1975). Instead, it favoured a statutory definition of the circumstances when it could be admitted.<sup>192</sup> The YJCEA 1999 therefore went further than the single-issue of rape that was the remit of the Heilbron Committee.

In Canada, the Court's opinion in *R v Seaboyer, R v Gayme*<sup>193</sup> was influential in taking reforms further in England. The Canadian Court had to interpret section 276 of the Criminal Code which excluded sexual history evidence as relevant to the issue of consent or credibility. The Court was wary of legislation (section 276) which fettered the rights of the defendant to have a fair trial because it created a blanket ban on any evidence of sexual activity whether tendered for an irrelevant or misleading purpose (such as the victim was consenting or unreliable) or a valid one. The 'pigeonhole' approach could not deal with these issues because it was predicting relevancy on a series of categories. It therefore had the potential to exclude otherwise highly admissible evidence which may be highly relevant to the defence. Despite the fact that this section was capable of contravening an accused's rights under the Canadian Charter in some circumstances, it remained operative except in the limited and rare circumstances where it would have an unconstitutional effect.

Notwithstanding the experience of the Canadian court, other jurisdictions also adopted a rigid pigeon-hole approach to sexual history evidence. In Michigan, the state, which was designed to remove judicial discretion on a case-by-case assessment, in the light of problematic cases like *Hackett*<sup>194</sup>. In 1992, New South Wales had adopted the inflexible approach under section 409 B Crimes Act 1900 (NSW)<sup>195</sup> but in several cases in the 1990s the trial judges stayed proceedings on the basis that the defendant could not have a fair trial under section 409 B and the NSW Law Reform Commission therefore recommended a return to a judicial discretion to remove the injustice.<sup>196</sup>

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<sup>191</sup> Ibid, p.12

<sup>192</sup> Ibid, p.76.

<sup>193</sup> 2 SCR 577 (1991).

<sup>194</sup> *People v Hackett* (1984) 421 Mich. 338.

<sup>195</sup> Ibid, p.269.

<sup>196</sup> N Kibble, 'Judicial discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2' *Crim L R* [2005], p.266.

England itself adopted a more rigid approach to witness protection by passing the YJCEA in 1999. In 1998, a Home Office Report concluded that there was overwhelming evidence that the courts were using sexual history evidence to discredit the complainant's character in the eyes of the jury.<sup>197</sup>

In Temkin's view, the meaning of the word 'relevance' to determine admissibility of sexual history evidence frequently involves distortion.<sup>198</sup> A consequence of the decision in *Morgan*<sup>199</sup> had been that cross-examination of witnesses on their mode of dress, behaviour and past sexual conduct could be admitted on the grounds of being relevant to a defence of consent. Temkin thought that the use of such evidence could be a 'dirty tactic', which discriminated against women and effectively breached the Bar Code of Conduct on treating clients equally, therefore the decision needed to be overruled.<sup>200</sup>

Temkin was sceptical about the Home Office's recommendation that the Lord Chief Justice issue a practice direction to barristers prohibiting them from aggressive and/or inappropriate cross-examinations, since there was no definition of what constituted 'appropriate' cross-examination. The Home Office study concluded that present court practice was falling short of the aims of the existing law,<sup>201</sup> though the interviewed barristers did not think that much more needed to be done.<sup>202</sup>

The Report interviewed prosecution and defendant legal practitioners of both genders who had experience in rape trials and found they held stereotypical views of rape complainants.<sup>203</sup> At the same time, the interviewees also shed light on the fact that not all obstacles to a successful prosecution could be imputed to the fear by a complainant that her private life might be probed. Barristers representing defendants also showed the reality of what actually occurred at sexual offence trials, where the word of one party is contested by another's:

Hindrances that were not related to the complainant's sexual history included:

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<sup>197</sup> Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998), para 9.64.

<sup>198</sup> Fn 38, Temkin: *op cit*, p.218.

<sup>199</sup> *DPP v Morgan* [1975] UKHL 3.

<sup>200</sup> J. Temkin, *Prosecuting and Defending Rape: Perspectives from the Bar* (vol 27, no 2, June 2000), *Journal of Law and Society* p.246.

<sup>201</sup> *Ibid*, p.247.

<sup>202</sup> *Ibid*, p.236.

<sup>203</sup> J. Temkin, *Prosecuting and Defending Rape: Perspectives from the Bar* (vol 27, no 2, June 2000), *Journal of Law and Society*, pp.219-248.

- The forum of trial, with complainants feeling more at ease giving their evidence-in-chief-in smaller, more intimate courtrooms.<sup>204</sup>
- The advocates felt that the witness herself could be a hindrance through her appearance, her behaviour and lifestyle.<sup>205</sup> Women were seen by some barristers to be their own worst enemies.<sup>206</sup>
- One barrister considered that it was pointless to prosecute cases where the complainant and her partner had a permanent relationship.<sup>207</sup>
- The interviewed barristers mainly agreed that the Crown Prosecution Service was competent in bringing prosecutions, even where cases lacked corroboration.<sup>208</sup>
- Some practitioners thought that inexperienced, low-paid prosecution counsel could affect the outcome of a rape trial.<sup>209</sup>

One interviewed barrister explained that a defending barrister needed to adopt a strategy to secure an acquittal in a contested case. If the barrister's brief were to defend her client, s/he had little option other than to undermine the credibility of the defendant. Some of the strategies she listed were questionable and would fall short of professional standards today. Such strategies included: maligning the complainant's behaviour to show that she had brought the incident upon herself, that she lacked common sense;<sup>210</sup> the way she was dressed at the time of the incident and maligning her sexual character.<sup>211</sup> Most barristers in the same study agreed they would apply for leave to adduce the sexual character evidence (which was then governed under section 2 of the SO(A)A 1976), with one barrister doing so if he thought the complainant could be portrayed as a 'slut' to secure an acquittal.<sup>212</sup> Several barristers did not believe that such evidence was relevant unless there was a similar fact type situation. One barrister stated:

*A jury must consider that if she sleeps with nine out of ten men, why is it that she wouldn't sleep with this one. I think it is relevant in almost every case where consent is the defence.*<sup>213</sup>

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<sup>204</sup> Ibid, p.222.

<sup>205</sup> Ibid, p.224.

<sup>206</sup> Ibid, p.225.

<sup>207</sup> Ibid, p.226.

<sup>208</sup> Ibid, p.227.

<sup>209</sup> Ibid, p.227

<sup>210</sup> Ibid, p.232.

<sup>211</sup> Ibid, p.233.

<sup>212</sup> Ibid, p.225.

<sup>213</sup> Ibid, p.234.



Temkin points out that the interviewed barristers thought that judges were careful to take a serious approach to sexual history evidence.<sup>214</sup> But they had little difficulty in making successful applications to the judge under the 1976 Act.<sup>215</sup> Temkin was in favour curtailing the judicial discretion that opened the door to cross-examinations on a complainant's sexual history. But she also thought that barristers would try to circumvent the proposed law:

*The study illustrates that sexual history evidence was regarded by most of the barristers as an important defence tool. They were also confident that if they framed their argument carefully they would be able to convince the judge to permit it.*<sup>216</sup>

The Home Office study sample of barristers had experience of both prosecuting and defending in rape cases, with female barristers tending to represent the defendant.<sup>217</sup> Some conceded that among older male barristers defending rape cases, the cross-examination style of the complainant was unpleasant and it came across about what particular views they held.<sup>218</sup> Bullying and harassment still occurred, though the interviewed advocates considered that this was poor advocacy and unproductive.<sup>219</sup> Defendants also risked losing face in front of the jury if such harassment tactics were adopted.<sup>220</sup> Temkin considered that aggressive defence tactics were also not assisted by lame prosecutions. In the study, barristers mainly had an unchallenging attitude towards the construction of rape in the courtroom; some shared the prejudiced assumptions that have for so long disfigured rape trials.<sup>221</sup>

Temkin favoured the structured approach of the Home Office recommendations that were subsequently incorporated in section 41 YJCEA 1999, which would prohibit cross-examinations on the complainant's sexual history save for four exceptions:

- where consent would not be in issue;
- where the defendant mistakenly believes the complainant consented;
- evidence of the complainant's sexual behaviour at or around the time of the charge (similar fact type situations);
- to rebut sexual history evidence adduced by the prosecution.<sup>222</sup>

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<sup>214</sup> Ibid, p.235.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid, p.247.

<sup>217</sup> Ibid, p.228.

<sup>218</sup> Ibid, p.229.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid, p.229.

<sup>221</sup> Ibid, p.240.

<sup>222</sup> Ibid, p.247.

(v) **Section 41 of the YJCEA 1999 and its remit**

The recommendations of *Speaking Up for Justice* 1998 were concretised by section 41 YJCEA 1999. This should have removed the double standard of sexual morality, whereby the jury in a sexual offences trial was told about the victim's sexual past, but the same jurors were prevented from learning whether the defendant had previously committed crimes of sexual assault.<sup>223</sup>

Section 41 aimed to decrease judicial discretion and to exclude irrelevant and prejudicial evidence in the spirit of section 276 of the previously discussed Canadian code. The Act also extended the range of sexual offences under section 62 (1), so that "sexual offence" meant (a) rape or burglary with intent to rape; (b) (unlawful intercourse, indecent assault, forcible abduction etc.); (c) unlawful intercourse with person receiving treatment for mental disorder by member of hospital staff etc.); (d) indecent conduct towards child under 14) and (e) incitement of child under 16 to commit incest).

**S.41: Restrictions on evidence or questions about complainant's sexual history**

*(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—*

*(a) no evidence may be adduced, and*

*(b) no question may be asked in cross-examination,*

*by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.*

*(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied —*

*(a) that subsection (3) or (5) applies, and*

*(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.*

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<sup>223</sup> Fn 10, Uglow: op cit, p.388.

*(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—*

*(a) that issue is not an issue of consent or*

*(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or*

*(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—*

*(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or*

*(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,<sup>224</sup>*

*that the similarity cannot reasonably be explained as a coincidence.*

Section 41 is a rape shield designed to prevent defendants from impugning the complainant's character.<sup>225</sup> It does not include other non-defendants. Section 100 of the CJA 2003 subsequently remedied this defect

Section 41 (1) (b) does not include any issue as to the belief of the accused that the complainant consented. If the defendant mistakenly believes that there had been consent, the test is whether the evidence or cross-examination relates to a relevant issue in the case.<sup>226</sup> This section was regarded as overly restrictive as it failed to take into account any continuum of relationship between the complainant and the defendant.<sup>227</sup>

The question of when a section 41 application is most likely to be made depends on the type of explanation asserted when a defendant is faced with sexual allegations. The most common type of defence involves a fact in issue; i.e., the incident occurred, but the complainant

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<sup>224</sup> The phrase "at or about the same time" has been suggested not to include the complainant's sexual behaviour which has occurred forty-eight hours prior to the alleged sexual offence. Home Office Explanatory Note s.148 of the YJCEA 1999, s. 41(3) (b).

<sup>225</sup> *R v A* (No. 2) [2002] UKHL 45.

<sup>226</sup> *Ibid*, para 23, *per* Lord Steyn.

<sup>227</sup> *Ibid*, para 9, *per* Lord Slynn.

consented or he had reasonable belief that she consented, therefore no crime occurred. Sections 41 (3) (b) and (c) might be applicable. Another fact in dispute might be that the defendant asserts that nothing ever happened. Since no activity is alleged to have happened, it is less likely that the complainant's sexual behaviour would be relevant and therefore a section 41 application would neither be appropriate nor succeed. The defendant might allege that nothing occurred, but that the complainant is promiscuous. Unless the defence is arguing that a different perpetrator among her encounters violated her, section 41 would prohibit the cross-examination of the complainant on her third-party relationships as the evidence has no bearing on a fact in issue and would be classified as impugning the complainant's credibility.

The meaning of 'sexual behaviour' is set out in section 42(1) Interpretation and application of section 41 of the YJCEA 1999:

*(c) "sexual behaviour" means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and (d) subject to any order made under subsection (2), "sexual offence" shall be construed in accordance with section 62.*

The prohibition is applicable to both the sexual experience of the complainant with the accused and/or her third party relationships.

#### **(vi) Appeals referring to use of section 41 YJCEA 1999**

The House of Lords decision in *R v A*<sup>228</sup> effectively restored to judges the right to decide what constituted relevant sexual history, thereby overriding section 41. The Lords had recognised that an orthodox approach to section 41 restricted the cross-examination of a complainant's sexual history too narrowly and this risked encroaching on Article 6 of the European Convention on Human Rights as concerns the defendant's right to a fair trial. Lord Hope stated in *R v A*:

*In the type of case which I have instanced where a man, who may be innocent, wishes to give evidence of previous acts of sexual intercourse with the complainant in the course of a recent close and affectionate relationship, such evidence would be a*

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<sup>228</sup> *R v A* (No.2) [2001], para 1 UKHL 25. [2002] 1 AC 45.

*central and essential part of his defence, and I consider that to deny him the opportunity to cross-examine the complainant and to give such evidence would compromise the overall fairness of the hearing and would deny him the essence of a fair trial. ... the right of a defendant to call relevant evidence, where the absence of such evidence may give rise to an unjust conviction, is an absolute right which cannot be qualified by considerations of public interest, no matter how well founded that public interest may be.*<sup>229</sup>

The section has remained problematic and far from the shield that it was intended to be.

#### *a) Claims of Consent*

Section 41 (3) (c) of the YJCEA 1999 was raised as a ground of appeal in *R v T*, a complainant wished to adduce that he and his partner had has consensual sex on a climbing frame three weeks before the current allegation of rape which was alleged to have occurred at the same place. The Court of Appeal held that cross-examination on this issue ought to have been allowed.<sup>230</sup> Yet in *R v Harris*, the defendant had not been allowed to cross-examine the complainant on the issue that the complainant had admitted to picking up strangers and having sexual intercourse with them.<sup>231</sup> It would therefore appear that the longer back in time the previous consensual relationship (in terms of years) the more likely the court will refuse a cross-examination.

In *R v Mukadi* a defendant's conviction for rape was successfully appealed because the trial judge had refused a section 42 (1) (c) application for complainant to be cross-examined about a previous incident which the defendant claimed been relevant to the issue of consent:

*Had the jury heard the evidence [that] - she had stepped into a stranger's car and exchanged phone numbers with the driver before stepping out and heading for Tesco's where she had then encountered the appellant - it could have caused them to take a different view of her evidence about her state of mind and her reason for accompanying the appellant and what she did or did not do or did or did not consent to prior to the act of intercourse.*<sup>232</sup>

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<sup>229</sup> Fn 86, *R v A*, at para 161.

<sup>230</sup> *R v T* [2004] 2 Cr App R 551.

<sup>231</sup> *R v Harris* [2009] EWCA Crim 434.

<sup>232</sup> Sir E Jowitt, para 16 [2004] Crim L R 373.

### *b) Age of consent as defence claim*

In HCSA cases, it is possible for the defendant to plead consent under sections 41(3)(b) or (c) where he claims that the relationship between the parties had started when the complainant was of consensual age. There is authority for this in the appeal case: *R v F*.<sup>233</sup> The complainant had alleged that she was raped by her stepfather as a child. The defendant denied having underage sex with his stepdaughter, but affirmed that the pair had a consensual relationship as adults, which was provable by the existence of videotaped evidence of their sexual acts and erotic photographs. The Court of Appeal stated that where sexual behaviour related to a relevant fact in issue, then subject to section 41 (4) and assuming the criteria for admissibility had been established, the court lacked any discretion to refuse to admit, to limit the admission of, such evidence.

The jury in *R v F* ought to have been allowed to see the videotape in question in order to assess for itself whether the relationship was consensual. Moreover, the prosecution itself had adduced evidence of the full consensual nature of the adult relationship to show that the longstanding relationship between the parties was indicative of a history of abuse. The defendant had been denied the opportunity of asking the complainant questions about the erotic photographs and videotapes of the parties to show that the complaint of CSA was brought about by the ending of the adult relationship. This evidence would also have been admissible as non-defendant bad character type under section 100 CJA 2003. Sections 41(1) (a) and (b) of section 100 clearly stipulate that no question regarding past sexual conduct will be raised and cross-examined unless court leave be given.

### *(c) False allegation claims by the defendant*

Section 41 was designed to limit the sexual history of the complainant but it does not cover false allegations made by the complainant, because the evidence or cross examination relates to past lies<sup>234</sup> not past sexual behaviour. This admissibility is controlled by the judge who needs to be satisfied that it was the complainant made the allegation; that it was false<sup>235</sup> and that there must be a strong evidential basis based on fact.<sup>236</sup>

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<sup>233</sup> [2005] EWCA Crim 493.

<sup>234</sup> *R v T* [2004] 2 Cr App R 551.

<sup>235</sup> *R v E* [2004] EWCA Crim 1313.

<sup>236</sup> *R v Murray* [2009] EWCA Crim 618.

For example, where the defendant alleges that the complainant had a motive to lie as a result of the breakup of a consensual relationship, the revelation of the complainant's sexual relationship with the defendant would be admissible even if incidentally the information would impugn her character, as was held in *R v Martin*.<sup>237</sup>

The appellant was convicted of indecent assault in respect of an act of forced oral sex. His defence was that he was elsewhere at the time and the complainant had fabricated the incident because he had rejected her advances two days before the incident, after she performed an act of oral sex upon him. The trial judge allowed cross-examination in respect of the alleged rejection of sexual advances, but refused to permit any reference to the oral sex before the rejection. The Court of Appeal considered that whilst one purpose of the proposed questions was to impugn the credibility of the complainant, another was to strengthen the defence case. Arguably, that rejection could have been said to be more hurtful if she had performed an act of oral sex upon him and then been rejected.

In CSA cases, a defendant is still permitted with leave to cross-examine a complainant under the YJCEA, section 41(3)(c) where a defendant has denied the allegations and asserts that the accuser has a prior history of making allegations of CSA against others. Under the ruling in *R v T and H*,<sup>238</sup> manifestly false allegations may be admissible, but the defence must have proper grounds for suggesting that the allegations were made and substantiated. Evidence which conforms to both criteria would not fall foul of being 'about' a complainant's sexual behaviour.

In *R v Shino Garaxo*<sup>239</sup> the appellant had wanted to make use of the complainant's two prior allegations of assault which had not been pursued, but which might have been regarded by the jury as false if they had heard a cross-examination about her crime reference number for the 'social' (security) and a refusal to co-operate with police whilst being under the influence of drugs at the time one of the allegations was made. ... the judge should have permitted cross-examination on these two matters.<sup>240</sup>

Similarly, in *R v James Lloyd*<sup>241</sup> the Court of Appeal held that questions would not have been about the sexual behaviour of the complainant and therefore ought to have been admitted.

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<sup>237</sup> [2004] 2 Cr App R 354.

<sup>238</sup> [2001] EWCA Crim 1877.

<sup>239</sup> [2005] EWCA Crim 1170.

<sup>240</sup> *Per Gage LJ*, para14.

<sup>241</sup> [2005] EWCA Crim 1111.

The defendant was not asserting that the complainant had indulged in a sexual act, but that she was the author of a falsified diary entry and had lied about a friend making it:

*We consider that the judge failed to focus on the real issue of relevance, namely the genuineness of the diary entries. Instead, he focused on the sexual allegation made by CH against the appellant.*<sup>242</sup>

Other relevant aspects of section 41 include:

- Subsection (4) disallows evidence which merely impugns the witness' character (irrelevant evidence). Since BCE is a tactic designed to discredit the opposing party, it may well be that legitimate defence evidence has been prohibited where it crosses the line of a general character debasement and as material that relates to the issue in question, giving rise to a possible miscarriage of justice.<sup>243</sup>
- Subsection (5) (a) (b) and (c) relates to the prosecution's own use of the witness' sexual history and the extent to which the accused may rebut or explain it.

Section 41 is *not* applicable to defendants who wish to have the complainant's sexual history excluded for their own tactical purposes, even where the prosecution itself has adduced such evidence. In *R v Soroya*, it was argued on appeal that the complainant's previous sexual history was wrongly introduced by the prosecution at trial in circumstances which would not have been permitted to the defence. If so, this might have constituted a breach of the appellant's right to a fair trial, and infringed the requirement that there should be "equality of arms" between prosecution and defence.<sup>244</sup> It was held that the prosecution had tactical reasons for adducing evidence of the complainant's false statement that she was a virgin before she had been raped by the defendant<sup>245</sup>

*...consideration should be given to the protective effect of section 78 of the Police and Criminal Evidence Act 1984...the provision is perfectly apt to be deployed in an appropriate case, where it is thought by the judge that the impact of section 41 of the 1999 Act on the defendant may produce an adverse effect on the fairness of the proceedings.*<sup>246</sup>

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<sup>242</sup> Ibid, para 29.

<sup>243</sup> Fn 95, *R v Martin*.

<sup>244</sup> *R v Soroya* EWCA Crim 1884, per Martineau J., para 14.

<sup>245</sup> Per Martineau J., para 27.

<sup>246</sup> Per Martineau J., para 28.



- Section (6) only permits the cross-examination of the complainant in specific incidents of prior sexual conduct and therefore not her general history.

**(vii) Is there still justification in allowing ‘similar fact evidence’ against complainants?**

There are other problems with the workability of section 41. In a contested rape trial, the complainant’s similar character evidence can be used to infer consent: the sexual act is not in dispute, but the circumstance in which it took place, is the key issue. Judges may try to prohibit the evidence where using the complainant’s character evidence appears to be a tactic designed to impugn the witness, rather than show a course of conduct which infers that the complainant did consent. In sexual offence cases where consent does not apply, such as child sexual abuse, the similar character evidence can be used to prove that the complainant is lying about the present allegations and has done so on previous occasions. A judge also has to consider whether there is substance to the claims about prior false allegations of a sexual nature or whether the evidence is a defendant’s smear-tactic. It may not become apparent until the trial is heard, that the complainant’s character evidence should be admissible, and that, *post-conviction* the Court of Appeal has to reappraise whether the pre-trial prohibition actually deprived the appellant of his legitimate defence. It is submitted that a complainant’s similar character evidence may be of little value in rape cases where consent is in issue, but still plays a vital role in false allegation defences.

Redmayne argued that section 41(3)(c) was obfuscatory legislation. Parliament had intended to make the admission of sexual history evidence to prove consent exceptional - the coincidence test which works tolerably well in some similar fact cases (ones like Smith)<sup>247</sup> but not when applied to sexual history<sup>248</sup> He was particularly concerned about the use of the complainant’s prior misconduct to infer consent in a rape trial. Drawing this parallel, the Heilbron Committee proposed an inclusionary rule for sexual history evidence based on ‘striking similarity’, while Canadian rape shield legislation adopted an approach based on ‘forbidden reasoning’.<sup>249</sup> Some United States jurisdictions allow sexual history evidence

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<sup>247</sup> (1915) 11 Cr App R. 229.

<sup>248</sup> M Redmayne, ‘Myths, relationships and coincidences: the new problems of sexual history’ E & P 2003, 7(2), p.101.

<sup>249</sup> Ibid p.89. See the Canadian Criminal Code, s.276 (1): ‘evidence that the complainant has engaged in sexual activity ... is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief’. Also its interpretation in *R v Darrach* [2000] 2 SCR 443 esp. at [2], [35].

which establishes a ‘pattern’. The YJCEA 1999 took the similar facts approach, too. Section 41 lays down a general rule excluding sexual history evidence on the issue of consent, whether the sexual history is with the defendant or with third parties. Such evidence may well be prejudicial, in that it might lead the jury to take a dim view of the complainant; it also invades her privacy. In all the common law jurisdictions adopting the similar fact exception, Redmayne observes that they use euphemistic, proxy wording such as ‘pattern’, ‘similarity’ or ‘non-coincidence’<sup>250</sup>

A defendant in a rape trial can bolster his claim by showing that the complainant has a track-record of consenting, and therefore latterly consented to intercourse with the defendant.<sup>251</sup> There is authority for stating that use of the complainant’s prior misconduct under section 41 (3) (c) (i) need not be strikingly similar.

*...The context and the purpose of the evidence is not so much to show from past events that history has been repeated, as to indicate a state of mind on the part of the complainant towards the defendant which is potentially highly relevant to her state of mind on the occasion in question. The language used is thus not quite the language of Boardman.*<sup>252</sup>

Lord Clyde’s interpretation in *R v A* was followed in the appeal case *R v Tahed*.<sup>253</sup> The appellant had been accused of rape and indecent assault. At the original trial, a cross-examination application under section 41(3)(c)(i) of the YJCEA 1999 had originally failed, on the grounds that an incident of consensual sex between the parties some 3-4 weeks earlier was considered to be insufficiently contemporaneous to be relevant. The Court of Appeal held that the earlier incident was admissible on the grounds that it was ‘similar’ and it overturned the conviction. However, this is not the only context in which the complainant’s bad character evidence can be used. It can also be an essential piece of evidence that can be used where the defendant negates the allegations, claims that they are a fabrication or where complainant has previously made false allegations on one or several occasions.

If the defendant is claiming that the complainant has a track record in deliberately making false allegations, this is also suggestive of criminality (perjury) on the part of the complainant. A ruling needs to be sought from the judge for any proposed questions about

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<sup>250</sup> Ibid, p.89-90.

<sup>251</sup> Ibid, p.91.

<sup>252</sup> *R v A* [2001] UKHL 25, *per* Lord Clyde, para 133.

<sup>253</sup> [2004] EWCA Crim 1220.

alleged previous false complaints. However, if a section 41(3)(c) application to obtain leave to cross-examine the complainant on prior false allegations is deemed to appear as a witness credibility attack, the judge will refuse it on the grounds set out in section 41(4). A refused application can sometimes deprive a defendant of a legitimate defence. For instance, *R v T* and *R v H*<sup>254</sup> the defendants had been convicted of sexual abuse of minors. They appealed against a ruling that the questions which they wished to put to their respective complainants were prohibited by reason of section 41 of the Youth Justice and Criminal Evidence Act 1999.

RT wished to cross-examine the complainant about why she had not raised allegations against him on an earlier occasion when she had been asked about her sexual history by the police in connection with alleged episodes of abuse by other males.<sup>255</sup> MH wanted to ask questions designed to identify a pattern of lying on the part of the complainant in respect of both sexual and non-sexual matters. Each appellant submitted that such lines of questioning were not about “sexual behaviour” within the meaning of section 41; they were about the complainants’ previous responses to certain relevant questions and were therefore excluded from the ambit of section 41 of the Act.

The Court allowed the appeals, on the grounds that section 41 of the Act had to be given a purposive interpretation<sup>256</sup> and even if, contrary to section 41(4), the questions were directed principally at the complainants’ credibility, they were not automatically precluded by the Act from being raised. *R. v A* was considered. Both issues were highly material in the context of their respective cases and it was important for the court to draw the distinction between questions “about” any sexual behaviour and those which, although referring to previous statements about sexual experience, did not require verification into the truth of them. This case illustrates that a cross-examination of a complainant’s sexual behaviour may be permitted to show that she had a motive for fabricated evidence, even if allowing it offends against section 41(4) which disallows questions testing credibility.

In a later case, *Garaxo*,<sup>257</sup> the defendant was also prevented from cross-examining the complainant’s evidence adduced by the prosecution that she had made prior allegations twice before. The appeal succeeded, as he ought to have been permitted to cross-examine on this

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<sup>254</sup> [2001] EWCA Crim 1877.

<sup>255</sup> Paras 5-8 of this judgement.

<sup>256</sup> *Supra*, para 36.

<sup>257</sup> *R v Garaxo* [2005] All ER (D) 363 (Apr).

point to demonstrate the falsity of the prior allegations; prior allegations therefore do not relate to the complainant's sexual behaviour.

A full set of trial and appeal papers were obtained for a case<sup>258</sup> that had already been the subject of an appeal: *R v W*.<sup>259</sup> Prior allegations of CSA made by the complainant against different people (but not proceeded with) were not in this case deemed to be regarded as 'bad character' under section 100 of the Criminal Justice Act 2003. It should be noted that allegations of CSA that had been recorded against a defendant but not prosecuted, this would be regarded as 'bad character' under section 101 of the CJA 2003.

Can it be argued that prior allegations should not be used in evidence against the complainant? Birch and Taylor hold that defence counsel bend the rules of the YJCEA 1999 by adducing evidence of prior complaints even where there is no basis for supposing them to be untrue.<sup>260</sup> They gave an example of where prior complaints had been made by children in care homes who were interviewed by police as suspected victims under the operations to uncover past abuse in the 1990s. The children might have been abused, but the cases against the accused had gone no further until the widespread police operations. They argued:

*...juries are popularly supposed to reason that a person who makes many complaints is more likely to be lying. This tactic is clearly prejudicial to the victim of past institutional abuse whose previous complaints may have been brushed aside for no good reason.*<sup>261</sup>

Therefore, juries can be misled by hearing a cross-examination that reveals unfounded allegations of the complainant's sexual activity. Birch contends, that unproved false allegations of sexual abuse could be deemed to be about a complainants' sexual behaviour and should therefore be excluded.<sup>262</sup> She considered the case of B, a child sexual abuse case, where the accused alleged that B had made prior false allegations of abuse by a third party on a different occasion. Such evidence was permitted, even though the prior complaint had been dropped by the police on other grounds (the allegation was not necessarily false). Birch argues that a prior allegation should be conclusively false in order for it to be admitted. She also mentions that this evidence was not 'about' a complainant's sexual history, but once

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<sup>258</sup> Appendix D, case of W, p.331.

<sup>259</sup> [2005] EWCA Crim 1617.

<sup>260</sup> N Padfield, 'Balancing Rights in 'Delayed' Trials' (2005) Archbold News.

<sup>261</sup> D Birch D and C Taylor 'People Like Us?' Responding to Allegations of Past Abuse in Care' [2003] Crim L R p.843.

<sup>262</sup> Fn.7, Birch: op cit, p.382.

mentioned in court as an alleged prior allegation of a sexual nature, such evidence could be construed as being about the complainant's sexual behaviour.

It appears the decision *R v T and H*<sup>263</sup> has now clarified the position on the use of false allegations, with the ruling that there must be truth in the substance of prior false allegations before they can be revealed.

Selective censorship therefore can skew the fact-finding process in a criminal trial.

**(viii) Is there still a place for section 41 of the YJCEA 1999 post section 100 of the Criminal Justice Act 2003?**

Ought section 41 YJCEA to have been repealed, given the further enactment of complainant protection under section 100 of the CJA 2003? Kibble's research on whether judges are exercising their discretion competently,<sup>264</sup> indicates that on the whole, they know when evidence is relevant and therefore admissible. However, the two-stage gateway process of both Acts is sometimes misunderstood by practitioners.

Tapper argues that section 41 YJCEA is difficult to interpret and apply.<sup>265</sup> He cites the case of *R v Mokrecovas*,<sup>266</sup> where apparently relevant evidence had been considered (and rejected by the trial judge) under the wrong gateway of section 41. The appellant tried to argue that the decision had deprived him of the chance to use the complainant's sexual history with a third party, which could have been admitted under a different gateway.

M, who was due to stand trial accused of rape, appealed under the Criminal Procedure and Investigations Act 1996 section 35 (interlocutory appeal) against the decision that the defence would not be able to cross examine the complainant about an allegation that prior to the alleged rape, she had had consensual sexual intercourse on two previous occasions with M's brother. M submitted that the case fell to be considered within the Youth Justice and Criminal Evidence Act 1999 section 41(3)(a) and not as originally argued, within section 41(3)(b) and (c) of the 1999 Act. He contended that the issue was not one of consent, but rather one of the

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<sup>263</sup> [2001] EWCA Crim 1877.

<sup>264</sup> N Kibble, 2004, Research Report for the Criminal Bar Association, *Judicial Perspectives on s.41 of the Youth Justice and Criminal Evidence Act 1999*.

<sup>265</sup> Fn 22, Cross and Tapper: *op cit*, p.362.

<sup>266</sup> [2001] EWCA Crim 1644.

motives the complainant may have had for lying about the offence, but the court rejected this argument.<sup>267</sup>

If trial lawyer misunderstands the gateways of admissibility in a section 41 application, the chance to reuse valuable material for an appeal may therefore be lost. Judicial refusal to allow a cross-examination under section 41 YJCEA 1999, particularly in rape cases, where the question was whether the complainant consented under section 41 (3)(c), has been a point of law in appeals against conviction, but it would appear that the Court of Appeal seldom decides to overturn the conviction, which tend to suggest that trial judges have been careful in deciding when to exclude complainant sexual history on the whole.

