THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.70002

Rethinking Reasonableness in Rape Prosecution: Lessons Learned in the Search for 'End to End' Justice in England and Wales

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Across several legal jurisdictions, the history of rape investigation and prosecution is one replete with points of crisis and condemnation, leading to high-profile reviews and reform. This article draws on original data that explores prosecutorial processes and decision-making in the context of a recent improvement initiative in England and Wales, known as 'Operation Soteria'. Though identifying some signs of progress in the context of this initiative, the authors focus on decision-making in respect of lines of investigative enquiry, belief in consent and prospects of conviction to highlight the malleability of the thresholds of reasonableness upon which case progression is determined. Demonstrating that misconceptions about sexual violence and assessments of evidence based on privileged perspectives too often continue to inform the processes and outcomes of prosecutorial engagement, the article reflects on the prospects for rape justice.

INTRODUCTION

The criminal law in liberal-democratic societies is presumed, or at least purported, to be populated by 'reasonable' people, both in terms of the citizens who are subject to legal power and the officials tasked by the state with its design and enforcement. Transgression reflects a failure to conform to expected standards of reasonable behaviour, which – when accompanied by an appropriate degree of intention, recklessness or malice – attracts censure and punishment. As Naffine and Owens put it, 'law has always assumed and constituted a subject who is deemed to act in certain ways, to wield certain rights and to assume certain responsibilities' and it 'has engaged in this act of creation quite self-consciously'.[1] But at the core of this process is a tension: the rationality of

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1 Ngaire Naffine and Rosemary Owens, 'Sexing Law' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (London: Sweet & Maxwell, 1997) 7; Ngaire Naffine, 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71.

law and of the legal subject is both a requirement and an impossibility, given historical and social limits of reasoning processes.[2] The characteristics attributed in law to the 'reasonable person', and the wider concept of 'reasonableness' on which those are grounded, have become a focus of critique, particularly by those who maintain that – despite being presented as universal – these standards are partial, exclusionary, and reflect the perspectives of the historically empowered.

This article deploys that critique of reasonableness in the context of the contemporary investigation and prosecution of adult rape complaints in England and Wales. In so doing, it builds on previous feminist work, across jurisdictions, which has exposed the ways in which abstract concepts of reasonableness, rationality and relevance, and their interpretation by justice professionals and/or jurors, has presented barriers to rape justice. It provides an original and important contribution to those discussions by drawing on a unique level of access to current prosecutorial attitudes, procedures and outcomes, tracing in detail the functioning of reasonableness criteria at key stages of the criminal justice process. Situating that analysis against the backdrop of recent improvement initiatives amongst police and prosecutors, implemented to redress a high-profile crisis in public and professional confidence in the handling of rape cases, this discussion also affords a particularly timely reflection on the limits of law and policy reform when operationalised in cultural or structural environments resistant to change.

In the next section, we set the scene of rape prosecution in England and Wales. This is a scene dominated by concern regarding the inadequacy of responses to adult rape complaints, leading to the programme of activity across policing and the Crown Prosecution Service (CPS) – known as 'Operation Soteria'[3] – that forms the backdrop to our analysis. In the third section, we explore the critique of reasonableness thresholds as a particularly significant barrier to rape prosecution, situating that discussion in the context of international concern about the intractability of rape injustice and relative failure of successive efforts at substantive law reform to bring meaningful progress. In the fourth section, we outline the data to which we had access during our fieldwork and the ways in which Operation Soteria can be understood as involving an effort to revise how the concept of reasonableness is evaluated and deployed by professionals in rape cases. In the fifth section, we detail our key findings regarding prosecutors' assessments of reasonableness across three distinct but related aspects, namely (i) reasonableness of lines of investigative enquiry; (ii) reasonableness of belief in consent harboured by the accused; and (iii) reasonableness of prospects for conviction.[4] We demonstrate that, while Soteria introduced some promising initiatives, prosecutors often continued to

2 Alan Norrie, *Crime, Reason and History* (Cambridge: CUP, 2014) 12.

3 See Crown Prosecution Service, 'Rape Strategy Update' (CPS, February 2022) at https://www.cps.gov.uk/publication/rape-strategy-update [https://perma.cc/55E8-NSA6].

4 Although, in England and Wales, the Code for Prosecutors has reformulated the test from one of 'reasonable' to 'realistic' prospect of conviction, the significance of the distinction has been marginal, and it was the former term that was deployed by our criminal justice participants.

rely on poorly informed or prejudiced perspectives, masked under a rhetoric of reasonableness, with the malleability of what counts as 'reasonable' also leading to inconsistency. Deploying the role and remit of reasonableness as a looking glass, we reflect on wider issues about the potential for, and resistance to, progressive and systemic sexual offences reform. In the conclusion, we consider the challenges and opportunities for meaningful improvement in a sexual offences process anchored to the concept of reasonableness, and the prospects for Soteria's ambition to achieve 'end to end' rape justice.

THE GROUND ON WHICH WE STAND: THE INTRACTABILITY OF RAPE INJUSTICE

In civil and common law jurisdictions alike, the history of criminal investigation and prosecution of rape is one replete with points of crisis and condemnation, leading to high-profile reviews and reform.[5] These have often failed, however, to bring significant change to the entrenched systems and professional norms that frame justice responses, leaving the status quo fundamentally intact to await the next cycle. Indeed, they have co-existed alongside persistent – even widening – 'justice gaps'[6] for rape complainants, prompting the conclusion that 'meaningful progress in respect of rape justice has been painfully slow, with survivors often continuing to recount journeys marked by scepticism, disempowerment, re-traumatisation, and disillusionment'.[7]

The past two decades in England and Wales can be seen to reflect this trajectory in a particularly pronounced way. Following the Government's 'Setting the Boundaries' review in 2000, which promised to modernise sexual offences law and render it fit for the 21st century, the Sexual Offences Act 2003 was passed.[8] Amongst other things, this provided – for the first time – a legislative definition of consent, and one that focussed on the need for a person

5 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Belfast: Department of Justice, 2019); NSW Law Reform Commission, *Consent in Relation to Sexual Offences* NSW, Law Reform Commission, Report 148 (September 2020); Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury: University of Canterbury Press, 2020); Scottish Court and Tribunal Service (SCTS), *Improving the Management of Sexual Offences Cases, Final Report from the Lord Justice Clerk's Review Group* (Edinburgh: SCTS, 2021); Victoria Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Melbourne: Victoria Law Reform Commission, 2021); Law Commission for England and Wales, *Evidence in Sexual Offences Prosecution: A Consultation Paper* CP 259 (2023).

6 The concept of a rape 'justice gap' has been widely used but is most closely associated in England and Wales with Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (2005) Home Office Research Study 293; deployed further in Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008).

7 Vanessa Munro, 'A Circle that Cannot be Squared? Survivor Confidence in an Adversarial Justice System' in Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking: Ten Years On* (London: Routledge, 2023) 214.

8 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (London: HMSO, 2002).

to have 'freedom and capacity to make a choice' regarding sexual contact. This was supported by a framework of evidential and conclusive presumptions of lack of consent, or any relevant belief therein: for example, where the complainant was asleep or unconscious, violence was used or threatened at the time or immediately beforehand, or the accused had intentionally deceived as to the nature or purpose of the act.[9] In addition, the Act shifted the mens rea threshold for rape to hold the accused to a higher standard of reasonable, rather than merely honest, belief in consent.[10]

At first glance, these looked to be quite radical legislative interventions.[11] However, it was not long before their limitations in bringing change on the ground had to be confronted. The high-profile conviction, in 2009, of two serial sex offenders – John Worboys and Kirk Reid – who 'managed to rape and assault many women before they were stopped, because the police in London did not take the victims seriously enough when they came to report',[12] prompted the Government to commission a further review into the handling of rape complaints. This concluded that, while 'attitudes, policies and practices' had fundamentally improved, problems remained with 'patchy' implementation across individuals and organisations.[13] In response, the Government acknowledged that 'the response to rape victims needs to continue to improve'.[14]

Despite this acknowledgment, and important innovation in terms of expanded availability of special measures[15] and use of judicial directions to address misconceptions about rape that might otherwise interfere with jury evaluations,[16] the decade that followed was not one of steady progress. To the contrary, there was a marked decline – particularly in the late 2010s – in the proportion of rape complaints being charged, let alone resulting in convictions. In 2021, though police recorded the highest ever number of rape offences in a 12-month period, rising 13 per cent from the previous year, only 1.3 per cent of offences that had been assigned an outcome had resulted in a charge

9 Sexual Offences Act 2003, ss 74-76.

10 Sexual Offences Act 2003, ss 1(1) and 1(2).

11 Nicola Lacey, 'Beset by Boundaries: The Home Office Review of Sexual Offences' [2001] *Criminal Law Review* 3; Phil Rumney, 'The Review of Sexual Offences and Rape Law Reform: Another False Dawn?' (2001) 64 MLR 890; Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problem of Consent' [2004] *Criminal Law Review* 328; Vanessa Munro, 'Dev'l-in Disguise? Harm, Privacy and the Sexual Offences Act 2003' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (London: Routledge, 2007); and John Spencer, 'The Sexual Offences Act 2003: Children and Family Offences' [2004] *Criminal Law Review* 347.

