The Law Commission's "Structured Discretion" Rape Shield: A Critique

By Dr Matt Thomason[1]

Taking up a Chapter of its own in the Law Commission's mammoth *Evidence in Sexual Offences Prosecutions* Consultation Paper[2] are proposals to reform the admissibility rules for sexual behaviour (née sexual history)[3] evidence (SBE). Though the Law Commission argues that its cornucopia of reform proposals be considered holistically,[4] the reforms to the use of SBE deserve individual scrutiny given their particularly contentious status amongst practitioners, academics, and the public. The current rules, found in ss.41-43 of the Youth Justice and Criminal Evidence Act 1999, have long been argued to be unsatisfactory[5] and, after considering the vast literature on s.41 (including doctrinal,[6] theoretical,[7] empirical,[8] and comparative[9] work), the Law Commission agrees.[10] This article critically considers these proposals to the admissibility of SBE, arguing that they are conceptually and doctrinally muddled, and fail to achieve the stated aims of better protecting both the defendant's fair trial rights and the complainant's privacy rights.

The Law Commission's Aims and Methodology

The Law Commission states at the outset of Chapter 4 that restrictions on the use of SBE are justified primarily because this type of evidence is liable to introduce myths and

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[2] Law Commission, *Evidence in Sexual Offences Prosecutions* (Law Com CP No 259, 2023) (CP 259), Chapter 4.

[3] CP 259, para 4.1 fn1.

[4] CP 259, Chapter 12.

[5] Albeit often for different reasons. Compare Birch and Temkin: Diane Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531; Jennifer Temkin, 'Sexual History Evidence – Beware the Backlash' [2003] *Criminal Law Review* 217; Diane Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] *Criminal Law Review* 370.

[6] Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367; Nick Dent and Sandra Paul, 'In Defence of Section 41' [2017] *Criminal Law Review* 613; Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) *International Journal of Evidence & Proof* 342.

[7] Susan Easton, 'The Use of Sexual History Evidence in Rape Trials' in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000), 174-180; Aileen McColgan, 'Common Law and the Relevance of Previous Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275; John Spencer, '"Rape Shields" and the Right to a Fair Trial' (2001) 60(3) *Cambridge Law Journal* 452; Neil Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27; McGlynn (2017), ibid; Thomason (2018), ibid.

[8] Neil 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' [2005] *Criminal Law Review* 263; Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006); Ruth Durham, Rachel Lawson, Anita Lord and Vera Baird DBE QC (now KC), *Seeing Is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16* (Northumbria Police and Crime Commissioner, 2017); Laura Hoyano, *The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row* (Criminal Bar Association, 2018).

[9] Susan Leahy, 'Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials' (2014) 4 *Irish Journal of Legal Studies* 65; Brian Brewis and Adam Jackson, 'Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework' (2020) 84(1) *The Journal of Criminal Law* 49.

[10] CP 259, paras 4.96-4.97.

misconceptions into the trial which may distort the reasoning of juries,[11] but also because restrictions limit the distress and humiliation that such questioning can cause to complainants.[12] Much later on in the Chapter, the complainant's privacy rights and society's interest in encouraging the reporting of sexual offences are also referred to as additional justifications. Most of this is uncontroversial, so long as the "myths and misconceptions" about rape (and sexual assault) are those which are empirically false rather than "rape myths" which may have some truth to them but are ethically problematic in some way.[13] One of the hallmark justifications for *any* exclusionary rule is to prevent juries misusing evidence,[14] for example through reasoning prejudice (overestimating probative value) or moral prejudice (using the evidence for illogical and illegitimate purposes), and it is now accepted that criminal trials must treat all participants humanely.[15] It is a shame, however, that these justifications are (very briefly) stipulated rather than fully argued for.

Moreover, it is peculiar that the Chapter begins with reasons for restricting SBE, rather than an analysis of the potential relevance (or not) of SBE. The first requirement for evidence to be admissible is that it must be *relevant* to an issue at trial. Only once evidence is relevant do we got on to consider whether an exclusionary rule is justified. Shockingly, this omission is not remedied elsewhere in Chapter 4. Instead of a dedicated analysis of relevance, the Law Commission provides only three examples where they argue SBE could be relevant.[16] None of the examples are critically analysed in terms of the underlying inferential processes that support relevance. Barely less surprising is the discovery that nowhere in the entire Consultation Paper are the overall purposes of criminal adjudication stated or engaged with,[17] and there are only a few paragraphs on the salience and implications of the defendant's Article 6 ECHR right to a fair trial.[18] It is worth noting that in this Consultation Paper the Law Commission makes regular reference to its prior work on bad character which, taking the relevant Consultation Paper as a comparison, analysed the relevance, probative value, and potential prejudice of bad character in depth across