Out of 21 appeal cases relating to section 41, two-thirds were dismissed in the first five years of its passing.<sup>268</sup> To overturn a conviction, the breach of section 41 would have to meet a very high threshold. For example, in *R v F*<sup>269</sup> the accused was the stepfather of the complainant, V. V had alleged rape and sexual abuse from the age of 7 until she was 16 years old. F denied the allegations, but explained that V had been in a sexual and cohabiting relationship with F from the age of 18 until the relationship ended six years later. V admitted that they had been in a relationship, but that it was coercive. F stated that the relationship was consensual and loving and that V had made the allegations maliciously when the relationship ended. The trial judge allowed evidence about the adult relationship, but refused the jury to see video and photographic evidence which showed that the relationship was one where V did willingly submit to F. It was held on appeal that the trial had wrongly excluded this latter piece of evidence under section 41.

A sound point is made by Khan,<sup>270</sup> that section 41 may have fulfilled its aim of restricting sexual history evidence, but the four exceptions cannot predict exactly what type of previous sexual history evidence may be relevant to a defence. It has led to contexts in which broadly similar relevant evidence which had been admissible within the time limit was inadmissible for being outside of it. In the former context the jury can at least see that the complainant and the defendant were not complete strangers to each other; that the existence of a former or pre-existing relationship may indicate a legitimate defence for a defendant pleading consent. The safeguards cannot prevent the unexpected, either. If a judge informs a jury to disregard

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<sup>267</sup> *Mokrecovas per* Lord Chief Justice Woolf, para 16.

<sup>268</sup> Fn 10, Uglow: op cit, p.385.

<sup>269</sup> [2005] EWCA Crim 493.

<sup>270</sup> Z Khan, 'Restrictions on the use of Sexual History Evidence: an Examination of S.41 of the Youth Justice and Criminal Evidence Act 1999' January 15, UK Law Student Review, vol 3, iss 1, p.14.

inadmissible sexual history evidence which subsequently came to light during a trial, the jury may still take a different view of the complainant's version of events.

There is a European dimension here – the Victims' Directive 2012/29/EU raises the competing human rights issues of the complainant and the defendant. It has been argued that the gateway for allowing prior sexual conduct under section 41(3)(c) is still too broad and still exposes victims' private lives unnecessarily. Londono argues that there is a conflict of interest between Article 3 of the Convention on Human Rights - which prohibits the torture, inhuman and degrading treatment of victims, contrasted with the rights of a defendant to have a fair trial under Article 6. She argues that the European Court of Human Rights has a positive duty to protect the rights of the victim under Article 3.<sup>271</sup> In the case of *R v A*,<sup>272</sup> where the Law Lords mentioned that victims' rights must not be violated whilst giving evidence, there was no mention made of the positive duties owed to the victim under Article 3 to conduct an effective examination capable of leading to the punishment of the offender. She points out that the right to cross-examine a witness is not an absolute one.<sup>273</sup> In *SN v Sweden*,<sup>274</sup> the complainant was a minor who did not give evidence in court but via statements made to police. Defence's counsel was not present, but he could have had questions put to the officer in charge conducting the interview. This right was not exercised and the ECHR found no breach of Article 6(3)(d). By contrast, in *PS v Germany*,<sup>275</sup> the defendant was convicted of sexually abusing an eight-year-old girl. The trial evidence consisted of statements made by the girl's mother concerning the allegations together with the police interview with the girl. The ECHR held that there had been a violation of Article 6(3)(d) as the accused had been denied the opportunity of having questions put directly to the girl.

The right to challenge prosecution evidence is certainly imperative as far as later ECHR rulings are concerned. In *W.S. v. Poland*, No. 21508/02, 19 June 2007, the Court found it unacceptable that the victim was never questioned by the prosecutor; nor was it acceptable that an applicant was only able to watch video testimony of the victim, which was the sole

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<sup>271</sup> P Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' *European Human Rights Law Review* (2007), p.168.

<sup>272</sup> *Supra*.

<sup>273</sup> Fn 129, Londono: *op cit*, p.165.

<sup>274</sup> (2004) 39 EHRR 13.

<sup>275</sup> (2003) 36 EHRR 61.

evidence used to convict him; see *A.S. v. Finland*, No. 40156/07, 28 September 2010. But in *Ruban and Others v. Spain*, No. 41640/04, 13 September 2005, the Court gave the national system flexibility to determine the level of confrontation required for sexual assault cases.

**(ix) Prior research on the judicial approach to section 41 of the YJCEA 1999**

Dennis<sup>276</sup> highlights the Home Office Report 20/06<sup>277</sup> which provides empirical information as to the efficacy of section 41 YJCEA 1999 in protecting witnesses from unwarranted intrusion into their sexual history. Two hundred and thirty-six rape trials were tracked over a three month period in England and Wales in 2003. In just under a quarter of these trials, the defence sought to adduce the complainant's sexual history and in two-thirds of cases, leave was given. Critics of section 41 may argue that this means that leave to cross-examine the complainant on sexual history has not been confined to exceptional circumstances; however, it may be indicative of an improvement on the repealed section 2 of the Sexual Offences (Amendment) Act 2006. This is because in three quarters of the rape trials, leave to adduce section 41 evidence was not sought, and that out of the remaining quarter where it was sought and obtained, the application was likely to have some merit. There is the *caveat*, however, that leave was often sought at the time that the complainant was giving evidence in court and not pretrial. In a study of 23 rape trials, a number of cases included a cross-examination of the complainant without reference to section 41.<sup>278</sup> This circumvention of the leave rules could have happened where the prosecution adduced the evidence itself; where there was mutual agreement on both sides (but against the complainant's wishes); where the defence was unaware of the rules or ignored them altogether.

The Report also highlighted the ignorance of practitioners of the pre-trial application requirements in the Crown Court rules, which were subsequently placed in Part 36 of the Criminal Procedure Rules in 2005. The Report commented that sexual history evidence occurred in the majority of sexual offence trials and prominently where the accused had a prior relationship with the complainant. However, there were very few instances in the study where questioning the complainant was lengthy and humiliating.<sup>279</sup>

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<sup>276</sup> I Dennis 'Sexual History Evidence: evaluating s.41' (Oct 2006), Crim L R 869-870.

<sup>277</sup> L Kelly *et al*, 'S.41 : an evaluation of new legislation limiting sexual history evidence in rape trials' Online report 20/06.

<sup>278</sup> Fn 134, Dennis: *op cit*, p.870.

<sup>279</sup> Fn 135 Kelly: *op cit*, p.23.



The research postdates the House of Lords decision in *R v A*<sup>280</sup> where it was held that judges should be able to determine where the line should be drawn in relation to the relevance of sexual behaviour between the complainant and the defendant, which allowed them to overstep the exception constraints of subsections 41(3)(b) and 41(3)(c) of the YJCEA. Whilst section 41 pursued desirable goals, the methods adopted amounted to legislative overkill.<sup>281</sup>

Courts were increasingly seeing cases where the complainant had been in a relationship with the accused. There was no sense in leaving out truly relevant evidence on their relationship with each other on an arbitrary basis and cause an unfair trial. In *R v A*<sup>282</sup> the Law Lords redesigned the ‘similar fact gateway’ to unshackle judges from a legislative straitjacket imposed by section 41(3)(c). The Law Lords sidestepped section 41 and restored judicial discretion as to when sexual history evidence would be adduced. Temkin regarded the decision in *R v A* as retrograde, as it re-empowered judges to have the final say on what was admissible evidence, rather than be dictated by strict statutory codification.<sup>283</sup>

However, in Kibble’s research<sup>284</sup> on whether judges were applying section 41 fairly, he concluded that that the judiciary were generally acting competently (and by implication also keeping a rein on barrister cross-examinations). Rook QC commented on the finding:

*We must not allow the public to be beguiled by the myth that section 41 needs tightening up because judges are not applying it rigorously. This is a complete myth. The section 41 regime is not a soft option. Of course we must outlaw the twin myths, but myths can cut both ways, and then used to justify reform on a fallacious basis.*<sup>285</sup>

In a research survey, 70 circuit judges in England and Wales were interviewed and were largely in agreement that the *R v A* decision to restore some measure of judicial discretion (the Steyn test) rendered section 41 workable and prevented potential injustice, particularly in relation to excluding prior sexual history between the complainant and the defendant.<sup>286</sup>

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<sup>280</sup> *Supra*.

<sup>281</sup> *R v A* [2001] UKHL 25 *per* Lord Steyn, para 43.

<sup>282</sup> *Supra*.

<sup>283</sup> J Temkin, ‘Sexual History Evidence - Beware the Backlash’ [2003] Crim L R, Apr, p.242.

<sup>284</sup> N Kibble, ‘S 41 of the Youth Justice and Criminal Evidence Act 1999: fundamentally flawed or fair and balanced?’ *Archbold News*, (08.09.2004), pp.6-9.

<sup>285</sup> P Rook QC, HHJ, Central Criminal Court, 2005, ‘Sexual Offences Act 2003 /Vulnerable Witnesses /S.41 Youth Justice Criminal Evidence Act 1999’.

<sup>286</sup> Fn 142 Kibble; *op cit*, p.7.

The judges also disagreed with the claim of that sexual history evidence was used in an attempt to discredit the victim's character in the eyes of the jury;<sup>287</sup> nor was there "overwhelming evidence" (as the Report claimed), that the present practice of the courts in relation to the use of sexual history evidence was unsatisfactory.

Given four mock rape scenarios, the judges were mainly consistent in their approach to sexual history admissibility, both in terms of whether the complainant should be allowed to be questioned and the extent to which evidence and questioning should be allowed. Judges were also sceptical that sexual history evidence was overwhelmingly prejudicial against the complainant; in some cases, the judges felt that the presentation of the complainant's sexual history could rebound adversely on the defendant.

Kibble argues that section 41 had as its intent the abolition of outmoded, sexist based sexual conduct evidence (under subsection 41(4)), but instead, it had the effect of barring evidence which may be essential to the presentation of a legitimate defence, hence to a fair trial.<sup>288</sup> He cites the case of *R v Martin*<sup>289</sup> in which Justice Crane indicated that 'he might be prepared to draw down subsection 41(4) where it is necessary to do so to allow questioning or evidence that is essential to a fair trial'.<sup>290</sup>

Arguably, section 41 YJCEA 1999 and section 100 CJA 2003, discussed next, already act as a sufficient control barrier for cross-examining on issues that are sensitive and personal to complainants. To bar cross-examination of all sensitive material relating to complainants would breach the equality of arms principle, because the State would then place the defence at a substantial disadvantage in terms of presenting its case according to Article 6 of the European Convention on Human Rights.

Professor Temkin, considered that the 1999 Act should have been taken a step further to exclude evidence of almost any form of the complainant's sexual history as section 41 was more generous to defence interests than restrictions in the US, Canada, Australia (New South Wales) and Scotland.<sup>291</sup> However, Birch suggested that were this to happen, juries could be misled about the type of relationship that had existed between the parties, leading them to speculate that the context was a stranger offence rather than acquaintance, with psychological

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<sup>287</sup> *Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, (1998), para 9.63.

<sup>288</sup> Fn 142, Kibble: op cit, p.9.

<sup>289</sup> [2004] EWCA Crim 916.

<sup>290</sup> Fn 142, Kibble, op cit, p.9.

<sup>291</sup> Fn 38, Temkin: op cit, p.231.

studies indicating that participants took a harsher view of offences by a stranger than an acquaintance. Juries could also speculate that the parties had been in a prior relationship if not properly informed.<sup>292</sup>

Home Office research into the impact of section 41 of the YJCEA 1999 suggests that it had no effect on attrition in rape cases.<sup>293</sup> Victims' rights advocates strove to reduce acquittals by campaigning for maximum legal prohibition of the complainant's sexual history in a trial, in order to encourage reports of sexual offences and the attendance of complainants in court to increase the chances of a taking a prosecution to term to get a conviction. In 2002, the Government's White Paper, *Justice for All* aimed to further rebalance the system in favour of victims, witnesses and communities.<sup>294</sup>

However, the Criminal Justice Bill on bad character reforms for non-defendants was criticised for its potential to undermine the defendant's right to a fair trial.<sup>295</sup> The Law Commission recommended equitable provisions for all parties, be they complainants, defendants or witnesses by prohibiting the use of their bad character for no good reason unless it were of substantial value for determination of the case - an enhanced relevance test.<sup>296</sup>

The wording of section 100 CJA 2003 distances itself from the descriptor 'bad character', but instead refers to 'sexual behaviour' of the complainant. This suggests that the intention was to remove the stigma of the complainant's sexual history to prevent it from being used to attack her credibility. The same cannot be said for section 101 where the sexual behaviour of the defendant can suggest that not only is he being untruthful in denying that sexual misconduct occurred, but also that virtually any past sexual misconduct can be shown to demonstrate that he has a propensity to commit sexual offences, including the current one. If section 101 was designed to act as a counterweight to the admissibility of the complainant's propensity evidence under section 41(3)(c) of the YJCEA 1999, a trial judge can still block the complainant's propensity evidence if it lacks sufficient relevance under section 100 CJA 2003.

Section 100:

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<sup>292</sup> Fn 7 Birch: op cit, p.5.

<sup>293</sup> Fn 135, Kelly: op cit, p.61

<sup>294</sup> CJS White Paper – *Justice for All*, (Cm. 5563, (2002), p.5

<sup>295</sup> <<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/40/4003.htm>>, para 22.

<sup>296</sup> Law Commission Evidence of Bad Character in Criminal Proceedings - A Summary, para 19.2 Law Com No 273 (Summary) 9 October 2001, p.4.

*(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if*

*(a) it is important explanatory evidence,*

*(b) it has substantial probative value in relation to a matter which*

*(i) is a matter in issue in the proceedings, and*

*(ii) is of substantial importance in the context of the case as a whole,*

*or (c) all parties to the proceedings agree to the evidence being admissible.*

*(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial.*

*(3) In assessing the probative value of evidence for the purposes of subsection (1) (b) the court must have regard to the following factors (and to any others it considers relevant) (a) the nature and number of the events, or other things, to which the evidence relates;*

*(b) when those events or things are alleged to have happened or existed;*

*(c) where-*

*(i) the evidence is evidence of a person's misconduct, and*

*(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;*

*(d) where-*

*(i) the evidence is evidence of a person's misconduct,*

*(ii) it is suggested that that person is also responsible for the misconduct charged, and*

*(iii) the identity of the person responsible for the misconduct charged is disputed,*

*the extent to which the evidence shows or tends to show that the same person was responsible each time.*

*(4) Except where subsection (1) (c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.*

Unless both parties agree to the use of the bad character material, (section 100(1)(c)), leave of the court will be required.

It would appear that non-defendants do benefit from the greater restrictions as to the admissibility of bad character evidence generally, as set out in *R v Somanathan*,<sup>297</sup> where the court stated that section 100 CJA imposes an enhanced relevance test on such evidence.<sup>298</sup> Paragraph 363 of the Explanatory Notes does refer to ‘an enhanced relevance test’ but only in relation to section 100 of the Act. The terms of that section clearly impose a higher test in respect of the introduction of a non-defendant’s bad character than the test for the introduction of a defendant’s bad character.

The defendant may find it difficult to use general bad character evidence to discredit a complainant or witness. It must relate to the incident in question at the current trial, suggesting that the BCE should be contemporaneous and specific. In *R v Benguit*,<sup>299</sup> B was convicted of murder. The prosecution had contended that B was a “knife carrier”. The Court said that this was evidence of “bad character” and that it did not come within section 98 (a) of the CJA 2003 because:

*...the evidence was not to establish so much that the appellant had the knife on him that day, but to establish that he was the sort of person who carried a knife. That seems to us to mean that it was evidence of bad character in a general sense and was insufficiently related to the actual offence itself as to be evidence admissible under section 98.<sup>300</sup>*

Contrast the requirement for specific BCE of non-defendants with that of section 101 of the CJA 2003, which admits propensity evidence under section 101(1)(d) read in conjunction with section 103 of the same. Section 101 is not limited to propensity, because section 103(1)

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<sup>297</sup> [2005] EWCA Crim 2866.

<sup>298</sup> *Somanathan*, per Kennedy LJ, para 36

<sup>299</sup> [2005] EWCA Crim 1953.

<sup>300</sup> *Benguit per* Lord Latham, para 31.

uses the word “include” i.e. it *includes* propensity but it is not confined to propensity as discussed in *R v Highton*.<sup>301</sup>

Thus there is inequality between the parties as concerns the rules on the use of propensity evidence, with section 100 disallowing evidence of general bad conduct even when part of the evidence does relate to the current facts in issue. Under section 103, the prosecution may use propensity evidence against the accused where it is trying to show that the accused has a tendency to misbehave or to be untruthful. In credibility-based trials, the section 100 restriction on the use of a non-defendant’s bad character deprives the defendant of potentially vital material to show a complainant’s propensity to tell lies, including untruthfulness of the present allegation/s.

In *R v Hussain (Mohammed)*,<sup>302</sup> a rape trial, the defendant disputed non-consensual intercourse between the parties and asserted the complainant in truth made sexual advances towards him and masturbated him. The trial judge had ruled that the complainant’s general creditworthiness was central to the case but he had prohibited the jury from hearing about the complainant’s previous convictions over a number of years, including battery, burglary, robbery, shoplifting and taking a motor vehicle without consent. The Court of Appeal held that he should also have ruled that the convictions were so numerous, varied and recent that they were of substantial probative value upon the issue of whether her accusation against the appellant was worthy of belief. It was for the jury to judge whether in the particular factual context of the present case her general bad character was of any assistance to them in resolving who was telling the truth.<sup>303</sup>

#### **(x) Comments on section 100 CJA 2003**

Notwithstanding that section 100 refers to ‘evidence’ and not ‘questions’ or ‘an allegation,’ the section is clearly intended to restrict any cross-examination that is calculated to undermine the credibility of a non-defendant witness. It is therefore wider reaching than the ‘complainants only’ ambit of section 2 of the SO(A)A 1976 and section 41 YJCEA 1999. This may include any prosecution witness, any defence witness or even the testimony of a deceased witness.

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<sup>301</sup> [2005] EWCA Crim 1985, para 9.

<sup>302</sup> *R v Hussain (Mohammed)* [2015] EWCA Crim 383.

<sup>303</sup> *Hussain, supra* para 24.

If the defendant wishes to discredit the credibility of a prosecution witness, it is possible for a trial court to allow evidence of his/her bad character under section 100 of the Criminal Justice Act 2003 under the following gateways:

- Important explanatory evidence as defined in section 100(2)(a), being evidence which, if it were excluded, the court or jury would find it impossible or difficult properly to understand other evidence in the case and where its value for understanding the case as a whole is substantial.
- Substantial probative value of evidence which must mean that the bad character evidence has an enhanced quality of proving or disproving a matter in issue. That assessment must be considered not as a generalised and hypothetical question but specifically within its practical and fact sensitive context.<sup>304</sup>The court must have regard to the following factors and to any others it considers relevant:

(a) the nature and number of the events or other things to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where (i) the evidence is evidence of a person's misconduct and (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct.

Under section 100(4), any such evidence may only be given with leave of the court.

In *Hanson, Gilmore and Pickstone*,<sup>305</sup> the court clarified that subject to judicial ruling on admissibility, previous convictions were capable of being disclosed. In disputed matters, it was expected that minimum undisputed facts would be admitted. But what about other forms of 'past misconduct' that have been admitted for a trial according to case law and what has been disputed on appeal?

Under section 100, a prosecution witness' convictions are unimportant.<sup>306</sup> Nor is a previous arrest for an offence held against the non-defendant; see *R v Weir and Others*.<sup>307</sup>

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<sup>304</sup> *R v Hussain (Mohammed)* [2015] EWCA Crim 383, para 23

<sup>305</sup> [2005] EWCA Crim 824.

<sup>306</sup> *R v Bovell and Dowds* [2005] EWCA Crim 1091.

<sup>307</sup> [2005] EWCA Crim 2866.

The purpose of the enhanced relevance test is to shield prosecution witnesses from having their previous convictions of peripheral importance used to impugn them. The law also shields non-defendants. In *Yaxley-Lennon*,<sup>308</sup> a crucial defence witness had a caution for cocaine possession which was inadmissible evidence under section 100 (1) CJA 2003, because the caution did not have substantial probative value in relation to her credibility.

Although the CJA 2003 repeals former rules for admitting bad character evidence, it still has some residual use of the common law where judges have had difficulty determining whether evidence is admissible under statute. The reforms have been designed to bring prosecution cases to trial by allowing an expansion of secondary evidence. The new legislation has restricted the use of bad character evidence against complainants unless it is highly relevant and has ‘enhanced value’. This difference was also acknowledged by the Home Office.<sup>309</sup>

If a defendant asserts that a complainant has a history of making false accusations, this evidence could be admitted as bad character under section 98 of CJA 2003, but would have to pass the ‘enhanced relevance’ test under section 100 of the same. If the defendant is asserting that the current allegation is false, this would be outside the remit of section 98 according to section 98 (a) of the CJA 2003. However, it should fall within section 98 (b) of the same as a false allegation could be construed as being ‘evidence of misconduct in connection with the investigation or prosecution of that offence’ or if the defendant can produce evidence that the prosecution witness made one or more false allegations on a separate occasion to show that s/he is not creditworthy in the current case. Even the 1970s Heilbron Report, above, considered that there was validity in allowing ‘strikingly similar’ misconduct evidence against prosecution witnesses, in the same way as similar fact evidence has been and still is used to show a defendant’s propensity to commit the type of offence or which he for currently indicted.<sup>310</sup>

If the defendant wishes to raise matters about the complainant’s sexual behaviour, he needs to seek leave under both section 100 (4) and section 41 of the YJCEA 1999. If the defendant wishes to assert that the complainant has made false allegations in the past, the judge may allow questioning at cross-examination, but will usually draw a line on further questioning once an admission or negation has been made by the complainant according to the rule of finality.

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<sup>308</sup> Ibid.

<sup>309</sup> Ministry of Justice: *Research into the impact of bad character provisions on the courts*, (2009), p.50.

<sup>310</sup> Fn 26, *Home Office Report, Advisory Group on the Law of Rape*, p.36.



Judges may forbid the presentation of the prosecution witness' BCE if the evidence straddles her sexual activity. Some may regard prior allegations as 'sexual activity' as well as being potential misconduct evidence claimed by the defence to be a false allegation under section 98 (b) CJA 2003, unless the prior false allegation is proved. The Court of Appeal has had to reconsider whether a false allegation claim should have been entertained by the trial judge.

In *R v David Stephenson*<sup>311</sup> the Court of Appeal had to consider whether the trial judge been wrong to refuse leave to cross-examine a complainant in a sexual abuse case on her previous bad character in order to determine her propensity for untruthfulness. The complainant, C, made allegations of historic sexual abuse (rape and indecency with a child) against S, following therapy for psychological disorders involving the resurfacing of suppressed memories. C and S were known to each other and had lived together with a family for three years. C alleged that she had been abused since the age of 13 by S. S denied all the offences but was convicted and appealed on two grounds. He argued that the judge should have admitted evidence that C had made similar allegations against every male she had ever had contact with and that she had been damaged by her life experiences and had developed a pattern of making false allegations against men.

It was argued that the judge had been wrong to disallow S to cross-examine C on her sexual history under section 41 of the Youth Justice and Criminal Evidence Act 1999. S further contended that the judge had erred in refusing leave to cross examine C on her bad character under section 100 of the Criminal Justice Act 2003. The Court of Appeal held that there had been no misapplication of section 41 YJCEA 1999, because the original application for leave to cross examine C was based on C's relationships specifically with two other men. The judge viewing the application left matters open for S to make a further application but none was made. The appeal judges thought that the nature of S's application as argued at appeal was not apparent to the judge at trial on the available documents. Furthermore, S's argument that he was wrongly prevented from developing a case that C made accusations against other men related to her credibility and ability to tell the truth, not her sexual history. As concerns section 100 CJA 2003, the appeal judges formed the view that had S argued at trial that C's allegations were part of a wider behaviour, the judge might have accepted that C's propensity as to truthfulness was of substantial probative value. The Court was satisfied that even if S had been allowed to cross examine C, her previous convictions were for minor matters that

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<sup>311</sup> [2006] EWCA Crim 2325.

occurred in her teens a long time prior to her giving evidence at S's trial. The Court of Appeal upheld the conviction.

***Child sexual abuse appeal case involving non-disclosure of the complainant's alleged bad character***

In *R v V*<sup>312</sup> the appellant had been charged with sexually abusing his daughter. The complainant was aged 13 at the time of the rape and assault allegations and aged 14 at trial. The defendant wished to adduce evidence that J had previously made a false allegation and other bad character evidence using the provisions of section 100 (4) CJA 2003.

There were several instances of the complainant's bad character that V wished to adduce. In the first incident, J and a friend had at one time complained to a police officer of discharge in their underpants as if they had been sexually assaulted. The girls had been medically examined and the incident was no-crimes by the police. The trial judge refused leave as there was no basis for saying that the allegations were false. The second incident involved an admission by J that she had falsely told friends she had been pushed by a schoolteacher. The trial judge disallowed this evidence under section 100 (1)(b) because it lacked substantial probative value. The third incident involved J telling her mother that a man (not V) had held a knife to her throat and put his fingers inside her knickers. J became aggressive towards her mother for reporting the matter to police, who then had to file the matter as undetected. The judge refused to admit this evidence; again deciding that there was no basis for the evidence to be false. On this issue, V had obtained a video conversation where J's friend C said that J had admitted that this complaint was false.

As to the first incident with the two girls' complaints, the appeal judges stated that the proposed questions to J would have led to the suggestion that she had imagined the incident. There was no proper evidential basis for allowing the cross examination; it was therefore correct not to allow it under section 41 (3) (a) and section 41(4) of the YJCEA 1999. The alleged assault by a teacher 'exaggerated to fellow pupils after some everyday classroom misbehaviour on J's part'<sup>313</sup> did not amount to reprehensible conduct under section 112 (1) when read in conjunction with section 98 of the CJA 2003. Furthermore, even if that conduct had arguably been reprehensible, it still did not satisfy the test under section 100 (1) (b) - the substantive probative value requirement. The third incident did pass the test for admissibility

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<sup>312</sup> [2006] EWCA Crim 1901.

<sup>313</sup> *R v V*, per Crane J., para 41.

under section 100 of the CJA 2003. The video interview showed that there was sufficient evidence for asserting that the statement made by J had been untrue. A cross-examination should have been permitted.

The case hinged on the credibility of both V and J. The Court of Appeal was satisfied that the jury had been made aware that J already had some sexual experience and had not always behaved well. Thus, if a defendant alleges that a complainant has a history of fabricating allegations of sexual abuse, the allegation must effectively be proved and on record to avoid being prohibited in a cross-examination.

Are section 41 YJCEA 1999 and section 100 CJA 2003 complementary? Practitioners have to negotiate, not one, but two sets of hurdles when making an application to admit a complainant's BCE, because section 41 has not been superseded by section 100 of the Criminal Justice Act 2003,<sup>314</sup> as clarified in *R v F*.<sup>315</sup> The tandem effect is permitted under section 112(3)(b) of the CJA 2003, which states that this provision does not affect the exclusion of evidence under section 41 YJCEA 1999; and section 41(8) of the YJCEA does not allow any evidence to be adduced or question asked under section 41 that would otherwise be inadmissible.

Section 41 of YJCEA 1999 and section 100 of the CJA 2003 have been the subject of appeals, often in specific categories of crime such as sexual offences, with most convictions being upheld. Having two statutes to negotiate is unwieldy and may cause misinterpretation of the provisions. There is scope for arguing that simplification and a reduction of the complainant's character evidence into a single statute would help to avoid unnecessary human cost.

### **(xii) Disparities between the complainant's and defendant's BCE rules**

It has already been argued that complainants are not treated equally compared with defendants since complainants may not object in person to a revelation of bad character at trial. Under section 100 of the CJA 2003, at the pre-trial hearing: the judge weeds out irrelevant evidence on her behalf. A rejected application to admit BCE is official objection by the court to the evidence's admission. But the gateways through which the defendant's bad

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<sup>314</sup> Fn 22, Cross and Tapper: op cit, p.362.

<sup>315</sup> [2005] EWCA Crim 493.

character can pass are much wider. Therefore, although the complainant's character evidence process denies her an active role in what BCE may be revealed in a cross-examination, the complainant's BCE still has to pass an enhanced relevance test, as well as being 'important explanatory evidence' under section 100 (1)(a) CJA 2003. The Criminal Justice Act, section 100 was drafted with the enhanced relevance test being the higher threshold for admitting the complainant's BCE. What are the roots of this disparity?

The 2002 White Paper, which led to the radical reforms of the Criminal Justice Act 2003, was arguably, ideology based and it edited submissions from the public which did not fit squarely with its own reform agenda:<sup>316</sup>

*... the processes of evidence collection and deployment did not comply with the government's theoretical and methodological dictates of 'evidence-based-policy' as a guiding principle in all public policymaking.*

Key evidence, which called into question the wisdom of the planned criminal justice reforms because miscarriages of justice might occur, was ignored at the discussion stage.<sup>317</sup> Also, the way in which the evidence was obtained, selected and deployed did not reflect the views expressed of groups and/or individuals with the most to contribute in the reform of the criminal justice system.<sup>318</sup> Known victims of miscarriage of justice were not included. Naughton points out that if the government had been intent on rebalancing the system in favour of victims, there would need to have been the inclusion of an analysis of the extent and consequences caused by miscarriages of justice. There was no attempt at ascertaining the scale and harm caused to the wrongfully convicted, nor any prediction of the consequences of diluting and removing safeguards from injustice caused by future changes to the criminal justice system.<sup>319</sup> This was because the agenda was victim-centred.<sup>320</sup>

The media had reported governmental plans to overhaul historically valued legal safeguards such as the double jeopardy rule, the restrictions on the use of jury trials, the revelation of previous criminal records, etc. Given the fast-track approach adopted by the government to

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<sup>316</sup> M Naughton 'Evidence-Based Policy and the Government of the Criminal Justice System – Only if the Evidence Fits!' (2005), *Critical Social Policy*, vol 25, p.47.

<sup>317</sup> *Ibid* Naughton, p.60.

<sup>318</sup> *Ibid*, p.52.

<sup>319</sup> *Ibid*, p.60.

<sup>320</sup> *Ibid* Naughton, p.61.

push through the criminal justice system reforms, there was surprisingly little debate from academia itself at any stage of the processes.<sup>321</sup>

Naughton argues that the 2002 White Paper was based on civil-servant generated findings, posing as proper evidence based policy (EBP). The evidence which led to the radical reforms of the criminal justice system was shrouded in obscurity for political expediency.

The responses to *Justice for All* were simply not made available for public information and/or scrutiny. The names of the organizations that took part in the *Justice for All* consultation were recorded, the names of the individuals who made a submission to the process were blacked out. This presented a particular barrier to any attempted research into the supposed public consultation and further deems this policy document as an intrinsically private governmental affair.<sup>322</sup>

Crime victims were not the only stakeholders in the consultation process as any human system can make mistakes and that miscarriages of justice can, and do, occur. The consultation took no account whatever of the forms of social, psychological, or financial harm caused to victims of miscarriage of justice who have successfully overturned their wrongful criminal convictions in England and Wales. It equally neglected the same forms of indirect harm caused by wrongful criminal convictions to wives/husbands/partners of miscarriage of justice victims, to their parents, children, friends and to communities when victims are wrongly convicted of criminal offences.<sup>323</sup>

The overemphasis on victims of crime at government policy level helps to explain why the legislation is more favourable towards crime victims.

### **(xiii) Human rights issues arising from the restrictions on the use of BCE of the complainant**

Sexual history evidence continues to play a key role by criminal justice agencies and ‘the prospect that such evidence will be raised in court influences complainants’ decisions both not to report and to withdraw reported complaints. Complainants fear the cross-examination stage of proceedings the most’.<sup>324</sup> This reticence of complainants to report alleged crimes is the key reason why section 41 YJCEA 1999 and section 100 CJA 2003 were passed. The

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<sup>321</sup> Ibid Naughton, p.60.