12 Government Equalities Office, *A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (London: Home Office, 2010) 3; Independent Police Complaints Commission, *Commissioner's Report: IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* (London: IPCC, 2010); Elish Angiolini QC, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (London: CPS, 2015).

13 Government Equalities Office, *ibid*, 8.

14 HM Government, *The Government Response to the Stern Review: An Independent Review into how rape complaints are handled by public authorities in England and Wales* (London: Cabinet Office, 2011) 8.

15 See Youth Justice and Criminal Evidence Act 1999.

16 *R* v *D* [2008] EWCA Crim 2557; Judicial College, *The Crown Court Compendium Part 1 – Jury and Trial Management and Summing Up* (London: Judicial College, 2024).

or summons, with CPS figures showing that the overall volume of completed rape prosecutions had dropped from over 5,000 in 2016/17 to just over 1,500 in 2020/21.[17] Fuelling concern that such 'shockingly low' charge rates sent a 'terrible message' to victim-survivors regarding the prospects for rape justice,[18] a succession of victim surveys over this period also documented extremely low levels of satisfaction and confidence in the criminal process.[19]

The increasingly protracted nature of investigations and substantial delays in rape cases coming to trial were raising additional, and acute, concerns in relation to access to justice and well-being.[20] By 2019, the End Violence Against Women Coalition had commenced judicial review proceedings against the CPS in respect of what it argued was a change to its policy and practice that precipitated the plummeting rates of charging in rape cases.[21] In the same year, the Ministry of Justice launched an 'End to End Rape Review'[22] amidst concern – amplified by the rape and murder, in 2021, of Sarah Everard by a police officer – that 'public confidence in the ability of the criminal justice system to respond to reports of rape … is at what could be its lowest point'.[23]

The conclusions reached by the Government in that review were damning, conceding that 'thousands of victims have gone without justice'.[24] In response, the Review was positioned as a pivotal moment that would bring 'system and culture change',[25] with a commitment to restore rates of charge and prosecution to their 2016 baselines by the end of the current parliament.[26] A key lever anticipated to enable this was 'Operation Soteria': a performance improvement initiative involving pilots across selected police forces and CPS Rape and Serious Sexual Offences (RASSO) units. Through a 'test and learn' approach, these pilots were to inform a revised operating model on adult rape that would be

17 'Sexual Offences in England and Wales' overviews at www.ons.gov.uk [https://perma.cc/PZY4-G4WS] and https://webarchive.nationalarchives.gov.uk/ukgwa/20160105160709/http://www.ons.gov.uk/ons/index.html [https://perma.cc/H9P6-S69D].

18 Home Affairs Committee, *Investigation and Prosecution of Rape* HL 193 (2022) 9.

19 Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (London: Victims Commissioner, 2020); Victims' Commissioner Office (VCO), *Victims' Experience: Annual Survey* (London: VCO, 2021); Sam Thompson and Meka Beresford, *Silenced Survivors: Understanding Gay and Bisexual Men's Experiences with Sexual Violence and Support Services in the UK* (London: Survivors UK, 2021); Ravi Thiara and Sumanta Roy, *Reclaiming Voice: Minoritised Women and Sexual Violence* (London: Imkaan, 2020).

20 Rape Crisis England and Wales, *Breaking Point: The Re-Traumatisation of Rape and Sexual Abuse Survivors in the Crown Court Backlog* (London: RCEW, 2023); Centre for Women's Justice, *The Decriminalisation of Rape: Why the Justice System is Failing Survivors of Rape and What Needs to Change* (London: CWJ, 2020).

21 *R (On Application of End Violence Against Women Coalition)* v *DPP* [2021] EWCA Civ 350.

22 HM Government, *The End to End Rape Review Report in Findings and Actions* CP 437 (2021).

23 Home Affairs Committee, n 18 above, 3. In their thematic inspections, His Majesty's Inspectorate of Constabulary and Fire & Rescue Service (HMICFRS) and HM Crown Prosecution Service Inspectorate (HMCPSI) shared the concern that the criminal justice system's response to rape lacked focus, with justice personnel too often driven by a mindset in which cases are seen as 'really difficult,' creating and justifying a 'more cautious' approach than in respect of other serious offences: CJJI, *Joint Thematic Inspections of the Police and CPS's Response to Rape* (London: HMICFRS & HMCPSI, 2021) 2.

24 HM Government, *The End to End Rape Review Report* n 22 above, ii.

25 *ibid*, ii.

26 *ibid*, para 17.

rolled out nationally and could be confidently predicted to bring substantial improvement in case preparation and victim support.

Elsewhere, we have reflected more broadly on the successes and challenges of Operation Soteria and the lessons that have, or should, be learned in terms of improving prosecutorial responses, particularly in relation to partnership-working, transparency, training and resource capacity.[27] In this article, we focus on how assessments of reasonableness pervaded and influenced professionals' handling of rape complaints, in a context in which Soteria can be understood to have targeted those assessments as a means to address charge attrition and dwindling public confidence. This analysis has clear resonance not only for England and Wales, but for the many other systems in which – against a backdrop of substantial dissatisfaction with the progress that has arisen from recurrent cycles of sexual offences reform – the concept of reasonableness continues to loom large in the framing and operation of contemporary rape laws.

THE CONCEPT OF REASONABLENESS AND THE LIMITS OF RAPE LAW REFORM

That sexual offences law reform can yield a disappointing legacy is far from a new observation. Almost 15 years ago, Jordan reflected that, despite some moments of gain for individual complainants, 'the scales of justice are still operated by the wheel of fortune', which creates a 'lottery-led justice' that is 'little better than the certainty of injustice, and may even be more detrimental'.[28] For Jordan, this persistent failure to bring 'substantive as opposed to superficial change' was attributable, fundamentally, to the tenacious hold of patriarchal logics on the foundations of legal doctrine, rules of evidence, investigative strategy, and modes of advocacy.

This maps to a wider, and recurrent, theme in feminist analysis that highlights the ways in which liberal law's claims to reasonableness not only produce an impoverished and partisan understanding of the nature and operation of legal power, which undermines efforts to agitate for gender equality, but also function to impose, preserve, and justify concrete barriers to justice in individual cases. This critique has sought to expose the myriad and complex ways in which the criteria for what constitute 'relevant' considerations and processes of 'rational' evaluation attributed to the 'reasonable' person are often framed by a specific and privileged perspective that has benefited from, and perpetuates, existing patterns of gendered power and knowledge.[29] In contexts ranging from

27 Alice King, Vanessa E. Munro and Lotte Young Andrade, 'Increasing Partnership, Progression and Procedural Justice? Reflecting on Lessons Learned about Rape Prosecution Under 'Operation Soteria' [2025] *Criminal Law Review* 198. For discussion of Soteria initiatives and achievements from the policing perspective, see Elisabeth Stanko, *Operation Soteria Bluestone: Year One Report, 2021-2022* (London: HMSO, 2022); Katrin Hohl and Elisabeth Stanko, *Policing Rape: The Way Forward* (London: Routledge, 2024).

28 Jan Jordan, 'Here We Go Round the Review-go-Round: Rape Investigation and Prosecution – Are Things Getting Worse Not Better?' (2011) 17 *Journal of Sexual Aggression* 234, 245.

29 Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998); Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886; Susan Dimock, 'Rea-

sexual harassment[30] to defences for victims who kill their abusers,[31] feminists have charted the relegation of (many) women's reactions and experiences to the realm of an unreasonable response that has denied them legal protection.[32] The solutions offered by critics to this have been varied and complex, particularly given the diversity of women's lives. However, Chamallas has argued that they are likely to lie in 'placing women's interests at the centre of the inquiry' regarding what counts as reasonable, thus framing it 'in more positive and more expansive terms'.[33] This, Cahn suggests, will 'enhance the credibility of women' by making their 'accounts believable within a system that puts the reasonable man on a pedestal'.[34]

While the concept of reasonableness is integral to the operation of law in many areas, this critique has often focussed on sexual offences as a particularly acute testing ground. It has been argued that the very foundations of consent are built on the fallacy of equal capacity for (hetero)sexual negotiation, agency and communication, with the constraint and coercion that frame many women's lived experiences being at best selectively acknowledged, and considerable license granted to men's pursuit of their sexual instincts and entitlements.[35] Du Toit, for example, has maintained that 'the meaningful consent assumed as possible by rape law is associated with the traditional liberal notions of free will, contractualism, free negotiation, formal equality, assertiveness, competitiveness and so on'.[36] As Cossins has highlighted, however, this means that 'the model presumes that men and women communicate about, and engage in, sexual behaviour from positions of social and economic equality when, in reality, many sexual interactions are characterised by inequality, control and/or exploitation'.[37]

sonable Women in the Law' (2008) 11 *Critical Review of International Social and Political Philosophy* 153.