[11] CP 259, paras 4.1-4.2. The Law Commission more fully considers myths and misconceptions in sex offence cases in Chapter 2.
[12] CP 259, para 4.3.
[13] In Chapter 2, the Law Commission considers both types of 'rape myth' as relevant to its project (CP 259, para 2.1), but in Chapter 4 only rape myths which are (generally) empirically false are referred to.
[14] See the Law Commission Consultation Papers on bad character and hearsay: Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com CP No 141, 1996) (CP 141), Chapter 7; Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com CP No 138, 1997) (CP 138), Chapter 6.
[15] Paul Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in Duff, Farmer, Marshall and Tadros (eds), *The Trial on Trial Volume Two – Judgment and Calling to Account* (Hart, 2006); Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3nd edn, Oxford: OUP, 2022), 22-23; Sam Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act 1999: Special Measures and Humane Treatment' (2021) 41 *Oxford Journal of Legal Studies* 1066.
[16] CP 259, paras 4.105-4.107.
[17] As now formally set out in Rule 1 of the Criminal Procedure Rules. Cf. There is brief mention in Chapter 7 concerning special measures: CP 259, para 7.14.
[18] CP 259, paras 4.60-4.67 (there is slightly more analysis of the ECtHR jurisprudence as it relates to SBE at Appendix 2 paras 2.92-2.99). There is also some abstract consideration of Article 6 in Chapter 1: CP 259, paras 1.79-1.89.

three full chapters each dealing with "Guiding Principles".[19] The absence of serious consideration of the purpose(s) of criminal trials, and how the identified Guiding Principles specifically relate to SBE, are significant shortcomings of the Law Commission's approach here and hinder the way they approach the reform task.

Instead of beginning from first principles and building a coherent normative framework through which a new approach to admissibility could be constructed, the Law Commission adopts a comparative approach.[20] Its five selected options for reform are: "a complete ban",[21] "alignment with the bad character provisions",[22] "a restrictive [category-based] approach",[23] "a broad discretion",[24] and "a structured discretion".[25] Jurisdictions which adopt these various approaches are considered, along with related academic commentary and empirical research, in order to determine which is 'best'. However, the lack of proper theoretical groundwork results in a distinct lack of clarity in *how* these different approaches are being compared, and the yardstick(s) by which their relative strengths and weaknesses are being measured. Ultimately, the Law Commission settles (begrudgingly) on "a structured discretion". Few positive arguments are advanced for this conclusion[26] and one gets the impression that it was selected as the least-worst option.

The Proposed Rule of Admissibility

Borrowing liberally from the Scottish[27] and Canadian[28] rape shield provisions, as well as the bad character provisions in the Criminal Justice Act 2003, the Law Commission proposes the following simple rule of admissibility for SBE:

> Sexual behaviour evidence should only be admissible if:
>
> 1) the evidence has substantial probative value; and
> 2) its admission would not significantly prejudice the proper administration of justice.[29]

These two steps are cumulative. The first task is to determine whether the evidence has substantial probative value (SPV). Only once evidence has that SPV will the judge be required to consider the second step, concerning the potential for the evidence to significantly prejudice the proper administration of justice.

To provide some "structure" to this broad two-step test, the Law Commission argues that the judge should be directed to consider specific factors in determining each step of the test. Unlike the two-step test, which is framed as a concrete proposal, the Law

[19] CP 141, Chapters 6-8.
[20] CP 259, paras 4.98-4.166.
[21] CP 259, paras 4.99-110.
[22] CP 259, paras 4.11-113. From their analysis, it appears that the Law Commission takes 'alignment' with s.100 of the Criminal Justice Act 2003 to mean that the rules should be exactly the same. They did not consider 'alignment with the hearsay provisions, as proposed by Marsh and Dein: L Marsh and J Dein KC, 'Serious Sex Offences in England and Wales' in R Killean, E Dowds and AM McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (Abingdon: Routledge, 2021).
[23] CP 259, paras 4.114-124.
[24] CP 259, paras 4.125-137.
[25] CP 259, paras 4.138-166.
[26] CP 259, paras 4.160. Likely another consequence of the lack of proper Guiding Principles.
[27] Criminal Procedure (Scotland) Act 1995, ss.274-275B.
[28] Criminal Code (Canada), s.276.
[29] CP 259, para 4.196.

Commission is less sure as to what these factors should be, and how they should relate to the two stages of the main admissibility test above. It tentatively suggests four factors as applying to both stages, inviting views as to whether these four are appropriate and whether any other factors should be included (including whether the list should be exhaustive or not). The proposal is as follows:

> When the judge is deciding whether sexual behaviour evidence:
>
> 1) has substantial probative value; and
> 2) its admission would not significantly prejudice the proper administration of justice,
>
> and therefore can be admitted… [the judge must consider:]
>
> a) protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights;
> b) the interests of justice including the defendant's right to a fair trial;
> c) the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions; and
> d) the risk of introducing or perpetuating myths or misconceptions.[30]

An initial difficulty in considering this proposal is the indeterminate application of the factors. As currently worded in Consultation Question 20, the Law Commission is asking whether any of the four factors should apply to both stages of the test. However, in the main text of the Consultation Paper, the Law Commission suggests they would apply only to part 2).[31] Here I will consider whether the factors should apply to either stage.