<sup>322</sup> Naughton, p.57.

<sup>323</sup> Ibid, p.62.

<sup>324</sup> M Burton, R Evans, and A Sanders, ‘Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales’ *International Journal of Evidence and Proof* 2007, vol 11, no 1, p.10.

judiciary has to balance the complainant's sensibilities against the rights of the defendant when they are asked to determine whether bad character, sexual past or sexual behaviour evidence is sufficiently important or its value sufficiently probative to justify admission.

The adversarial court system is governed by the principle of orality, which may prevent vulnerable and intimidated witnesses from giving their best evidence, whatever modifications are made to accommodate them.<sup>325</sup> The changes in the bad character laws under the YJCEA 1999 and the CJA 2003 were designed to elicit the best evidence from vulnerable complainants and witnesses without unnecessary intrusion into their personal history.

#### *Tensions between rights of the victim and defendant under the European Convention*

Article 8(1) of the European Convention on Human Rights states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. Arguably, the recent tightening of the use of a complainant's sexual history in contested sexual offence trials conforms to this principle. However, Article 8(2) is a qualified right:

*There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.*

Therefore, the rights of the victim, such as to be free from psychological hindrance when giving evidence, are conditional upon the right of the defendant to have a fair trial under the adversarial system so that the accused may challenge his accuser in open court by means of cross-examining the accuser's evidence.<sup>326</sup> In English law, it is at the cross-examination stage in court where the defendant may challenge the prosecution witness. Judges have an active role in deciding whether a cross-examination is overstepping the line. A convicted defendant may decide to appeal on the grounds that the trial judge was wrong to have prohibited the revelation of the complainant's BCE as well as being a violation of his right to a fair trial.

Burton, Evans and Sanders conclude that complainants would be better served by the inquisitorial legal process.<sup>327</sup> The complainant's witness statement would be videotaped. A cross-examination could take place *in camera*. The videotaping would allow the complainant

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<sup>325</sup> Burton *et al.* p.1.

<sup>326</sup> Ibid p.2.

<sup>327</sup> Ibid p.21.

to narrate authentically rather than the current process of having his/her statement taken by an investigator only to be scribed by the police and typed up in a witness statement.<sup>328</sup> Cross-examinations could then be allowed on delicate matters, provided that they are relevant, taped and shown to the jury in court.

This method is designed to respect both the rights of victims not to suffer ‘humiliating and degrading’ treatment under Article 3 of the European Convention at the same time as allowing the defendant to cross-examine or have the complainant cross-examined under Article 6 of the same and perhaps reduce the psychological barriers victims face when deciding to report crimes, but dispense with the fear of being in the courtroom.

Academics such as Londono, maintain that the present BCE laws affecting complainants still flout Article 3 of the European Convention on Human Rights.<sup>329</sup> She argues that both section 41 of the Youth Justice and Criminal Evidence Act 1999 and the Criminal Justice Act 2003, section 100, still fail to protect the complainant from humiliating and degrading treatment when her sexual history is adduced in cross-examination by the defence, even if relevant to facts in issue which may undermine the prosecution’s case and would therefore be at the expense of the accused’s rights to a fair trial under Article 6. Yet in fact-finding, if the search for the truth of the substance of the allegation is compromised to the extent that key evidence is left out of the equation, there is the risk that a trial will be unfair to the defendant – evidence which might exonerate him at trial or be sufficient grounds to argue for a wrongful conviction appeal.

Policymakers have acknowledged the quandary of a person who comes forward and makes a formal complaint: ‘Too often the perception is that victims and witnesses are the ones on trial, rather than the suspect.’<sup>330</sup> However, if one assumes that what a complainant says is true, this implies that the accused is *prima facie* culpable before the trial, thereby reversing the presumption of innocence.

The tenet that prior sexual experience shows a propensity to consent and a lack of veracity about the allegation are not the only ‘rape myths’; nor are they necessarily the most damaging.<sup>331</sup> Is it helpful to conceal from the jury potentially relevant material under the restrictions of section 41 YJCEA 1999 at a time when juries are become increasingly

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<sup>328</sup> Ibid p.11.

<sup>329</sup> Fn 129, Londono: op cit, p.158.

<sup>330</sup> *Justice for All*, (Cm 5563, July 2002), p.37.

<sup>331</sup> Fn 7, Birch: op cit, p.373.

entrusted to hear sensitive evidence? The *Justice for All* White paper commented on the need for juries to have access to relevant evidence:

*Magistrates, judges and juries should be trusted to give appropriate evidence the weight it deserves when they exercise their judgement ... the rules of evidence need to be rewritten to ensure that they have included all relevant material to help them to reach a just verdict. The rules should be coherent, consistent and realistic...*<sup>332</sup>

Birch points out the paradox of the White paper's confidence in a jury's maturity and modern mindset, yet section 41 YJCEA was premised on the assumption that juries held anachronistic views on evidence about sexuality, which, if true, meant that they were incapable of assessing sexual history evidence impartially. This approach, she states, paves the way for justifying even more restrictions on juries hearing sexual history evidence, effectively amounting to a blanket ban.<sup>333</sup> She makes a strong point, that bowdlerising relevant sexual history material risks skewing the truth-finding mission of the jury. At the same time, little is known about how much weight is given to a complainant's bad character evidence by juries. This is because researchers are currently forbidden in the UK from canvassing jurors under section 8 of the Contempt of Court Act 1981.<sup>334</sup> It is difficult to see why juries should decide serious cases with the reasoning of their verdicts kept secret by law in a democratic society which values openness and accountability on matters conducted in the public interest in the public forum of the courtroom.

There has been recent agitation by campaigners for more victim-centred rights within the criminal justice system, perhaps due to victories they have made in persuading criminal law-makers to draft laws that are more favourable to them. A July 2009 government report discussed whether the role of the Crown should change to become the 'victim's advocate' rather than representative of the public interest.<sup>335</sup>

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<sup>332</sup> *Justice for All* (Cm 5563, 2002), para 4.53.

<sup>333</sup> Fn 7, Birch, *op cit*, p.373.

<sup>334</sup> M Zander, *Cases and Materials on the English Legal System*, (10th edn Cambridge 2007) at p.513. The Department of Constitutional Affairs in 2005 was not opposed to amending the 1981 Contempt of Court Act, but suggested that it not be done until there were specific questions to be answered that could not be sufficiently investigated without altering the law. Current research has used 'mock' jury trials, or interviewed police, lawyers and judges, offering their impressions.

<sup>335</sup> The Crown Prosecution Service: Gatekeeper of the Criminal Justice System – Justice Committee Contents, Part 3 Prosecutors and Victims: At the Heart of the Criminal Justice System Ninth Report of Session 2008-09, 15 July 2002 HC 186.



Nicola Padfield said that the Government's determination to 'rebalance' the system in favour of victims can exaggerate the role of the victim in the prosecution process.<sup>336</sup>

Robin White noted that there had to be distance between the victim and the prosecutor: 'One form of prosecutor independence in the public interest is independence from the victim'.<sup>337</sup>

He went on to distinguish between the role of the prosecutor with regard to the victim and to the criminal justice system:

*...prosecution by a public prosecutor is not necessarily in the interests of the victim. It may or may not be, but the point of the criminal justice system is to identify who did the wrong thing and make that individual subject to a penalty'.<sup>338</sup>*

Sir Ken Macdonald QC noted in his final lecture as Director of Public Prosecutions that:

*It will never be possible, in adversarial proceedings governed appropriately by Article 6, for the interests of victims to overcome those of defendants.<sup>339</sup>*

By analogy, it is arguable that as section 100 CJA 2003 is partisan legislation, given the tighter restrictions of the use of the complainant's BCE, it therefore presupposes that the prosecution is dealing with a (proved) victim rather than a complainant. The criminal justice system is designed to test whether a complaint of a crime can be formally substantiated.

The changes in bad character legislation in 1999 and 2003 were premised on low attrition rates in rape cases, which claims makers argued, was due to the complainant's reticence to report a crime or give evidence at trial. What other factors could cause a low report rate? As Naughton pointed out, victims of false allegations were not party to the formal consultation on criminal justice system reform.<sup>340</sup>

At the same time, a Metropolitan Police report (London area) found that there was still underreporting of sexual offences because cases are still being 'no-crimed' even where they are not unsubstantiated.<sup>341</sup> In 80% of the crimed allegations a suspect was identified, approximately three quarters (73%) of which led to an arrest.<sup>342</sup> One in three rape allegations were no/not

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<sup>336</sup> Ibid, para. 80.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Fn 174, Naughton op. cit., p.60.

<sup>341</sup> Metropolitan Police January Report 2007: *The Attrition of Rape Allegations in London, a Review*; full report also available at <[www.docstoc.com](http://www.docstoc.com)>.

<sup>342</sup> Ibid, para 4.4.

crimed, an increase from one in four at the time of the 2005 Review.<sup>343</sup> One quarter of crimed rape allegations resulted in a charge by the CPS. Following arrest, just under a half of suspects (44%) were charged.<sup>344</sup> Of the 115 suspects charged by the CPS, 36 (one in three) were convicted.<sup>345</sup>

Whilst concerns do remain about the low report rate of sexual offences, are many investigators reaching competent decisions not to pursue certain complaints? There may be legitimate reasons why an investigation is ‘no-crimed’ (and this may include cases which may be left on file until more evidence against the accused is discovered to reactivate matters). Other no-crimed cases may be solved because the complaint was withdrawn because its maker admitted to fabricating it. Brown and Horvath’s pamphlet criticising the rape attrition rate cites the research conclusion of Stanko and Williams which indicated that ‘only about ten per cent of allegations were regarded as false.’<sup>346</sup> Campaigners seeking to improve the lot of victims of sexual offences focus on rape attrition rates to justify the passing of more laws to enhance the prospects of obtaining more rape convictions, but downplay statistics which indicate that there is also a problem with manifestly false allegations and wrongful convictions.

Understandably, campaigners for both victims of sexual offences and false allegations of these offences will not want nebulous data to risk adulterating their cause. The temptation is to ignore false positives and false negatives so as not to throw doubt on those genuine cases. In the case of historic child sexual abuse, without forensic proof or proof that a crime has occurred, the need to investigate each case fully and impartially becomes imperative, given the dire consequences of false negatives of abuse (acquittal of the guilty) or false positives (innocent found guilty).<sup>347</sup>

Assuming that the Metropolitan police report on rape attrition is accurate in its methodology, the percentage of false allegations is low, but when the sample numbers are analysed more carefully, the number of false reports is still scores of accused, rather than a few. The Metropolitan Police study indicated that in 2005, 11% of allegations were false.<sup>348</sup> These were cases in which the complainant admitted that the allegations were false or that the evidence

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<sup>343</sup> Ibid, para 4.3.

<sup>344</sup> Ibid, para 4.5.

<sup>345</sup> Ibid, para 4.6.

<sup>346</sup> J Brown J. and A H Horvath, ‘Web of Injustice’ pamphlet at p.2 of Feature from - Police Federation of England & Wales; <[www.polfed.org](http://www.polfed.org)> accessed on 16 Feb 2014.

<sup>347</sup> R Burnett, ‘Default Belief’ The Justice Gap, 8 March 2013; <[thejusticegap.com/2013/03/the-default-belief](http://thejusticegap.com/2013/03/the-default-belief)> accessed on 16 Feb 2014.

<sup>348</sup> Ibid, para 4.13, p.13.

substantiated that the original allegation had no basis in fact. 72 out of 677 rape allegations were no-crimes in this way. In 2006, 4% of allegations (28 complaints) were categorised as false. The police research shows that dozens were still subjected to a false allegation.<sup>349</sup> Rape statistics also tend not to show successfully appealed cases where the accused was tried and convicted, which therefore could be added to false report figures (if 'false' can include wrongful convictions). More empirical research on false allegations in sexual offences should be undertaken, such as that of the Crown Prosecution Service in 2013 on false allegations of rape, discussed earlier in this thesis.<sup>350</sup>

#### **(xiv) Applications and implications of Directive 2012/29/EU ('Victims' Directive')**

Victims have now been accorded a significant status under the European Union's Framework Decision 2001/220/JHA.<sup>351</sup> Paragraph (4) states that Member states should approximate their laws and legislations to the extent necessary to attain the objective of affording victims of crime a high level of protection, both witness protection and privacy at legal proceedings. Paragraph (5) states the victims' needs should be considered in a comprehensive and coordinated manner, avoiding partial and inconsistent decisions which may give rise to secondary victimisation. Under paragraph (8) rules and practices regarding the standing and main rights of victims have to be approximated, with particular regard to the right to be treated with respect for their dignity and the right to be protected at the various stages of procedure. The ambit of the word 'protection' is set out in Article 8, Right to Protection, paras 1-4:

*Each Member State shall ensure a suitable level of protection for victims...as regards their safety and protection of their privacy, where the competent authorities consider...that there is firm evidence of serious intent to intrude upon their privacy.*

This section could therefore be interpreted as including the right to respect for a private life under Article 8 of the European Convention, such as the right to individual sexuality and the right to psychological integrity.<sup>352</sup>

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<sup>349</sup> Ibid, para 5.3, p.18.

<sup>350</sup> A Levitt, QC and the Crown Prosecution Service Equality and Diversity Unit: *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*, March 2013.

<sup>351</sup> Official Journal of the European Communities, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. (2001/220/JHA), L82/1-L82/4.

<sup>352</sup> <<https://www.liberty-human-rights.org.uk/search?query=article+8>> published 31 August 2010.

Under paragraph (11) of the Framework Decision, suitable and adequate training should be given to persons coming into contact with victims. This provision can apply not only to police who interview complainants, but also legal staff on both the prosecution and defence side who also question them. The Bar Council of England and Wales contributed to a consultation which reviewed the efficacy of the Framework Decision 2001/220/JHA.<sup>353</sup> It advised that member states should ensure that new practitioner programmes and that continuing professional development requirements includes training in how to handle victims and witnesses, not just for the police, prosecutors and judges, but also for defence lawyers.<sup>354</sup>

It was in favour of identifying vulnerable witnesses who would benefit from special provisions such as pre-recorded cross examinations, screens, and live video links given elsewhere transmitted into the courtroom. It regarded children as vulnerable victims who required these provisions, but it also suggested identifying vulnerable victims by assessing their personal and case-specific attributes to tailor the special measures to the personal needs of these victims.<sup>355</sup> The existing Framework Decision contained sensible suggestions, but it had not been implemented by numerous member states, therefore it recommended that the Framework be contained in a directive.<sup>356</sup>

Following this advice, the European Parliament adopted Directive 2012/29/EU. This Directive sets out minimum standards on the rights, support and protection of victims of crime with special regards to the vulnerable, including children.<sup>357</sup> It enhances and complements the Framework Decision already in place on the standing of victims in legal proceedings but it is more powerful because member states are mandated to ensure that measures are available to protect complainants from secondary victimisation, especially by protecting their dignity during questioning and when testifying.<sup>358</sup> Article 24 provides for an additional set of available measures for child victims. Member states are obliged to guarantee that all interviews with the child victim may be audio visually recorded and that such recorded interviews may be used as evidence in criminal proceedings. It is for the member

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<sup>353</sup> The General Council of the Bar of England and Wales, European Commission Consultation on Victims, Contribution by the Bar Council of England and Wales, December 2010.

<sup>354</sup> *Ibid*, p.3.

<sup>355</sup> *Ibid*, para 8, p.4.

<sup>356</sup> *Ibid*, para 4, p.3.

<sup>357</sup> Explanatory Memorandum Commission Proposal Directive 2011/0129 (COD), p.25.

<sup>358</sup> *Ibid*, p.27.

states to determine procedural rules for these recordings. These provisions may have direct effect - an individual can invoke them before national courts.<sup>359</sup>

The Directive's Article 24 provision has already been criticised for undermining the right of the defendant to examine or have examined witnesses against him cross examined under Article 6 (3) (d) because member states no longer have the discretion to determine the recording of obtaining evidence from complainants who are deemed vulnerable (and therefore offered special treatment) under the new rules.<sup>360</sup> In England, the pre-recording of interviews with child victims is already permitted, but the Directive will now allow any other complainant deemed vulnerable to be allowed to have a pre-recorded interview. According to *Vanhatalo v Finland*, no. 22692/93, 18 Oct 1995, sexual abuse cases victims need not testify as long as there is some corroborating evidence available for examination.

The extent of any measure protecting specific needs of victims should be determined without prejudice to the rights of the defence and in accordance with the rules of judicial discretion.<sup>361</sup> According to its preamble, the Directive shall respect all fundamental rights and principles recognised in the Charter of the Rights of the European Union, including the right to a fair trial, the rights of the child, and the right to dignity.<sup>362</sup> The European Court of Justice has held in *Pupino*<sup>363</sup> that protective measures for victims must be designed in such a way that the right to fair trial is respected. The yardstick for what constitutes a fair trial for the accused was also discussed. In dispute was whether the Italian justice system could extend the availability of special measures to five-year-old children who alleged to have been physically assaulted by their primary school teacher where the national law explicitly stated that the national measures applied to complainants of sexual offences. The ruling effectively allowed the ambit of the Framework Decision to go beyond the protection limited to child victims of sexual offences.<sup>364</sup>

Directive 2012/29/EU has extended victims' rights and special treatment for vulnerable victims, yet there must be a real concern that the requirements implied by the suspect's rights to a fair trial under Article 6 have been diluted. Nevertheless, as long as criminal proceedings

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<sup>359</sup> T. Konigs, S Wahedi and W Tjalling, 'The European Union's Approach towards Child Victim Testimonies in Criminal Proceedings Compared to the Right to a Fair Trial, *summa ius, summa injuria?*' *Journal of Politics and Law*; vol 6, no 4; 2013, p.18.

<sup>360</sup> *Ibid.*

<sup>361</sup> Preamble Directive 2012/29/EU, Art. 58, Directive 2012/29/EU, Art. 23(1).

<sup>362</sup> Preamble Directive 2012/29/EU, L315/58, para 12.

<sup>363</sup> ECJ 16 June 2005, Case C-105/03, para 59.

<sup>364</sup> *Ibid.*, para 60.

are considered to be fair in the aggregate as discussed in *Pupino*, above, these developments are considered by the Court to be consistent with Article 6.

The impact of the legislation favouring victims can be illustrated in this way: the trial of a defendant *in absentia* in open court is not encouraged,<sup>365</sup> yet he may now be tried with his alleged victim *in absentia* (in a pre-recording, not as a live witness in open court). Whilst these conditions may be less intimidating and embarrassing for complainants, their demeanour (body language) in a pre-recording may differ from the performance they would otherwise have given in the courtroom before the jury. The defendant, by contrast, is denied the opportunity of giving his evidence under these more comfortable conditions, where allegations impugning his sexual conduct are made in the courtroom and they may also be reported in the Press which may adversely affect his own family's rights to respect for privacy. If pre-recording complainants for their evidence-in-chief were to be universally applied to adults as well as children, it is suggested that directions by the judge would have to be given to explain that demeanour can be affected by the type of condition to which each party is subjected to offset the greater advantage complainants offered to complainants.

In England, the prosecution side is still represented by the Crown, but it is likely that there will emerge a second 'prosecutor' - the victim - against whom an accused must amount a defence, given the increasing latitude and status afforded to victims under the new EU Directive for victims. Are we witnessing a reconceptualization of what constitutes a fair trial, privileging the protection of interests over those of the defendant? The problem with this new concept is that we are losing sight of the original reasons for ensuring the right to a fair trial - it is a truth seeking tool, guided by a set of rules designed to keep the delicate balance between the two goals of punishing perpetrators of crimes at trial and preventing the punishment of innocent people.<sup>366</sup>

It is true that the right to defend oneself does not provide for an unlimited right to use any kind of defence argument,<sup>367</sup> but it has been shown in this thesis that there have been breaches of the defendant's right to a fair trial which have been successfully appealed where legitimate defence cross-examination questions on the complainant's sexual past or conduct had been wrongly censored by the trial court.

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<sup>365</sup> *Sejdovic v Italy*, App no 56581/00 (ECHR, 1 March 2006), para 29.

<sup>366</sup> B Bagci, 'An examination of the right to a fair trial: The proceedings of absentia trial in international criminal proceedings' (2013), p.2.

<sup>367</sup> *Brandstetter v. Austria* 28 August 1991, § 52, Series A no. 211) 15 ECHR 378.

Advocates of victims' rights may argue that there is now technical equilibrium over fair trial rights and protections for defendants and victims, but given the modifications favouring the latter without counterbalancing measures for the accused, there appears to be a trade-off favouring victims.<sup>368</sup>

#### (xv) Conclusion

Policymakers have attempted to encourage the reporting and prosecution of sexual offences such as rape by providing greater protection to complainants in the matter of their being questioned about their sexual history and bad character, not only because such information is considered to be irrelevant and detracts from main issues in such a trial, but also because witnesses are reluctant to have their private lives probed in a public forum.

Whilst recent policy and law on 'bad character' have been tailored to accommodate a complainant's needs to protect intrusion into her private life, it is difficult to see how justice is served to both complainants and defendants, where bad character evidence statutes have been informed by selective evidence-based policy (as criticized by Naughton) and a (mistaken) assumption that the judiciary (revisions in policy since *R v A*) cannot be entrusted with the delicate matter of determining the merits of bad character applications. The provisions considered above need to be revisited.

Both victims of abuse and the falsely accused need to have their experiences taken seriously. A criminal justice system favouring only victims of sexual offences, including and especially child sexual abuse, risks imprisoning innocent parties accused of such crimes for a long time; moreover, children of people who are falsely accused of child abuse and sexual crimes may be socially stigmatized and psychologically damaged by those who condemn the convicted parent. Comparatively little is said of the trauma and stigma attached to those accused of sexual offences, where the allegations turn out to be false by the complainant's own admission or where the defendant is acquitted or appeals successfully. Anonymity for such defendants is not a new concept, and should also be revisited.

Clearly, cross-examination of complainants on issues intimate to them should never involve irrelevant questions which would infringe Article 8 of the victim's right to respect for her privacy. It is likely that we are going to see more applications by the prosecution to video-

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<sup>368</sup> P Chenivesse and C J Piranio, 'What price justice? On the evolving notion of 'right to fair trial' from Nuremberg to The Hague', *Cambridge Review of International Affairs*, (2 Nov 2011), 24:3, p.422.

record the testimony of both children and adults deemed vulnerable in the UK in sexual offence cases given the directly effective rights afforded by the new Victims' Directive. Whilst their testimony would still be played to an open court, they would be spared the trauma of personal appearance before strangers in court. Any inadmissible evidence relating to their private lives can be redacted by the judge after leave to admit video recorded evidence in chief under section 27 of the Youth Justice and Criminal Evidence Act 1999. Under section 27 (2) and (3) of the same, the court may direct that any part of the recording be excluded. Section 27 (2) permits editing of inadmissible evidence but this is subject to an 'interests of justice' test which considers whether any prejudice the accused might incur would be outweighed by allowing these special measures in whole or in part (27 (3)).

Article 6 remains a limited or special right which cannot be completely balanced against the rights of other individuals<sup>369</sup>. If a defendant raises an issue which is part of his legitimate defence which pertains to an aspect of the complainant's private life, then censoring use of this evidence would deprive the defendant of a fair trial and he risks being wrongfully convicted. However, the Victims' Directive 2012/29/EU has been shaped by Article 3 – the psychological harm complainants may suffer by appearing in court in front of their alleged assailants, and Article 8 on the right of victims to respect for a private life. At trial, pressure is on the defendant – who will have the charges, his life, family and reputation fully exposed to the court and public eye – he has not been accorded any protective privileges afforded under the Directive which have been constructed by the victim's discourse.

The Bar's code of conduct and modern judicial training manuals now offer advice on the rights of and treatment of victims during cross-examinations. Logically, defence counsel should by now be more sensitised to avoid stereotyping complainants and subjecting them to unethical cross-examination as previously exposed by Temkin.<sup>370</sup> Indeed, the English Bar actively promoted the Directive favouring victims. However, it is submitted that the right to a fair trial for the defendant can only be honoured by a robust cross-examination of relevant facts in issue argued by the defendant in contested proceedings. In HCSA trials the cross-examination may be the only means by which an innocent defendant can rebut the allegations made against him, and any attempts to erode this right must be assessed.

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<sup>369</sup> Crown Prosecution Service online:

<[http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_rights\\_and\\_criminal\\_prosecutions\\_general\\_principles](http://www.cps.gov.uk/legal/h_to_k/human_rights_and_criminal_prosecutions_general_principles)>

<sup>370</sup> J Temkin, *Prosecuting and Defending Rape: Perspectives from the Bar* (Vol 27, No 2, June 2000), *Journal of Law and Society*, pp.219-248.



## **Chapter VI    Developments concerning the defendant's bad character evidence in sexual offence cases and the impact on the fairness of proceedings**

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This chapter explores the evolution of the use of bad character evidence which can be produced by the prosecution against the defendant and asks whether the accused in HCSA cases is more disadvantaged than defendants accused of different crimes.

Where previous convictions are disclosed to an English jury and they are of a similar nature to the current allegations being tried, it will be seen through mock jury research and Canadian research (using real jury opinions) that previous convictions are given great importance when applied to current CSA cases. What measures could be taken to ensure that a jury can try a CSA case impartially?

Given that admission of bad character evidence often turns on the issue of predisposition, the chapter also has regard to the recent literature on recidivism to assess whether sex offenders, particularly CSA offenders are more likely to reoffend for the same or similar crimes in the future. Could psychology literature be useful for understanding which categories of offender in serious crimes are actually most likely to be recidivists for the same/similar offences?

The chapter comprises the following elements:

- (i) Evidence of character?
- (ii) The evolution of bad character evidence
- (iii) Reform of bad character evidence
- (iv) Policy underlying the erosion of safeguards for the use of BCE
- (v) Comparative practice
- (vi) Prior research on previous convictions and predisposition to criminality
- (vii) The Criminal Justice Act 2003 and its impact on sexual offence trials
- (viii) Functions of the seven gateways
- (ix) Safeguards from abuse
- (x) Problems with identifying tainted bad character evidence
- (xi) Conclusion

**(i) Evidence of character?**

While a defendant was always allowed to adduce evidence of reputation in his community to demonstrate good character,<sup>1</sup> the prosecution were restricted – they could present evidence in rebuttal of good character or adduce evidence that the accused was the kind of person who was predisposed to commit an offence and/or to show that he had actually committed the offence charged by proof of convictions. This was established in *Makin v Attorney-General for New South Wales*.<sup>2</sup> Then, under the Criminal Evidence Act 1898, character was defined as being distinct from previous convictions and misconduct, but ‘it became convenient to use the term character in an extended sense to include these terms as well as reputation’.<sup>3</sup>

Earlier misconduct is not conclusive of a defendant’s guilt, but where a tribunal of fact is concerned, there is the danger that without guidance, it may give bad character evidence undue weight over other evidence (reasoning prejudice). If it reaches the conclusion that the accused is a ‘bad’ man, it may not decide to give him the benefit of any doubt (moral prejudice).<sup>4</sup> Character evidence is founded on moral premises. A person of ‘good’ character means someone possesses moral skills and sensibilities that enable him to act well and which are in keeping with respecting the dignity of others and proper concern for their welfare<sup>5</sup>, whereas someone with a ‘bad’ character lacks these moral sensibilities and skills, has little interest in extending them or shirks the value of so doing and aims to show little regard for the dignity and welfare of others.<sup>6</sup> In law, however, a good character means nothing more than not having previous convictions, rather than being an upstanding and community minded member of society.<sup>7</sup>

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<sup>1</sup> P. Murphy ‘Character evidence: the search for logic and policy continues’ (1998) *International Journal of Evidence and Proof*, p.85.

<sup>2</sup> [1894] AC 57.

<sup>3</sup> Fn 1, Murphy: op cit, p.75.

<sup>4</sup> G Durston, *Evidence*, (2nd edn OUP 2011), p.191.

<sup>5</sup> R L Lippke, ‘Criminal record, character evidence, and the criminal trial’ (2008) L T, p.171.

<sup>6</sup> Fn 5, Lippke: op cit, p. 171.

<sup>7</sup> *Ibid*, p.170.

**(ii) The evolution of bad character evidence**

Sexual offences, particularly those which involve multiple allegations against the defendant, have often involved the presentation of bad character evidence, classified as similar fact evidence (SFE) under the old regime of part-statute section 1(3) of the Criminal Evidence Act 1898, and part-common law. Cross-admissibility of allegations joined on a current indictment has the same effect as well: this evidence can be brought in chief so as to show a pattern of misconduct of similar or same offences. This therefore shows the tribunal of fact that the accused has the propensity (natural inclination) to commit the type of crime with which he has been charged. The law used to be concerned with distancing itself from convicting defendants merely on the grounds that they had a propensity to commit the current crime, as set out in *Makin v New South Wales* ‘*but the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury.*’<sup>8</sup>

Lippke states that criminal defendants are not to be found guilty or punished by the state merely because they have chequered pasts; that judges and juries should not decide the fate of criminal defendants based on stereotypical evidence. People’s conduct can change over time and they may even desist; therefore, greater care should be taken where past misdemeanours have become antiquated. Conversely, it is also thought that, even though it is possible for people to act out of character, when it comes to behaviour, someone may often or usually behave in a particular way.<sup>9</sup> Nowadays, the question of what constitutes a propensity in law is more difficult to ask, as some might argue that a single prior misconduct may be sufficient to convince a judge to place it before a jury as propensity evidence in a current trial. Since 2003, it would appear that a single prior conviction showing a tendency to unusual behaviour such as sexual offence against a minor or fire setting can be accepted as propensity as set out in *R v Hanson*.<sup>10</sup> It will be shown later that the Lloyd-Bostock study verified how prejudicial just a single conviction for a child sexual offence can be when a jury hears about irrespective of whether the current charge is similar or dissimilar.<sup>11</sup>

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<sup>8</sup> Fn 2, *Makin*, per the Lord Chancellor, p.65.

<sup>9</sup> Fn 5, Lippke, op cit pp.168,171,180.

<sup>10</sup> [2005] EWCA Crim 824, per the Vice President, para 9.

<sup>11</sup> S Lloyd-Bostock, ‘The effects on juries of hearing about the defendant’s previous criminal record: a simulation study’ [2000] Crim L R Sept, pp.734-755.

The reason for the abolition of the old bad character statute and the common law relating thereto, was that it was perceived as suffering from defects which distort the trial process, make tactical decisions paramount and inhibit the defence in presenting its case to the fact finders whilst often exposing witnesses to gratuitous and humiliating exposure of long forgotten misconduct.<sup>12</sup>

If a defendant did not testify in court, he could not be cross-examined on his bad character. The defendant's representative could then attack the character of prosecution witnesses with impunity. He could only lose his 'shield' (face a cross-examination) if he appeared in court and either asserted that he was a person of good character under section 1(f) (ii) of the Criminal Evidence Act 1898, or if he attacked a prosecution witness in court under section 1 (f) (ii) or if he attacked the character of a co-defendant under section 1 (f) (iii). The attacks on witnesses other than the defendant had to be more than an emphatic denial of the charges. Effectively, the accused was afforded tactical advantages to conceal his bad character over those of the complainant and other witnesses at trial. The exception, though, was similar fact evidence (SFE).

The courts were gradually persuaded that, in some instances, the facts of events in similar crimes could form part of important background evidence to help juries evaluate whether the accused had committed the current offence. SFE could be admitted in chief as part of the prosecution's case against the accused under section 1 of the Criminal Evidence Act 1898. It was the task of the judge to decide in advance the probative value against the possible prejudice that could impact on the defendant's case. Normally, the prosecution was not permitted to allow evidence of other crimes that did not form part of the present indictment, but if the other crimes appeared to be relevant to an issue placed before the jury, such as showing criminal intent, or to prove that the present offence could not logically be accidental, or to rebut a defence that the accused might have had, then it was permitted.<sup>13</sup> It was evidence of the defendant's propensity or disposition to misconduct himself in general or specific ways and did not need to be criminal conduct.<sup>14</sup> The determination of 'similar fact' evidence was essentially a process of classification, because fact A may have features in common with fact B, but they may also have features not in common, otherwise they would be identical.<sup>15</sup>

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<sup>12</sup> Law Commission (No. 273) *Evidence of Bad Character in Criminal Proceedings* (Cm 5257, October 2001), Para 1.7.