30 Lucinda Finley, 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Journal of Law and Feminism* 41; Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 *Oxford Journal of Legal Studies* 407.

31 Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven, CT: Yale University Press, 2000); Julia Tolmie and others, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' (2018) 2 *New Zealand Law Review* 181.

32 Kathleen Lahey, 'Reasonable Women and the Law' in Martha Fineman and Nancy Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (London: Routledge, 1991).

33 Martha Chamallas, 'Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation' (1992) 1 *Texas Journal of Women and the Law* 95, 136.

34 Naomi Cahn, 'Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice' (1992) 77 *Cornell Law Review* 1398, 1408.

35 See Catharine MacKinnon, 'Law in The Everyday Life of Women' in Catharine MacKinnon, *Women's Lives, Men's Laws* (Cambridge, MA: Harvard University Press, 2005); Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987); Sue Lees, *Carnal Knowledge: Rape on Trial* (London: Penguin, 1996); Sharon Cowan, 'Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape' in Munro and Stychin (eds), n 11 above; Vanessa Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923.

36 Louise Du Toit, 'The Conditions of Consent' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Choice and Subjectivity* (London: Routledge, 2007) 58.

37 Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (London: Palgrave MacMillan, 2020) 288.

The implications of this have been powerfully underscored by MacKinnon. Highlighting the ways in which relying on consent as a threshold disguises underlying structures of 'constraint and disparity',[38] she has argued that distinguishing rape from (hetero)sex relies on a standard framed by men's delineations of 'acceptable' levels of heterosexual initiative, inducement, and pressure. This is so regardless of whether the law requires a subjective evaluation of what an individual understood at the time, or a more objective assessment of what a reasonable man should have understood in the circumstances, since the sociocultural framing of what counts as 'reasonable' is marked by its patriarchal legacy. As a result, the legally incomprehensible nature of women's (hetero)sexual violation is maintained under the guise of reasonableness, supported by a concept of consent that lacks attention to relational and situational constraints. As MacKinnon puts it, 'to attempt to solve [the problem] by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why – meaning, what conditions make it reasonable – is one sided: male-sided'.[39]

Thus, though it may be inconvenient and destabilising to liberal doctrine, reasonableness is a 'relative concept'[40] and leaving its interpretation to 'the discretion and moral standards of fact-finders might well perpetuate an unacceptable degree of uncertainty in the law'.[41] Moreover, where those with the power to define and interpret do so from a particular experiential vantage point, any prospect for progressive change may be imperilled. Tracing the impact of this, Naffine has highlighted the extent to which the 'men of law' – as architects and participants – can be 'blind to the limitations of their point of view', with their 'immense power, a tight social demography and self-interest' creating a condition that 'goes beyond wilful blindness' and offers 'poor ingredients for fair and impartial judgement'.[42]

In this context, the intractability of rape injustice evidences the dangers of placing faith in legal reforms that fail to interrogate and challenge underlying cultures, presumptions and processes of decision-making regarding women's lives.[43] Indeed, once the role played by liberal law in creating social injustice is acknowledged, it can no longer be 'represented as a straightforwardly useable tool for feminist legal strategy'.[44] Abandoning the enterprise of feminist law reform risks a situation in which 'male power continues to own law unopposed'.[45] But, in engaging with it, it is necessary to heed Smart's caution that 'in accepting law's terms in order to challenge the law, feminism always concedes

38 Catharine MacKinnon, *Towards a Feminist Theory of State* (Cambridge, MA: Harvard University Press, 1989) 175.
39 Mackinnon, *ibid*, 183.
40 Cossins, n 37 above, 296.
41 Cowan, n 35 above, 66.
42 Ngaire Naffine, *Criminal Law and the Man Problem* (Oxford: Hart Publishing, 2019) 141; Ngaire Naffine, 'Erotic Love in the Law of Rape' (1994) 57 MLR 10; Naffine and Owens, n 1 above.
43 Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Heather Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence' (1985) 1 *Berkeley Women's Law Journal* 64; Martha Fineman, 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (1990) 42 *Florida Law Review* 25.
44 Lacey, n 29 above, 196.
45 MacKinnon, n 38 above, 107.

too much',[46] and recognise that 'law is not found only in courts and cases, and legislatures and statutes, but in implementing institutions, such as social work and law enforcement, as well'.[47]

In their different ways, then, what these accounts highlight is that the biases and injustices that the law of sexual offences perpetuate are not extraneous or anomalous to the wider constitution of legal and social power. It is not surprising, therefore, that they cannot be easily moved beyond through acts of legislative reform, since they are reflective of wider asymmetries in experience and authority, both amongst those who shape the direction and content of law reform and those responsible for its subsequent implementation. Those asymmetries must be challenged if interpretive dynamics that frustrate the potential for change are not to be reinstated. Notwithstanding legislative reform across jurisdictions that has decoupled the connection between rape and force, heralded 'affirmative' consent standards and imposed the requirement that an accused's mistaken belief in consent be reasonably held, the narratives that continue to inform and infuse rape investigations and prosecutions appear to have been little impacted.[48] Indeed, from research exploring police and defence counsel strategies,[49] to mock jury deliberation,[50] and trial observation studies,[51] it has been shown that consent often continues to be inferred from a complainant's conduct, character, and general circumstances, with the reasonableness of that inference assessed in light of dubious socio-sexual scripts and attitudes.

46 Smart, n 43 above, 5.

47 Fineman, n 43 above, 34.

48 Rachel Burgin and Asher Flynn, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21 *Social and Legal Studies* 334; Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865.

49 Clare Gunby and Anna Carline, 'How An Ordinary Jury Makes Sense of It is a Mystery: Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32 *Liverpool Law Review* 237; Wendy Larcombe and others, 'I Think It's Rape and I Think He Would Be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape' (2016) 25 *Social and Legal Studies* 611; Jennifer M. Brown, Carys Hamilton and Darragh O'Neill, 'Characteristics Associated with Rape Attrition and the Role Played by Skepticism or Legal Rationality by Investigators and Prosecutors' (2007) 13 *Psychology, Crime and Law* 355; Temkin and Krahé, n 6 above.

50 Emily Finch and Vanessa Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303; Louise Ellison and Vanessa Munro, 'Of "normal sex" and "real rape": Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291; James Chalmers, Fiona Leverick and Vanessa E. Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 *Journal of Law and Society* 226; Yvette Tinsley, Claire Baylis and Warren Young, 'I Think She's Learnt Her Lesson: Juror Use of Cultural Misconceptions in Sexual Violence Trials' (2022) 52 *Victoria University of Wellington Law Review* 463.

51 Olivia Smith and Tina Skinner, 'How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials' (2017) 2 *Social and Legal Studies* 441; McDonald, n 5 above; Eithne Dowds, 'I Presume She Wanted it to Happen: Rape, Reasonable Belief in Consent, and Law Reform in Northern Ireland' (2022) 73 *Northern Ireland Legal Quarterly* 501; Julia Quilter and Luke McNamara, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis', Crime and Justice Bulletin No 259 (Sydney, NSW: Bureau of Crime Statistics and Research, 2023); Sharon Cowan, Eamon P. H. Keane, and Vanessa E. Munro, 'The Use of Complainer's Sexual History and Character Evidence in Scottish Rape and Attempted Rape Trials' [2025] *Criminal Law Review* 324.

In this context, the approach taken under Operation Soteria is interesting, and potentially innovative, since it was driven not by a focus on legislative reform or policy change, but by a grounded interrogation of the operational processes and attitudinal frames through which rape complaints are responded to and evaluated by justice professionals. In that sense, unlike many preceding reviews and initiatives, it took the wider landscape of existing sexual offences law and policy largely for granted and interrogated what might be the additional barriers to procedural and substantive justice created or preserved within those confines by how practitioners investigate, evaluate and devise strategy around rape cases. This engages with the question of how professionals interpret and apply the concept of reasonableness, and the ways in which that might be impacted by their personal perspective, organisational culture, or compassion fatigue. In what follows, we explore this using data accessed as part of an independent evaluation of RASSO units' Operation Soteria pilots that we were commissioned by the CPS to undertake.