Step 1: Substantial Probative Value

One stated aim in constructing the new test is to ensure that the current bar for admissibility, where SBE (s.41 YJCEA 1999) is more difficult to lawfully admit at trial than non-defendant bad character evidence (s.100 CJA 2003), remains at the same level.[32] It is therefore peculiar that part 1) of this test, that the evidence must be of SPV, is borrowed directly from s.100(1)(b) but without its additional requirements that the evidence's SPV must relate 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

By omitting these additional words from s.100(1)(b), the Law Commission's SBE proposal leaves open the question as to what issue(s) the SBE must be substantially probative *of*. By implication, the issue need not be one that is of substantial importance in the case: it can be any issue in the case at all. This ironic error therefore renders part 1) of the test easier to satisfy than its bad character counterpart, contrary to the Law Commission's stated intentions. This is easily remedied by including the omitted parts above and would sensibly require judges and counsel to focus their minds on the particular issue(s) to which

[30] CP 259, para 4.197.
[31] CP 259, paras 4.176-4.190.
[32] CP 259, para 4.168-4.169.

the SBE is allegedly relevant, and further limit the use of SBE to those issues which are material to the case.

It is worth considering here whether the complainant's credibility, as an issue in the case, should be specifically referred to in the proposed rule. In the current s.41(4) YJCEA 1999, SBE relevant to the complainant's credibility is not admissible unless it is being used to rebut prosecution evidence via s.41(5). This provision was inserted to prevent counsel using SBE in gratuitous character attacks, on the basis that SBE is almost always irrelevant to the ability of a witness to be truthful. The problem is with the word "almost", as there *are* situations where SBE *may* be relevant to credibility. The most obvious example relates to prior false allegations,[33] where the complainant has made an allegation of sexual assault relating to a sexual incident which in fact was consensual. Of course, the important part of this evidence is the lie (which may amount to perjury if written in a sworn witness statement, or given in live evidence at trial), but this is not properly explainable without referring to the context in which the lie took place. As it is currently written, the Law Commission's proposal does not make any special provision for SBE relevant to complainant credibility. Given the "folly"[34] of attempting to pre-empt relevance this is sensible, but it may alarm some when combined with the following observation.

The greatest concern with step 1) of the proposed test, and not so easily remedied as the "issues" point, is the complete lack of structure given to judges and counsel to assist in their analysis of the relevance and probative value of SBE. It is unsurprising that there is no guidance given on this. As was noted above, the Law Commission itself did not engage in any sustained analysis of the potential relevance and probative value of SBE, and so had no basis on which to propose structured guidance. However, guidance on reasoning using SBE is surely vital as the potential for illogical or misconceived chains of reasoning involving SBE being referred to at trial is identified as the primary justification for restrictions.[35] Once again, the proposed reforms here compare poorly to the non-defendant bad character provisions, which provide some guidance in s.100(3) CJA 2003 as to how to determine whether evidence has SPV for the purpose of the rule in s.100(1)(b). It is not being suggested here that the guidance be identical to that given in s.100(3) CJA 2003, but it may be used as a starting point from which to develop guidance that is more specifically tailored to SBE.

In terms of the four factors listed in the proposed rule, none assist in a positive analysis of probative value.[36] However, factor d) may well have value in requiring practitioners to question whether their arguments concerning the probative value of SBE

[33] CP 259, paras5.166-5.225. Further consideration of the applicability of the new SBE rule to evidence of prior false allegations, as is proposed by the Law Commission, is beyond the scope of this article.
[34] Birch (2002), fn. 5 above, 534. See also Roberts (2022), fn. 15 above, 497.
[35] CP 259, paras 4.1-4.2.
[36] Factor b), the defendant's right to a fair trial, may justify the admission of SBE which is of SPV, but it does little to guide the initial assessment as to the probative value of that evidence.

are founded on myths and/or misconceptions, or instead rely on sound inferential reasoning. As it is currently drafted, judges are directed to consider any and all myths and misconceptions. This has a major benefit: as misconceived beliefs about rape and sex evolve over time, a fixed list of examples would eventually become out of date. Even so, without any examples or further guidance judges and counsel (and appellate courts) are left to determine for themselves whether a belief qualifies as a myth or misconception, a task for which they may be ill equipped to take on. Any list of examples or additional guidance would need to be non-exhaustive to retain the benefit of the provision being future-proof. It is here where a specific reference to complainant credibility may also be included, for example: guidance could specify that SBE will only have SPV to complainant credibility if the evidence has a logical inferential link to the complainant's propensity for dis/honesty.[37]

Step 2: Significant Prejudice to the Proper Administration of Justice

The intention seems to be that, once the high hurdle in part 1) has been passed, the judge is invited in part 2) to balance a variety of factors, both in favour of admission and exclusion, in determining whether admission would significantly prejudice the proper administration of justice.[38] In terms of the four suggested factors, this essentially pits b) (the defendant's right to a fair trial) against the other three factors (complainant's rights to privacy, encouraging complainants to support prosecutions, and the risks of introducing myths/misconceptions).