<sup>13</sup> Fn 1, Murphy, p.88.

<sup>14</sup> Fn 12, para. 2.4.

<sup>15</sup> J. Stone, 'Exclusion of similar fact evidence' 46 Harv L Rev 1932-1933, p.954-955.

SFE was mainly used for murder and other serious trials<sup>16</sup> as evidence to allow juries to evaluate whether prior circumstances of past misconduct could be connected with the issue of whether the accused committed the present allegation(s). The common law only permitted a narrow, categorical approach to the use of SFE to obviate the general prohibition on its use. A jury was forbidden from being allowed to hear evidence which would lead to the conclusion that the accused was likely to have committed the current offence judging from his criminal conduct or character, except in cases where SFE was allowed. Not only the jury could err on the use of SFE, but also judges struggled with the concept of SFE and the criteria for its admissibility to the jury.

In sexual offence cases, public revulsion towards the alleged offender would have been evident by the revelation of a past sexual crime, as much then as now. Certain patterns of behaviour could be perceived to be part of the indivisibility and permanent nature of the accused's character, including and especially sexual offences. Murphy contended that the doctrine of indivisibility should be abrogated. He thought that the history of bad character was based on the 'criminal class' theory which stereotyped certain crimes as being germane to common criminals or else sexually deviant criminals.<sup>17</sup>

If significant background information on a defendant is held back, juries may wrongly acquit a sexual offender. But equally, if the background information were freely admissible, given the emotional aspect in sexual offence trials, juries may also be more likely to deliver a wrongful conviction. Therefore, when defendants were finally allowed to testify, cross-examination on bad character was controlled by section 1 (f) of the Criminal Evidence Act 1898, so that it was forbidden for the prosecution to lead or ask the defendant in cross-examination about bad character evidence which was more prejudicial than probative.<sup>18</sup> The exclusionary rule was consistent with the safeguard in the criminal justice system that defendants are innocent until they are proved guilty.<sup>19</sup>

The landmark case was *Makin v AG for New South Wales*.<sup>20</sup> The co-accused, a couple called the Makins, were being tried for the murder of a child whom they had taken into their care for payment after having advertised to foster unwanted children. Both denied murdering the

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<sup>16</sup> *Smith* [1915] 11 Cr. App. R. 229, defendant charged with wife's murder claiming death in the bath by natural causes; prosecution was allowed to adduce evidence of the deaths of two of his previous wives by drowning in baths for which the defendant received life insurance payments.

<sup>17</sup> Fn 1, Murphy: op cit, p.108.

<sup>18</sup> The defendant could lose this protective shield if the evidence was designed to show that he was guilty of the offence charged s. 1 (f) (i); cast imputations on the prosecution s. 1 (f) (ii) or he had given evidence against anyone else charged in the proceedings s. 1 (f) (iii) of CEA 1898.

<sup>19</sup> <<http://www.richardwebster.net/print/xsimilarfactevidence.htm>>.

<sup>20</sup> [1894] AC 57.

child. However, the prosecution wanted and received permission to lead evidence that a total of thirteen bodies of children had been found buried at the couple's rented premises. The evidence was used by the prosecution to rebut the possible defence of accidental death, and increase the likelihood that the present victim had been murdered. It was also designed to show that the defendants were predisposed to commit the discreditable act in issue as it was used to corroborate the commission of the crime (*actus reus*) and that the accused had the *mens rea* to do this - showing that circumstantially it was unlikely that all thirteen deaths were accidental. The safeguard set out in *Makin* was that SFE should not be used at trial merely because it seemed relevant to the count on the indictment, but because it was both relevant and probative. This ruling was followed in *R v Smith*,<sup>21</sup> another murder trial where the accused denied murdering his wife and profiteering from insurance paid out after her death. The court allowed evidence to show that two other of the accused's former wives had been found drowned in the bath like the latest victim, and that the accused had also gained financially as a result of their deaths. Once again, there was probative value in allowing the jury to hear strikingly similar circumstantial facts which the court regarded as overruling any prejudice to the accused arising from the revelations. The problem with admitting SFE in sexual offence cases, is not the use of relevant and probative evidence, but the emotionality of fact finders, which may obfuscate the logic of the use of such evidence. Similar facts might be of probative weight in relation to the fact alleged, but they may influence the minds of jurymen unduly when the crime alleged is one of a revolting character and the person has not been trained to think judicially, the prejudice must sometimes be insurmountable.<sup>22</sup>

The SFE principle was extended to sexual offence cases when judges came under pressure to secure more convictions from the early 20<sup>th</sup> century onwards, particularly in relation to homosexual offences. In *R v Sims*,<sup>23</sup> a buggery trial, the judge allowed evidence of three different male complainants to be admitted in the same trial as being mutually supportive that the offence had occurred. The significance of the use of bad character evidence in *Sims*, was that in murder cases, the jury heard strikingly similar facts that were concrete, whereas in sexual offence cases, the jury was now able to hear strikingly similar allegations, i.e., unproven facts. It would have been more correct to have classified this type of evidence as similar allegation evidence and not SFE. Webster argues that the threshold for admission of SFE had been thus lowered.<sup>24</sup>

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<sup>21</sup> [1915] 11 Cr App R, 229.

<sup>22</sup> Fn 15, Stone, citing *Rex v Bond* [1906] 2 K B 389, 398 *per* Kennedy J, p.957.

<sup>23</sup> [1946] 31 Cr App R 158.

<sup>24</sup> <<http://www.richardwebster.net/similarfactevidence.html>> accessed on 19 September 2012.

The issue of similar allegation evidence arose again in the case of *Boardman*<sup>25</sup> when a teacher was accused of buggery by three adolescent boys. The accused appealed his conviction and it went as far as the House of Lords. The Law Lords held the view that the allegations were rightly relevant and cross-admissible to counts involving the characteristic that the defendant played the passive role in the homosexual conduct. Yet, this case was the first time that there had been discussion about the difference between a series of allegations which were all denied by the accused, from those types of case such as *Smith*<sup>26</sup> and *Makin*<sup>27</sup> which had concerned the undisputed evidence of previous deaths, or as Lord Cross had pointed out 'there was no question of the witness for the prosecution telling lies.'<sup>28</sup> With the present case, he thought it wise to consider the possibility of fabrication:

*In such circumstances, the first question which arises is obviously whether his accusers may not have put their heads together to concoct false evidence and if there is any real chance of this having occurred the similar fact evidence must be excluded.*

In *DPP v Boardman*,<sup>29</sup> the Law Lords were found to have used two different tests, rather than a different application of the same test for determining whether allegations of buggery made by different boys known to the accused, were cross-admissible as SFE. Lords Morris, Cross and Wilberforce preferred a prejudice-based test while Lords Hailsham and Salmon preferred an irrelevance-based test. Compare Lord Hailsham's comments with those of Lord Cross:

*If the inadmissible chain of reasoning is the only purpose for which the evidence is adduced as a matter of law, the evidence itself is not admissible. If there is some other relevant, probative purpose than for the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning.*<sup>30</sup>

Lord Cross:

*...it is not possible to compile an exhaustive list of the sort of cases in which "similar fact" evidence is admissible. The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is*

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<sup>25</sup> Fn 27, *Boardman*.

<sup>26</sup> Fn 17, *Smith*.

<sup>27</sup> Fn 2, *Makin*.

<sup>28</sup> *Boardman v DPP* (1974) 60 Cr App R 165, per Lord Cross at p.186.

<sup>29</sup> [1975] A.C. 457.

<sup>30</sup> *DPP v Boardman* [1974] 3 W.L.R. 673, per Lord Hailsham, p.453.

*charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it.*<sup>31</sup>

The Lords proposed specific safeguards before allowing similar allegation evidence to be admitted: the trial judge had to assess whether the probative value of such evidence outweighed its prejudicial effect. If the similar fact evidence was so weak, so unreliable or so contaminated that its probative value was outweighed by its capacity to prejudice a jury, then it ought to be excluded. Also, the other allegations made against the accused had to be strikingly similar.<sup>32</sup>

The crucial difference between the tests based on irrelevance and prejudice was that reasoning from bad disposition was prohibited under the former, while permitted, but only under certain conditions, under the latter. A rule that states a particular line of reasoning is forbidden is clearly logically inconsistent and irreconcilable with a rule that states that that line of reasoning is permissible under certain conditions.

If a defendant made an outright denial of the offence, particularly in child sexual abuse cases, the court could exclude relative and probative evidence, thereby affording the defendant a shield. For example, in *R v Lewis*<sup>33</sup> the court allowed evidence of paedophilic tendencies where the defendant had said that touching the child was accidental or innocent, but disallowed it where he denied a particular incident had taken place. In *R v Wright*,<sup>34</sup> the courts made a similar ruling. The Law Commission cited these cases as an example of where justice was too defendant-centred.<sup>35</sup>

However, in *DPP v P*<sup>36</sup> one of the safeguards for defendants was removed when Lord Mackay relaxed the ‘striking similarity’ criterion to the issue of identifying a perpetrator. I

*...The essential feature of evidence which was to be admitted was that its probative force in support of the allegation that an accused person committed a crime was sufficiently great to make it just to admit the evidence, notwithstanding that it was prejudicial to the accused as tending to show that he was guilty of another crime.*<sup>37</sup>

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<sup>31</sup> *DPP v Boardman supra*, per Lord Cross, p.457.

<sup>32</sup> *Boardman*, per Lord Salmon, p.189.

<sup>33</sup> [1983] 76 Cr App R 33.

<sup>34</sup> [1990] 90 Cr App R 325.

<sup>35</sup> Law Commission (No. 273) Evidence of Bad Character in Criminal Proceedings (Cm 5257, October 2001), paras 2.14 and 2.15, pp. 10-11.

<sup>36</sup> *DPP v P* [1991] 2 A C 447.

<sup>37</sup> *R v P* (a father), Director of Public Prosecutions v P (1991) 93 Cr App R 267.



Inferentially, it was unlikely that several independent witnesses would falsely attribute even vaguely similar conduct to the same person, and the unlikelihood of coincidence increased with the ‘more peculiar the circumstances and the greater the number of instances’.<sup>38</sup> The Law Commission thought that SFE could be used to demonstrate a criminal purpose,<sup>39</sup> e.g., a doctor performing abortions on two of his girlfriends at different times, to rebut a defence of medical examination on a procurement charge, *R v Bond*,<sup>40</sup> or knowledge, by reference to an illegal drug importation case *R v Peters*.<sup>41</sup> In the latter case, the defendant alleged that amphetamines had been put in his car without his knowledge, but evidence of the discovery of small amounts of cannabis at his address was allowed to rebut the defence. SFE can also be used to show that a death is not attributable to natural causes (*Smith, supra*) but to the actions of the accused.<sup>42</sup>

### **(iii) Reform of bad character evidence**

These bad character rules, prior to the 2003 Criminal Justice Act (CJA), were regarded as being unjust for complainants, excluding relevant evidence. The Law Commission was asked to review bad character provisions.<sup>43</sup> It delivered its report in 2001 and this resulted in Parliament placing all of the rules governing bad character in criminal cases into a single statute, whether for defendants, witnesses or third parties, and whether going to credit or directly to the issue in a case.<sup>44</sup> It will be seen, however, that far from simplifying the rules, Parliament’s definition under section 98 of the Criminal Justice Act 2003 is so broad, that it merits separate treatment in the next section of this chapter.

From the 1990s onwards, interest groups put pressure on the then Government to improve the attrition rate in rape cases, as well to increase convictions in child sex offence cases, after the high-profile murder and sexual abuse of Sarah Payne.<sup>45</sup> The Law Commission also considered the findings of Lloyd-Bostock, when it advocated freeing judges from the prevailing statutory and case-law restraints imposed upon them when deciding whether to allow juries to hear previous convictions and other misconduct evidence. The Commission thought that these modifications were possible and permissible, as long as certain statutory

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<sup>38</sup> <[http://www.oup.com/uk/orc/bin/9780199292004/tapper\\_ch08.pdf](http://www.oup.com/uk/orc/bin/9780199292004/tapper_ch08.pdf), 408> accessed on 19 September 2012.

<sup>39</sup> Law Commission report, fn 35 at p.11.

<sup>40</sup> [1906] 2 KB 389.

<sup>41</sup> [1995] 2 Cr App R 77.

<sup>42</sup> Fn 35, Law Commission, para 2.13.

<sup>43</sup> *Ibid*, (Cm 5257, 2001).

<sup>44</sup> Fn 4, Durston: *op cit*, p.177.

<sup>45</sup> T. Black, ‘The NSPCC doesn’t help kids – it harms them’ 5 Sept 2011; <[www.spiked-online.com/newsite/article/11050](http://www.spiked-online.com/newsite/article/11050)>. Accessed on 3 Mar 2014.

safeguards were put in place. Their proposed Criminal Evidence Bill (2001) for the terms of use of BCE as propensity evidence was as follows:

***Evidence going to a matter in issue***

*(1) Evidence falls within this section if the following two conditions are met.*

*(2) The first condition is that the evidence has substantial probative value in relation to a matter which*

*(a) is a matter in issue in the proceedings, and*

*(b) is of substantial importance in the context of the case as a whole.*

*(3) The second condition is that the court is satisfied that*

*(a) in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or*

*(b) that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible in view of*

*(i) how much probative value it has in relation to the matter in issue,*

*(ii) what other evidence has been, or can be, given on that matter and,*

*(iii) how important that matter is in the context of the case as a whole.<sup>46</sup>*

This part of the Criminal Evidence Bill shows that the Law Commission was fully aware of the potentially prejudicial effect of BCE.<sup>47</sup> In the interest of fairness, such evidence was not supposed to be used as the only part of the prosecution case other than the allegation itself (see *other evidence* stated in the above draft), and in addition, the prior BCE was supposed to have substantial probative value in showing a pattern of behaviour to show predisposition to commit the current offence.<sup>48</sup>

The Law Commission tried to limit the type of bad character evidence other than previous convictions, but the opposite effect occurred when the definition of bad character under section 98 of the Criminal Justice Act 2003 itself and court rulings extended the remit of

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<sup>46</sup> Fn 35, of Law Commission's Report: Draft Bill and Explanatory Notes, Criminal Evidence Bill, p.233.

<sup>47</sup> Ibid, p.90, para 6.33.

<sup>48</sup> Ibid, Law Commission, p.102, para 7.8.

BCE. These changes could henceforth assist the prosecution in adducing background evidence that was more contentious and of a lesser standard to obtain successful convictions.

Section 99 of the CJA 2003 abolished the old common law rules for similar fact evidence:

*(1) The common law rules governing the admissibility of evidence of bad character in criminal (not civil) proceedings are abolished.*

*(2) Subsection (1) is subject to section 118(1) insofar as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.*

The concept of bad character is defined under section 98 of the Criminal Justice Act 2003. There are two types of bad character that section 98 recognises:

*References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which –*

*(a) has to do with the alleged facts of the offence with which the defendant is charged, or*

*(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.*

The section 98 exclusion must be related to evidence where there is some *nexus* in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce.<sup>49</sup>

According to *R v McNeil*,<sup>50</sup> section 98 (b) is evidence of misconduct which "has to do with the alleged facts of the offence with which the defendant is charged" and is an exception of *prima facie* broad application. The words encompass evidence relating to the alleged facts of an offence which would have been admissible under the common law outside the context of bad character, or they embrace anything directly relevant to the offence charged, provided at any rate it was contemporaneous with and closely associated with its alleged facts.

Previous convictions or prior cautions are typical examples of bad character, but the concept may now also include investigations prior to the accused being charged or prosecuted.

Evidence of bad character is presumed to be true unless there is material to suggest the

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<sup>49</sup> *R v Tirnaveanu* [2007] EWCA Crim 1239.

<sup>50</sup> [2007] EWCA Crim 2927.

contrary under section 109 of the Criminal Justice Act 2003. Defendants do have a right to challenge the use of bad character evidence. In *R v C*<sup>51</sup> it was stated that the defendant should produce a detailed statement that identifies all the ingredients of the case that he will advance for the purposes of proving that he did not commit the crime of which he was been convicted. A bare assertion that he did not commit the offence is inadequate.

The statutory definition of bad character permits conduct arising out of a conviction or even an acquittal, as determined in *R v Z*; <sup>52</sup> this case also decided that it also includes evidence of a number of charges being tried concurrently which may also be cross-admissible in respect of the other charges. The police are now permitted to track a suspect's bad character history at the investigatory stage to include it as part of a prospective prosecution. The proposed bad character evidence to be used is set out in the police's MG16 (bad character/dangerous offender) document. It includes previous convictions and this information may be added to the prosecution's files.<sup>53</sup> Particulars of the offence should be more detailed than they appear on the Police National Computer, especially as concerns the offender's *modus operandi*, concurrent charges, offences that were taken into consideration, cautions, reprimands and final warnings. 'Probative' evidence is also included, which is defined as evidence that is other than a conviction, outstanding investigations, acquittals, discontinuances, previous allegations made against the defendant and incident reports, including domestic or racial violence.<sup>54</sup>

#### *'Reprehensible' conduct*

Also included are actions which people would regard as 'reprehensible' as set out in section 112 of the Criminal Justice Act 2003. The purpose of framing section 112 as 'reprehensible behaviour' was to avoid argument about whether a particular act amounted to an offence where no charge or conviction resulted. This definition differs from the draft version published by the Law Commission. Section 112 of the CJA 2003 states that misconduct means the commission of an offence or other reprehensible behaviour, whereas the Law Commission's draft statute read:

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<sup>51</sup> [2010] EWCA Crim 2971.

<sup>52</sup> [2002] 2 AC 483.

<sup>53</sup> Association of Chief Police Officers, *Practice Advice on Evidence of Bad Character* (2nd edn ACPO, NPIA 2008), p.3.

<sup>54</sup> *Ibid* ACPO *Practice Advice*, p.12.

*Commission of an offence or behaviour that, in the opinion of the court, might be viewed with disapproval by a reasonable person.*<sup>55</sup>

The concept of ‘reprehensible behaviour’ is open to interpretation: is it a subjective test or the more objective ‘man on the Clapham bendy bus’?<sup>56</sup> MPs thought that the draft version was too broad and harmful to the defendant’s interests. Yet under the current provisions, what is now accepted as misconduct evidence indicates that the effect of the new definition was the same. ‘Reprehensible conduct’ should be viewed objectively and take into account whether the public would regard such conduct as reprehensible, such as racism, bullying and a bad record at work for misconduct, a parent who has had a child taken into care and petty theft from employers.<sup>57</sup>

A 2009 Ministry of Justice study found that reprehensible evidence was infrequently adduced (only 12 cases over the studied period in between February and October 2006)<sup>58</sup> but that particular study included: images from the internet in a case of alleged sexual assault; the fact that one defendant made a large number of nuisance calls to his alleged rape victim; and in another case, allegations that the defendant had previously sexually assaulted the complainant.<sup>59</sup> The study found that law enforcement and prosecution lawyers were reluctant to use ‘reprehensible behaviour,’ as it was not clearly understood by them. For the sake of certainty, the Court of Appeal decision in *R v Hanson*,<sup>60</sup> advised that the safe approach would be to seek to use previous convictions which should be related to the same offence, but reprehensible behaviour could be especially of value in domestic violence cases, where police logs could be brought in about prior domestic incidents.<sup>61</sup>

The concept of bad character is fluid and nowadays there is a more cautious approach as to what should be included. For example, modern *mores* would not generally support the view that evidence of homosexuality would amount to such as had occurred in *R v Bishop*.<sup>62</sup>

However, the papers of one of the cases that were volunteered for this study raised the issue of a trial proceeding even when evidence that the trial judge had tried to exclude was accidentally shown to the jury. X, a teacher, had been accused of eight counts of sexually

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<sup>55</sup> Fn 35, Law Commission, para 8.16 at p.112.

<sup>56</sup> R. Hall, ‘Criminal Justice Act, Bad Character Provisions’ March 16, 2005, One King’s Bench Walk; <[www.docstoc.com/.../Criminal-Justice-Act-2003-Bad-Character-Provisions](http://www.docstoc.com/.../Criminal-Justice-Act-2003-Bad-Character-Provisions)>

<sup>57</sup> ACPO *Practice Advice*, para 2.3 at p.20.

<sup>58</sup> Office of Criminal Justice Reform: *Research into the impact of bad character provisions on the courts* 2009, (Ministry of Justice Research Series 5/09).

<sup>59</sup> Fn 56, Hall: op cit, p.18.

<sup>60</sup> [2005] EWCA Crim 824.

<sup>61</sup> Fn 56, Hall: op cit, p.19.

<sup>62</sup> [1974] Crim L R 546.

assaulting two boys who had been pupils of his in the late 1980s until 1990, when they would have been aged 12 years and onwards.<sup>63</sup> During the police investigation of X's home in 2002, they seized a male homosexual pornographic magazine and a mainstream, legal, gay pornographic video. These items were on the exhibits list prepared by the Crown Prosecution Service, but the trial judge ordered them to be removed from the list as shown to the jury. The implication was that this evidence would weigh against a favourable assessment of the defendant's character. However, these items on the exhibits list were only partially removed and some remained accessible to the jury.

The judge tried to correct the prejudice that this evidence might have caused by asking the jury to disregard it. X was found guilty of all counts by a 10-1 majority and received a three-year prison sentence. X felt that the jury may have been swayed by evidence even though the pornography the police had seized was not contemporaneously dated with the allegations, was legal and was not indicative of an interest in paedophilia or ephebophilia, but simply showed an interest in gay erotica? The trial judge felt it necessary to direct the jury to put it out of their minds, but in a climate of heightened concern it X felt that the jurors had drawn a link or at least disapproval in respect of X's sexual predispositions and the charges against him.

In a not dissimilar case, Lord Wilberforce pointed out how careful trial judges had to be:

*...in judging whether one fact is probative of another, experience plays as large a place as logic. And in matters of experience it is for the judge to keep close to current mores. What is striking in one age is normal in another: the perversions of yesterday may be the routine or the fashion of tomorrow. The ultimate test has to be applied by the jury using similar qualities of experience and common sense after a fair presentation of the dangers either way of admission or of rejection. Finally, whether the judge has properly used and stated the ingredients of experience and common sense may be reviewed by the Court of Appeal.*<sup>64</sup>

#### **(iv) Policy underlying the erosion of safeguards for the use of BCE**

Before looking in detail at s.101, it is worth exploring the underlying reason for the erosion of the safeguards to admit SFE? Homosexuality was partially decriminalised in 1967 between consenting males aged 21 and over<sup>65</sup> and by 1994, the Criminal Justice and Public Order Act 1994 reduced the age of consent between males to 16. The change to the SFE rules was

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<sup>63</sup> Appendix D, case of X, p.331.

<sup>64</sup> DPP v Boardman [1975] A.C. 421, 444

<sup>65</sup> Sexual Offences Act 1967.

probably guided by the widespread concern about child sexual abuse in the care homes which were being investigated by police forces in England and Wales. A public inquiry had been held to examine the extent of the abuse and whether the police forces had been competent to find perpetrators thereof:

*In relation to allegations of sexual abuse . . . questions of corroboration clouded the issue for much of the period, but at least since the House of Lords decision in DPP v P (1991), the prosecution of those against whom more than one similar offence (or type of offence) is alleged has been made procedurally and evidentially easier.*<sup>66</sup>

Elsewhere, in the US during the 1990s, there was strong political pressure to obtain more convictions for sexual offences against children. This resulted in changes to the Federal Rules of Evidence 413, 414 and 415 which rendered previous convictions for sexual offences admissible in current trials for sexual assault, child molestation and civil cases involving sexual assaults or child molestation.<sup>67</sup> US policy may have also been a contributory factor in influencing the reforms in the UK.

By the end of the 20<sup>th</sup> century, there was the perception that too few criminals were being caught or convicted. One of the reasons for this was that juries were being denied the chance to hear important background evidence about previous misconduct, especially previous convictions. The old bad character rules used to restrict the occasions when the jury could be informed about them, to respect the principle of the presumption of innocence of the accused. However, it was now felt that victims' rights should also be respected, and this could only be achieved by discussion about how they could be better served. In the policy paper *Justice for All*, the Labour Party pledged to allow the court to be informed of a defendant's previous convictions, where appropriate as one way of 'rebalancing the criminal justice system in favour of the victim.'<sup>68</sup> It envisaged a simplified and modern approach to evidence, to convict the guilty and acquit the innocent, which meant relaxing the prevailing restrictions as to when relevant previous convictions could be heard. The main aim of the reforms was to secure more convictions for sex offenders, particularly child sex offenders. In 2001, Roy Whiting was accused and found guilty of the murder and sexual assault of nine year old Sarah Payne. This particular case epitomised perceived injustice to victims, yet as has been pointed out, the

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<sup>66</sup> R Webster, 'Similar Fact Evidence: the Origins and the Erosion of the Modern Similar Fact Principle' 2002; <<http://www.richardwebster.net/similarfactevidence.html>>.

<sup>67</sup> Fn 1, Murphy: op cit, p.86.

<sup>68</sup> <<http://www.cps.gov.uk/Publications/docs/jfawhitepaper.pdf>, 26> accessed on 19 September 2012; see also *Justice for All* (Cm 5563, 2002), p.4 and p.12.

jury convicted Whiting despite it being prevented from hearing about his previous conviction for abduction.<sup>69</sup>

Government policy to relax the rules of evidence had also been guided by judicial decisions which had already called for change: The Law Lords in the *Attorney-General's Reference No. 3, 1999*<sup>70</sup> had stated that fairness of proceedings was meant to apply to all sides, - the accused, the victim and the public, - which was part of the developing principle of human rights legislation. The old similar fact principle had already been modified to include previous acquittals of the accused in *R v Z*,<sup>71</sup> and the Government sought to reinforce the judgment by legislation. It intended to allow relevant previous conviction evidence provided that the prejudicial effect did not outweigh its probative value.<sup>72</sup>

At the time, less than a quarter of sexual crimes recorded by the police were being prosecuted, which was doing little to instil public confidence in the criminal justice system. Research had also been conducted into the outcomes of rape reports, one of the most comprehensive surveys analysed the attrition rate in 19 European countries. It was found that conviction rates of rape in the UK had declined substantially since 1977, based on the following data: from 1977-1981 the rate was 30%, from 1993-1997 it was down to 10% and from 1998-2001 it had gone down further to 8%, resulting in a decrease of 22% from the earliest to the latest recorded periods. The lowest conviction rates were mainly in jurisdictions with adversarial systems, except Sweden, which had a 10% conviction rate.<sup>73</sup>

The Government had already referred to the Law Commission to consider evidence of previous misconduct in criminal proceedings in 1994.<sup>74</sup> Reforms to bad character evidence were drafted in a Criminal Justice Bill, called the 'victims' justice bill' by the then Prime Minister Blair.<sup>75</sup>

There already had been concern about defendants being convicted of numerous crimes with judges ordering acquittals, because they had admitted forbidden bad character evidence at trial. For example, in *Beggs*,<sup>76</sup> the defendant had been convicted of slashing a man to death

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<sup>69</sup> S Brown, and B Steventon, 'The admissibility of bad character evidence' (2008) Cov L J, p.2.

<sup>70</sup> House of Lords, *per* Lord Steyn, 14 Dec 2000, para VI.

<sup>71</sup> [2002] 2 A C 483.

<sup>72</sup> *Criminal Justice: the Way Ahead* (London: Home Office, 2001), Cmnd 5074, p.58.

<sup>73</sup> L Regan and L Kelly, 'Rape: Still a forgotten issue. Briefing Document for Strengthening the Linkages – Consolidating the European Network Project' (September 2003) Child and Woman Abuse Studies Unit London Metropolitan University.

<sup>74</sup> Fn 35, Law Commission, para 1.1, p.1.

<sup>75</sup> M Tempest, 'Blunkett's bill under fire' *The Guardian* 21 Nov 2002.

<sup>76</sup> (1990) 90 Cr App R 430; [1989] Crim L R 898; Times, July 4, 1989; BBC News: 'Begg's Catalogue of Violent Crime' Friday 12 October, 2001.



on a murder charge, but the judge had allowed the jury to hear about several incidents where he had cut men – the conviction was successfully appealed. In 2001, he was convicted again for murder. Juries could also be forbidden from hearing about serial offending of a similar nature: Simon Berkowitz was acquitted of burgling the offices of Paddy Ashdown’s solicitor and stealing material relating to this politician’s affair with his personal assistant; yet he already had 230 (undisclosed to the jury) previous convictions for burglary.<sup>77</sup>

#### (v) Comparative practice

Again before looking at the current rules regarding BCE, it is useful to look at the research and the practice in civil law countries. The high attrition rate in serious crimes such as sexual offences and unjust outcomes where bad character evidence had been used, or omitted, led to debate about whether to carry on with the existing unsatisfactory bad character rules or to reform them. The question was, to what extent should the threshold of the bad character evidence be lowered? In continental Europe, revelation of the defendant’s bad character from the outset of the trial was already commonplace. The fact-finding judge or jury would inevitably be influenced by these antecedents as well as the judge being able to deliver sentence more promptly at a single hearing. Furthermore, previous convictions on the Continent were admitted as evidence of guilt, not merely credit.<sup>78</sup>

*Use of bad character evidence on the Continent:*

Two examples show the different approaches taken on continental Europe

#### **Norway**

The Norwegian Ministry of Justice was contacted for this study to discover out how bad character evidence in the form of previous convictions was permitted to be used in subsequent trials.<sup>79</sup> The ministry were asked:

*Since the passing of the Criminal Justice Act 2003, greater use is now made of previous convictions and misconduct evidence in the UK. I understand that many EU*

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<sup>77</sup> Phil Vinter, ‘Career criminal, 65, who stole notes detailing Paddy Ashdown’s affair 20 years ago is jailed again for burglary’ *Daily Mail* 7 June 2012.

<sup>78</sup> Fn 35, Law Commission, para 3.8, p.41.

<sup>79</sup> Request made by email to Norwegian Ministry of Justice 2 Jul 2012 and email reply on 21 Jan 2013 from Mr Aaserudhagen.

*countries adduce bad character evidence in chief as a matter of course. If your country allows previous convictions, how does your criminal justice system safeguard against unfairness to the accused who risks being judged on his record? If a defendant hotly disputes the use of the previous conviction because he states he was wrongly convicted, may he appeal the use thereof in the current trial, and how?*

Their reply was:

*Evidence of the bad character of an accused may be presented to the extent the court allows. The court will normally refuse bad character evidence without relevance to the case. Evidence which may have direct significance for the case in question will normally have to be allowed. Notwithstanding the main rule, the defence may always present relevant evidence of the good character of the person indicted. The prosecutor may then always present counter-evidence. Written statements on the reputation of the accused indicted may never be used as evidence.*

*The court may only refuse evidence of previous convictions if a conviction is of no importance to the present case. This may be the case for old or unrelated offences. It is in principle up to the court to decide at which stage of a trial previous convictions are to be presented. However, to reduce the risk of a previous conviction influencing on the decision of whether the accused is guilty, previous convictions will – in a jury case – normally be presented only after the accused has been found guilty, but before the sentencing. If the previous conviction is of special relevance to the question of whether the person is guilty, it will normally be allowed at an earlier stage of the trial. In cases without a jury, evidence of previous convictions is presented before the conviction but at the very end of the trial (*

## **Croatia<sup>80</sup>**

Croatia not only uses previous convictions at the defendant's trial, there are also special provisions for sex offenders concerning when their offences are spent:

*The Republic of Croatia has brought a new Act the legal effects of convictions, criminal records and rehabilitation which regulates the legal effects of convictions, the organisation, management, accessibility, transmission and deletion of information*

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<sup>80</sup> Email reply from Marijana Palec, Pitanja - Ministarstvo Pravosudja RH, Croatia 13 Mar 2015.