OPERATION SOTERIA: SECURING INSIGHTS INTO, AND IMPACT ON, PROSECUTORIAL DECISION-MAKING

Previous research has provided valuable interrogation of police decision-making in rape cases.[52] However, analysis of its prosecutorial equivalent in England and Wales has been substantially more limited.[53] The CPS now publish periodic 'dashboards' detailing, for example, volume of file receipts, rate of charge decision, timeliness of case progression, and outcomes.[54] Though important, this data often does not lend itself to a rich and textured understanding of the handling, investigation and evaluation of cases; and without this, it is impossible to fully assess the extent to which progress is being made, the challenges that may be faced in ensuring a consistent approach, and the barriers or opportunities to change. Studies elsewhere have offered glimpses, particularly into reviewing lawyers' assessments of legal and extra-legal considerations in rape cases.[55] But

52 See Brown, Hamilton and O'Neill, n 49 above; Katrin Hohl and Elisabeth Stanko, 'Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales' (2015) 12 *European Journal of Criminology* 324; Emma Sleath and Ray Bull, 'Police perceptions of rape victims and the impact on case decision making: A systematic review' (2016) 34 *Aggression and Violent Behavior* 102. In the context of Soteria, see also Anna Gekoski and others, '"A lot of the time it's dealing with victims who don't want to know, it's all made up, or they've got mental health": Rape myths in a large English police force' (2024) 30 *International Review of Victimology* 3; Stanko, n 27 above.

53 The most extensive insight to date has come from Hester and Lilley who accessed 87 police files with accompanying CPS paperwork for a subset of 17 cases, and conducted interviews with a small sample of RASSO lawyers: Marianne Hester and Sarah-Jane Lilley, 'Rape Investigation and Attrition in Acquaintance, Domestic Violence and Historical Rape Cases' (2017) 14 *Journal of Investigative Psychology and Offender Profiling* 175.

54 Ministry of Justice, 'Criminal Justice System Delivery Data Dashboard' – with information by 'all crime' or 'adult rape' at https://criminal-justice-delivery-data-dashboards.justice.gov.uk/overview [https://perma.cc/8WTK-LQR2].

55 Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice Report No 291 (January 2005);

there are peculiarities of process, culture, and context that are likely to impact in different ways across jurisdictions and time. Given the persistent concerns that have been raised in relation to rape justice in England and Wales, the need for greater insight into prosecutorial attitudes, practices, and outcomes is clear. Benefitting from an unprecedented level of access to internal CPS materials and engagement with senior personnel, and a mixed method data collection that substantially exceeds any previous academic research, ours is the first study to be able to explore these issues in a sustained and qualitative manner.

From July 2022 to October 2023, we undertook an extensive review of policy and operational materials across the five RASSO units initially selected by the CPS to run Operation Soteria pilots. This included access to their internal memorandums of understanding with police and monthly 'tracker' entries completed by CPS areas to report on Soteria plans, progress and outcomes. We also conducted 146 interviews with professional stakeholders across the CPS, spanning RASSO lawyers of varying seniority, paralegal officers, case progression managers and those in victim liaison roles (n = 58 (47 female; 11 male)); policing, including officers of varying seniority, all with experience investigating rape (n = 33 (20 female; 13 male)); third sector, including those working as Independent Sexual Violence Advisors (ISVAs) or providing support and advocacy in 'by and for' organisations (n = 27 (26 female; 1 male)); external RASSO counsel in local court circuits (n = 16 (7 female, 9 male)); and the judiciary (n = 12 (5 female, 7 male)). All interviews were conducted online, via MS Teams, and recorded for subsequent transcription, with participants recruited through a mix of open calls, targeted invitations, and snowball referrals.

In addition, we conducted observations of Early Advice discussions between police and reviewing lawyers where investigative strategy in individual cases was discussed and matters that required to be addressed prior to a charge decision identified (n = 36); No Further Action (NFA) scrutiny panels at which police, CPS, and (often) third sector stakeholders evaluated previous case decision-making (n = 15); forums to facilitate CPS / third sector collaboration (n = 7); and CPS mandated RASSO training events (n = 4). These took place through a combination of in-person and online mediums. The structure and duration of advice discussions varied depending on the participants and topics identified by the officer as requiring lawyers' input, with some completed in a few minutes whilst others lasted over one hour. The formality and composition of scrutiny panels was also variable. We were sometimes provided with case files ahead of panels and key documents ahead of advice discussions. In other cases, we were given a summary in writing or verbally. Occasionally, we had no pre-brief. It would not have been appropriate to record observations, so we relied on notes taken contemporaneously and supplemented thereafter.

We also conducted close analysis of 24 adult rape case files from across pilot areas. These files were substantial, often running to several hundreds of pages. The cases were selected at random, with RASSO units asked to provide a list of identifiers for all cases involving a rape charge against an adult complainant

Jamie Small, 'Conceptualizing Consent: How Prosecutors Identify Sexual Victimization in Statutory Rape Cases' (2020) 45 *Law and Social Inquiry* 111.

received in the past 12 months, with no further filtering in regard to case outcome or complaint characteristics. Where cases were active at the time of study selection, we sought subsequent updates around their case progression and disposal.

Notes from case files and observations, together with interview transcripts, were uploaded for qualitative thematic analysis using Nvivo. Coding was undertaken collaboratively, with the authors first establishing a frame on a grounded basis, informed by the literature review and CPS workstream priorities, and using a sub-sample of files to ensure consistency.[56] When synergies had been identified, node structure imposed, and points of inconsistency addressed, we continued to code using this frame with flexibility to add emergent themes on an iterative basis. This generated a coding design that included 44 nodes, with over 6,650 coded extracts.

In addition, demographic and case progression data was extracted (where available) and inputted into SPSS for descriptive quantitative analysis in respect of all the cases with which we interacted during the study (n = 115). In line with wider patterns of serious sexual offending, the majority involved female complainants (n = 103, 90 per cent) and male perpetrators (n = 107, 93 per cent). Reflecting the focus of Soteria, 93 cases involved individuals who were adults at the time of the incident, but there were 22 cases (19 per cent) in which the complainant was under 16, and 10 suspects across the cohort whom we knew to have been aged 12 to 16. Eighty-eight of the cases (77 per cent) involved a sole complainant, with the parties known to each other in 79 per cent of cases, very often due to being in a previous or ongoing intimate relationship. In a small number of cases, charges were laid alongside rape, most commonly sexual assault (n = 11, nine per cent), assault by penetration (n = 8, seven per cent), or coercive or controlling behaviour (n = 6, five per cent). While it was not possible to identify systematic differences in case handling or outcomes across case 'types', as we will demonstrate, there were some issues – for example the impact of domestic abuse, relevance of sexual history or character, and existence of mental ill-health diagnoses – around which we identified particularly problematic prosecutorial approaches that were apt to generate additional barriers to case progression.

In analysing the data, we adopted a broad interpretation of Soteria priorities and pilots, in order to better capture areas of concern, challenge and progress. Though distilled across specific workstreams, we identified key objectives for the CPS around increasing partnership-working with police to build stronger, more targeted and suspect-focussed cases; ensuring appropriate, timely and transparent decision-making with prosecutors emboldened to bring charges, even in what might be deemed 'marginal' cases; improving communication with complainants and ISVAs who support them; and empowering RASSO unit staff to perform their roles by providing appropriate training, resourcing and support. Success was tied to an increase in the volume of cases sent to the CPS for charging, and in the proportion deemed capable of being taken

56 Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

forward to trial, as well as improved scrutiny and transparency of prosecutorial decision-making, which it was hoped would restore the deficit in victim and public confidence and improve professional partnerships. Thus, while Soteria was not explicitly framed as an exploration of the role and remit of reasonableness tests in rape investigation and prosecution, analysing our data in light of these objectives brought this to the fore, both at the level of individual case decision-making and the organisational cultures that informed the context in which those decisions were made.