This is quite an illogical way of structuring a decision. One only gets to step 2) once one has already determined that the evidence has *substantial* probative value. This is not an insignificant task given that SBE, though perhaps often relevant at a basic level,[39] is usually considered to be of relatively low probative value.[40] Assuming it is defence evidence, then generally speaking it is axiomatic that exonerating evidence of SPV is required to be admitted for the defendant to receive a fair trial (and, as such, is also in the interests of justice). Therefore, factor b) will always be satisfied and so adds little, if any, independent value to the balancing exercise. Moreover, once the first SPV standard has been met, the evidence will only then be excluded if it would not *significantly* prejudice the administration of justice. The evidence will therefore be admissible if it prejudices the administration of justice a little bit, or perhaps even a moderate amount. This does not give the impression of a particularly high standard of admissibility, as is intended.

[37] This point concerns "general credibility". The legislation would also need to permit the admissibility of SBE which goes to rebut "specific credibility", such as where the complainant lies in evidence about their past sexual behaviour and SBE may be relevant in showing that they are willing to lie under oath. On the relationship between the two forms of credibility see: Thomason (2018), fn. 6 above, 351-352; Roberts (2022), fn.15 above, 371-373.
[38] LC CP 259, paras 4.176-4.190.
[39] Thomason (2018), fn. 6 above.
[40] There is often slippage in the literature, where commentators who argue that SBE is "irrelevant" are better interpreted as arguing that it is of low probative value. See for example: McColgan (1996), fn. 7 above.

A more workable interpretation of the proposed rule is to see it as requiring a balance *between* parts 1) and 2). Though not an exact analogue, this would require analysis along the lines of the common law "probative value must outweigh prejudicial effect" (PV>PE) test which applies to prosecution evidence.[41] For example, the rule may require evidence be excluded if, despite its SPV, this is outweighed by its potential prejudicial effect. Rules of evidence requiring judges to balance the probative value of evidence against its potential prejudice are relatively common, though in almost all cases they apply only to prosecution evidence.[42] In the prosecution context, these balancing exercises acknowledge that convictions should not be sought at all costs, as there are other values which criminal trials are meant to protect and uphold,[43] and are intended to assist in protecting against wrongful convictions.[44] It is less clear how this sort of balancing exercise is meant to apply when the evidence in question is *exonerating* evidence being adduced by the defence, though the remaining listed factors for the judge to consider give some clues.

The first consideration is the "protection of the complainant's dignity, respect for the complainant's private life and the complainant's legal rights." As previously discussed, these concerns are factors which motivate the existence of an exclusionary rule dealing with SBE. The questioning of a sexual offence complainant about their sexual past is by definition invasive, and certainly engages their right to respect for private life under the ECHR. [45] The Law Commission's proposal explicitly requires judges to balance the defendant's right to a fair trial against the complainant's right to privacy in what Sanders has referred to as a rare, but genuine, "zero-sum game."[46] This means that there is no way in which the criminal trial can properly protect both the complainant's privacy rights *and* the defendant's right to a fair trial, and that there must be trade-offs. A similar balancing is required by the Canadian legislation. In her analysis of the Canadian case law, Leahy argues that judges also see this balancing exercise as a zero-sum game, and as a result

[41] See *R v Christie* [1914] AC 545 (HL); *R v Sang* [1980] AC 402 (HL); Roberts (2022), fn. 15 above, 79-80.
[42] See the rules relating to defendant bad character (section 101(3) of the Criminal Justice Act 2003) and the common law "PV>PE'" discretion (*Christie*, ibid, and *Sang*, ibid). A similar balancing exercise is required for the court's residual power to exclude hearsay, though this applies to all parties (section 126 of the Criminal Justice Act 2003).
[43] This is formalised in Rule 1 of the Criminal Procedure Rules. For further discussion see: Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007), Part II; Roberts (2022), fn. 15 above, 19-24.
[44] Roberts (2022), ibid, 27. The term "wrongful conviction" is here meant in both senses of the term: the conviction of innocents, and convictions obtained by unfair processes; see: Michael Naughton, 'Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction' (2005) 45 *British Journal of Criminology* 165; Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer' (2007) 70 Modern Law Review 759.
[45] ECHR, Art 8; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546 [46] (Lord Steyn); Mary W Stewart, Shirley A Dobbin and Sophie I Gatowski, '"Real Rapes" and "Real Victims": The Shared Reliance On Common Cultural Definitions of Rape' (1996) 4(2) *Feminist Legal Studies* 159, 165; Eamon Keane and Tony Convery, *Proposal for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (2020), 16 https://www.law.ed.ac.uk/research/impact-and-engagement/sexual-offences-complainers-report citing *Y v Slovenia* [2016] 62 EHRR 3.
[46] Andrew Sanders, 'Involving Victims in Sentencing: A Conflict with Defendants' Rights in Ed Cape (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004), 99.

the defendant's right to a fair trial seems to always prevail.[47] This is inevitable. Remember that judges will only need to consider the complainant's right to privacy once the SBE has already been determined to be of *substantial* probative value. It is difficult to imagine situations where trial judges will then go on to decide that the complainant's right to privacy overrides the defendant's right to adduce the substantially probative SBE, the consequence of which would be to increase the risk of a wrongful conviction.