*extracted from criminal records, international exchanges of information extracted from criminal records, and rehabilitation.*

*... criminal records shall be operated for nationals of the Republic of Croatia and for legal entities established in the Republic of Croatia against whom a final conviction in respect of a criminal offence has been handed down outside the Republic of Croatia.*

*Criminal records shall also contain a list of persons against whom a final conviction has been handed down in respect of criminal offences of sexual abuse and exploitation of children and other criminal offences against children. We do not have a separate file which is related to the sexual offenders against children, these data are incorporated in our general register.*

*Of course, such data are available to the courts, Public Attorneys and police forces for the purposes of investigation of criminal offences or court trials... The court can obtain information about previous convictions any time during the trial*

*A conviction is deleted from the criminal record within a specific period after the perpetrator have served a sentence. The condition is that he/she has not committed a new crime in this time. The deadlines for deleting a conviction depend on the level and type of sanction.*

There does not appear to be anything to suggest in European law that admitting a defendant's bad character is contrary to a fair trial. The Law Commission had to consider whether any reforms to the bad character provisions could constitute a breach of Article 6 of the European Convention on Human Rights. It found that the European Court of Human Rights allowed each member state to determine questions on the admissibility of evidence. A particular rule of evidence may cause an unfair trial on the facts in any system, but neither the Strasbourg Court nor the European Commission have established that any particular rule of bad character evidence is impermissible.<sup>81</sup>

In *X v Denmark*,<sup>82</sup> the European Commission held that as many member states already provided for the disclosure of previous convictions in their criminal procedure, there was no breach of Article 6 on the defendant's rights to have a fair trial; and this decision was

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<sup>81</sup> Fn 35, Law Commission, para 3.5, 40.

<sup>82</sup> [1965] vol 8, 370.

endorsed in *Unterpertinger v Austria*.<sup>83</sup> Given the Denmark case involved trial by jury and the Austrian case was before lay judges, therefore there were no grounds for arguing that the UK could not look to continental systems when considering relaxation on the use of bad character evidence.<sup>84</sup>

Arguably, English law under the old statutes and case law concerning bad character were far more defendant-protective than on the continent. Perhaps this was because it was felt that in terms of power balance, it was the State that fixed the rules of evidence when trying the accused as an individual, who needed protection from abuse of power. Not everyone has felt that the accused should have special protection. Jeremy Bentham argued that all logically relevant material should be admissible on the basis of rectitude of decision, with suitable guidance as to its weight.<sup>85</sup> Bentham also thought that the rights of the accused were the product of ‘sentimental liberalism.’<sup>86</sup> The question of whether it is ‘good’ or ‘bad’ to obtain more convictions by using prior BCE depends on whether one is supportive of the rights of the defendant over the complainant or vice versa.

(vi) **Prior research on previous convictions and predisposition to criminality**

But would the prospective reforms to bad character evidence in England follow a continental approach to admitting bad character, or would there still be restraints? Although English law had traditionally and generally taken the *tenet* that no-one should be judged on their past record, there already was the exception that past records could be exposed if they were admissible as SFE. This concession was designed to allow fact-finders to ascertain the truth (sufficient probability) even though the bad character might be so prejudicial as to compromise the accused’s right to a fair trial. Murphy states that bringing in the accused’s bad character has a fundamental and often determinative impact on the outcome of a criminal trial; jury directions do not generally mitigate the impact the prejudicial evidence has on it.<sup>87</sup>

This notion is borne out by the Lloyd-Bostock study which looked at the psychological impact of certain types of bad character revealed to jurors: sexual offences against children

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<sup>83</sup> [1991] 13 EHRR 175.

<sup>84</sup> Fn 35, Law Commission, para 3.8, p.42.

<sup>85</sup> J Bentham, *Rationale of Judicial Evidence*, Hunt and Clarke 1827.

<sup>86</sup> Fn 1, Murphy: op cit, p.73.

<sup>87</sup> Ibid.

as prior misconduct adversely affects the jury's attitude to the accused, whatever the current allegations on trial.<sup>88</sup>

In 1994, the Home Secretary asked the Law Commission to consider the law of England and Wales relating to evidence of previous misconduct in criminal proceedings and to make appropriate recommendations to the existing law and trial process. The Commission published its report in 2001. It sought a guided and structured approach for decision-takers (the judges) to arrive at predictable and consistent decisions when allowing the use of bad character evidence as it was mindful that fact-finders, both lay and professional, were susceptible, however much they tried to avoid it, to having their good judgment either overborne or distorted by prejudice.<sup>89</sup>

The Commission accepted that both defendants and non-defendants should be spared having their previous misconduct for no good reason.<sup>90</sup> It also thought that a person's character should not be regarded as indivisible:<sup>91</sup> only sufficiently relevant parts<sup>92</sup> should be revealed to the fact-finders and then only to the extent that it was necessary to serve the interests of justice and under guidance about the risks inherent in such evidence.

The Law Commission referred to the Lloyd-Bostock study to find out about the psychology of juries who hear about bad character. The study was conducted because, hitherto, there had been little empirical research in this area. The results of this study indicated that a defendant's previous criminal record evoked stereotypes of typical criminality and therefore over-caution about revealing a defendant's criminal record were well justified. Additionally, the study thought that directions to juries to avoid 'forbidden reasoning' - they should not assume the defendant must be guilty merely because he has a criminal past when they heard of the defendant's previous convictions was unrealistic. Juries were told that previous convictions only went to the credibility of the defendant and not whether he was guilty of the current offence. Paradoxically, when they heard about a defendant's good character (if he had one), the juries were able to assess the probability of whether he had committed the current offence as well as his credibility. That the defence should have asymmetric weight given to his good character was a relic from the nineteenth century based on fairness, not logic, as it harked

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<sup>88</sup> Fn 35, Law Commission, see fn. 87 of its comments at section 4.48 on Credibility.

<sup>89</sup> Ibid, para 1.6, p.2.

<sup>90</sup> Ibid, para 1.8, p.2.

<sup>91</sup> Ibid, para 4.27, p.59.

<sup>92</sup> Ibid, para 1.8 (6), p.3.

back to ‘judicial attempts to redress the procedural disabilities from which the accused suffered in trials on indictment.’<sup>93</sup>

The problem with expanding the use of bad character evidence of variable quality is that it increases the risk that innocent defendants may be found guilty. This has been found in both real and mock juror trials. In a US study, there was a 27 percent higher chance of being convicted in cases where a previous conviction was disclosed, contrasted with cases without disclosure.<sup>94</sup> Doob and Kirshenbaum<sup>95</sup> found this was a similar outcome in mock juror trials. Clary and Shaffer’s study using groups of four psychology students as mock jurors found no impact on conviction rates,<sup>96</sup> but the reason for the difference could be ascribed to previous conviction being for a juvenile offence (the prior offence was therefore stale and more latitude might have been given for immaturity). Wissler and Sacks and Cornish and Sealy found that defendants were less likely to be found guilty if they had minor dissimilar previous convictions, but not more serious dissimilar ones. The Lloyd-Bostock study conducted in the UK indicated that mock jurors were affected by similar previous convictions both old and recent, but not old dissimilar convictions, although real lay magistrates who also participated in that study were affected thereby. However, if the dissimilar conviction is for a more serious crime, such as rape or murder, the effect was unfavourable.<sup>97</sup>

Can revealing the defendant’s previous convictions be valuable for assessing whether a defendant could be guilty of the current charges against him, provided that it is not the *only* piece of evidence that is used to incriminate him? The problem with sexual offence cases is that they are frequently credibility contests between the complainant and the defendant; the further back in time the allegations, there may be even less or no forensic evidence to build a prosecution. Therefore, previous convictions become more significant as part of the present case, rather than as a peripheral element. Spencer had advocated that paedophilic tendencies and convictions should be allowed in child abuse cases on the grounds that such evidence ‘tells us something more important and more directly relevant than previous convictions for

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<sup>93</sup> Fn 1, Murphy: op cit, p.83.

<sup>94</sup> H Kalven and H Zeisel, *The American Jury* (University of Chicago Press 1966).

<sup>95</sup> A N Doob and H M Kirshenbaum, ‘Some empirical evidence on the effect of S.12 of the Canada Evidence Act upon the accused’ (1972) *Criminal Law Quarterly*, 15, 88-96.

<sup>96</sup> E G Clary and D R Shaffer, ‘Effects of evidence withholding and a defendant’s prior record on juristic decisions’ (1980) *Journal of Social Psychology*, 112 (2), 237-245.

<sup>97</sup> Cornish and Sealy, ‘Juries and the rules of evidence’ (1973) *Criminal Law Quarterly*, 16, 208-223; M L Wissler and M J, ‘On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt’ (1985) *Law and Human Behaviour*, 9 (1), 37-48.

theft or assault'.<sup>98</sup> The problem with bad character evidence is that it is often more immediately linked to the ultimate issue of guilt itself than other types of evidence which therefore makes bad character evidence a powerful tool for the prosecution.<sup>99</sup>

The Lloyd-Bostock study revealed that both charges and previous convictions for child sexual offences were more likely to disgust juries than any other type of misconduct, thereby prejudicing the defendant from the outset.<sup>100</sup> It is the task of fact-finders to look at evidence dispassionately. In Canada, an attempt has been made to reduce the effects of blind prejudice in child sexual offence cases by allowing potential jurors for such trials to be excused if they feel that they could not judge the case fairly. A sociological study of this provision showed that 36 per cent stated on oath that they could not be impartial.<sup>101</sup> It should also not be forgotten that juries are not a single entity, but comprise individuals whose educational levels vary, as well as their capacities for complex reasoning.

*This is an especially powerful reason to avoid putting weakly probative character evidence in their hands and it might be a reason for not providing them with highly probative character evidence.*<sup>102</sup>

It has been said that if juries are properly directed by trial judges, then they could know the purpose of the BCE. Yet, prior research shows that many jurors do not even understand the presumption of innocence, and presume the defendant guilty until proven innocent. This calls into question whether juries are generally able to understand directions such as the use of misconduct evidence.<sup>103</sup>

In the UK, juries are not permitted to be canvassed either before being selected for service or to interview them about their role as a juror *post*-trial. The Lloyd-Bostock study therefore suffered from the defect that the outcomes were simulated, though the study attempted to create lifelike conditions to gauge the psychological impact of the jury hearing about specified previous convictions.<sup>104</sup> Prior research indicates that juries are more likely to find a defendant guilty if he has similar previous convictions or when they are told at the trial about a similar concurrent charge. The opposite occurred when juries heard about recent dissimilar

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<sup>98</sup> J. Spencer, 'Reforming the Law on Children's Evidence in England: The Pigot Committee and After' in H. Dent and R Flin, 'Children as Witnesses' (Wiley 1992), writing of the law before *DPP v. P* [1991] 2 A.C. 447.

<sup>99</sup> Para 29 of judgment of British Columbia Court of Appeal in *R v Corbett* [1988] 1 S.C.R. 670 (Canadian case on use of previous convictions in cross examination against a defendant).

<sup>100</sup> Fn 11, Lloyd-Bostock study, p.749.

<sup>101</sup> Ibid Lloyd-Bostock, p.737.

<sup>102</sup> Fn 5, Lippke: op cit, p.186.

<sup>103</sup> Ibid, p.187.

<sup>104</sup> Fn 11, Lloyd-Bostock study, p.735.

convictions that were not serious.<sup>105</sup> Jurors in mock trials in Canada and the US appeared to be confused about directions on ‘forbidden reasoning,’ where juries may only consider whether the bad character evidence used against the defendant goes only to his credibility and not his propensity; yet in Cornish and Sealy’s research on the jury’s ability to disregard a previous conviction upon judicial direction, it did so, but in further research, the opposite outcome occurred. In a simulation study by Grant, where previous convictions for child sexual offences were revealed, the jury was more concerned about wrongfully acquitting the defendant than avoiding a wrongful conviction.<sup>106</sup>

If a defendant is facing charges of child sexual abuse and a jury gets to hear about a previous conviction for the same, he is more likely to be convicted on the current charges than for a defendant accused of non-sexual offences with a prior criminal record for a non-sexual offence. Under the Lloyd-Bostock simulated conditions, 25% of the defendants who had previously committed and were currently on similar charges, were convicted. This outcome is to be compared with 16.7% or lower for other offences.<sup>107</sup> The study also asked juries about their impressions of defendants who had previous convictions for child sexual assaults. His testimony was not only perceived as being the least credible, but also more likely to commit the offence for which he was on charges, whether they were sexual assaults on a child or of a different type. He was regarded as being the least trustworthy, most deserving of punishment, most likely to have committed undetected crimes, would definitely not be given a job involving looking after children and thought to be most likely to tell lies in court.<sup>108</sup> This is a surprising outcome, considering that the mock jurors did not think that people who had previous convictions for handling stolen goods had low credibility. In fact, the latter was rated most believed, even marginally above someone who had a good character. The Lloyd-Bostock report concluded that very thin information about a previous conviction was sufficient to evoke a rich stereotype, so that a recent similar conviction, especially where it was for the sexual abuse of a child, was potentially damaging for no reason the law admits.<sup>109</sup> If juries have arbitrary views of defendants who are on current child abuse charges who have similar previous convictions, surely the same phenomenon occurs where a defendant with no previous convictions on multiple charges of sexual offences on minors which are cross-

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<sup>105</sup> Ibid p.743.

<sup>106</sup> Ibid p.738.

<sup>107</sup> Ibid p.749.

<sup>108</sup> Ibid p.748.

<sup>109</sup> Ibid, p.754.



admissible? The Lloyd-Bostock study concluded that, even given the limitations of its own study:

*If we assume that, amongst defendants with similar previous convictions, some are innocent of the current offence, we have good grounds to infer that routinely revealing previous convictions would indeed increase the risk of convicting an innocent man.*<sup>110</sup>

Neither the Lloyd-Bostock study nor the Law Commission report dealt with the possibility that some prior convictions may have been wrongfully decided or that an innocent defendant might be induced to plead guilty to avoid receiving a harsher sanction were he to plead not guilty and be convicted at trial. Therefore, juries may be given a rather sketchy impression about a defendant's criminal past, which may not be all that helpful in assessing his true character. Where the criminal record is more persistent and recent and supported by testimony from others about the defendant's criminal nature, more can be gleaned, though it may not be known completely.

Stale convictions dating from more than five or ten years may not tell juries much about the defendant's current propensity or his capacity for self-reform.<sup>111</sup> In *R v Dhooper*,<sup>112</sup> a conviction for manslaughter was quashed after the judge admitted evidence of a previous conviction relating to an offence some 13 years previously, without referring to the Criminal Justice Act 2003 section 101(4) and the length of time between the earlier offence and the alleged offence. The opposite may be true where old convictions show a continuing propensity are adduced (*Hanson, supra*). An old caution may also be admitted if it is sufficiently similar to the instant offence. In *R v Woodhouse*<sup>113</sup> a conviction for sexual activity with a child was upheld, as the judge had been entitled to allow prosecution evidence of a similar incident over 10 years earlier for which the offender had received a caution, as it had similarities to the instant offence.

K, one of the volunteers who provided details of their case for this study, had a previous conviction for sexual assaults on an underage step-daughter dating back to 1985.<sup>114</sup> Seven years later, he was accused of raping and sexually assaulting his two natural daughters, products of his first marriage, when they were aged 3 and upwards, in the 1970s. The stale

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<sup>110</sup> Ibid, p.755.

<sup>111</sup> Ibid, pp.173-174.

<sup>112</sup> [2008] EWCA Crim 2892.

<sup>113</sup> [2009] EWCA Crim 498.

<sup>114</sup> Case of K, Appendix D, p.332.

conviction was admitted, even though it differed from the new case (they were *comparatively* minor assaults), and even though the defendant pre-trial now lived alone and was considered to be no longer a danger to family members. He was convicted of the new matters, and received a sentence of 15 years imprisonment. K felt strongly that the previous case had been damning to his prospects of a fair trial in the later case.

The Law Commission agreed with expanding the circumstances under which bad character evidence could be adduced, but past records unrelated to the current charges are not supposed to be sufficiently probative and too prejudicial to be used. Past convictions for a specific current offence may help to answer questions about the defendant's motive, knowledge, *modus operandi* or crime pattern or rebut a defence in a more logical way instead of being used to depict the accused as having a bad character and therefore more likely to have committed the current crime.<sup>115</sup> Specific BCE may also assist, where perhaps a preponderance of the evidence supports a conclusion that the defendant is guilty. In other words, there are more or stronger reasons for judging him guilty than for judging him not guilty.<sup>116</sup>

The BCE itself has to have validity: it should be reliable, fresh and specific and should not be the main evidence for prosecution, as *per se* it is unlikely to satisfy the reasonable doubt standard to secure a conviction.<sup>117</sup>

#### *The value of recidivism studies to estimate the likelihood of current criminality*

Propensity to commit a crime is a complex criminological issue. In 2002, retrospective research (Soothill *et al*) was carried out to identify factors which may indicate and/or predict the commission of further serious crimes by reference to the types of prior conviction which offenders of serious crimes had.<sup>118</sup> The purpose of the study was for the police and probation services to identify what kind of risk the offenders posed to society in terms of sanction and safeguarding the community. The study's conclusion was cautious and speculative, requiring more detailed data sources to challenge or confirm this observation.<sup>119</sup> The study found that certain serious types of prior offence which appeared to be dissimilar to the one the subjects

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<sup>115</sup> Fn 5, Lippke: *op cit* p.175.

<sup>116</sup> *Ibid* Lippke, p.179.

<sup>117</sup> *Ibid.* p.184.

<sup>118</sup> K Soothill, *et al*, *Murder and Serious Sexual Assault: What criminal histories can future serious offending*, (Police Research Series 2002), Paper 144.

<sup>119</sup> Fn 118, Soothill study, p.41.

subsequently committed were often at minimum indicative of a future serious crime against the person.

The Lloyd-Bostock study had examined what kind of evidence could be prejudicial and therefore subjective, based on jurors' and magistrates' impressions about the predictive value of previous convictions of defendants on current charges. But the 2002 Home Office paper by Soothill *et al* was attempting to examine behavioural patterns of offenders in a more scientific way. Although the main purpose of the study was for risk assessment, the findings also tried to work out the probability of an offender carrying out future serious violent and sexual crimes. If the Lloyd-Bostock study showed that juries could be swayed by merely hearing about a conviction without further details, the Soothill study subsequently suggested that previous convictions for rare and unusual serious offences do indicate a high and statistically significant likelihood of subsequent serious offending.<sup>120</sup> The Law Commission had also agreed that 'past misbehaviour can be admitted where there are close and unusual similarities between the past and present situations'.<sup>121</sup>

Some psychologists had postulated that people had relatively stable personality traits;<sup>122</sup> others thought that behaviour could change according to the situation. The two diametric views came to be known as the person-situation debate. Today, the interaction of both personality and situations are considered important factors in explaining behaviour, but only over long periods of time can stable overall differences in behaviour be discerned.<sup>123</sup> It is risky to be over-reliant on past behaviour when determining whether a current offence occurred, because character is only one facet for a jury to consider. More recent research has focused on long-term recidivism outcomes to predict whether a record offender, particularly sexual offending, can be fairly said to have value in both criminal trials and for post-sentencing treatment and rehabilitation of offenders. The problem with using previous convictions in a current trial, is that even apparently forensic methods of predicting future behaviour of dangerous offenders have shown false positives by at least 50 per cent.<sup>124</sup>

A study based on two-year reconviction rates for sexual offences indicated a surprisingly low figure, compared with robbery, another serious, uncommon crime, which may be due to successful rehabilitation of the offender on prison programmes or low problems in detection

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<sup>120</sup> Ibid p.44.

<sup>121</sup> Fn 35, Law Commission, para 6.11, p.83.

<sup>122</sup> G W Allport, *Personality: A Psychological Interpretation* (London 1937), p.688.

<sup>123</sup> Redmayne, M. *Character in the Criminal Trial* (OUP 2015), p.12.

<sup>124</sup> A Ashworth, *Sentencing and Criminal Justice* (3rd edn London 2000), pp. 180-181.

and proof on sexual offences.<sup>125</sup> This research is consistent with Soothill and Ackerley's earlier study over a 21-year period of the recidivism rate of child sex offenders convicted in 1973, where it was shown that the vast majority had not been reconvicted for similar sexual offences.<sup>126</sup>

Whilst someone with a conviction for robbery will remain more likely to commit another robbery than someone without a previous conviction, the likelihood decreases the longer the time goes without reoffending. Multiple convictions (7-10 previous convictions) are twice as likely to be convicted of a crime as those with only one previous conviction. Whilst many young people commit crimes, most will desist at some point.<sup>127</sup>

Whilst there are commonalities in risk factors between sexual and non-sexual offenders, there are also some features that are uniquely related to sexual recidivism. A history of offending both for sex offender and non sex offenders has consistently been shown to relate to further sexual offending. The higher the number of offences and the more varied the history of sexual offending, the more likely he is to continue in this offending behaviour.<sup>128</sup> Father-daughter incest offenders have the lowest rate of re-offending, whereas offenders who have male victims or victims unrelated to them or who engage in a variety of contact and non-contact offences demonstrate higher rates of recidivism. An enduring propensity for sexual offending combined with a willingness to disregard the rights of others are the best predictors of sexual recidivism.<sup>129</sup>

No single study is sufficient to determine what is or is not a risk factor for future sexual offending. As society has given more attention to these offences, so has independent research into recidivism and follow-up studies. Hanson and Morton-Bourgon located 37 studies between 1995 and 2003 as well as 10 updates in their 1998 work, which has increased knowledge of the risk factors for sexual recidivism. They identified two risk factors, static (unchangeable) and dynamic (aspects of the offender that are liable to change). A major predictor of general and violent recidivism among sexual offenders which are static include an antisocial orientation indicated by antisocial traits and personality and a history of rule violations.<sup>130</sup> In terms of dynamics, high category deviants have socio-affective dysfunctions

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<sup>125</sup> Redmayne: op cit p.696.

<sup>126</sup> K Soothill, B Francis, and E Ackerley, 'Paedophilia and Paedophiles' NLJ 1998 vol 148 iss 6844 (12 June 1998), p. 867.

<sup>127</sup> Fn 125, Redmayne: op cit, p.697.

<sup>128</sup> A R Beech, L A Craig, and K D Browne, *Assessment and Treatment of Sex Offenders: a Handbook* (John Wiley & Sons 2009), p.40.

<sup>129</sup> Ibid, p.41

<sup>130</sup> See R H Hanson and K Morton-Bourgon, 'Predictors of Sexual Recidivism: an Updated Meta-Analysis 2004-02' Public Works and Government Services, Canada, p.8.

such as feelings of inadequacy and emotional identification with children, a tendency to dwell on negative emotional states, and poor self-management abilities such as an impulsive lifestyle. High deviancy child sex offenders display high levels of sexual preoccupation and high levels of sexual arousal to children. Lower level deviants show very low levels of these characteristics and are more socially adept.<sup>131</sup>

The ability to predict the risk of further offending by people who have committed a sexual offence remains contentious. It has been argued that statistics do not support the stereotype of ‘inveterate’ sex offender for whom recidivism is inevitable, even within specific offence types such as paedophilia.<sup>132</sup> There are different rates of recidivism for different types of sex offenders. A 2002 study by Hood found, that all offenders in their study who had offended against children and then reconvicted for a sexual offence had originally been convicted of an extra-familial sexual crime. After six years, 32% of the extra-familial group had been imprisoned again for a sexual or a serious violent crime. Similarly, earlier work published in England (Fisher 1994) noted that non-familial sexual abusers of boys reoffended between 13% and 40% of the time. The comparative figure in Hood’s study for men who originally offended against adults was 7.5% reconviction for a sexual offence after six years, and 15% reconviction for a sexual or serious violent crime.<sup>133</sup> Similar patterns were evident in other countries. Marshall and Barbaree (1990) noted different rates of recidivism for different types of sex offenders. Exhibitionists, for example, had the highest rate of recidivism, ranging from 41-71%. Non-familial child sexual abusers showed the next highest rate of reoffending (10-40%), followed by rapists (7-35%) and finally familial child sexual abusers (4-10%). Child molesters with male victims showed a higher rate of recidivism than those with female victims (35% v. 18%; Quinsey *et al.* 1995).<sup>134</sup> A methodological analysis of recidivism studies of sex offenders assessed six official sources on 251 rapists and child molesters discharged from a treatment centre in Massachusetts over a 25-year period (Prentky *et al.* 1997). The research found high variability in reported recidivism depending on the methods and definitions used.

In essence, research on sex offending consistently shows relatively low rates of recidivism relative to all other types of offending. Different rates of recidivism are apparent for different types of sex offenders. However, sexual offenders remain at risk of reoffending often long

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<sup>131</sup> Ibid, p.42

<sup>132</sup> Scottish Executive, Dr N Loucks, *Recidivism amongst Serious Violent and Sexual Offenders*, Crime and Criminal Justice, Social Research, (8 Nov 2002); <<http://www.gov.scot/Publications/2002/11/15729/12633>>.

<sup>133</sup> Ibid, para 2.9.

<sup>134</sup> H E Barbaree, ‘Stimulus Control of Sexual Arousal: its role in sexual assault’ (1990) In W L Marshall, D R Laws, and H E Barbaree, eds., *Handbook of Sexual Assault* New York: Plenum Press, pp.9-20.

after their discharge from custody. Marshall argues that a person should be considered a potential sexual recidivist if he has ever been convicted of a sexual offence, regardless of the nature of any further offending.<sup>135</sup>

Harris and Hanson conducted in 2004 a meta-analysis of ten Anglo-American follow-up studies of adult male sex offenders (4724 participants). Recidivism for any sexual re-offense was 14% within 5-year, 20% within a 10-year and 24% within a 15-year follow-up period and this outcome was similar for sub-groups of rapists and child molesters. Offenders with a prior recorded sexual offence had recidivism rates that were double the rate of first-time sexual offenders.<sup>136</sup>

Rettenberger *et al* more recently conducted a study of recidivism among 1115 male convicted and imprisoned sex offenders - rapists and child molesters. Their sample did not include psychiatrically/outpatient treated offenders, it was limited to a ten-year follow-up period and restricted to just one penal system (Austrian) to which they were permitted access. However, they noted that their recidivism rate for these sub-groups of offenders was lower than Hanson and Buissiere's meta-analytic review on sex offender 4-5 year follow-up recidivism studies which had an 18.9% re-offending rate for rapists and 12.7% for child molesters.

The Rettenberger study found that the rapist sub-group's recidivism rate was 6% compared with 8% for the child molesters. First-time offenders were significantly less likely to sexually reoffend than those with previous sexual convictions. Rapists tended to have higher rates of reconviction for general and violent crimes due to differences in their psychopathic personality traits. Lifestyle impulsivity and pervasive anger are likely to be more relevant for rapists, but constructs related to sexual deviance like degree and fixation of paraphilic interests seem to be of major importance for child molesters. Their impact of previous offences on the predictability of future crimes tallied with prior research: there was a stable and significant association between the number of previous general, violent and sexual offences with a significant increase in violent and recidivism rates.<sup>137</sup>

It is not only researchers who have concluded that previous convictions could indicate criminal predisposition. The Police Federation of England and Wales welcomed the Home Secretary's announcement that juries would be allowed to hear previous relevant convictions,

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<sup>135</sup> Fn 132, para 2.16.

<sup>136</sup> A J R Harris, and R K Hanson, *Sex offender recidivism: A simple question* (User Report No. 2004-03). Ottawa, Ontario: Public Safety and Emergency Preparedness Canada.

<sup>137</sup> M Rettenberger, P Briken, D Turner and R Eher, 'Sexual Offender Recidivism Among a Population-Based Prison Sample' (2015) *International Journal of Offender Therapy and Comparative Criminology*, vol 59 (4), pp.439-440.

given past cases where juries acquitted a defendant and were then informed that about catalogue a of relevant previous convictions. However, Mark Leech, editor of Prisons Handbook and founder of ex-prisoner's charity *Unlock* thought that the new rules were ill conceived and caused by political posturing. The fact that an offence has been committed in the past does not automatically mean that they have committed the current one; legal goal posts were being moved to facilitate convictions, not necessarily to improve the standards of justice.<sup>138</sup>

### **(vii) The Criminal Justice Act 2003 and its impact on sexual offence trials**

In the light of such comparative experience and sociological and psychological research, we have a basis for assessing the 2003 reforms. By 2002, not only had the safeguards of judicial weighing of prejudice against probative value and striking similarity been eroded, but also *R v Z*<sup>139</sup> now allowed for bad character evidence of a lesser standard to go before juries - previous acquittals. Thus, when the Law Commission found that there were grounds for widening the range of bad character evidence, it was merely continuing what had already been set in motion.<sup>140</sup>

There were several underlying reasons for reforming the bad character provisions. Firstly, prior bad character can be used at the investigatory stage to identify a possible suspect's *modus operandi* as well as at trial for juries to identify whether the accused is the criminal or that he committed this particular current crime. Secondly, bad character evidence can be used to try to persuade a suspect to plead guilty rather than go to full trial. Furthermore, the reforms allow the prosecution to adduce the bad character as being pertinent to the current allegations.<sup>141</sup>

The Criminal Justice Act 2003 codified the old bad character rules and broadened its scope, with section 101 solely governing the admissibility of bad character evidence of the defendant. The reforms were designed to be more inclusive of a defendant's bad character; by contrast, non-defendants such as complainants, prosecution and defendant witnesses and third parties would be more protected from character attacks by raising the admissibility threshold to 'enhanced relevance.' Although the new Act abolished previous common law and most old statutory provisions under section 99, it was anticipated that judges and lawyers would

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<sup>138</sup> BBC News, 'Should juries know a defendant's history?' 25 Oct 2004.

<sup>139</sup> *Supra*.

<sup>140</sup> Fn 1, Murphy, *op cit*, p.73.

<sup>141</sup> Office of Criminal Justice Reform: *Research into the impact of bad character provisions on the courts* 2009, p.5.

continue to think in terms of old case law when applying standards contained in the Act.<sup>142</sup> This can occur, for example, where the defendant launches an attack on another person's character, be it a prosecution witness or a third party. Section 101(g) draws heavily on pre-2003 case law. Also, *Hanson*<sup>143</sup> confirmed that 2003 authorities will continue to apply to the extent that they are compatible with section 106.<sup>144</sup>

Under section 101(1) there are seven gateways through which BCE may be admitted.

- (a) All the parties may agree to the admissibility of the evidence;
- (b) The evidence may be adduced by the defendant himself or is given in answer to a question asked by him in cross examination and intended to elicit it;
- (c) It is important explanatory evidence;
- (d) It is relevant to an important matter in issue between the defendant and the prosecution;
- (e) It has a substantial probative value in relation to an important matter in issue between a defendant and a co-defendant;
- (f) It is evidence to correct a false impression given by the defendant or
- (g) The defendant has made an attack on another person's character.

### **(viii) Functions of the seven gateways**

Gateway (a) would have been available as an option under the old rules. Once the defendant has decided to reveal his own bad character, this evidence may be used by the tribunal of fact for any purpose.<sup>145</sup>

Gateway (b) preserves the *status quo* where an accused might want to introduce his prior bad character for tactical reasons, perhaps as damage limitation to avoid the revelation being used by the prosecution as a surprise to the jury; or it could have stronger value as part of the accused's defence. For example, the BCE may be stale and/or dissimilar to the current charges, and therefore arguably the accused is less likely to have committed the latter, or

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<sup>142</sup> Fn 56, Hall, p.10.

<sup>143</sup> [2005] EWCA Crim 824.

<sup>144</sup> R Tandy, 'Legislative Comment: The admissibility of a defendant's previous criminal record: a critical analysis of the Criminal Justice Act 2003' (2009) Stat. L.R. 30(3), p.205.

<sup>145</sup> *R v Enright and Gray* [2005] EWCA Crim 3244.



perhaps it is *alibi* evidence, such as the accused was in prison at the time of the current allegations and it was therefore impossible for him to have committed the current offences.

Gateway (c) This gateway is premised on the pre-existing common law principle that background evidence may be used in a subsequent trial.<sup>146</sup> It may be used where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence. If background evidence shows the accused in a particularly bad light, this may be a factor to be taken into account in deciding whether it would be excluded in the discretion of the court on the ground that the prejudicial effect of the evidence outweighs its probative value. A court will not readily interfere with a trial judge's decision on discretion.

Evidence of the defendant's bad character is admissible if it is important explanatory evidence. Under section 98 of the CJA 2003, the bad character that may be used can be of a lesser standard than a conviction. This section must be read in conjunction with section 102 which states that important explanatory evidence is such that without it, the court or jury would find it impossible or difficult to understand other evidence in the case and (b) its value for understanding the case is substantial. In essence, the evidence must be both important *and* explanatory. It is not permitted to use the important explanatory evidence gateway, where the prime purpose is to show the defendant's propensity<sup>147</sup> which has different safeguards under gateway (d) of this Act.