EXPLORING PROSECUTORS' RECKONINGS WITH REASONABLENESS

Such research as exists in England and Wales regarding prosecutors' approach and attitudes towards their professional role, although not specific to RASSO work, has indicated that fidelity to the 'Code for Crown Prosecutors'[57] as the anchor for charge decision-making can be variable, with more intuitive appraisals, grounded in 'life experience', often playing an important role.[58] In Hawkins' exploration of decision-making in health and safety prosecutions, a tripartite schema was identified to capture mutually interacting factors, beyond the legal tests, that have an impact. These encompass the 'surround', which is the broad socio-political context in which the decision is made, and against which the specific 'field' for prosecutorial action is set by guidelines, constraints, resourcing, and bureaucratic processes. Action in this field is also informed by the 'frame', that is, the structures of knowledge, experience and value through which information is received, made sense of and processed by decision-makers.[59] Deploying this lens, Widdicombe has concluded that 'the discretionary space left for Crown Prosecutors to operate within the constraints of the Code, guidance and statute is large … so large that almost contradictory positions can continue to coexist between CPS prosecutors'.[60] In the specific context of RASSO cases, this may be particularly concerning given the malleability of key legal concepts (including not only 'reasonable belief', but also 'freedom' and 'capacity' to make a 'choice'), the stubborn legacy of sexist attitudes, and numerous accounts of poor performance, which can be tied to ongoing concern about the existence of 'lottery-led justice' for victims.[61]

In this section, we explore prosecutorial handling of cases that we encountered during Soteria, with a focus on how the concept of reasonableness was interpreted and applied to determine the routes and destinations of individ-

57 CPS, 'Code for Crown Prosecutors' (26 October 2018) at https://www.cps.gov.uk/publication/code-crown-prosecutors [https://perma.cc/ZP9D-MYFT].

58 Ben Widdicombe, 'Nine Critical Factors in Prosecution Decision-Making' (2024) 88 *Journal of Criminal Law* 374.

59 Keith Hawkins, *Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: OUP, 2002); see also Samantha Fairclough, 'Using Hawkin's Surround, Field and Frames Concepts to Understand the Complexities of Special Measures Decision-making in Crown Court Trials' (2018) 45 *Journal of Law and Society* 457.

60 Widdicombe, n 58 above, 387.

61 Jordan, n 28 above.

ual rape complaints, and how this illuminates wider personal and institutional dynamics that can impact the prospects for progressive change. More specifically, we focus on three key moments across the justice journey where determinations of reasonableness were particularly pivotal, around lines of investigative enquiry; the accused's belief in consent; and prospects for conviction. Though these moments can be seen to follow sequentially in the process of case progression, they are also interconnected in complex and cyclical ways. We unpack the approach taken by prosecutors to them, and the degree to which efforts under Soteria to encourage greater reflexivity and consistency might bring change.

Rethinking the reasonableness of lines of enquiry

When a complaint of rape is made, professionals must investigate to the degree necessary to establish the material facts of the allegation and the response given by, or anticipated from, the accused, whilst attending to the evidential tests and legal points to prove. This involves exploring matters that support or undermine the complaint, but it is not a license for exhaustive trawls of parties' personal histories. A balance must be struck – for practical and privacy purposes – around investigative scope, often associated with determining 'reasonable' lines of enquiry.[62]

Across the 2010s, there was a shift in criminal justice practice in England and Wales towards greater 'front-loading' of rape investigations: that is, police were encouraged to undertake as fulsome an investigation as possible (including in relation to requests for third-party material) prior to submitting files for a charging decision.[63] It was anticipated that this would improve the accuracy of decision-making by enabling prosecutors to benefit from a more fully prepared file that would assist, in turn, in assessing prospects for conviction and devising trial strategy. Police were encouraged to seek advice from the CPS at an early stage in order to shape this investigative process.[64] However, uptake was minimal, with many officers continuing to progress rape investigations based on their own assessment of reasonable lines of enquiry, informed by predictions as to the level of detail that they felt a reviewing lawyer would likely require.

The concern – compounded by the concurrent retraction of specialist RASSO policing as part of wider austerity cuts – was that this increased the timelines for case progression, with officers failing to identify matters that required to be addressed later or taking an unnecessarily expansive approach that

62 In the Criminal Procedure and Investigations Act 1996 Code of Practice, it is stated that 'in conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. It is a matter for the investigator, with the assistance of the prosecutor if required, to decide what constitutes a reasonable line of inquiry in each case': Criminal Procedure and Investigations Act 1996, Code of Practice (2020) para 3.5.

63 Angiolini, n 12 above; HMCPSI, *Thematic Review of CPS Rape and Serious Sexual Offences Units* (London: HMCPSI, 2016).

64 CPS, 'Director's Guidance on Charging 6th edition' (CPS Guidance, effective from 31 December 2020) at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Directors-Guidance-on-Charging-6th-Edition.pdf [https://perma.cc/SE2M-MFR3] para 7.3.

delayed (and in some cases, derailed) submission of files. The consequences of this were reflected in a case discussed in Scrutiny 12 in our study, where it took over one year from the report before the CPS conducted a review, whereupon the lawyer noted considerable time and resource had been wasted by police obtaining third-party material in relation to the (child) complainant, which was irrelevant to the key point to prove in the voyeurism charge.

Complexities associated with determining what constitutes a 'reasonable line of enquiry' have been furthered, moreover, by an explosion in our use of telephony, social media, and digital platforms. This has the potential to exponentially increase the volume of material falling within an investigative remit. In England and Wales, the case of Liam Allan, in 2017,[65] in which a trial involving multiple charges of rape and sexual assault collapsed after it emerged that text messages that would have been relevant to the defence had not been identified and disclosed, was also a significant moment. Indeed, this was acknowledged by some of our interviewees as having had a 'chilling effect' (CPS1) that made lawyers more hesitant and encouraged a 'checklist' mentality (CPS3) in which expansive requests for digital or third-party material were made, or anticipated, resulting in 'wide-ranging Action Plans with everything you can think might be faintly useful' (CPS29). Not only did this significantly prolong investigative timelines and deplete policing resources, it created overreach into complainants' privacy and increased the likelihood of uncovering material that complainants may find distressing to have to share and which, despite a peripheral relevance, may disincline professionals from taking cases forward.

By the time of Operation Soteria, the damaging impacts of this approach had been increasingly acknowledged.[66] Guidelines issued by the Attorney General underscored that front-loading of investigations required a keen eye to proportionality in respect of disclosure requests, with the reasonableness of any line of enquiry needing to be well-articulated.[67] This was supported by new case law in relation to the use of mobile phone data,[68] and modifications to training and operational processes for both police and prosecutors. Despite this, our data demonstrated ongoing variability in assessments of what constitute reasonable lines of enquiry. In some respects, this is unsurprising. The legal landscape can be complicated, requiring case-specific assessments that make it difficult to ensure a consistent approach. As CPS50 put it, 'it's really sort of subjective and you can think about, when what would be appropriate, and what one person might think is fine, another person might think isn't'. In addition, CPS5 noted

65 Metropolitan Police and CPS, 'A Joint Review of the Disclosure Process in the Case of R v Allan, Findings and Recommendations for the Metropolitan Police Service and CPS London' (Metropolitan Police and CPS, January 2018) at https://www.cps.gov.uk/sites/default/files/documents/publications/joint-review-disclosure-Allan.pdf [https://perma.cc/6DEW-ADXM].

66 Information Commissioner's Office, *Who's Under Investigation? The Processing of Victims' Personal Data in Rape and Serious Sexual Offence Investigations* (London: ICO, 2022).

67 Attorney General's Office, 'Attorney General's Guidelines on Disclosure: For Investigators, Prosecutors and Defence Practitioners' (2020) updated 29 February 2024 at https://assets.publishing.service.gov.uk/media/65e1ab9d2f2b3b00117cd803/Attorney_General_s_Guidelines_on_Disclosure_-_2024.pdf [https://perma.cc/2X24-53U7].

68 *R* v *Bater-James* [2020] EWCA Crim 79.

that, relative to the previous position, lawyers are experiencing 'a huge cultural change as we try to be super, super proportionate and super, super targeted and justified' in setting investigative strategy.

This candour around the fact that assessments of reasonableness are not objective and self-evident is welcome, but it should prompt critical reflection around the perspectives and assumptions that frame decisions rather than resignation to 'lottery-led justice'.[69] In this respect, the focus under Soteria on making routine use of early advice to encourage more explicit – and shared – understanding between police and lawyers around what constitute reasonable lines of enquiry is important. In some cases, this clearly benefitted the case build: for example, in Advice 33, where the lawyer directed the police officer (who did not indicate an intention otherwise to do so) to re-approach women who previously made reports against the accused but were reluctant to support prosecution as sole complainants. The outcome here was to expand the remit of enquiry, but more often lawyers spoke of working with police during meetings to 'narrow down the parameters' (CPS9) of an investigation. In Advice 10, we saw evidence of this when the lawyer and officer ruled out 'speculative' requests in relation to the complainant's mental health history. Similarly, in Advice 13, we observed a constructive discussion between the officer and lawyer regarding parameters for review of the complainant's social services records, which emphasised a focus on relevant interventions and not 'looking at everything in a blanket way'.