The inclusion of a "complainant's dignity/privacy" factor is therefore unlikely to have much, if any, influence over admissibility determinations. It may well serve an expressive function, but equally its inclusion is likely to provide false hope to complainants seeking the exclusion of their SBE,[48] leading to even further disillusionment with the criminal process. In this author's view, it would be better to omit this factor entirely.[49] Trial judges are not necessarily best placed to undertake this balancing exercise; rather this should be the role of the Law Commission (and, ultimately, the legislature) in formulating the rule of evidence. A rule which ensures that the only SBE which is admitted at trial is that which is of SPV to issues which are substantially important in the case, and provides clear guidance to counsel and trial judges on how to determine this, will have the *effect* of protecting complainants' dignity and privacy rights even if it is not explicitly referred to.

The remaining factor suggested for judges to consider is "the benefits of encouraging victims to report and provide evidence for sexual assault prosecutions." The rationale behind this factor relates to the belief that complainants are less likely to report sexual offences (and/or support the prosecution) if they are at risk of being cross-examined on their sexual past, which can ultimately lead to the criminal justice system losing legitimacy.[50] Brewis and Jackson[51] and McGlynn[52] share the view that this factor should be included, despite the fact that there is little evidence beyond anecdote that there is a real deterrent effect here. Whatever the rules of evidence are, it seems more likely that Hoyano is correct that any deterrent effect, if there is one, is more properly attributed to sensationalist and misrepresentative media reporting on sex offence trials.[53]

On the substance of the argument, this author's objection to this factor is noted in the Consultation Paper itself.[54] To borrow a phrase from Spencer, used in relation to s.41, it is "nothing short of monstrous"[55] to suggest that a current defendant's liberty must be

[47] Leahy (2014), fn. 9 above, 87-91.
[48] Which they will be able to do if the Law Commission's proposals concerning independent legal representation are enacted: CP 259, Chapter 8.
[49] This position is slightly different to the one I initially presented to the Law Commission (CP 259, para 4.150). This will be fully explained in a forthcoming article.
[50] CP 259, para 4.187. See also: Zsuzsanna Adler, *Rape on Trial* (London: Routledge & Keegan Paul, 1987); Stewart et al (1996), fn. 45 above.; Jenny McEwan, *The Verdict of the Court: Passing Judgment in Law and Psychology* (Oxford: Hart, 2003).
[51] Brewis and Jackson (2020), fn. 9 above.
[52] Clare McGlynn, 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' [2018] *Criminal Law Review* 216.
[53] Hoyano (2018), fn. 8 above, paras 139-141.
[54] CP 259, para 4.186.
[55] Spencer (2001), fn. 7 above, 454.

balanced against the potential future interests of complainants (or anyone, for that matter). This rabid consequentialism uses the defendant as a means to an end, and is antithetical to any rational, liberal conception of criminal process.[56] Like the privacy factor, it is difficult – if not impossible – to imagine scenarios where trial judges would use this factor to exclude SBE which has been already found to have SPV, and the Law Commission acknowledges this.[57] To do so would be to accept the increased risk of a wrongful conviction in pursuit of some policy goal extrinsic to the concerns of the present trial. Assuming we remain committed to the presumption of innocence as a fundamental component of the defendant's fair trial rights, this factor must be excised from the proposal. If there is a genuine concern about deterring complainants from engaging with the criminal process (which is not clear, on the existing evidence), then it can only perhaps justify restrictions on sex offence case publicity,[58] but not the admission of evidence itself.

The Scope of the Rule

In addition to changing the substance of the rule of admissibility, the Law Commission makes several reform suggestions targeted to the scope of the rule.

Definition of "Sexual"

The current rule in s.41 YJCEA 1999 applies to evidence of "sexual behaviour or other sexual experience[s]", where the term "sexual" is not further defined. The open-ended nature of this definition has led to a few strange decisions. In *Mukadi*,[59] the defendant sought to question the complainant regarding her behaviour before meeting him that night, where she was alleged to have got into a stranger's car and was driven around by him, though no sexual activity occurred. The trial judge held that the complainant getting into the stranger's car qualified as "sexual behaviour" as there was further testimony from the complainant regarding her (potentially sexual) intentions when getting into the stranger's car.[60] A similarly odd ruling is found in *Ben-Rejab*.[61] The complainant had answered questions to several quizzes on Facebook with titles such as: "Best places to have sex around the house", "How good are you in bed?" and "What's your sexual style". In holding that answering questions to these quizzes qualifies as sexual behaviour, Pitchford LJ reasoned thus: "What motive can there have been when engaging in the activity of answering sexually explicit questions unless it was to obtain sexual pleasure from it?".[62] In the context of how social media are used and consumed, this is naïve.[63] The Law