*R v Lee*<sup>148</sup> perfectly illustrates how important it is for prosecutors and judges to allow evidence through the right gateway. Lee had been accused of seven historic sexual offences against his step-daughter A and her friend, B. The prosecution case was that on three separate occasions when she was aged 11, the defendant had indecently assaulted A by touching her vagina while she was in bed. A had reported the abuse to her school. Social services were notified and they in turn informed the police. The defendant denied the allegations. At the trial, the prosecution sought to rely on bad character evidence that A had stated that, when she was aged 16, the defendant had planted a camcorder in the bathroom to film her bathing. The prosecution further sought to adduce evidence that, after A had left home aged 16, she

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<sup>146</sup> *R v Pettman* CACD, unreported 2 May 1985.

<sup>147</sup> *R v Davis* [2008] EWCA Crim 1156.

<sup>148</sup> [2012] All E R (D) 106 (Feb), *Criminal Law and Justice Weekly* (2012), 176 JPN 12625 February 2012.

had returned for a visit and had found on the home computer indecent images of children which she believed had been uploaded by the defendant. The prosecution's stance was that the evidence explained how events had progressed and it was an explanation for why A had left home aged 16. The Judge found that to exclude the evidence would leave a lacuna in the events. The Judge admitted the evidence under gateway (c) section 101(1) of the Criminal Justice Act 2003, as "important explanatory evidence".

In her summing up, the Judge narrated the evidence in terms which recounted A's evidence in such a way that suggested that the evidence showed a propensity. The Judge gave a conventional direction on cross-admissibility. She had not directed the jury as to the proper approach to propensity evidence. The defendant was convicted of indecent assault. He appealed against conviction and submitted that the Judge had erred in allowing the prosecution to adduce bad character evidence as "important explanatory evidence". In the summing up, she had incorrectly referred to the evidence admitted as evidence of propensity but had not been asked to admit it on this basis. The appeal was allowed since the evidence could not properly be described as important explanatory evidence. Accordingly, it was not admissible under gateway (c), which had to be read in conjunction with section 102 of the 2003 Act. The other evidence in the case was not impossible to understand without consideration of the evidence in question. It was impossible to exclude the possibility that the jury had relied on the two pieces of evidence as evidence of propensity to commit the instant offences.

Gateway (c) is not commonly used according in the 2009 Ministry of Justice study; it was cited in only 13% of applications, of which 73% related to previous convictions.<sup>149</sup>

Gateway (d) makes the defendant's bad character able to be admitted as part of the prosecution's case; it must be relevant to an important issue between the defendant and the prosecution. Section 112(1) defines "important matter as being a matter of substantial importance in the context of the case as a whole." The issue must be important, relevant and relate to that issue. According to section 103, matters in issue include (a) evidence of propensity to commit offences of the kind with which the accused is charged, except where his having a propensity makes it no more likely that he is guilty of the offence or (b) a propensity to be untruthful, but it may not be adduced where it is not suggested that the defendant's case is untruthful. (It would appear to apply to cases where the defendant does not dispute the facts of the case, but disputes that he committed an offence by so doing. The context is usually

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<sup>149</sup> *Research into the impact of bad character provisions on the courts*, 2009, p.20.

regulatory crime where character is rarely an issue in any event).

In *Hanson*, the court took a conservative view by suggesting that ‘Parliament deliberately chose the word “untruthful” to convey ... a defendant’s account of his behaviour, or lies told when committing an offence.’<sup>150</sup> This reasoning led the court to conclude that any previous convictions could only be capable of displaying a propensity to be untruthful if they satisfied the following criteria:

- (a) In the present case, truthfulness is an issue and
- (b) In the earlier case(s), there was either:
  - (i) A plea of not guilty coupled with an account given by the defendant which the jury have disbelieved, or
  - (ii) The way in which the offence was committed showed such a propensity, for example by making false representations.

Propensity may include previous convictions of the same description or same Secretary of State prescribed category as the current offence. Gateway (d) has been the most appealed. *Hanson*<sup>151</sup> helped to clarify when it should be admitted and used. The appellants were disputing the use of BCE against them under section 101 (d) of the CJA 2003. This was the first Court of Appeal case that dealt with the substantive provisions relating to the admissibility of the defendant’s past bad character under the Criminal Justice Act 2003. The Court of Appeal had advised prosecutors to bear in mind that Parliament’s purpose in the legislation was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. The presentation of a defendant’s previous convictions, should be based on the particular circumstances of each case.<sup>152</sup>

The Court of Appeal had set out the test for allowing propensity evidence. It has to be asked:

- (i) whether the history of convictions establish a propensity to commit offences of the kind charged;
- (ii) whether that propensity makes it more likely that the defendant committed the offence charged;

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<sup>150</sup> *Hanson*[2005] EWCA Crim 824 , *per* Rose LJ, para. 13.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*, *per* Rose LJ, para 4.

(iii) whether it is unjust to rely on the convictions of the same description or category and, in any event, whether the proceedings would be unfair if they were admitted.

Section 103 (2) is not exhaustive of the types of convictions which might be relied on to show evidence of propensity to commit offences of the same kind. Equally, simply because an offence falls within the same description or category is not necessarily sufficient to show a propensity. There is no minimum number of events that are required to show propensity. The fewer the number of convictions, the weaker the evidence of propensity is likely to be.

However, a single previous conviction may show evidence of propensity where the offence discloses unusual tendencies or the *modus operandi* discloses significant features. The Court of Appeal draws on the ‘old’ similar fact evidence test, exemplified in *DPP v P*<sup>153</sup> to illustrate its point.

In a Ministry of Justice 2009 study, gateway (d) featured in 77% of applications, with 93% relating to previous convictions.<sup>154</sup> The apparent wide scope of gateway (d) is tempered by section 101 (3) which makes it mandatory for the court to exclude the BCE if it would have a significantly adverse effect on the fairness of proceedings. Evidence that is apparently highly prejudicial may be adduced, with the prejudicial effect ostensibly being controlled by the limit of information the jury has about the particulars of the defendant’s previous convictions. In child sexual offence trials, considerable latitude may be given to include stale BCE that is similar to the allegations in the instant case and even a charge of sexual abuse on a child.<sup>155</sup> This latitude should be contrasted with a non-sexual offence case: old similar convictions might be excluded on the interests of justice discretion under section 101 (3). For instance, in *R v George Kenneth Baker*<sup>156</sup> the defendant appealed the use of previous convictions in a sexual assault charge. The previous convictions of the appellant were as follows. On 24th April 1989, when the defendant was 24 years old, he had been convicted in the Crown Court at Birmingham of attempted rape. The following facts were never put before the jury: in the early hours of January 1989, he had dragged the victim onto a grassed area and indecently assaulted her by fondling her breasts under her clothing. He had ripped her trousers, inserted fingers into her vagina, exposed himself and attempted intercourse but was frightened off by neighbours alerted by the screaming of the victim. He was arrested 30 minutes later. That had occurred 22 years before the trial in question.

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<sup>153</sup> [1991] 2 AC 447.

<sup>154</sup> Fn 149, p.20.

<sup>155</sup> Fn 11, Lloyd-Bostock 2000 study, p.737.

<sup>156</sup> [2012] EWCA Crim 1801.

The second conviction had occurred on 20th December 1996, where he had pleaded guilty to three counts of unlawful sexual intercourse with a girl aged under 16. The facts which again were not known to the jury were as follows. The victim in that matter was aged under 14 when the first offence took place. During the summer of 1995, she befriended the appellant as he worked in the local record shop. One evening prior to her 14th birthday, the defendant called at her house while her mother was out. He then had full sexual intercourse with the girl. They then had sexual intercourse on two further occasions during 1995 and 1996. The victim made a brief entry in her diary recording that intercourse had occurred on the relevant days. It appeared that her mother had read the diary and discovered that she had had sex with the appellant. She questioned her daughter and later informed the police. The prosecution applied to put before the jury those matters as evidence of propensity under section 101(1) (d) of the Criminal Justice Act 2003. That was disputed on behalf of the appellant.

The judge dismissed the case. He had had regard to the guidance given by this court in *R v Hanson*.<sup>157</sup> He held that although these had occurred a long time ago, the appellant had been an adult. The admission of these offences would help the jury as they were plainly evidence of propensity. Thirdly, that it was not unfair to do so provided that the details were restricted to the mere fact of the date of the conviction and its nature. None of the details was made available.<sup>158</sup>

Gateway (e) admits a defendant's bad character where there is an important matter in issue between a defendant and a co-defendant. "Important matter" is a substantial matter of substantial importance in the context of the case as a whole. The gateway is available only to the defence, not the prosecution. If the nature or conduct of the defence undermines the co-defendant, then the co-defendant's representative can use evidence that is relevant to show that he has the propensity to be untruthful under section 104. This part of the act would appear to reflect the old common law provisions. Gateway (e) arguably fetters a co-defendant from exposing the co-accused's untruthful character unjustifiably, as he can only do so where the co-accused has undermined his own defence. However, once bad character evidence of the co-defendant has passed the 'probative quality test,' there is no power to exclude it.<sup>159</sup>

Gateway (f) enables a defendant's bad character to be admitted where he has offered a false impression to law enforcement and the court. Under section 105, the defendant himself must have caused the express or implied assertion, and this could have occurred even before police

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<sup>157</sup> [2005] EWCA Crim 824.

<sup>158</sup> Fn 156, *Kenneth Baker*, per Sir John Thomas, paras 13-15.

<sup>159</sup> *Ibrahim Musone v The Crown* [2007] EWCA Crim 1237.

have cautioned him, during interview under caution, by a witness he calls, or in reply to a question asked on his behalf or even the defendant's courtroom appearance. The defendant will not be protected from this gateway if he does not appear in court. This is much broader leeway than under the common law. The defendant can rescue himself from the onslaught of (f) if he withdraws the false remark that had been made, and it can be edited from pre-trial interview documents. This was discussed in *R v Ullah*.<sup>160</sup> The appeal court held that by claiming never to have acted dishonestly in a prepared statement, a client with a conviction for dishonesty gave a false impression and opened gateway (f) to character. It appears that the defence did not make the Crown aware that it had resiled from that impression and thus withdrawn it as it is entitled to under section 105(3) of the Criminal Justice Act 2003. The only type of rebuttal evidence that can be used against the defendant is that which corrects the false impression. The safeguard for admissibility is under section 105(1)(b); any bad character evidence admitted through this gateway must have probative value in correcting the alleged false impression.

Gateway (g): The defendant's bad character may be brought in where he has made an attack on another person, whether or not a prosecution witness. In *R v Edwards*, the appellant had been convicted of two counts of common assault and having a bladed weapon in a public place. He had previous convictions for robbery and dwelling-house burglary that were thirteen years old at the time of the trial, and given their staleness, the Recorder had initially refused the prosecution's application to have them included under section 101(1)(d) in relation to the defendant's credibility.<sup>161</sup> However, during the trial, the defendant had attacked the characters of the two police officers who had apprehended him, claiming that he had been gratuitously and offensively treated by them. The Recorder then allowed the jury to hear the previous convictions by virtue of section 101(1)(g). The Court of Appeal agreed with his decision.<sup>162</sup>

Gateway (g) can be used if the defendant attacks someone at the questioning stage, interview or charge or at the trial itself. It differs from the common law rules, because (g) can be used against the defendant even where he does not make a court appearance. If evidence is admitted under section 101 (1) (g) because the defendant makes an attack on another person's character, it may be relevant not only to his credibility but also incidentally to propensity to commit offences of the kind charged.<sup>163</sup> The way in which the evidence is to be used is meant

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<sup>160</sup> [2006] EWCA Crim 2003.

<sup>161</sup> *R v Edwards and Others* EWCA Crim 1813 per Vice President, para 8.

<sup>162</sup> *Ibid. Edwards per Vice President*, para 14.

<sup>163</sup> *R v Highton, R v Van Nguyen, R v Carp* [2005] EWCA Crim 1985, p.3473.

to be controlled by section 101 (3) – an application by the defence to exclude it on the grounds of unfairness.<sup>164</sup> If the evidence is double pronged – relating both the defendant’s credibility and propensity, the judge must give the jury warnings as to the relevance and value of the evidence.

**(ix) Safeguards from abuse of the seven gateways**

The old common law used to protect defendants from abuse of the bad character rules by excluding prejudice that outweighed its probative value,<sup>165</sup> and later through the provisions section 78 of the Police and Criminal Evidence Act 1984 (PACE) (exclusion of unfair evidence):

*(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

*(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.*

There has been debate about whether PACE has been superseded by section 101(3) and (4) of the Criminal Justice Act 2003. The court must not admit evidence under section 101(1)(d) or (g), if on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it. This means that, under these circumstances, it is now mandatory for the court to exclude the evidence. It would be rare for a court to exclude relevant important explanatory evidence, although a defendant may have grounds under section 101(3) where the misconduct evidence is stale, the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the sentence charged. The old common law guidance for excluding bad character evidence was that judges should weigh up whether its prejudicial effect outweighed its probative value. It would appear that Parliament intended section 101(3) to be the test without further reference to common law cases.

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<sup>164</sup> *Highton, per curiam*, note ii.

<sup>165</sup> *R v Sang* [1980] AC 402.

According to the 2009 Ministry of Justice study on bad character applications, by far the most successful for the presentation of previous convictions was through the propensity gateway, (d) of section 101 of the CJA 2003. In 91% of determined applications, the evidence put forward to show bad character was the defendant's previous convictions.<sup>166</sup> Some police members were not sure about what constituted 'misconduct evidence', such as previous acquittals or arrests. This could explain why BCE under 'reprehensible behaviour' was seldom used.<sup>167</sup> The Crown Prosecution Service criticised the police for sending them incomplete MG16 forms, as particulars of the prior offence may be more relevant than its mere description of type. The CPS applications were mainly those which raised the defendant's previous convictions and related to the accused's propensity to commit crime. In the Ministry of Justice 2009 study, 86% of applications by the CPS were based on gateway (d). 97% involved the use of previous convictions with just 3% for 'reprehensible behaviour'.<sup>168</sup>

#### **(x) Problems with identifying tainted bad character evidence**

Should we be concerned about the use of propensity evidence to obtain convictions in sexual offences? After all, the use of propensity evidence was not unusual in sexual offence cases under the common law. But are there adequate legal safeguards for weeding out unreliable evidence that should never be admissible? Unreliability can be identified in the following instances: collusion and contamination. Keane explained the power of similar fact evidence to the Home Affairs Select Committee in 2002.<sup>169</sup> At the time, historic CSA indictments often contained a number of counts which could be cross-admissible as SFE because they were relevant to the admission of guilt. Evidence falling short of this could be excluded, or juries could be directed by the judge to consider each count separately as to whether or not the accused was guilty, or severance and separate trials could be ordered as permitted under the Indictment Act 1915.<sup>170</sup> Nowadays, where a defendant is charged with two or more offences

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<sup>166</sup> Ministry of Justice *Research into the impact of bad character provisions on the courts* (2009), p.12; the study period in 2006 postdates the decision in *Hanson*.

<sup>167</sup> *Ibid*, p.5.

<sup>168</sup> *Ibid*, p.6.

<sup>169</sup> Home Affairs Select Committee 2001-02 Fourth Report, vol II Ev 66-7.

<sup>170</sup> Section 5(3).



in the same criminal proceedings, it has the effect as if each offence were charged in separate proceedings under section 112(2) of the Criminal Justice Act 2003.

The problem with SFE and bad character evidence generally was that, in some cases, there was the real risk of collusion between complainants or contamination of their evidence. This risk arises where there is evidence to suggest that the complainants have deliberately concocted false evidence by conspiracy or collaboration or where their evidence has been innocently contaminated, i.e., influenced by knowledge of the account of another complainant, whether acquired from direct discussion with another victim, indirectly through a third party, e.g., a social services department seeking potential complainants, or from media publicity. The problem is compounded, of course, if there is a prospect of compensation or some other motive for giving false evidence. Until *R v H*,<sup>171</sup> the preponderance of authority favoured the judicial exclusion of such tainted evidence. There are cogent reasons to support such exclusion. If, there being no question of collusion or contamination, a number of witnesses give evidence of separate but similar incidents, their evidence has probative force because of the unlikelihood of coincidence, and the greater the number of incidents and the more striking or unusual the similarities, then the greater the probative force of their evidence. Thus if similarities are the result of collusion or contamination, the probative force disappears. Prior to *R v H* there was reasonably clear authority that if there was a real risk of collusion, the evidence should be excluded rather than left to the jury, with a suitable warning.

In *R v H*, these cases were overruled. *R v H* involved sexual offences against a daughter and a step-daughter between whom, the parties agreed, there existed a risk of collusion. Lord Mackay LC held that on a defence application to exclude the SFE where collusion is in question,

*(i)... the judge should decide the question of admissibility on the basis that the similar facts are true and apply the test in DPP v P. Generally collusion is not relevant at this stage.*<sup>172</sup>

*(ii) If a submission is made raising a question of collusion in such a way as to cause the judge difficulty in applying the test in DPP v P, the judge may be compelled to hold a trial within a trial to decide admissibility.*

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<sup>171</sup> [1995] 1 AC 596 (HL).

<sup>172</sup> [1991] 2 AC 447 (HL).

(iii) *If the evidence is admitted and evidence is also adduced in the course of the trial which indicates that no reasonable jury could accept the evidence as free from collusion, the judge should direct the jury that it cannot be relied upon as corroboration or for any other purpose adverse to the defence.*

(iv) *Where this is not so but the question of collusion has been raised, the judge must direct the jury that they may rely upon the evidence as corroboration if satisfied that it is free from collusion, but that if not so satisfied they cannot rely upon it as corroboration or for any other purpose adverse to the defence.*<sup>173</sup>

Keane criticised the House of Lords' decision as it would be wrong for the judge to rule on the question of collusion, because he would inevitably be drawn into considering whether the evidence is untrue and hence whether there is a possibility that the accused is innocent, the very question for the jury.<sup>174</sup> Any case where a judge stopped a case on the grounds of collusion might prevent justice for victims who also knew each other in contexts such as sibling relationships or as care homes residents.

He also argues, however, that the danger of admitting contaminated evidence was seriously underplayed by the House. There can be no guarantee that directions of the kind set out in (iii) and (iv) above will have the effect of removing the obvious prejudice likely to be caused by admission of the evidence.<sup>175</sup> Thus, there is a serious risk that despite such directions, the jury will follow a forbidden line of reasoning that since the accused appears to have the disposition towards the type of misconduct in question, he is guilty of the misconduct alleged. If a conviction results, it is, in effect, unappealable. The record will show that the judge properly applied the test under *DPP v P* and then directed the jury in accordance with *R v H* but not, of course, what happened in the jury room.

In *R v H*, Lord Mackay held that where there is a series of similar allegations, it should generally be presumed that they are true.<sup>176</sup> There are several problems with this presumption. Firstly, judges were now being asked to assess the probative value of statements without knowing whether or not they were reliable, secondly if the allegations *prima facie* are to be taken to be true, the presumption of innocence must necessarily be reversed. In cases

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<sup>173</sup> *R v H per Lord Mackay*, p.612.

<sup>174</sup> A Keane, Home Affairs Select Committee Report (2002), vol II, para 5, Memorandum 32.

<sup>175</sup> *Ibid*, para 5.

<sup>176</sup> *R v H, per Lord Mackay*, p.597.

where the witnesses have put their heads together, the evidence is obviously worthless.<sup>177</sup> Therefore, Keane's concerns ought to be heeded.

The Law Commission also examined the possibility of contamination and collusion. Yet, ultimately it decided that courts should not investigate whether evidence suffers from collusion or contamination, but take it at face value, unless it was unrealistic so to do.<sup>178</sup> It felt that the prosecution should not be unduly overburdened with disproving collusion or contamination: this would require a *voir dire* hearing in a large number of cases with the delays and possible collapse of such cases.<sup>179</sup> Nor did it think it was the role of the trial judge to usurp the role of the jury in judging the truthfulness of complainants who knew each other or who had mixed together. Nevertheless, it agreed that where judges could see that evidence in depositions, if taken at their highest, would not prove the facts it was adduced to prove, they should not admit it.<sup>180</sup> The Law Commission envisaged a policing role for the judge, whose duty was to check the quality of the evidence under review and withdraw a case where evidence has been admitted which is highly prejudicial, where a direction from the judge may not adequately guard against prejudice.<sup>181</sup>

The Criminal Justice Act 2003 included the safeguard provision discussed by the Law Commission under section 107 which allows a case to be stopped where the evidence turns out to be contaminated:

*(1) If on a defendant's trial before a judge and jury for an offence—*

*(a) evidence of his bad character has been admitted under any of paragraphs (c) to (g) of section 101(1), and*

*(b) the court is satisfied at any time after the close of the case for the prosecution that—*

*(i) the evidence is contaminated, and (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe,*

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<sup>177</sup> *R v H* [1995] 2 All E R *per* Lord Nicholls p.890; see also, 'Case Comment 'Severance - counts alleging sexual offences against young girls'', Crim L R 1999, pp. 859-860.

<sup>178</sup> Fn 35, Law Commission, p.184.

<sup>179</sup> *Ibid*, para 15.22, pp.189-190.

<sup>180</sup> *Ibid*, para 15.23, p.190.

<sup>181</sup> *Ibid* para 15.24, p.190.

*the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.*

The real problem with the use of bad character evidence is to ensure that it is substantiated and untainted. The Law Commission conceded that the latter problem could result in wrongful convictions, whether complainants actively conspire or the investigatory method itself causes contamination or (innocent) collusion.<sup>182</sup> If the safeguards under section 107 of the CJA 2003 are to be effective, this means that where historic allegations are contested, it should be incumbent on the police and the Crown Prosecution Service to ensure that the criminal justice system itself has not generated tainted evidence.

### **(xi) Conclusion**

This chapter sought to discover whether the admissibility of bad character evidence under changes in the law might operate in a way which is prejudicial to the fair trial of the defendant in these cases.

The 2000 Lloyd-Bostock study indicates that juries are definitely prejudiced against anyone convicted of such crimes even to the extent that juries will be influenced into thinking it more likely that a defendant accused of a current non-sexual offence is guilty if he has a prior record of a child sexual offence. However, research shows how several sequential convictions might reveal a proclivity and tendency to criminality, but more scientific research need to be done on criminal behaviour, including sexual offences as it has already been shown that there is a low reconviction rate for the latter (Redmayne) which may be ascribed to low detection rates or desistence.

Both the UK and legal systems of continental Europe are familiar with bad character evidence. The UK system has generally favoured an exclusionary approach compared with the inclusionary one of some continental legal systems. The effect of the Criminal Justice Act 2003 has been to move towards the approach of the continental system. It has been shown that the European Court of Human Rights has been reluctant to interfere with the autonomy of member states to regulate their own evidence rules, as long as in the aggregate, the defendant's right to a fair trial is not compromised.

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<sup>182</sup> Ibid, para 15.3, p.184.

It is submitted that the defendant's right to a fair trial implies that law enforcement, the Crown Prosecution Service and the Courts themselves should all be vigilant about filtering case documentation to ensure that evidence in cases has not suffered from collusion and contamination due to investigatory procedures. This reinforces the earlier conclusion that future investigations of historic CSA cases should take place in official police interviewing suites with audio-visual recordings of all adult complainants. The Law Commission's recommendation that if a judge can determine on the papers that there has been concoction, then the evidence should not be admitted, is clearly sound.<sup>183</sup>

Certainly courts should also be careful about admitting bad character evidence where the defendant applies to have it excluded on the grounds that it was defamatory or wrongful, and provides evidence to support this claim, whether or not previously appealed.

Finally, given that merely hearing allegations of child abuse provoke such strong negative reactions as indicated by the Lloyd-Bostock findings, it would be in the interests of a fair trial that jurors are questioned on whether they can make an impartial decision prior to being empanelled.

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<sup>183</sup> Fn 35, Law Commission, para 15.23, p.190.

## Chapter VII Conclusion

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The purpose of this study has been to discover whether, given intense public concern about child abuse and recent significant developments in law and procedure, those accused of historic sexual child abuse are able to obtain a fair trial. It began to answer that question by contextualising it within an understanding of the problem of child abuse, the public reaction to it and the impact of that reaction on the criminal justice system.

It was only from the mid-20<sup>th</sup> century onwards with improved medical knowledge and cultural change that the extent of child abuse in both families and institutions became fully acknowledged and subjected to increasing criminal investigation and sanction. The intense and sustained public concern about this issue since the 1980s in particular has had a tremendous cultural and psychological impact on law and society.

It is in this context that specific aspects of the investigation and trial of HCSA cases have been considered. Although most of them such as the identification and interviewing of complainants, the long delay before allegations are made, the protection of witnesses from intrusive and oppressive questioning, and the revelation of the past character of defendants are of course of general effect and concern throughout the criminal justice system, it has been shown that their impact upon the investigation and trial of HCSA cases has been in many instances especially problematic.

It has been shown that the identification and interviewing of complainants raises particular problems in historic cases. For example, the reliability and integrity of evidence elicited years after the events complained of is especially difficult to assess. It is suggested that the audio-video recording of interviews be made compulsory from the earliest stage of investigations of historic cases so that it might be possible for a fairer and more rigorous evaluation of the evidence to be conducted at the trial stage. This is one of the most important of the suggested reforms to help to reduce potential miscarriages of justice. Safe investigatory techniques, properly resourced, should be improved.

It has also been shown that the solicitation of complainants through dip sampling, and the possibilities of financial compensation being made known to interviewees by police, lawyers or others, renders evidence obtained from such sources vulnerable to the implication of collusion and inducement. It is found that the bringing into contact by the police of potential

witnesses after many years provides ample scope for the contamination of evidence or even collusion between witnesses for ulterior motives. It is suggested that stricter protocols be elaborated for handling potential witnesses in these circumstances.

It has been shown that in dealing with events that occurred years or even decades earlier - the frailty of memory - especially where children are concerned, and the difficulty of obtaining reliable independent evidence of a documentary or other character, simply of themselves point to the desirability of that Parliament should consider passing a continental-style statute of limitation. This type of statute could take into consideration factors such as the sentence for the offence (the more serious the offence, the longer the time limit for being able to make a complaint) as well when the complainant is no longer under dominion of the alleged offender.

A case has also been made for a more careful and perhaps more sympathetic approach by the judiciary to the weight to be given to the absence, after years or decades, of documentary evidence likely to be helpful to the defendant, especially where a reasonable expectation exists (in institutional cases for example) that it should have been available. The onus should also be on the prosecution to show that a defendant would not be disadvantaged by the loss or unavailability of a significant and relevant piece of defence evidence in a delayed prosecution as suggested by Ring.<sup>1</sup>

It has been shown that the courts are sometimes overly reluctant to permit questioning of complainants, notwithstanding judicial qualification of s.41 of the Youth Justice and Criminal Evidence Act 1999, and the introduction of s.100 of the Criminal Justice Act 2003. Policy considerations concerning the rape attrition rate (the gap between reported offences and convictions) and the respectful treatment of women and particularly child witnesses have clearly had a significant impact in the framing and application of the current law on this issue. Sympathy for such witnesses is entirely understandable, but has to be balanced against the need to allow defendants to adduce evidence that is relevant to the determination of their guilt.

It should be noted that s.100 was designed to work in tandem with s.41, not supersede it, so that if defence material regarding the sexual behaviour of the complainant could be admitted, under s.41, it should not be blocked by use of the gateway criteria under s.100. A defendant

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<sup>1</sup> S Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 2 Judicial Studies Institute Journal, pp.184-185.

wishing to cross-examine a complainant about a previous sexual allegation which he claims was false, has to obtain leave under both s.41 and s.100 of the CJA 2003.<sup>2</sup> It is therefore submitted that incontrovertible evidence of fabrication of sexual allegations ought to be admitted where it forms part of the defence case. The decision in *R v Flint*<sup>3</sup> introduced a welcome corrective note in 2005, in pointing out that a trial judge's obligation to see that the interests of a complainant were protected did not permit him or her, by way of a general discretion, to prevent the proper deployment of evidence falling within the ambit permitted by s.41 of the Act. Merely because cross-examination might impugn a complainant's credibility, it did not necessarily follow that that was its main purpose. It is submitted that this approach should be built upon and more robustly applied.

Finally, it has been shown that the extension by s.101 of the Criminal Justice Act 2003 of the types of bad character evidence that could be admitted against the defendant, may unfairly prejudice the trial of the defendant in HCSA cases. As discussed, s.101 (d) of the Act provides that even a single previous conviction may be admitted as propensity evidence. The probative value of such evidence in the grave, highly charged and emotive context of HCSA cases should, in many cases, be clearly outweighed by its prejudicial effect on the fairness of the trial to render it admissible. It is recommended that prospective jurors be asked in advance whether they think that they could reach an impartial verdict on the child sexual abuse case they would be hearing.

Considerable and commendable headway has been made to enable victims to come forward and to provide them not only with adequate protection but also with respectful treatment in the criminal justice system. These measures however have to co-exist with, and be balanced against, the right of the defendant to a fair trial. Article 8 of the ECHR may safeguard respect for privacy and family life under 8(1) but this right is subject to the protection of the rights and freedoms of others under 8(2). Procedures and laws governing sexual offences, therefore, must not encroach upon Article 6, the defendant's right to a fair trial. Cross examination of complainants on facts that are genuinely relevant to a defendant's case, even if sensitive, must be permitted. Pre-recording cross-examinations of victims could also safeguard the defendant's right to a fair trial under Article 6(3)(d) without unduly encroaching on Article 8.

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<sup>2</sup> *R v V*, CA [2006] EWCA Crim 1901.

<sup>3</sup> [2005] EWCA Crim 493.



It is submitted that the development of a much more prominent focus on the victim or possible victim is operating to undermine the presumption of innocence of the defendant and the procedural and evidential safeguards which protect that principle, and especially in cases concerning child sexual abuse. The many cases considered in this study which have involved convictions being overturned suggests that there are cases every year in which an individual is wrongly condemned and imprisoned as a child sexual abuser. It should be remembered that in most of these cases the defendants served, or would have served, lengthy sentences and suffered social and institutional stigma whilst in the prison system. If miscarriages of justice are to be avoided in this area then critical circumspection about the current law and practice is crucial.

The conclusions which are set out above have been arrived at not only on the basis of analysing each of the discrete dimensions of the problem which have been addressed but also in utilising a holistic methodology which has brought together background context, the earliest steps of police investigation, the underlying challenge posed by delayed allegations, and two very distinct evidential rule developments concerning the complainant and defendant respectively. Of course, many issues can be broken down and approached in similar ways but it is submitted that the prosecution of historic child sexual abuse is an issue which cannot properly be understood without distinct analysis of the key dimensions addressed here whilst at the same time considering them together in order properly to acknowledge their cumulative impact.

**Ingrid Karmark**

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 -- *Somanathan* [2005] EWCA Crim 2866.  
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 -- *Stephenson (David)* [2006] EWCA Crim 2325.  
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- *W* [2006] EWCA. Crim 1359.
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#### European Cases

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- Brandstetter v. Austria* 28 August 1991, ECHR 378
- Bulut v Austria*, No. 17358/90 (22 February 1996)
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- E.S. and Others v. Slovakia* No. 8227/04 (15 September 2009)
- E and Others v. the United Kingdom* No 33218/96 (November 26 2002)
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- Barker v Wingo* [1972] 407 U.S.
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*Maves v Grand Trunk Pacific Rail Co* (1913) 14 DLR  
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*People v Hackett* (1984) 421 Mich. 338.  
*Pupino*, ECJ 16 June 2005, Case C-105/03.  
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*Re Thompson and Venables* (tariff recommendations) - [2000] All ER (D) 1534

On the redaction of composite witness statements by the prosecution– Criminal Practice Directions 2015, Division V Evidence 16 A.1:

Relevant sections of the European Convention on Human Rights used for this study

**Article 3** of the European Convention on Human Rights: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

**Article 6** European Convention on Human Rights:

1.

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2.

*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3.