Despite this, other lawyers we spoke with continued to complain about receiving excessive amounts of irrelevant digital material from officers, whilst some police lamented what they saw as a tendency for the CPS to still want 'absolutely everything' (Police2) or insist on 'a complete fishing exercise' (Police29) during the investigative process. In support of this, we encountered cases in which expansive requests for third-party material were made without a clear or apparently compelling basis. In Advice 6, for example, the lawyer imposed some restriction on the parameters proposed by police, delimiting enquiry into the complainant's medical records to the period after she was 13 years old when the officer had proposed from the age of 10. Nonetheless, they pursued the request knowing 'we probably won't need it, but will get it all', and asked the police to conduct a review of any social services records 'just to make sure we have covered everything'. Strikingly, this was a case in which the issue was not one of consent, but of whether the adult accused knew the complainant to be under the age of 16 at the time of intercourse, on which point there was already compelling evidence, making the relevance of her medical and social services records all the more questionable. Meanwhile, in Case File 19, a reviewing lawyer advised, in a case where the parties had no prior relationship, that 'the issue in this case is likely to be her credibility and reliability'. Thus, they instructed the officer to obtain the complainant's medical records over the past decade as well as her counselling records, and to make enquiries as to any social services interactions, whilst stipulating that no parallel enquiries were needed regarding the accused. These examples echo

69 Jordan, n 28 above, 245.

findings from concurrent Home Office analysis, which found that, across a three-month period, 342 third-party material requests were made by police in a sample of 139 rape cases, 62 per cent with no limits as to scope.[70]

In addition, in those instances where police and reviewing lawyers took a more circumscribed approach to what constituted reasonable lines of enquiry, it was unclear that this was welcomed by professionals in latter stages of the trial process. While some CPS participants recounted getting 'some "old school" requests from barristers' (Forum 1) who had not 'moved with the times in terms of things like disclosure' (CPS54), several barristers and judges expressed concern about the pressure to use a 'sniper' rather than 'shotgun' approach (Judge7) to disclosure. They suggested this could prevent 'broader exploration', with 'a protective mindset vis-à-vis the complainant's privacy' (Judge9) weakening the ability to address defence arguments. Speaking about a (growing) division in this context, Barrister10 remarked 'I know it's not very popular, but the new … approach to disclosure is not working, taking a very narrow view … don't look at phones, don't get medical records … what I am quite sure about is that the courts are not backing that approach up'. Attributing this shift to a desire to cut costs, rather than to do what is 'fair or proper', they insisted that, when at court, 'the defence are saying these medical records need to be reviewed and the judge says yes, they do. School records, yes, they need to be obtained'.

Such tension across professional perspectives was reflected in Case File 10, where three individuals made complaints of historical abuse against the suspect with their accounts providing corroboration in terms of the modus operandi. Police refused to obtain full downloads of the complainants' social media or text messages, which defence counsel (and latterly, the CPS lawyer) maintained would be needed to rule out the possibility of their collusion: 'victims are exactly that, it has taken a great deal of courage to eventually disclose their experience and it was not felt proportionate to examine devices when they had not actually seen each other [for decades] and contact between them had been minimal and was only made so police could get in contact'. Counsel ultimately made a formal complaint against the Disclosure Officer in this case, alleging they were acting unreasonably in refusing to obtain and share this information.

To the extent that this suggests that more expansive disclosure is often still expected – even mandated – at trial, this is in line with recent international studies which have reported that, notwithstanding efforts to delimit parameters of enquiry, rape complainants' medical or mental health histories, engagement with social services, or wider sexual history and character, continue to be subject to scrutiny in the courtroom.[71] While recent legislative innovation in England and Wales will impose additional barriers specifically in respect of requests

70 Home Office, 'Police Requests for Third Party Material' (Government consultation, 2022) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094754/Police_requests_for_third_party_material_July_2022.pdf [https://perma.cc/FVY3-2NDV].

71 Quilter and McNamara, n 51 above; McDonald, n 5 above; Sharon Cowan, Eamon P. H. Keane, and Vanessa E. Munro, *The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials: A Research Report* (Edinburgh: University of Edinburgh, 2024).

to disclose complainants' counselling records,[72] the prospects for this bringing change will also ultimately depend on how professionals assess 'reasonable' lines of enquiry and 'relevant' considerations.

In rape cases, there can be a paucity of corroborating evidence and a strong prospect that the accused's defence will rely on a denial that the intercourse was non-consensual. Though this engages the reliability and credibility of both parties, historically – and our data suggests still, often, currently – scrutiny has fallen disproportionately on the complainant and perceptions of their behaviour, even in contexts and times far removed from the incident. Underpinning this is a legacy in which women are sexualised beings, holding a responsibility to be respectable whilst also being sufficiently robust to communicate and manage their sexual boundaries in the face of (inevitable) male heterosexual initiative. While vulnerabilities to social exclusion, mental ill-health, or substance misuse may be amongst the things that increase the likelihood of victimisation,[73] they can also be perceived by justice professionals as matters that undermine credibility and reliability, or that might be likely to be so perceived by jury members, making it 'reasonable' for them to be investigated in support of a defence counter of fabrication. In this context, our findings suggest that – notwithstanding efforts under Operation Soteria that sit alongside judicial authority and new practice guidance calling for a targeted approach in which the reasonableness and relevance of lines of enquiry are clearly articulated and defensible – the scope of investigative remit in rape cases remains unpredictable and inconsistent, with police and prosecutors alike still relying on ill-founded and outdated assumptions to justify enquiries that are invasive, traumatising and may be unfairly damaging to complainants' justice interests.

Rethinking the reasonableness of belief in consent

The thrust of all defences does not lie in the insistence that the allegation of non-consensual sex is wholly fabricated. The accused's position may be that intercourse did take place, and that the complainant was not, in fact, consenting, thereby satisfying the first limb of the offence definition, but that the accused nonetheless mistakenly believed they were. This line of defence can invoke the tenacious claim that (hetero)sexual communication is 'complicated' with nuanced social signalling and fear of reputational reprisal requiring consent to be interpreted by men rather than affirmatively given by women.[74] Though, as noted above, the Sexual Offences Act 2003 was designed to bring a radical shift – from a position in which the accused's mistaken belief sufficed where it was

72 Police, Crime, Sentencing and Courts Act 2022 (as amended by Victims and Prisoners Act 2024), s 44A.

73 Louise Ellison and others, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimisation' (2015) 15 *Criminology and Criminal Justice* 225; Hohl and Stanko, n 52 above; Elisabeth Stanko and Emma Williams, 'Reviewing Rape and Rape Allegations in London: What Are the Vulnerabilities of Victims Who Report to the Police?' in Horvath & Brown (eds), n 7 above.

74 Ellison and Munro, n 50 above; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (London: Routledge, 2nd ed, 2005); Charlene Muehlenhard and Carrie Rodgers, 'Token Resistance to Sex: New Perspectives on an Old Stereotype' (1998) 22 *Psychology of Women Quarterly* 443.

honestly held to one in which the objective feasibility of that belief was to be interrogated, including specifically by having regard to any steps the accused took to ascertain consent – in reality, the mechanisms through which rape cases are investigated and trial strategy devised have shown few signs of change. Indeed, in reviews that preceded Operation Soteria, there was a recurrent concern about the absence of scrutiny afforded to suspects' behaviour.[75]

The need to redress this through more suspect-focussed investigative and trial strategy was a dominant theme in training designed and implemented in Soteria pilots. CPS51, reflecting on its importance, articulated it as a series of questions to consider: 'what steps did the suspect take to ensure that the victim, the complainant, was consenting? Did they target them, did they target their vulnerabilities? Let's focus on the suspect and what they did or didn't do' – an approach that was counterposed by other lawyers to a conventional preoccupation with '*her* credibility' (CPS20). But the degree to which this impacted on concrete decision-making was less clear.

Across our data, we saw many cases in which perceptions about complainants' behaviour or character having been likely to have sent 'signals' to the accused that could reasonably be interpreted as indicative of consent were relied upon to halt case progression. In line with other research,[76] we found that myths around promiscuity and respectability could be particularly resurgent in the context of dating apps, for example. In Scrutiny 3, multiple references were made to the possibility that the complainant had 'catfished' the suspect online and made a false allegation of rape when they met because he had rejected her. There was little explanation for why this was given such credence, though the fact she was older and notably physically larger than the suspect was remarked upon by police. Meanwhile, in Case File 24, though the complainant was said to have given a 'detailed and credible' interview in relation to an alleged rape that occurred when the parties met after connecting on a dating app, the case was not charged. The rationale for that decision was not clearly articulated in the files to which we had access, but it was striking that the suspect's police interview focussed overwhelmingly on whether the complainant had communicated non-consent. In a marked absence of any suspect-focussed approach, there was little questioning around the basis on which the accused felt confident of consent being present, supporting the concern that those using dating apps can be presumed more readily to have consented to a resulting sexual encounter absent clear refusals.