[56] Roberts (2006), fn. 15 above,; Mike Redmayne, 'Theorizing the Criminal Trial' (2009) 12 New Criminal Law Review 287; Ho Hock Lai, 'Liberalism and the Criminal Trial' (2010) 32 *Sydney Law Review* 243.
[57] CP 259, para 4.187.
[58] Elsewhere, the Law Commission makes proposals about limiting the public gallery in sex offence trials: CP 259, paras 7.168-7.192.
[59] *Mukadi* [2003] EWCA Crim 3765, [2004] Crim LR 373.
[60] Ibid, [16] (Sir Edwin Jowitt). The Court of Appeal at [17] did not feel it was required to decide whether the activity was properly considered "sexual behaviour", though they clearly thought it was possible.
[61] *Ben-Rejab and Baccar* [2011] EWCA Crim 1136, [2012] 1 WLR 2364, [2012] 1 CrAppR 1256
[62] Ibid, [35] (Pitchford LJ).
[63] For general criticism of this case and the use of social media posts as evidence more generally, see: Micheál O'Floinn and David Ormerod, 'Social Networking Material as Criminal Evidence' [2012] *Criminal Law Review* 486.

Commission appears relatively unphased by such oddities, noting that a wide definition of "sexual" allows the exclusionary rule to capture more evidence and therefore better protect complainants.[64] Though apparently unconvinced by the necessity for reform, the proposal is nonetheless floated as to whether the definition of "sexual" from s.78 of the Sexual Offences Act 2003 should apply.[65] In this author's view this would be beneficial, not for reasons of widening or tightening the scope of the rule, but for bringing greater clarity to the rule and therefore increasing consistency in application.

Elsewhere, the potential for the rule to apply to behaviour which is not sexual, but may give rise to similar concerns than SBE, is also raised. For example, evidence of the complainant's clothes, or that they were dancing provocatively. The analysis offered by the Law Commission is insufficient to justify an expansion of the rule to these additional forms of evidence. No evidence of illegitimate trial tactics in England and Wales is cited in support of this argument. Instead, an exhibition staged at the University of Hertfordshire is cited for the claim that there is a *perception* in public discourse that rape victims are shamed for wearing "provocative" clothing.[66] Evidence of perception is not evidence of reality, and the rule of evidence should not be widened unless there is robust empirical evidence or convincing normative argument in support.

Relationship Evidence

One of the more unexpected proposals concerns how to deal with "relationship evidence" (i.e. evidence of a sexual relationship between the complainant and the accused). The Law Commission accepts criticisms that the current s.41 – if applied strictly – unfairly limits the ability of the accused to refer to his or her past relationship with the complainant.[67] Its solution is to remove relationship evidence from the scope of the rule entirely, where it is used "only" as background or explanatory evidence.[68] The consequence of which is to permit the admissibility of relationship evidence on a bare relevance standard.

The primary restriction is the requirement that counsel will need to convince the trial judge that the *only* relevance of the evidence is to background. This may be very difficult. It is extremely rare for evidence to be relevant to one issue only. Relationship evidence may explain the connection between the defendant and complainant but, at minimum, it will often also go to the two individuals' states of mind towards each other during the alleged assault. A more workable draft might borrow from the current s.41(4) and apply to evidence where the purpose "(or main purpose)" is to go to background, which would permit the use for evidence where the primary purpose is as background, but

[64] CP 259, para 4.208.
[65] CP 259, para 4.221.
[66] University of Hertfordshire "University of Hertfordshire exhibition tackles sexual assault myth" (29 October 2021), cited in CP 259, para 4.212 fn309.
[67] Kibble (2001), fn. 7 above; Birch (2002), fn. 5 above; Kelly et al (2006), fn. 8 above, 76; Thomason (2018), fn. 6 above.
[68] CP 259, paras 4.222-4.228.

which may have incidental relevance to other issues.

It remains the case, however, that the dangers of SBE (risk of jury prejudice, complainant privacy rights etc.), though lessened, do not entirely evaporate where the evidence concerns the defendant and complainant. It is perhaps for this reason that the Law Commission invites responses as to whether relationship evidence used for background should be subject to any restrictions independent of the main exclusionary rule for SBE. It is here obviously querying whether a rule similar to the one in ss.100(1)(a) and 100(2) CJA 2003 should be put in place. That rule, which applies to non-defendant bad character evidence, admits "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.