*Everyone charged with a criminal offence has the following minimum rights:*

(a)

*to have adequate time and facilities for the preparation of his defence;*

(d)

*to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*

**Article 8** of the European Convention on Human Rights:

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>>, accessed 21 Aug 2016

## Appendix A

### **Criminal Cases Review Commission results on appealed cases from 1997-2012 involving a sexual offence**

**Name :** A **Reference Number:** 812/08 **Date Referred to Court:** 27/03/2009 **Offence:** Rape  
**Appeal Outcome:** Quashed **Date of Appeal Outcome:** 23/07/2009

**Name:** A Derek **Reference Number:** 161/97 **Date Referred to Court:** 30/11/1998 **Offence:** Indecent assault, rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 14/03/2000

**Name:** ALLEN, Stewart **Reference Number:** 541/05 **Date Referred to Court:** 20/07/2006  
**Offence:** Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 12/06/2007

**Name:** B **Reference Number:** 477/05 **Date Referred to Court:** 14/02/2007 **Offence:** Rape; indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 27/07/2007

**Name:** B **Reference Number:** 390/04 **Date Referred to Court:** 02/05/2006 **Offence:** Rape (x2); buggery (x2); indecency with a child **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 14/12/2006

**Name:** B **Reference Number:** 714/08 **Date Referred to Court:** 20/05/2009 **Offence:** 22 counts of making an indecent photograph or pseudo-photograph of children **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 03/12/2009

**Name:** BEATTY, David **Reference Number:** 199/02 **Date Referred to Court:** 10/06/2005  
**Offence:** Rape; kidnap; threats to kill **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 17/10/2006

**Name:** BJS **Reference Number:** 516/99 **Date Referred to Court:** 13/06/2001 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 25/02/2002

**Name:** BLACKWELL, Warren **Reference Number:** 723/03 **Date Referred to Court:** 02/02/2006 **Offence:** Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 12/09/2006

**Name:** BOND Ernest **Reference Number:** 884/97 **Date Referred to Court:** 07/02/2001  
**Offence:** Conspiracy to commit indecent assault, indecent assault (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 30/10/2003

**Name:** BROMFIELD Milton **Reference Number:** 515/00 **Date Referred to Court:** 30/10/2001 **Offence:** Rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 14/02/2002

**Name:** BROOKE, Ian **Reference Number:** 683/01 **Date Referred to Court:** 08/12/2004  
**Offence:** Rape (x3); buggery; indecent assault (x3) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 15/06/2006

**Name:** BROWN Kevin **Reference Number:** 659/97 **Date Referred to Court:** 29/08/2001  
**Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 22/01/2004



**Name:** CLIBERY Anthony Mark **Reference Number:** 95/00 **Date Referred to Court:** 15/10/2001 **Offence:** Rape (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 19/07/2005

**Name:** D **Reference Number:** 745/07 **Date Referred to Court:** 10/06/2009 **Offence:** Rape; Assault by penetration **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 05/03/2010

**Name:** EMM **Reference Number:** 402/01 **Date Referred to Court:** 11/03/2003 **Offence:** Incest; Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 13/10/2005

**Name:** F **Reference Number:** 794/08 **Date Referred to Court:** 23/07/2009 **Offence:** Rape (anal); indecent assault (x3) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 06/05/2010

**Name:** F Reginald **Reference Number:** 106/97 **Date Referred to Court:** 11/12/1998 **Offence:** Indecent assault, incest (x4) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 14/02/2002

**R v GG** [2005] EWCA Crim 1792 (CCRC referral on domestic historic sexual abuse). Conviction upheld.

**Name:** FLETCHER, Joseph **Reference Number:** 923/05 **Date Referred to Court:** 22/02/2007 **Offence:** Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 31/07/2007

**Name:** H **Reference Number:** 509/03 **Date Referred to Court:** 29/09/2004 **Offence:** Indecent assault (x2); rape (x3) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 30/06/2005

**Name:** H Dennis **Reference Number:** 199/97 **Date Referred to Court:** 12/12/2000 **Offence:** Rape, Assault occasioning Actual Bodily Harm, Indecent Assault (x3) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 17/07/2002

**Name:** HAKALA Peter Ian **Reference Number:** 169/97 **Date Referred to Court:** 05/06/2000 **Offence:** Rape (x3), assault occasioning actual bodily harm **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 19/03/2002

**Name:** HAMMILL, Martin **Reference Number:** 576/03 **Date Referred to Court:** 26/06/2007 **Offence:** Unlawful sexual intercourse; indecent assault **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 23/10/2008

**Name:** HEMPSTON, David **Reference Number:** 129/04 **Date Referred to Court:** 27/01/2006 **Offence:** Common assault (x3); burglary with intent to rape; rape; attempt to render incapable or resistance with intent; assault occasioning actual bodily harm **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 30/10/2006

**Name:** HESMER, Alan **Reference Number:** 25/04 **Date Referred to Court:** 19/09/2006 **Offence:** Attempted indecent assault; indecent assault (x2) **Appeal Outcome:** Not Available **Date of Appeal Outcome:** N/A

**Name:** HOWE, Paul **Reference Number:** 193/08 **Date Referred to Court:** 03/03/2009 **Offence:** Making indecent photographs or pseudo-photographs of children **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 03/12/2009

**Name:** IRWIN, Paul **Reference Number:** 391/02 **Date Referred to Court:** 16/12/2003  
**Offence:** Rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 09/11/2004

**Name:** J **Reference Number:** 95/07 **Date Referred to Court:** 24/02/2010 **Offence:** indecent assault (x8); rape (x4); incest, buggery and attempted rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 14/05/2010

**Name:** JARVIS, Mark **Reference Number:** 150/05 **Date Referred to Court:** 10/08/2005  
**Offence:** Rape; robbery (2); kidnapping **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 04/07/2006

**Name:** JF **Reference Number:** 687/07 **Date Referred to Court:** 03/10/2008 **Offence:** Rape. Causing or inciting a child under the age of 13 to engage in sexual activity. Sexual assault.  
**Outcome:** Upheld **Date of Appeal Outcome:** 27/01/2009

**Name:** JUVENILE A **Reference Number:** 1026/98 **Date Referred to Court:** 15/02/2001  
**Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 11/12/2002

**Name:** JUVENILE C **Reference Number:** 149/01 **Date Referred to Court:** 26/02/2002  
**Offence:** Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 11/10/2002

**Name:** K **Reference Number:** 736/06 **Date Referred to Court:** 01/05/2007 **Offence:** Indecency with a child (x3); indecent assault (x3) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 28/09/2007

**Name:** K, Jason **Reference Number:** 413/04 **Date Referred to Court:** 04/08/2005 **Offence:** Rape; indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 12/01/2006

**Name:** L **Reference Number:** 800/03 **Date Referred to Court:** 03/08/2005 **Offence:** Rape; indecent assault (x4) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 08/12/2005

**Name:** L **Reference Number:** 874/06 **Date Referred to Court:** 12/03/2010 **Offence:** rape (x2); attempted rape; gross indecency with a child and indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 02/12/2010

**Name:** LAY, Andrew **Reference Number:** 965/05 **Date Referred to Court:** 14/08/2006  
**Offence:** Indecent assault (x2); unlawful sexual intercourse with a girl under 16 (x2); gross indecency with a child; making an indecent photograph of a child (x25) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 07/11/2006

**Name:** MILLER, David **Reference Number:** 557/09 **Date Referred to Court:** 15/12/2009  
**Offence:** possession of indecent pseudo photographs of a child (x4) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 25/11/2010

**Name:** MORRIS Andrew Robert **Reference Number:** 77/01 **Date Referred to Court:** 15/05/2001 **Offence:** Indecent Assault (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 05/02/2003

**Name:** Mr F **Reference Number:** 591/02 **Date Referred to Court:** 25/09/2008 **Offence:** Indecency with a child, indecent assault & rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 13/05/2009

**Name:** N **Reference Number:** 263/08 **Date Referred to Court:** 13/05/2010 **Offence:** Attempted rape; sexual assault of a child under 13 (x5) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 29/10/2010

**Name:** Nicholson, Michael **Reference Number:** 669/04 **Date Referred to Court:** 21/10/2004 **Offence:** Possession of indecent photographs of children **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 26/10/2004

**Name:** O **Reference Number:** 633/08 **Date Referred to Court:** 11/06/2010 **Offence:** Indecent assault (x7); rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 04/11/2010

**Name:** O **Reference Number:** 145/07 **Date Referred to Court:** 25/06/2009 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 09/02/2011

**Name:** O **Reference Number:** 191/01 **Date Referred to Court:** 20/01/2004 **Offence:** Rape; indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 04/08/2004

**Name:** P **Reference Number:** 748/03 **Date Referred to Court:** 14/02/2005 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 01/11/2005

**Name:** P **Reference Number:** 686/02 **Date Referred to Court:** 18/11/2003 **Offence:** Rape; Assault occasioning actual bodily harm **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 13/05/2004

**Name:** P **Reference Number:** 456/02 **Date Referred to Court:** 22/03/2006 **Offence:** Indecent assault on a female below age 13 (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 24/01/2007

**Name:** P **Reference Number:** 976/05 **Date Referred to Court:** 25/08/2010 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 10/02/2011

**Name:** P Michael **Reference Number:** 270/97 **Date Referred to Court:** 23/10/1998 **Offence:** Indecent Assault (x3), rape (x3) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 20/07/1999

**Name:** P Peter **Reference Number:** 527/97 **Date Referred to Court:** 26/01/2000 **Offence:** Indecent Assault, Rape, Attempted Rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 30/11/2001

**Name:** PARKIN, David **Reference Number:** 420/02 **Date Referred to Court:** 16/12/2003 **Offence:** Rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 09/11/2004

**Name:** POPAT Chetan **Reference Number:** 207/99 **Date Referred to Court:** 17/05/1999 **Offence:** Attempted rape, indecent assault (x2), intimidating a witness **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 30/07/1999

**Name:** PURVIS Dominic **Reference Number:** 204/07 **Date Referred to Court:** 04/06/2008 **Offence:** Possessing indecent images **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 31/07/2008

**Name:** Q **Reference Number:** 432/09 **Date Referred to Court:** 07/09/2010 **Offence:** Rape; indecent assault **Appeal Outcome:** Not Available

**Name:** R **Reference Number:** 63/07 **Date Referred to Court:** 20/09/2010 **Offence:** attempted buggery; indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 25/01/2011 **Judgment:** Not Available

**Name:** R **Reference Number:** 301/05 **Date Referred to Court:** 13/02/2006 **Offence:** Rape (x3); buggery; indecent assault (x6) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 15/02/2007

**Name:** ROBOTHAM, John **Reference Number:** 323/05 **Date Referred to Court:** 19/02/2007 **Offence:** Indecent assault on a male **Appeal Outcome:** Upheld **Date of Appeal Outcome:** N/A

**Name:** ROWE, Christopher **Reference Number:** 227/06 **Date Referred to Court:** 09/01/2008 **Offence:** Possession of indecent photographs of a child **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 04/11/2008

**Name:** S **Reference Number:** 316/07 **Date Referred to Court:** 04/09/2008 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 13/10/2009

**Name:** S **Reference Number:** 198/03 **Date Referred to Court:** 28/09/2006 **Offence:** Indecent assault (x4); rape (x4) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 08/06/2007

**Name:** S **Reference Number:** 34/08 **Date Referred to Court:** 02/03/2011 **Offence:** Indecent assault on a female under 14 **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

**Name:** SHAW Cornelius Renny **Reference Number:** 277/97 **Date Referred to Court:** 09/02/2000 **Offence:** Rape and indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 15/02/2001

**Name:** SHAW Olbie **Reference Number:** 167/00 **Date Referred to Court:** 28/03/2000 **Offence:** Rape, Indecent Assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 15/02/2001

**Name:** SHEEHAN, Peter **Reference Number:** 236/02 **Date Referred to Court:** 30/09/2004 **Offence:** Indecent assault (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 10/11/2005

**Name:** SIDDALL, John **Reference Number:** 511/00 **Date Referred to Court:** 08/12/2004 **Offence:** Indecent assault (x3); indecency with a child **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 15/06/2006

**Name:** SMITH Allen **Reference Number:** 205/97 **Date Referred to Court:** 25/01/2000 **Offence:** Rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 30/07/2002

**Name:** SMITH Shane Stepon **Reference Number:** 290/00 **Date Referred to Court:** 19/12/2001 **Offence:** Attempted rape; burglary with intent to rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 24/03/2003

**Name:** SMITH, Peter **Reference Number:** 230/04 **Date Referred to Court:** 22/09/2004 **Offence:** Indecent assault (x3) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 03/03/2005

**Name:** SOLOMON, Dean **Reference Number:** 337/03 **Date Referred to Court:** 18/12/2006 **Offence:** Rape (x2); indecent assault; buggery; attempted buggery **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 22/10/2007

**Name:** T **Reference Number:** 516/06 **Date Referred to Court:** 13/09/2007 **Offence:** Indecent assault **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 19/05/2008

**Name:** TUNBRIDGE, Justin **Reference Number:** 88/05 **Date Referred to Court:** 08/02/2007 **Offence:** Indecent assault (x2) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 17/04/2008

**Name:** U **Reference Number:** 868/07 **Date Referred to Court:** 23/03/2011 **Offence:** Rape **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

**Name:** V **Reference Number:** 231/07 **Date Referred to Court:** 24/03/2011 **Offence:** Rape [anal], contrary to section 1(1) of the Sexual Offences Act 2003 **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

**Name:** V **Reference Number:** 201/08 **Date Referred to Court:** 26/07/2011 **Offence:** Buggery, Indecency with a child, Indecent assault **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

**Name:** W **Reference Number:** 441/06 **Date Referred to Court:** 29/03/2007 **Offence:** Buggery; rape (x2); indecent assault (x11) **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 19/05/2008

**Name:** W **Reference Number:** 549/03 **Date Referred to Court:** 29/11/2004 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 01/03/2005

**Name:** W Graham **Reference Number:** 689/98 **Date Referred to Court:** 22/10/1998 **Offence:** Indecent assault and rape **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 19/01/1999

**Name:** WALTERS Christopher Patrick **Reference Number:** 441/98 **Date Referred to Court:** 08/05/2001 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 17/06/2002

**Name:** WARREN, Leslie **Reference Number:** 549/03 **Date Referred to Court:** 29/11/2004 **Offence:** Rape **Appeal Outcome:** Quashed **Date of Appeal Outcome:** 01/03/2005

**Name:** WHITEHEAD, Ian **Reference Number:** 241/04

**Date Referred to Court:** 08/03/2005 **Offence:** Indecent assault (x6) **Appeal Outcome:** Upheld **Date of Appeal Outcome:** 23/06/2006

**Name:** X **Reference Number:** 706/08 **Date Referred to Court:** 19/07/2011 **Offence:** Indecent assault (x2); Attempted rape; Rape **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

**Name:** Y **Reference Number:** 101/11 **Date Referred to Court:** 26/07/2011 **Offence:** Attempted rape, Indecent assault **Appeal Outcome:** Not Available **Date of Appeal Outcome:**

## Appendix B

Historic child sexual abuse cases: ones that miscarried

**R v Robert Francis O'Brien** Court of Appeal [2000] Crim. L.R. 863 Criminal Division No: 200000738/Y3 20 March 2000

Appellant was Headmaster of St Mary's Hall, Preparatory School for Stoneyhurst College. Tried in 2000. Four complainants from said School, allegations ranging from 1972 and 1998, four pupils alleging indecent assault. N and R were 1970s pupils, A and C pupils from 1990s. Allegations from two different eras were considered by the Court of Appeal to be too dissimilar to have been tried together:

*In the context of the criminal law and procedure, in our judgment, the longer the gap in time between two separate alleged offences, the clearer must be the nexus required, both to constitute a sufficient relationship between the events to give rise to a series within the Indictment Rules and to give rise to the admissibility of evidence in relation to one period to prove offences in relation to the other. In the words of Lord MacKay in P, there must be "strong probative force" if the evidence of one is to be admissible in relation to the other. We do not find in the four matters to which Mr Webster referred strong probative force. Indeed, it seems to us that those matters, properly analysed, do not provide much, if any, probative force. That being so, the learned judge, in our judgment, was wrong to permit these offences to be tried together.*

Convictions quashed.

**R. v B (Brian S)** [2003] EWCA Crim 319

Complaint of sexual abuse made 30 years after incident. The Court of Appeal stated that there was no need to order stay for abuse of process. Any prejudice caused by delay could be dealt with within the trial. Justice had to be done for both defendant and complainant. 'Better guilty go unpunished than innocent punished'. Given delay only defence available was denial.

B appealed against his convictions for indecently assaulting the complainant, his stepdaughter, 30 years previously. During the period when the offences had taken place, the complainant had been aged between 7 and 11-years-old. Prior to trial, B had applied for a stay of proceedings on the basis that due to the delay that had occurred since the incidents, which had taken place 30 years before a complaint was made, and the difficulty in obtaining witnesses, the trial would amount to an abuse of process. That application was refused. B appealed on the ground that the evidence was unreliable and unsupported by any independent evidence. Held, allowing the appeal and quashing the convictions, due to the delay and limited evidence available, the convictions were not safe. B had been unable to defend himself or effectively cross-examine the complainant. In the interests of justice the convictions should be set aside.

Miscarriage case involving historic allegations of abuse in children's homes (Operation Care). Conviction quashed upon fresh evidence). Each of the appellants was in the past a member of the staff at a Residential Community Home near Liverpool, which cared for boys under 17 with disturbed backgrounds, and in July 1996 social services and the police began to investigate allegations that members of staff at that home had sexually abused boys in their care. That investigation was given the code name "Operation Care". The investigation involved circulating former residents, and inviting them to contact the police if they had complaints. The separate prosecutions of the two appellants were part of the results of that operation. Williams-Rigby was tried first, and to some extent the course of the later trial of Lawson was affected by the conviction of Williams-Rigby. There was also one complainant who was common to both trials.

### **The fresh evidence (contemporaneous/eyewitnesses)**

New witness for the appellant, John Kellaheer. He was admitted to St George's in June 1979 and was happy there. He told us that he saw no sign of physical or sexual abuse, and was treated "perfect" by Williams-Rigby. He was never aware of anyone entering the dormitory which he shared with BS and MO after the lights had been put out, and he would have known had anyone done so, especially if it had happened three or four times per week. He regarded as impossible the suggestion that anyone might come into the dormitory and sexually abuse a boy who slept there without any other boy in the dormitory being aware of what was happening. He only visited Williams-Rigby's flat once, for tea a couple of days before he left. In cross-examination Kellaheer did make the extravagant claim that those in the dormitory did not sleep until 3 or 4 a.m., but in general his evidence appeared to the Court of Appeal to be credible. It was not contended on behalf of the Crown that either Kellaheer or Robert Harrison could and should have been produced by the defence as witnesses at the trial.

New witness for the appellant, Harrison. Since 1995 he has been serving a life sentence for murder, but in June 1979 he too went to St George's, and was in the dormitory with BS and MO. He was treated very well, and experienced no sexual or physical abuse. At that time he was very small, and Williams-Rigby was someone whom he regarded as fair. He too rejected the idea that anyone could have visited the dormitory late and taken a boy or boys out, or forced himself on a boy, without the other boys knowing. Williams-Rigby never visited the dormitory, except perhaps to check, after lights out, and his own visits to Williams-Rigby's flat had been during the day, never after 8 p.m. Harrison, like Kellaheer, was regarded by the Court of Appeal as an apparently credible witness.

### **Conclusion: Williams-Rigby.**

The fresh evidence which was is capable of belief. Plainly it would have been admissible at the trial, and it is accepted that there is a reasonable explanation to the failure to adduce it

then, so the only remaining matter to be considered pursuant to section 23(2) of the Criminal Appeal Act 1968 is whether that fresh evidence affords any ground for allowing the appeal. The fresh evidence directly undermined the evidence of two of the complainants, BS and MO, and the evidence of MO may well have assisted the jury to reach a conclusion in relation to ML and WM.

### **On Lawson's convictions.**

There had been concern about how the jury might have interpreted evidence about a police document called Scene 22. This was a list drawn up by the police of 91 members of staff who had been under suspicion or arrested as a result of Operation Care. The investigation had involved circulating former residents and asking them to contact police if they had complaints to make. At the trial Detective Superintendent Robbins agreed under cross-examination that following letters (sent by the police) addressed to former pupils at the school there had been 8 or 9 who had complained about Lawson, out of about 8,600 with whom Lawson would have been in contact during the indictment period. There were some 16 or so other witnesses upon whom the prosecution would seek to rely.

*These complainants have not combined in some sort of witch hunt against this defendant alone – others have also been accused. And of course it is relevant in the arguments that Mr Fordham put forward about the large number of pupils who have passed through over the years and the small number of complaints, because you know that there are other complaints and other subjects of complaint.*

Appeal counsel had raised the issue of police contamination to the Court of Appeal: There was no video or audio tape of the first contact between a complainant and a police officer in response to the letters sent out to those conducting Operation Care, and the risk of contamination was something. Lawson had been convicted on the unsupported testimony of a complainant with a criminal history and Counsel had suggested that at the time a stronger care warning as advised in *Makanjuola* [1995] 2 Cr App R 469, but this was rejected as a point of law for the appeal.

*The naming of those listed in the Scene 22 document was, to say the least, unfortunate, and in the light of what has happened to all of them it is impossible for us to be satisfied that the naming did not distort Lawson's trial. ...We (also) have serious reservations about the admissibility of (and fairness of admitting) the convictions of Williams-Rigby.*

**R v Birks (Dene)** Court of Appeal, 20 December 2002 [2002] EWCA Crim 3091; [2003] 2 Cr. App. R. 7; [2003] Crim. L.R. 401; Independent, March 10, 2003

**N.B.: Case decided before the passing of section 120 of the Criminal Justice Act 2003, which now allows a recent complaint as a previous consistent statement to bolster a complainant's credibility.**

On 3rd May 2002 the appellant, Dene Birks, was found guilty of three counts of indecent assault and one count of indecency with a child. The complainant was 19 at the time of the trial, but her evidence concerned what had happened to her when she was a young child. She



gave evidence that she was sexually abused by the appellant and that it happened about once a month for about twelve months and finished when she was about 6 to 7 years old, that is some thirteen or fourteen years before trial. This would have made the appellant 18 to 19 years old at the time of the alleged offending. Thus the complainant alleged that the abuse began when she was 5 or 6 years old.

The Court of Appeal was reluctant to accept the ground of appeal, but was, at that time, bound by the doctrine of recent complaint.

On this appeal there is, in effect, a single ground of appeal, although there are two limbs to it, first that the complainant's and her mother's evidence of the complainant's complaint arising out of the television programme should not have been admitted at all, but secondly, if it could have been admitted at the outset (which occurred when the material before the court about what the complainant would say was that she had made her complaint some two months after the end of the appellant's conduct), the judge should have reviewed his decision and, in the event, discharged the jury once the evidence had emerged in the cross-examination of the complainant that her complaint might have been made up to six months after the end of the appellant's conduct towards her and also in the light of the mother's evidence of the complaint being made a year later.

At the initial stage when the judge was asked to rule about the admissibility of the complaint, the judge exercised his discretion to admit this evidence, basing himself upon the case of *R v Valentine* [1996] 2 Cr App R 213, and, in particular, a passage in the judgment of Roch LJ, giving the judgment of this court in that case, at 223G to 224A as follows:

*The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, a complaint will not be inadmissible merely because there has been an earlier complaint ...*

She said first about two months after the last incident, though she accepted when she was cross-examined it could be longer, it could be six months, but she said, 'When you're little assessing time spans is very difficult' ...

...[t]he judge erred in this case, in admitting the recent complaint evidence in the first place, but, *a fortiori*, in not discharging the jury once it emerged that the time in question was not simply two months, but up to six months or even a year.

...the evidence of the confrontation between the mother and the appellant and the significance or otherwise of the defendant's lie that such confrontation had never taken place was itself the product of the admission of the evidence of complaint. The position is, therefore, that, in a case which depended essentially upon the credibility of the complainant *vis-à-vis* that of the appellant, not only was her credibility assisted by the admission of this evidence, but further

evidence, possibly to the prejudice of the appellant, regarding the mother's confrontation with him came in upon coat-tails. Mr Quirke submits that it may be that if the evidence of confrontation had not come in as a result of the evidence of recent complaint, then it could have been admissible by some other means. But even if this is the case, he accepts that in such a situation no more evidence of the complaint would have been put before the jury than was necessary to set up the background to the confrontation. In that even the force of the evidence relating to the manner in which the complaint arose spontaneously out of the television programme would not have been before the jury. We therefore are unable to accept his submission that we should regard these convictions as nevertheless safe. In these circumstances, we feel bound to quash the convictions and allow the appeal.

...we feel that, although bound by the doctrine of recent complaint in the way that we have described in our judgment, it would be preferable if the law could develop in the way which ...subject to appropriate directions of course, it is undesirable for juries to be kept in the dark as to what has happened between the time, sometimes many years or even decades in the past, of the alleged abuse and the time at which they are trying the case. If complaints, albeit not recent complaints in the existing sense of that term, have come forward in circumstances which are safe to put before the jury for their evaluation, then we think that they should be. Ultimately it would be for the jury, subject to proper directions, to decide what they make of a proper narrative of events which would explain to them how it is that the charges put before them for their decision arise when they do, either against the background, depending on the facts of the case, of a complete silence of decades, however that is explained, or against some other possibly highly significant background.

In this connection we would also observe that in the Criminal Justice Bill which has recently been published, the doctrine of recent complaint, as an exception to the prohibition on the admission of previous consistent statements, has been extended from the case of sexual crime to all crimes. We refer to clause 104 of the draft Bill, headed "Other previous statements of witnesses". Under subclause (7)(d), one of the conditions for the admission of previous statements is:

"The complaint was made as soon as could reasonably be expected after the alleged conduct."

Were a new statute to be enacted in those terms, we could also visualise arguments, on the one hand, that the words "as soon as" were strong words, pointing to a necessarily early complaint, but, on the other hand, we could visualise arguments that, in the context of an entirely new legislative beginning, where the test was laid down in statutory language, the overall expression "made as soon as could reasonably be expected after the alleged conduct" could permit of a broader test, which would allow the sort of complaint in question in this case or even more delayed complaints, depending upon all the circumstances.

29. However, we also note in the Explanatory Notes published in connection with this Bill, at paragraph 346 the following:

"This extends the common law rule known as recent complaint."

We can also visualise an argument being made on the basis of that sort of comment that the legislative intent was not to go beyond the circumstances previously found in the common law relating to recent complaint. We draw attention in this context to these provisions of the Criminal Justice Bill because it seems to us that it might be helpful to consider the circumstances and submissions made in this case for the purpose of defining any new legislative rule.

Nevertheless, for the reasons we have given, our decision on the present law must be that the judge erred in this case and the appeal must be allowed.

**R v J** [2004] UKHL 42, [2005] 1 All ER 1

David Carrington-Jones was released on October 16, 2007, after spending six years in jail for a rape, having been previously found guilty on two counts of rape and sexual assault against a pair of teenage sisters in December 2000. One of the complainants subsequently admitted to police she made up the allegations against her stepfather Mr Carrington-Jones because she ‘did not like him’. It has transpired that the girl had previously made up other allegations of rape against her brother, fiancée, stepfather and even a customer at her work, but the jury was not told of this, and Mr Carrington-Jones was sentenced to a ten-year jail term. He was later refused parole hearings because of his refusal to admit his guilt.

**Anver Daud Sheikh v The Crown** [2006] EWCA Crim 2625

[MG’s] allegations are predicated upon there being an opportunity for the offence to be committed. If there was no opportunity there could be no offence, and the evidence which we have, the possibility of there being an opportunity is low. [MG] was in B house and said he never moved from B house. ...

Missing documents, in particular the staff rota and the personnel records, were likely to be highly relevant to two issues in this case, First, whether the appellant would have come into contact with MG so as to have the opportunity to win his trust as MG alleged that he had; secondly, whether the appellant had the opportunity to commit these offences against MG.

Now in those circumstances, the very existence of those documents would provide the means by which the Defendant could show beyond doubt reverse *alibi*. He is denied that opportunity because of the absence of those records. We submit there cannot be a clearer example of there being prejudice to the Defendant because of a consequence of delay, the consequence of delay being the absence, either through destruction or mislaying, of those critical records.”

Mr Goose made the point that the appellant did not have to be on duty to commit the offence and therefore the records would not necessarily assist. As to the personnel records, he submitted that they might not show whether he was still living at the home and therefore would not necessarily assist.

Mr Cosgrove replied in part:

“... we submit it will not do to suggest that this offence could have been committed when Mr Sheikh was not on duty. That is not consistent in our submission with the evidence given by [MG] who spoke about him being working on house B on a number of occasions over a period of time as the trust built up, and indeed his evidence about what occurred on the night in question, namely the complaint and the locking in the room, making sure he was secure, are consistent only with that Mr Sheikh was on duty, and therefore it is not possible to try to wriggle out of the notion that whether or not he was on duty is a highly relevant consideration. Unfortunately all concerned had overlooked the complainant's evidence that when he had spoken to the appellant about the bullying and the suggestion had been made to lock the dormitory door, the appellant was on duty. In any event, one might expect that if a door to a dormitory is to be locked from the outside, with the attendant dangers, it would be done by a member of staff who was on duty.

**R. v Smolinski (Mark Paul)** [2004] EWCA Crim 1270; [2004] 2 Cr. App. R. 40; Times, May 28, 2004; [2004] 2 Cr. App. R. 40,

An appeal against conviction for historic indecent assault on children on the basis that the case should have been stayed as an abuse of process due to the delayed prosecution.

*If it had not been for the matter of the (mixed) verdicts, to which we have referred, we would have found it difficult to interfere with the conviction which took place in this case. We do not think it is right for this court to lay down the principle that because of the period which has elapsed (twenty years) when the complainant has given a reason for the delay, it is inevitably the case that the convictions will be unsafe. However, where there has been a long period of delay such as existed in this case, and where the complainants are young, as they were here (6 and 7 respectively at the time matters happened), this court should scrutinise convictions with particular care. Likewise, we consider that trial judges should scrutinise the evidence with particular care and come to a conclusion whether or not it is safe for the matter to be left to the jury.*

*In this case, looking at the matter as a whole, bearing in mind there are discrepancies, bearing in mind that the elder sister, until reminded by her younger sister, was apparently oblivious of what was alleged to have happened earlier, bearing in mind the conclusion which the jury came to on the first count but were unable to come to the same conclusion on the second count, that this is a case where the conviction is unsafe. Accordingly, we will therefore allow the appeal.*

The judges also advised that any abuse of process hearing should take place after the evidence has been called at trial.

**R. v A (Paul)** [2005] EWCA Crim 2941

Admissibility; Delay; Indecent assault;

The Court of Appeal held that the convictions are unsafe for the following reasons:

- first, the delay of nineteen to 29 years between offences and trial in a case where the defence was one of complete denial;
- secondly, the prejudice occasioned to the appellant by the unavailability of medical and Social Services records;
- third, the prejudice occasioned by the inability to trace potential defence witnesses from the Samaritans;
- fourth, the prejudice occasioned by the impossibility of viewing the scene of the alleged offences;
- fifth, prejudice occasioned by the death of the mother;
- sixth, the failure of the Hampshire and Suffolk police forces to keep adequate records;
- seventh, the failure of the judge to discharge the jury after hearing the inadmissible evidence of violence;
- eighth, his failure to direct the jury adequately on the impact of delay on the formulation and conduct of the appellant's defence;
- ninth, his failure to direct the jury that any previous consistent statement by the complainant could not be taken as evidence of the truth of its contents;
- tenth, the acquittal of the appellant by the jury on counts 4 and 5 of the indictment, which depended, as did counts 1-3, on the uncorroborated evidence of the complainant whose credibility was in issue.

The fact that verdicts are apparently logically inconsistent does not make the verdicts complained of unsafe unless the only explanation must or might be that the jury were confused or adopted the wrong approach. *R v McCluskey* 98 Cr App R 216 is referred to. Nonetheless this is another factor, counsel submits, that the court can take into account when deciding on the safety of the convictions. He further submits that, given the way in which the verdicts were returned, it is difficult to avoid a suspicion that the jury arrived at an improper compromise.

But given the inadmissible evidence heard by the jury (regarding new allegations that the accused had been violent towards his wife, the sole defence witness to rebut the complainant's five uncorroborated allegations impacting, as it very possibly did, upon their assessment of a witness important, if not vital, to the defence and one said to have been to a degree complicit in the offending, and given the other factors to which we have referred and to which we have had regard, we are unable to regard these convictions as safe.