More generally, we observed several cases in which the previous sexual behaviour of the complainant, with the accused or others, was relied on to suggest an increased proclivity to consent, or at least to support a suspect's rea-

75 Charlotte Dalton and others, 'A Systematic Literature Review of Specialist Policing of Rape and Serious Sexual Offences' (2022) 2 *International Criminology* 230; Miranda Horvath and Kari Davies, 'Improving Rape and Serious Sex Offence Investigations' (2025) 15 *Journal of Criminal Psychology* 541.

76 Equally Ours, 'CPS and Equally Ours: Research into the Public Understanding of Rape and Serious Sexual Offences (RASSO) and Consent: A Summary Report' (CPS Publication, Sexual offences, 24 January 2024) at https://www.cps.gov.uk/publication/cps-and-equally-ours-research-public-understanding-rape-and-serious-sexual-offences [https://perma.cc/WD6K-5BEG].

sonable belief therein. This was particularly evident in relation to adolescent victims, where the combination of their sexual experience and young age was highlighted by police and prosecutors alike.[77] In Scrutiny 9, for example, the panel discussed a case in which the 13 year old complainant was reported to have 'appeared quite chuffed with herself for having sex' with the 16 year old suspect on a previous occasion. The relevance of this to the incident in question was not interrogated, but the case was not progressed because police felt 'confident there was no rape there'. This was so, moreover, despite the suspect having previously 'got into some hot water' after approaching another 13 year old girl for sex, and it was acknowledged that this prior incident was 'never really unpicked'.

In Advice 23, another 13 year old girl, who reported having been sexually assaulted by an adult male while travelling on public transport, was noted to be 'in some sort of gang', and to have had 'previous relationships with older men', 'implicit sexual connotations' on her social media, and 'bragged' to the suspect about 'how many times she had had sex'. Though this was introduced by the investigating police officer to support the suspect's account that he reasonably believed her to be consenting, its relevance was unclear given the parties' ages, and the fact that the complainant maintained she had told the accused that she was a minor, which meant that the primary issue in the case was likely to be whether the touching took place (on which there was CCTV evidence available) rather than consent.[78] Meanwhile, in Case File 2, external counsel advised the CPS that they did not consider there to be a realistic prospect of conviction, noting in particular that 'the principal weakness in the case is that the complainant made, or caused to be made, a video of herself kissing the defendant [which] … sits uncomfortably alongside her contention that she would not have engaged in consensual sexual activity with [him]'. This would seem to suggest either that the complainant, having consented to a degree of consensual activity, could not subsequently revoke that consent to more intimate conduct later in the evening or, equally problematically, that the suspect would be entitled reasonably to infer that latter consent from their earlier kiss.

In some cases, then, contextual information of dubious relevance – in particular, about complainants' sexual behaviour or character – appeared to be taken into account in assessing the likelihood of, and reasonableness of a suspect's belief in, consent. By contrast, in other cases, contextual factors that might be thought to be key appeared to have been ignored or trivialised by decision-makers. In particular, we identified several cases in which professionals failed to sufficiently interrogate, or understand, the wider dynamics of domestic abuse, grooming or coercive control that existed in the parties' relationships. Sometimes, the consequence of this was that additional charging options were

77 This echoes findings from the US, which suggest that 'in distinguishing between victimization and consent (which is distinct from desire), prosecutors rely on commonplace notions of appropriate adolescent behaviour' and struggle 'to distinguish between sexual agency and sexual victimisation when it came to teenage girls': Small, n 55 above, 118.

78 Under the Sexual Offences Act 2003, s 9, a person aged 18 or over (A) commits an offence if they intentionally touch another person (B), that touching is sexual in nature, and B is under the age of 16, in circumstances in which A does not reasonably believe B to be 16 or over, or B is under the age of 13.

not considered and opportunities for effective support and safety planning for victim-survivors were missed. In other cases, a background of abuse between the parties was seen to complicate the issue of consent, and reasonable belief therein.

In Advice 16, for example, the lawyer – in relation to a complainant who had a prior relationship with the suspect arising from prolonged drug use together – observed that her account 'is very, very vague and it is very difficult for us to put to the court' since 'she admits consensual sex with him in the beginning and then plays that down … and says she was effectively pressurised into the sex but doesn't say that it wasn't consensual'. Similarly, in Advice 21, which involved a report of repeated abuse by someone in a position of authority over the complainant, the lawyer interpreted the complainant's account that they did try, at times, to resist the suspect, not as bolstering claims to lack of consent and any reasonable belief therein, but as undermining the view that they lacked agency and control: '[the complainant] suggests that he puts up some resistance, so he was not completely dominated by the suspect to have had no willpower at all'.

In respect of intimate domestic partners, Case File 5 provides an illustrative example. The chronology here revealed a 'classic' case of coercive control in which, after a period of intense courtship, the suspect subjected the complainant to physical assaults (including strangulation), isolated her from family and friends, and secured financial control over her. The complainant spoke of how the suspect believed she was his property and that she no longer felt able to say no to his persistent sexual advances. In support of this, the suspect intimated during his police interview that the idea of 'having to rape my own wife' was unfathomable since she would always agree to whatever he asked of her. Declining to bring charges, however, the reviewing lawyer concluded that it was 'one word against another' and 'it seems from her account that, after he pestered her, she reluctantly gave in and thus consented, or at least the suspect may have had a reasonable belief that she was consenting'.

Meanwhile, in Case File 1, a victim widely recognised to be vulnerable, who had been in an on-off relationship with the suspect (almost 30 years her senior) since she was in her late teens, reported that all sex between them over the past months had been non-consensual. She was recognised in domestic abuse risk assessments to be at very high risk of harm, and – noting that she was 'petrified' of her partner but also 'petrified of losing him' – disclosed that she submitted to sexual acts to placate him and avoid violent repercussions. Rather than critically interrogate the context of that submission, the lawyer here simply flagged as a 'difficulty' to discuss with external counsel the fact that the complainant 'does not use the word rape and it's not clear whether she did not consent or just went along with what he wanted'.

These responses appear to invoke a very demanding threshold in terms of the types and levels of control that suspects need to wield before reflection around the impact of abuse is prompted. They also suggest a hesitancy to consider submission to sexual activity as a consequence of fear, pressure, or isolation as sufficient to establish a lack of freedom to consent, or to bring into question the reasonableness of any belief in consent held by abusers. As a consequence, this reinforces a narrow, contractual, and decontextualised approach to sexual con-

sent that fails to engage with the concrete realities of domestically abusive relationships. A more expansive interpretation of 'freedom' and 'capacity' to 'make a choice', and of the circumstances in which assessments of belief in consent are to be adjudged, could have accommodated a more nuanced understanding of the constraints on agency that these complainants were navigating. A more suspect-focussed approach could also have taken seriously the ways in which tactics of grooming or coercive control are deployed by perpetrators to create and cement conditions of dependency, often deliberately depleting victims' confidence and resources for resistance.[79] This, in turn, would have prompted greater critical scrutiny to be applied to any claims made by the architects of those abusive conditions that they had a reasonable basis for mistakenly believing consent to be present. In neither of these cases, however, was that opportunity taken up.

Thus, notwithstanding ambitions under Soteria to encourage a rebalancing of investigative focus that ensures scrutiny is not reserved exclusively for the conduct and intentions of the complainant, our data suggests a limited impact. The burden for establishing lack of consent continued to be borne overwhelmingly by complainants, even in circumstances where their age or dynamics of grooming or control could be seen to have had significantly corrosive impacts on agency. Moreover, the requirement to consider steps taken by the accused to ascertain consent was often still dealt with in a cursory manner, with reflection on the reasonableness or otherwise of that belief in the circumstances being limited and leaving key patriarchal logics unchallenged. To this extent, our findings – 20 years on from its implementation in England and Wales – echo Temkin and Ashworth's caution that, in respect of its approach to mens rea, the Sexual Offences Act 2003 'contains no real challenge to society's norms and stereotypes about either the relationship between men and women or other sexual situations', and 'leaves open the possibility that those stereotypes' and the 'culturally engendered belief[s]' that fuel them will continue to 'determine assessments of reasonableness' by legal and lay decision-makers.[80]

Rethinking the reasonableness of prospects of conviction

The Code for Crown Prosecutors in England and Wales stipulates that, before making the decision to charge, prosecutors 'must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction'. This requires 'objective assessment of the evidence', with a focus on whether 'an objective, impartial and reasonable jury … properly directed and acting in accordance with the law, is more likely than not to convict'.[81] Though this marks a shift

79 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford: OUP, 2007); Nicola Sharp-Jeffs, Liz Kelly and Renate Klein, 'Long Journeys Towards Freedom: The Relationship between Coercive Control and Space for Action' (2018) 24 *Violence Against Women* 163; Julia Tolmie, Rachel Smith and Denise Wilson, 'Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework' (2024) 30 *Violence Against Women* 54.