In order to prevent the creation of, what could be, a substantial loophole, it seems sensible that relationship evidence should be subject to some sort of heightened admissibility requirement, and not left on a bare relevance standard. Otherwise, it may be that the evidence is subject to the "when it's in, it's in"[69] principle where, once admitted, evidence may be used by the factfinder for any purpose for which it is relevant (even those which were not within the articulated purpose(s) in seeking the evidence's admission). To remedy this, section 100(1)(a) is a perfectly sensible template, which may be improved with one minor alteration. There is some empirical evidence that the word "impossible" creates too high a barrier to admissibility here (despite the fact that "difficult" is provided as an alternative),[70] and so this could be removed.

Applies to All Offences

Most of Consultation Paper 259 is spent proposing new rules of evidence and procedure for sex offence trials which, if all enacted, would create drastic differences in how sex offence trials run as compared to trials for other offences. Against that tide, in Chapter 4 the Law Commission questions whether the new SBE rule should apply to all offence types.[71] This is based on the proposition that any non-sexual offence may potentially contain a sexual element (e.g. motive), and that the risks associated with SBE are similar whenever it is used. Like some other elements of the reform proposals, this is phrased as a genuine question for consultation (Consultation Question 26) rather than a proposal inviting comment.

Prima facie, this seems a sensible suggestion. The Law Commission is correct that any list of offences to which the rule would apply would inevitably be underinclusive,[72] and

[69] J Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), para 5.62.
[70] Matt Thomason, 'Non-Defendant Bad Character and s. 100 of the Criminal Justice Act 2003: A Socio-Legal Analysis of Admissibility Gateways and Trial Tactics' (2023) 27 *International Journal of Evidence & Proof* 26, 31-33.
[71] CP 259, paras 4.229-233.
[72] For the same reasons that a 'category-based' rule of evidence is rejected: CP 259, paras 4.114-124.

whenever SBE is used there is the potential for prejudice. A heightened admissibility threshold across all offences may therefore be justifiable. Given that most myths and misconceptions concerning SBE relate to the issues of consent and beliefs in consent, it seems likely that in practice the rule will be easier to satisfy in non-sex offence cases and will not impose a particularly onerous burden on the party seeking admission. A significant practical difficulty arises, however, when this is combined with the separate proposal to give sex offence complainants independent legal advice and representation. In Chapter 8, the Law Commission propose that complainants be allowed to consult a lawyer and have them make representations on their behalf in applications to admit SBE.[73] It is not made clear whether this proposal would apply to SBE applications in *all* offence types or, as is implied by the analysis in Chapter 8, to SBE applications in sex offence trials only. Neither option is particularly attractive. The former would significantly increase the resource burden for the independent legal representation project and raises difficult questions concerning why SBE is being singled out in this way. If the complainant is able to object to SBE through counsel, they may think it inconsistent[74] if they are not equally able to object to, for example, their previous convictions being admitted or any other evidence which raises privacy concerns. The latter would revive the problem which this very proposal is intending to eliminate, by allowing the complainant to object to SBE in some cases but not others.

Applies to the Prosecution

The final proposed reform to the scope of the SBE rule is that it should no longer apply only to the defence, but also to the prosecution. Normatively, there are fewer objections to limiting prosecution evidence. Though most evidential restraints on the prosecution are intended to prevent unfairness to the defendant,[75] some rules can be justified by reference to other values such as protecting the integrity and legitimacy of the process.[76] Moreover, as the Law Commission makes clear, the "equality of arms" principle has particular force here.[77] Whomever seeks the admission of the evidence the risk of juror prejudice arises,[78] and the complainant's privacy rights are equally engaged.

In principle, this seems correct, but, as with the prior proposal, it may well cause difficulties in practice. Though not the complainant's representative, in the two-party

[73] CP 259, paras 8.137
[74] And they may well be right.
[75] For example the rules concerning defendant bad character (s.101 CJA 2003), coerced confessions (s.76 PACE 1984), and the general power to exclude unfair evidence (s.78 PACE 1984).
[76] Though most exclusionary rules have multiple underlying rationales, entrapment evidence is often cited as a primary example of evidence excluded on integrity grounds: Duff et al (2007), fn. 43 above, chapter 8; Robert M Bloom and David H Fentin, '"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule' (2010) 13 University of Pennsylvania Journal of Constitutional Law 47; Peter Chau, 'Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials' in Jill Hunter, Paul Roberts, Simon NM Young and David Dixon (eds), *The Integrity of Criminal Process* (Hart, 2016).
[77] CP 259, para 4.242.
[78] Though it seems more likely to arise where the defence seek its admission.

adversarial system the prosecution and complainant are on "the same side". The proposal disrupts this and will inevitably lead to situations where the complainant is at odds with the prosecution. Consider the following scenario:

> The complainant alleges that the defendant, with whom she was in a long-term relationship, dragged her into the toilets of a nightclub they had visited together and raped her. The prosecution seeks to admit evidence that on all occasions other than the incident in question, the complainant and defendant had (consensual) sexual intercourse in bedrooms at their respective homes, and never had sex outside or in any public space. The relevance here is to support the complainant's claims of non-consent (it was not a "normal" sexual encounter between them) and rebut any suggestion of the defendant's reasonable belief in consent. The complainant comes from a strict religious background and does not want her sexual past to be revealed in open court to her family and friends.