### **R v Flint** [2005] EWCA Crim 493

The trial Judge had unreasonably refused jury to view real evidence (video recordings) for cross-examination. The cross-examination of evidence in the video was relevance to fact in issue under s.41 of the Youth Justice and Criminal Evidence Act 1999.

Where s.41 of the applied, a trial judge's obligation to see that the interests of a complainant were protected did not permit him or her, by way of a general discretion, to prevent the proper deployment of evidence falling within the ambit permitted by s.41 of the Act. Merely because cross-examination of a complainant might impugn her credibility, it did not necessarily follow that that was its main purpose.

## **R v Chapman [2006] EWCA Crim 1656**

Misdirection on delay and good character. Unavailability of defence witnesses due to deaths.

The first point of law related to the directions which the trial judge ought to have given to the jury in relation to the lapse of time between the allegations made by the complainant and the time when this applicant was interviewed in November 2001, with the trial a year later. The lapse of time in this case, as in so many others, between the facts giving rise to the complaint and the interview of this applicant in November 2001, had considerable impact on his defence. As we have said, his defence was that nothing untoward had taken place; it was a complete denial. He said, as we have pointed out, that he had very little opportunity to be alone with the complainant and had only baby-sat on a few occasions for short periods. The delay clearly prevented any precision in the evidence which he could give, still less which any witness to be called on his behalf could give. Moreover, as is clear from the nature of the cross-examination of the complainant, it was part of the applicant's case that the complainant had been looked after by a stepfather's niece, a girl called Zhalini, between 1992 and 1994. She could not be called to give evidence because she died in 2004. Moreover, in the house where most of the offences were alleged to have taken place, where this applicant lived, there lived also his father. He spent most of the day downstairs and might have given further evidence to support the defence case of lack of opportunity. He died in 1994. These were quite specific disadvantages under which the defence laboured as a result of the delay. Moreover, there was, as in so many other cases like this, a general disadvantage of the defence arising from the inability to adduce evidence of the demeanour of the complainant, perhaps with the defendant or on her own, which might suggest that she did not give the appearance of suffering in the way she described that she was suffering. It also diminished the possibility of identifying features to suggest either exaggeration or fabrication.

In the instant case, not only did the judge fail to give any warning, he appears positively to have encouraged the jury to disregard the delay.

The impact of the delay trenches on the fairness of the trial so far as the defendant is concerned and it is that feature of which the jury should be instructed in cases where the issue of delay should form part of the judge's directions.

The essential importance of good character evidence is that the jury should not reach a concluded view as to the truthfulness of a complainant's evidence without taking into account the two important features of the good character of the defendant, both of which are relevant to the assessment of the truthfulness of the complainant's account. In other words, the process by which the jury reached a conclusion as to the truth of the allegations requires, in accordance with proper directions from a judge, the jury to take into account the good character of the defendant.

No explanation was given to the jury as to why it was necessary to do so, in other words to enable the witness to be more at ease, nor was any warning given that it should not be considered prejudicial to the accused.

There was a further serious defect in the failure of the judge to draw attention to certain comments made by the questioners during the course of the interview with the complainant. As commonly occurs, words were uttered by the interviewers designed to put the witness at rest, to give her peace of mind and to encourage her. Such words were spoken during the course of the interview, for example, the complainant said:

"...I just don't want it to happen to my sisters. Q. Okay. Nobody deserves to happen to them. You've got the perspective right; he is wrong, not you."

Other similar expressions were uttered by the interviewers. It was, in our view, in this particular case incumbent on the judge, if those matters were to be before the jury - and we make no criticism of the decision to allow them to go before the jury - to warn the jury that the apparent approbation of the interviewers was not any indication as to where the truth lay.

**R. v Clark (Nigel Paul)** [2006] EWCA Crim 231

The allegations were of systematic, historic abuse of both girls when they were aged between 10 to 15, in A's case between 10 to 12. It was submitted that the evidence of the second complainant, A, should have been excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984. It was said that her recollections may have been the product of hypnotherapy and not an accurate recollection of what had occurred. There was also some concern, because research showed that the public believed a person under hypnosis was incapable of telling a lie. Secondly, it was submitted that even if A's evidence was admitted, the defence ought to have been entitled to call the evidence of Dr Naish as to the dangers of evidence produced through hypnotherapy. The judge ruled against this application on both the basis, ruling that A's evidence should be heard by the jury and the evidence of Dr Naish should not be admitted.

Conviction quashed, retrial ordered.

**R. v H (Michael John)** [2006] EWCA Crim 994

Historic child sexual abuse; Delay; Indecent assault; Jury directions

The Court of Appeal had to assess what the weight the jury had attached to a disclosure of indecent assault by the complainant to a partner of hers, Lee Hemingway in a weak prosecution case.

Lee Hemingway had said in evidence amounted to evidence supporting KD's evidence. It is not in dispute that Hemingway's evidence did not in any sense support KD's evidence. It is submitted on behalf of the appellant by Mr Storey that this was a material error because in a case where essentially the issue was: which of two, KD and the appellant, were telling the truth, the jury would be bound to look for evidence which supported one or other. It is submitted that the evidence of the three other witnesses who were relied on as supporting KD's evidence (Susan Tunstall, Nicola and Christopher Scales) was individually weak and insignificant. Accordingly, it was all the more important for the judge correctly to identify the evidence that was said to support KD's evidence.

Conviction quashed, retrial ordered.

Counsel for the appellant relied on a number of authorities which stress the need for a judge to give a careful direction to a jury when dealing with alleged historic abuse. He submitted that the directions given by the judge in this case did not measure up to the required standard. Crown Counsel conceded that fuller directions could have been given, but his submission was that the directions given by the judge were in all the circumstances adequate.

Court of Appeal directed that:

*Whilst it will now be rare for a court to stay such proceedings, the jury should be alerted to the difficulties which delay causes to a defendant. The Judicial Studies Board specimen directions provide a fair draft for judges to follow, always bearing in mind that it is for the judge to tailor his or her directions to the evidence in the individual case. In our judgment it is important for the judge to point out in brief terms the difficulties which may face a defendant in answering allegations of historic abuse, such as: the longer the time, the more difficult it may be for the defendant to answer the allegations; passage of time dims memories and may deprive a defendant of evidence which would have assisted him. In our view it is also desirable to couple these directions with a reference to the burden of proof.*

**R. v. Robson and others** [2006] EWCA Crim 2754

On the correct approach to an abuse of process application in cases involving historic allegations (in the appealed case, of cruelty from a care home involving multiple defendants). They raise the issue as to whether, either at the close of the prosecution case, or at the close of the defence case, the judge should have intervened to withdraw the allegations from the jury on the basis that no jury could safely convict. They also raise an issue as to the proper way the judge should have directed the jury about such incidents.

The Court of Appeal agreed that stronger judicial guidance should be offered to juries when discrepancies arose from the evidence of complainants in HCSA cases.

Such an approach is not correct in relation to evidence of events which took place many years before, of which the sources were young and vulnerable witnesses. It is not sufficient, in giving such a ruling, for a judge merely to comment that it is for a jury to assess the impact of discrepancies. On the contrary, as we have said, it is for the judge to assess the significance of the discrepancies and to rule whether their impact upon the quality of the evidence is such that no jury could safely convict on the Counts to which they relate.

*...we suggest that in cases such as this, posing complicated factual issues arising out of historical events, time would be well spent in seeking the assistance of counsel as to which pieces of evidence go to which Counts and the significant controversies which arise out of that evidence. By such means a judge, with the assistance of counsel, can give directions as to fact to the jury which do, in reality, assist them to focus on the significant issues which arise under the separate Counts. If this process takes time and causes delay before the jury's consideration, it is, we suggest, time well spent. It*



*must not be forgotten that the witnesses were purporting to identify teachers as being responsible for this fight, possibly some twenty-six years previously.*

There was such a lack of clear, reliable and consistent evidence, coupled with a significantly inaccurate direction as to lead us to the conclusion that the verdicts on several of the Count were unsafe.

**R. v Siddall (John Stephen) and Brooke**[2006] EWCA Crim 1353

Siddall was convicted on two counts of indecent assault (counts 4–5) on a girl called RW between 10th October 1985 and 13th May 1986 by engaging her in sexual intercourse and two counts (6 and 7) of indecency with a child and indecent assault between 12th December 1987 and 13th February 1988, the child concerned being PW. He was acquitted of 3 counts of indecent assault (counts 1–3) on a girl called JF between 20th June 1985 and 23 January 1986. He received a total sentence of 4 years imprisonment.

Brooke was charged with counts of indecent assault, rape and buggery of the same RW. He was acquitted of one charge of indecent assault in the Lake District (count 1) but convicted of two charges of rape between 11th May and 7th December 1986 (counts 2 and 3), one charge of buggery (count 4) between the same dates. He was also convicted on 3 counts of indecent assault (counts 5–7) on a girl called AMS between 16th June and 1st November 1986 and one count of rape (count 11) of the same girl between the same dates. He received a total sentence of 10 years imprisonment.

CCRC referral in 2004, new evidence as follows:

- (A) Allegations of rape made by RW but not disclosed by RW in the course of her disclosures to officers responsible for Operation Clyde (the relevant police investigation into incidents at R and W) and Operation Care (another investigation in relation to a care home on Merseyside to which RW was subsequently sent). These allegations derived from information contained in contemporaneous records recovered by the CCRC (1) from Nugent Care Society files relating to RW's time at C in Merseyside which themselves contained information about RW's time at W and (2) from Social Services files compiled in and around 1998 in connection with care proceedings relating to RW's children;
- (B) Other information contained in these files;
- (C) Information contained in applications to the Criminal Injuries Compensation Authority ("CICA") in relation both to Siddall and another person, this time at C, Wilfred Jollie who was tried in Liverpool in May 2001 but against whom the Crown decided to proceed no further as a result of RW's cross-examination;
- (D) Allegations made, subsequent to trial, by JF of penetrative sex by Siddall, no such allegations having been made by JF during the trial of the counts of indecent assault of which Siddall was in any event acquitted.

In the unused material, RW both in her witness statement and in her evidence at trial had alleged that only 3 or 4 acts of sexual intercourse had occurred with Siddall, she had

subsequently alleged frequent sexual intercourse, almost as a matter of routine, in her application to CICA. The Crown has, however, been able to show that RW's initial CICA application was in similar terms to those of the contents of an interview conducted with RW on 13th December 1996 in the presence of a social worker June Bailey, WPC Annette Holliday and RW's then partner Roland Day. In this interview RW said that she could not remember how sex began with Siddall at R but that it went on until she went to W. "It was like a routine."

The Crown could not positively say (since the relevant documentation is now lost) that it was actually sent to the appellant's then solicitors. Some material presented by Siddall's new defence team showed that the previous defence team (or, at any rate, Siddall personally) did have access to the contents of an interview of 13th December so far as it related to Siddall since, when Siddall's employment was terminated by the local authority, he brought proceedings for unfair dismissal before a Leeds Industrial Tribunal in which the relevant parts of the interview were disclosed and he made a written response to the allegations contained in it. It was the other material discovered by the CCRC that should cause the court to have concerns about the safety of the conviction.

Doubt was now cast on the verdicts jury had reached about Brooke. RW had claimed that she has been raped by 12 taxi drivers. RW had also previously accused boyfriends, by two male strangers when she had absconded, a husband, her natural father and other care workers of sexually assaulting her on different occasions.

A report of the matter in 1986 had been disclosed both counsel for the Crown and for the defence could have taken appropriate decisions about how to deal with it. The report had been created when RW had been admitted to care home, W.

Appeal court concerned that the jury had been given a false picture about this matter overall. Witness who had created the report had been called by Brooke in order to deal with the first count of the indictment of indecent assault on which he was, in the event, acquitted. This defence witness had impressed the jury. But nobody thought to ask about the contents of her July 1986 document because nobody knew it existed.

Convictions of both defendants were quashed.

### **R v Charnley** Court of Appeal [2007] EWCA Crim 1354

Child abuse case. Jury had failed to return majority verdicts on remaining 5 counts (they had decided properly on 19 acquittals).

Came to the attention of the trial judge by a juror who wrote to him about the wrong verdict delivered by the foreman:

*We had 24 counts to consider and managed to reach a unanimous verdict of not guilty for 19 of the counts. However, the remaining five counts were split. One count 8 for majority of guilty and four counts 9 - 3 majority of guilty.*

*.. The following day there was an article in the local press informing the defendant*

*had been sentenced to 3 years' imprisonment. Since this has occurred I have been questioning the authenticity of the defendant's sentence as I am led to believe a minimum accepted majority sentencing is 10-2. This has caused me great concern.*

The prohibitions in section 8(1) of the Contempt of Court Act 1981 do not extend to investigations by or on behalf of the Court into possible jury irregularities (*R v Mirza* [2005] 1 AC 1118).

The CCRC was permitted to interview 11 out of 12 jurors to ascertain the error which led to the overturning of Charnley's conviction.

#### ***R v T* [2008] EWCA Crim 484**

An unmarried man in his 40s was accused by a relative's son with a history of drug and alcohol problems. Friends of the accuser joined in to make marginal claims with rumour playing a potent role in a close knit rural community. Convicted at a second trial after the first ended with a hung jury.

The appellant (T) appealed against his conviction for various sexual offences against two young boys. The victims complained to the police some years after the commission of the offences. The Crown relied on evidence from three other young men, each of whom spoke of a single incident of sexual impropriety towards himself on T's part, many years before. The evidence of the unproved allegations was admitted pursuant to the Criminal Justice Act 2003 s.101 (1)(d) as being relevant to T's propensity to molest adolescent boys sexually. The judge also admitted hearsay evidence from people to whom the five young men had, at different times, made their complaints and given descriptions of what had taken place. T submitted that (1) the hearsay evidence and the bad character evidence had not been properly summed up to the jury, and as a result the jury were misdirected into giving the evidence undue weight without the necessary safeguards. The jury should have been directed in clear terms that they should consider the case of each of the complainants and the three additional witnesses separately, and only if they were sure of the reliability and accuracy of the evidence of that particular witness could they take it into account as evidence supporting the Crown's case because it showed the relevant propensity; (2) the judge had failed to give him the benefit and full weight of the second limb of the standard good character direction. The jury were not told they should give weight to his good character; (3) the hearsay evidence should not have been admitted. It could only have been admitted under s.120(4) and s.120(7) in relation to the two complainants on the indictment, and not in relation to the other three witnesses.

#### ***R v D* [2007] Court of Appeal Criminal Division**

Uncorroborated historic allegations of rape and other offences made against a man of exemplary character by a former neighbour from a broken home with a long history of psycho-social problems. Disclosure of medical and counselling records had been refused by the prosecution at trial. The Court of Appeal ordered disclosure of records which led to the conviction being quashed.

A retrial was requested by the prosecution and a leading psychiatrist and psychologist undermined the reliability of the complainant. The D passed away prior to the onset of trial. Permission to publish the Court of Appeal judgment is still pending.

### **R v B [2007] Court of Appeal - Conviction quashed.**

B was accused by an adult daughter after a property dispute. The twelve year old daughter of a former partner who lived opposite the main accuser also made allegations of abuse aged 3 despite having previously denied abuse during a previous unrelated child protection investigation. Leave to appeal was granted out of time and the conviction quashed by the full court.

### **R v Joynson [2008] EWCA Crim 3049**

The Court of Appeal quashed this carer's conviction. Delay and forensic disadvantage caused thereby are the appeal points.

On 27 November 2007, ...the appellant was convicted of twelve counts of indecent assault on a male contrary to section 15 of the Sexual Offences Act 1956 and of two counts of buggery contrary to section 12 of the same Act. He was sentenced to a total of thirteen years' imprisonment. The courts have sadly become familiar with sexual abuse cases going back many years, but, as the trial judge recognised, the period of delay in this case was by any standards exceptional. Moreover, it was delay in the complainants giving evidence about events which were alleged to have occurred during their childhood (in one instance as young as 8). The surprising apparent powers of recall of witnesses 35 years and more after the event impressed the judge, but did not lessen the importance of the absence of contemporaneous evidence by which to test the degree to which such apparent recall was true and reliable recall.

Having identified in summary the nature of the significant prejudice in this case, we must consider whether the case was so strong and/or whether there were sufficient safeguards that the convictions may nevertheless be regarded as safe, despite such prejudice. This is a fact-specific exercise and it calls for close scrutiny. As to the first, it is difficult to isolate consideration of the strength of the case from what the missing documents would or might have shown. For example, if contemporaneous documents had shown that as a schoolboy PF complained about Eagles, not the appellant, and that his evidence about the appellant's references to DC were an instance of his memory playing him false 35 years after the event, the case would inevitably have appeared less strong than otherwise, for the defence would then have been able to say that on the two points where contemporaneous objective evidence existed, it demonstrated that the seemingly credible recollection of the witness was wrong.

We turn to consider the adequacy of the safeguards. One safeguard was the ability of Mr Barlow to cross-examine the complainants and other witnesses, to which the judge referred. However, the effectiveness of any cross-examination must be dependent on the material to be

deployed. In one case there may be ample other material and the significance of missing material may therefore be small. In another case the absence of material which previously existed may be critical.

In relation to PF, the defence, as Mr Gosling has rightly submitted, had available to it the contradiction between PF and his mother. It also had the evidence of the appellant himself that he had left the school before DC arrived. In relation to those issues the jury was left with the word of one witness against another. They lacked contemporaneous evidence which would have settled those points. There was no objective evidence to show that PF was wrong. Without that material the effectiveness of any cross-examination was bound to be reduced.

We also find it difficult in this case to see how the specific prejudice which we have identified could be nullified or made practically harmless by a “strong direction”. A jury could be warned -and indeed this jury was properly warned - to consider with special care the risk of memories becoming unreliable through passage of time, but, as the judge also correctly directed them, the jury had to decide the case on the evidence. No general warning could in this case be a substitute for the documents which were missing.

This court is always slow to allow an appeal against a conviction where the case has been handled with care by an experienced judge and the jury has reached its conclusions of fact after hearing all the witnesses. Nevertheless, we must stand back from the case and ask ourselves whether we regard the convictions as safe. The case as presented to us may be a little different from the way it was presented to the judge when he read the skeleton arguments which were before him, but we are troubled by the very great delay and its particular consequences in the context of the specific allegations in this case. We have reached the conclusion that we cannot regard these convictions as safe.

### **R. v Aston (Stephen Leslie) [2010] EWCA Crim 3067**

Convictions for child sex offences were unsafe where fresh evidence was presented that was based on new developments in medical understanding relating to the physical signs of child sexual abuse.

The appellant (X), upon a reference by the Criminal Cases Review Commission, appealed against his convictions for rape, attempted rape, gross indecency with a child and indecent assault. The victims (V) had alleged that they were sexually abused by their babysitter, X. V were medically examined by two experts whose uncontested medical evidence at trial supported allegations that one of V had been subjected to penetrative abuse. X had argued that although there had apparently been abuse, he was not the perpetrator. Approximately nine years after X was convicted, the commission obtained fresh expert opinion, in view of research carried out since X's trial which significantly altered medical knowledge in relation to the physical signs of child sexual abuse. A report produced by the commission's expert concluded that the medical findings of the trial experts were no longer supportive of abuse. X appealed and the appeal was not opposed by the Crown. The issue was whether X's conviction was safe in light of the fresh evidence and the developments in medical understanding.

Appeal allowed. (1) At trial X was inhibited from exploring the question of whether abuse had taken place. Such caution was understandable given the state of medical knowledge and evidence and, had the new medical evidence been available, it would have transformed the shape of the trial. Therefore the fresh evidence was admitted (see para.19 of judgment). (2) The question for the court in light of the new evidence was not whether it believed X was guilty but whether the convictions were regarded as safe. In the circumstances, X's convictions were not safe and were therefore quashed.

Under sections 9 to 12 of the Criminal Appeal Act 1995 , where a person has been convicted on indictment ... the Commission may at any time refer the resulting conviction ... to the Court of Appeal ... as appropriate.

2. By section 13 of the Act, a reference shall not be made unless the Commission consider that there is a real possibility that the conviction ... would not be upheld were the reference to be made.

**R v GJB** [2011] EWCA Crim 867. Historic sexual abuse; conviction found to be unsafe on appeal due to unfair summing up by the trial judge - unfair summing up had included giving undue credence to unsupported assertions made by the Crown in relation to memory.

Deficiencies in a judge's summing up were such as to render a conviction for historic child sex offences unsafe.

The appellant (B) appealed against his conviction for buggery and indecency with a child. B had been convicted in 2007 of the sexual abuse of his two nephews (M and R) between 1989 and 1991. M stated that the buggery had taken place in B's bedroom when M was aged five and the prosecution suggested that M's good recollection of the room was because he had been abused in it. R alleged that B had encouraged him to masturbate him when he was aged between 9 and 10. B was of previous good character. In summing up, the judge referred to B as not having any explanation for M's clear recollection of his bedroom. He gave a Lucas direction and also stated that B had failed to account for where he had been living for a year during the relevant period. Evidence produced post-trial confirmed that there had been no basis for that inference. The judge gave a good character direction but without specific reference to the passage of 18 years since the alleged offences. He referred to the difficulty of understanding why a child would or would not speak about what had allegedly happened and described evidence of a change in M's behaviour, elicited in cross-examination of R, as having opened "the can of worms". B submitted that the judge's summing up was defective.

Appeal allowed. There was nothing to support the assertion that M's recollection of B's bedroom was accurate because he had been abused in it. There was no expert evidence to support the suggestion that such an incident would enhance a child's memory of his surroundings at the time. The suggestion should not have been made by the prosecution and should not have been given credence in the summing up. In fact, the judge might well have warned the jury against acting on it. His comment regarding B having no explanation for M's recollection had effectively reversed the burden of proof (see paras 10-12 of judgment). The

Lucas direction was defective. It assumed that what B had said was incorrect and focused on whether B had deliberately lied whereas the jury should have been clearly directed to first consider whether they were satisfied that what B had said was incorrect. Only then could they proceed to consider whether he had deliberately lied (paras 13-15). The assumption that B could not account for the missing year had to have damaged his credibility. The interests of justice required that the evidence confirming there was no basis for that assumption should be taken into account and it followed that B's credibility had been wrongly damaged (paras 16-17). B's good character was relevant to his credibility and his propensity to commit such offences, and he had been entitled to a full direction in respect of both. In historic sexual abuse cases there were two aspects of propensity to be considered. A person of good character was less likely to have committed the alleged offence. Given the passage of time since the alleged offences, the fact that a defendant had not committed any offence since then was also relevant and was particularly apt where the delay rendered it more difficult to defend the allegations. In the instant case, the good character direction had not been sufficiently tailored to the facts (paras 18-24). The judge had been entitled to comment on the reluctance of victims of sexual abuse to speak about it for a long time. However, it was important that the guilt of the defendant should not be assumed. The defendant's case had not been made clear and the direction should have been preceded by making the comment conditional on the abuse having happened rather than the assumption that it had.

#### ***R v RP* [2011] EWCA 1764**

The case concerned historic allegations of sexual offences by two sisters against a father. The allegations were made after a brother had visited a clairvoyant who said two sisters were abused. The complaints were bizarre and extreme within a background of alleged extreme physical abuse. The defence case was that none of the allegations was true and that the complainants were motivated by malice through acrimonious family disputes. The appellant received negative advice from trial counsel and the case was reviewed. Leave was given for appeal outside time with fresh counsel. The conviction was quashed because of the one-sided summing-up and deficient directions on delay.

## Appendix C

### The Criminal Justice Act 2003 (Categories of Offences) Order 2004:

The Secretary of State, in exercise of the powers conferred upon him by section 103(4)(b) of the Criminal Justice Act 2003[1] hereby makes the following Order, a draft of which has n laid before and approved by a resolution of each House of Parliament:

1.(1) This Order may be cited as 2004 and shall come into force 14 days after the day on which it is made or on the day that sections 98 to 110 of the 2003 Act (Evidence of Bad Character) come into force, whichever is later.

(2) In this Order "the 2003 Act" means the Criminal Justice Act 2003.

2. - (1) The categories of offences set out in Parts 1 and 2 of the Schedule to this Order are hereby prescribed for the purposes of section 103(4)(b) of the 2003 Act.

(2) Two offences are of the same category as each other if they are included in the same Part of the Schedule.

## SCHEDULE

### Article 2

#### Prescribed Categories of Offences

### PART 1

#### THEFT CATEGORY

1.An offence under section 1 of the Theft Act 1968[2] (theft).

2.An offence under section 8 of that Act (robbery).

3.An offence under section 9(1)(a) of that Act[3] (burglary) if it was committed with intent to commit an offence of stealing anything in the building or part of a building in question.

4.An offence under section 9(1)(b) of that Act (burglary) if the offender stole or attempted to steal anything in the building or that part of it.

5.An offence under section 10 of that Act (aggravated burglary) if the offender committed a burglary described in paragraph 3 or 4 of this Part of the Schedule.

6.An offence under section 12 of that Act[4] (taking motor vehicle or other conveyance



without authority).

7. An offence under section 12A of that Act[5] (aggravated vehicle-taking).
8. An offence under section 22 of that Act (handling stolen goods).
9. An offence under section 25 of that Act (going equipped for stealing).
10. An offence under section 3 of the Theft Act 1978[6] (making off without payment).
11. An offence of-

(a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in this Part of this Schedule; or

(b) attempting to commit an offence so specified.

## PART 2

### SEXUAL OFFENCES (PERSONS UNDER THE AGE OF 16) CATEGORY

1. An offence under section 1 of the Sexual Offences Act 1956[7] (rape) if it was committed in relation to a person under the age of 16.
2. An offence under section 5 of the Sexual Offences Act 1956[8] (intercourse with a girl under thirteen).
3. An offence under section 6 of that Act[9] (intercourse with a girl under sixteen).
4. An offence under section 7 of that Act[10] (intercourse with a defective) if it was committed in relation to a person under the age of 16.
5. An offence under section 10 of that Act (incest by a man) if it was committed in relation to a person under the age of 16.
6. An offence under section 11 of that Act (incest by a woman) if it was committed in relation to a person under the age of 16.
7. An offence under section 12 of that Act[11] (buggery) if it was committed in relation to a person under the age of 16.
8. An offence under section 13 of that Act[12] (indecenty between men) if it was committed in relation to a person under the age of 16.
9. An offence under section 14 of that Act (indecent assault on a woman) if it was committed in relation to a person under the age of 16.
10. An offence under section 15 of that Act (indecent assault on a man) if it was committed in relation to a person under the age of 16.

- 11.**An offence under section 128 of the Mental Health Act 1959[13] (sexual intercourse with patients) if it was committed in relation to a person under the age of 16.
- 12.**An offence under section 1 of the Indecency with Children Act 1960[14] (indecent conduct towards young child).
- 13.**An offence under section 54 of the Criminal Law Act 1977[15] (inciting a girl under 16 to have incestuous sexual intercourse).
- 14.**An offence under section 3 of the Sexual Offences (Amendment) Act 2000[16] (abuse of a position of trust) if it was committed in relation to a person under the age of 16.
- 15.**An offence under section 1 of the Sexual Offences Act 2003[17] (rape) if it was committed in relation to a person under the age of 16.
- 16.**An offence under section 2 of that Act (assault by penetration) if it was committed in relation to a person under the age of 16.
- 17.**An offence under section 3 of that Act (sexual assault) if it was committed in relation to a person under the age of 16.
- 18.**An offence under section 4 of that Act (causing a person to engage in sexual activity without consent) if it was committed in relation to a person under the age of 16.
- 19.**An offence under section 5 of the Sexual Offences Act 2003 (rape of a child under 13).
- 20.**An offence under section 6 of that Act (assault of a child under 13 by penetration).
- 21.**An offence under section 7 of that Act (sexual assault of a child under 13).
- 22.**An offence under section 8 of that Act (causing or inciting a child under 13 to engage in sexual activity).
- 23.**An offence under section 9 of that Act (sexual activity with a child).
- 24.**An offence under section 10 of that Act (causing or inciting a child to engage in sexual activity).
- 25.**An offence under section 14 of that Act if doing it will involve the commission of an offence under sections 9 and 10 of that Act (arranging or facilitating the commission of a child sex offence).
- 26.**An offence under section 16 of that Act (abuse of position of trust: sexual activity with a child) if it was committed in relation to a person under the age of 16.
- 27.**An offence under section 17 of that Act (abuse of position of trust: causing or inciting a child to engage in sexual activity) if it was committed in relation to a person under the age of 16.
- 28.**An offence under section 25 of that Act (sexual activity with a child family member) if it was committed in relation to a person under the age of 16.

- 29.**An offence under section 26 of that Act (inciting a child family member to engage in sexual activity) if it was committed in relation to a person under the age of 16.
- 30.**An offence under section 30 of that Act (sexual activity with a person with a mental disorder impeding choice) if it was committed in relation to a person under the age of 16.
- 31.**An offence under section 31 of that Act (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity) if it was committed in relation to a person under the age of 16.
- 32.**An offence under section 34 of that Act (inducement, threat, or deception to procure activity with a person with a mental disorder) if it was committed in relation to a person under the age of 16.
- 33.**An offence under section 35 of that Act (causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception) if it was committed in relation to a person under the age of 16.
- 34.**An offence under section 38 of that Act (care workers: sexual activity with a person with a mental disorder) if it was committed in relation to a person under the age of 16.
- 35.**An offence under section 39 of that Act (care workers: causing or inciting sexual activity) if it was committed in relation to a person under the age of 16.
- 36.**An offence of-
- (a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in this Part of this Schedule; or
  - (b) attempting to commit an offence so specified.

## **Appendix D**

### **The case papers from convicted defendants and the issues they raise**

These are the cases of six volunteers who offered their case files for the purpose of this study. All six were convicted, appealed, and lost their appeals. In all six cases counsel advised on grounds of appeal. All six still protest their innocence. Their cases do not prove any proposition advanced in this study, but they do provide evidence of specific areas of concern on the part of those who contest the safety of their convictions and are included as illustrative examples of the concerns identified and explored in this study.

#### ***R v F***

##### **Forensic disadvantage caused to the defendant by a delayed prosecution**

The case of F provides an example of how delay can involve the loss of evidence. F had been convicted of anally raping X as a minor. This case was referred to the CCRC. The CCRC noticed that the original police notebooks were missing, mislaid over the years, so the contents of the notebooks could not be used to challenge prosecution witness inconsistencies.

#### ***R v S***

##### **Heightened public concern as possible influence on jury**

S was tried in June 2001 and convicted of sexual assaults against his two biological children (rape on three occasions and cruelty on four occasions all occurring between 1977-1985). A character witness statement obtained as part of an appeal, suggests that one of the reasons that S was convicted may have been the media vilification of S before his trial. Sarah Payne's death had been highly publicised in July 2000. It was suggested that this extreme case of child abuse was still fresh in the minds of the media and the general public.

#### ***R v W***

##### **Bad character of the complainant**

Prior allegations of CSA made by the complainant against different people (but not proceeded with) were not in this case deemed to be regarded as 'bad character' under section 100 of the Criminal Justice Act 2003.

#### ***R v X***

##### **Bad character of the defendant**

X, a teacher, had been accused of eight counts of sexually assaulting two boys who had been pupils of his in the late 1980s until 1990, when they would have been aged 12 years and onwards. Items of gay pornography seized from the defendant were indicated on a list of exhibits sheet disclosed to the jury. This sheet was withdrawn by the trial judge and those entries partially but not wholly obliterated, with the description of some items remaining visible to the jury, which subsequently convicted him.

## ***R v H***

### **Police trawling operations**

H was a care home employee, arrested by police in 1995 and charged with historic allegations of CSA alleged by six former care home inmates. He was convicted on some allegations and acquitted on others. The jury accepted the allegations of three out of the six complainants and delivered a mixed verdict for which received a four-year prison sentence. The complainants had been identified by the police investigation method of dip sampling, which H maintained had tainted the presentation of the case against him.

## ***R v K***

### **Bad character of the defendant/stale convictions; and claimed collusion of prosecution witnesses:**

Stale previous conviction for CSA was admitted in evidence in his trial; K argued that the case against him was contaminated when he alleged that some, not all, of the complainants had colluded before giving evidence.