Here, the interests of the prosecution (to obtain a conviction) and the complainant (to keep her sex life private) conflict. Under the Law Commission's proposals, the complainant would be able to object to the prosecution's application and instruct independent counsel to argue against admission. There seems to be no positive outcome here, whatever is decided. If the evidence is admitted (the prosecution "wins"), then the complainant will likely feel alienated and potentially perceive both the prosecution and defence as being against her, perhaps to the extent that she refuses to cooperate further. If the evidence is excluded (the complainant "wins"), then the prosecution will be aggrieved with their main witness and the likelihood of obtaining a conviction will be reduced. Meanwhile, the defence can simply watch on at the in-fighting. Criticisms of independent legal representation for complainants focus on the "2 v 1" scenario in terms of the defence facing two opposition,[79] but it is equally plausible that the complainant will end up being the "1" in many cases.

This may not be merely an optics problem. Though this author is sceptical, if the Law Commission is concerned about the rules of evidence potentially discouraging future complainants reporting offences, then surely the prospect of complainants arguing against both the prosecution *and* defence during trials has equal, if not greater, potential to deter engagement with the criminal process? Researchers suggest that complainants already feel like the English and Welsh criminal justice system is against them;[80] this would formalise that feeling.

Still Only Applies to the Complainant

One question not considered anywhere in Chapter 4 is whether the SBE rule should apply to the defendant as well as the complainant. Or, indeed, whether it should apply to other witnesses or non-witnesses. If there are risks of prejudice in terms of juror reasoning and bias with evidence of a sexual nature, then these risks arise to whomever the evidence

[79] CP 259, paras 8.68-8.87.
[80] Vanessa E Munro, 'A Circle That Cannot be Squared? Survivor Confidence in an Adversarial Justice System' in Miranda AH Hovarth and Jennifer M Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (Abingdon: Routledge, 2023).

relates (though perhaps to differing extents). Similarly, if sexual matters are considered to raise privacy rights concerns, then these also apply to all individuals involved in a criminal trial.

There is not the space here to consider this question in great detail, but there are some myths and misconceptions relating to men which justify at least putting this on the Law Commission's agenda. For example, beliefs which rely on generalisations and stereotypes concerning heterosexual masculinity,[81] such as men usually being sexual instigators and are "always in the mood",[82] may operate prejudicially against a male defendant if relied on by the prosecution through evidence of that particular defendant's extensive sexual history.[83]

Conclusion: How Did We Get Here, and Where to Go Now?

The Law Commission's proposed reforms to SBE/s.41 must be understood as merely one aspect of the full Consultation Paper which, in addition to rules of evidence, considers such diverse topics as disclosure, special measures, independent legal advice and representation for complainants, judicial directions, counsel's speeches, and juries. The Law Commission appears to have been somewhat bound by its Terms of Reference, which require it to examine the entire trial process as applied to adult sex offences.[84] In doing so, despite its gargantuan size (over 700 pages) the Consultation Paper is unfortunately unable to do justice to each topic. Concerning chapter 4, the subject of this article, one cannot help but compare the 70 pages here to the Consultation Papers on bad character (over 300 pages)[85] and hearsay evidence (over 270 pages).[86] Given its complexity and controversy, full consideration of how SBE should be treated in criminal trials needed a Consultation Paper of comparable depth, breadth and, indeed, length. This is true of most other topics discussed in the Paper, each of which is worthy of its own independent project.

Taking the critiques provided in this article together, it is abundantly clear that much more work needs to be done in order to produce a rule of admissibility for SBE which both achieves its intended aims and is practically workable (whether considered independently or in combination with other reform proposals). It is hoped that this article provides some guidance as to what that work should entail. Practitioners, academics, and all interested parties must take the Consultation Paper seriously and constructively engage in the reform process. The stakes are high, but defendants and complainants in sex offence cases

[81] For discussion of 'heterosexual double standard beliefs', see Joyce J Endendijk, Anneloes L van Baar, and Maja Deković, 'He is a Stud, She is a Slut! A Meta-Analysis on the Continued Existence of Sexual Double Standards' (2020) 24(2) *Personality and Social Psychology Review* 463.
[82] This belief has recently been challenged in the pop-psychology book: Sarah H Murray, *Not Always in the Mood: The New Science of Men, Sex, and Relationships* (Washington DC: Rowman & Littlefield, 2019).
[83] The relationship between 'sexual scripts' (culturally determined "prototypes" for how sexual events normally occur) and rape myths is helpfully explained by Katherine Ryan, though she focuses on scripts relates to women: Katherine M Ryan, 'The Relationship between Rape Myths and Sexual Scripts: The Social Construction of Rape' (2011) 65 *Sex Roles* 774.
[84] CP 259, paras 1.7-1.9.
[85] CP 141.
[86] CP 138.

deserve nothing less.