80 Temkin and Ashworth, n 11 above, 342.

81 CPS, n 57 above, paras 4.6 and 4.7.

from the test's original wording, which revolved around a 'reasonable prospect' of conviction, it is clear that an assessment of reasonableness remains key, and it has been suggested that 'any material difference' between the terms 'realistic' and 'reasonable' is 'obscure' in this context.[82] In our interviews, lawyers consistently used the terminology of 'reasonable prospect of conviction' to describe the test, bringing it in line with the wording still deployed in many other jurisdictions.[83]

Charge decision-making is 'not a precise science',[84] and inclusion of the requirement that conviction be 'more likely than not' has been identified as particularly apt to 'cause confusion … if we don't expect prosecutors to think in terms of probability'.[85] Indeed, it was concern about how this test was being operationalised in rape cases that prompted the End Violence Against Women Coalition to bring the judicial review proceedings against the CPS referred to above.[86] There, the court rejected the suggestion that there had been a shift towards a 'bookmakers' approach that relied on 'statistical guesswork' or a 'purely predictive approach based on past experience of similar cases',[87] rather than considering how the case would be received by objective, impartial, and reasonable decision-makers. While the terminology of a 'merits-based approach', which had come to be used to articulate this objective assessment, was excised from its guidance in 2016, the CPS said this was to redress concern that prosecutors might otherwise interpret the test as requiring them to charge, even where there were significant evidential flaws. Either way, the court concluded that this 'merits-based approach' was 'not an alternative to, or a substitute for' the evidential sufficiency test set, but simply 'another way of expressing that test'.[88] As such, abandoning that language in guidance did not indicate a change in practice.

Though intended to underscore the constancy of the evidential sufficiency test, this conclusion can also be seen to highlight the flexibility and scope for divergent interpretation that lies within it, particularly given the unsteady and unpredictable trajectory of rape attrition in England and Wales. Even with the presumption that the jury will assess evidence objectively, there are likely to be cases – perhaps especially so in serious sexual offences – where that evidence is so finely balanced that it is not feasible to predict verdict outcomes. It

82 David Wolchover and Anthony Heaton-Armstrong, 'It's Time to Modify the CPS 50 Per Cent Threshold Test' (2021) 171 *New Law Journal* 17, 18.

83 This includes, closest to home, both Northern Ireland (Public Prosecution Service, 'Code for Prosecutors' (2023) para 4.7 at https://www.ppsni.gov.uk/files/ppsni/2023-05/Code%20for%20Prosecutors%20-%20May%202023_0.pdf [https://perma.cc/VCA8-XEMT]) and the Republic of Ireland (Director of Public Prosecutions, 'Guidelines for Prosecutors' (2019) para 4.11 at https://www.dppireland.ie/app/uploads/2023/01/Guidelines-for-Prosecutors-5th-Edition-eng.pdf [https://perma.cc/36FH-P485]).

84 Andrew Ashworth and Julia Fionda, 'The New Code for Crown Prosecutors: Prosecution, Accountability and the Public Interest' [1994] *Criminal Law Review* 894; R. Daw, 'The New Code for Crown Prosecutors: A Response' [1997] *Criminal Law Review* 904, 905.

85 Jonathan Rogers, 'A Human Rights Perspective on the Evidential Test for Bringing Prosecutions' [2017] *Criminal Law Review* 678, 694.

86 *R (On Application of End Violence Against Women Coalition)* v *DPP* n 21 above.

87 *R (FB)* v *DPP* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072 per Lord Toulson.

88 *R (On Application of End Violence Against Women Coalition)* v *DPP* n 21 above at [71].

has been suggested that this makes prosecutorial decision-making 'unlikely to amount to anything other than guesswork', with lawyers deterred from taking forward 'cases of middling strength which can quite reasonably be predicted to go either way'.[89] Though much of the focus in Operation Soteria was on early-stage processes, partnerships and organisational cultures, it was clearly anticipated that there would be flow-through consequences, including not only stronger investigations but also an emboldened approach to charging in cases that may previously have been 'no further actioned'.

Across our data, we did discern limited evidence of such a shift. In some advice meetings, we observed lawyers carefully working with officers to build rape cases, explicitly postponing any judgment about prospects of conviction, and being careful not to prematurely suggest any 'steer' around this to police until a full investigation had been completed. Likewise, some scrutiny panel discussions prompted insightful reflections about how to ensure greater consistency and rigour in lawyers' application of the charging test. In Scrutiny 15, for example, it was underscored that, in cases involving parties with mental ill-health, it was 'dangerous' for prosecutors to operate on the basis of assumptions or generalist knowledge, and that they should instead ensure they are properly informed regarding the condition and how it manifests before making a decision. We also saw signs of a growing willingness, amongst some prosecutors, to proceed in what might previously have been seen as 'too marginal' cases, with increased confidence that such decisions would be supported. As CPS49 put it, 'there's a heightened awareness that a marginal pass is still a pass … we have leadership that says you won't be criticised for a marginal pass'.

This shift in prosecutorial approach was also identified and remarked upon by some of our other interviewees. Police19, for example, observed that 'I do think there is that mindset change from the CPS … I'm in no doubt, historically, officers would have said "finalise this case, it's not going anywhere" because they would have had their previous mindset set by the CPS and the previous challenges they've had on those cases; whereas now, they're seeing that change'. Similarly, Barrister2 identified 'a move away from worrying about it just being word against word, and … a shift towards thinking that, you know, if it's just word against word it may well be sufficient'.

At the same time, however, even in the context of heightened scrutiny that surrounded Soteria, it was clear that, in some of the cases that we interacted with, a decision to take 'no further action' had been made or encouraged at an early stage, often on seemingly limited information. It was apparent too that concern regarding how a jury – reasonable or otherwise – would be likely to interpret aspects of the complainant's behaviour was often a determining factor in this process.

In Advice 1, for example, the parties had previously been in an intimate relationship which was confirmed as abusive, but were separated at the time of the incident, with the complainant having formed a new relationship with a third party. Whilst accompanying the comment with a disclaimer that it was not intended to 'victim-blame', the lawyer's opening remark after the police

89 Wolchover and Heaton-Armstrong, n 82 above.

officer set out these facts was to ask: 'what would the jury say to know she was [meeting in private] with another man'? In response, the officer noted the complainant said she met with the suspect in the belief that he wanted to make amends for his past behaviour, but this only prompted more concern from the lawyer that jurors would be unsympathetic since, knowing the suspect to be violent, she ought to have anticipated the risk of assault. Meanwhile, in Advice 20, a case that involved individuals who remained in contact after the incident, the lawyer opened the meeting by commenting to the police officer: 'this is one where I am going to invite you to NFA [no further action] straight away'. Without further explanation, they opined 'the reasons for late disclosure are not very convincing'. In Advice 21, the same lawyer observed, in a case where the complainant exchanged 'friendly' text messages with the accused post-assault, 'I just don't think this hangs together … you wouldn't say that if you'd been abused, not in a million years'.

Not all lawyers were so explicit in directing the police around prospects of conviction at this early investigative stage. Nonetheless, many still clearly signalled that the prognosis for success was poor. In Advice 16, for example, the lawyer remarked to the officer that 'all of this is going to be seriously problematic if we charge it, so it is very negative, and I am having trouble with the positives'. In particular, they highlighted that the complainant was 'very vague' regarding how she knew the rape had occurred when she was heavily intoxicated at the time, and that the recording quality of her police interview was poor. They also commented that 'some references make me think she possibly has mental health problems' which, though without the benefit of confirmation or diagnostic details, they felt would make establishing her credibility 'difficult'. Meanwhile, in Advice 2, the police officer remarked that, although they 'believe everything they have been told' by the complainant, they did not think that 'twelve members of the jury would believe her' due to her 'frantic' appearance in the video-recorded interview. Though noting that this interview was conducted with the complainant's son in the room next door, there was no reflection around how this might have impacted her ability to disclose. Instead, the lawyer concurred that the interview was 'like getting blood from a stone', and that it would 'require a lot of explaining on her part' if she was to be able to bolster her credibility sufficiently for the jury.

It is clearly appropriate, in determining realistic prospects of conviction, for lawyers to consider how jurors are likely to receive and assess the evidence before them. What was striking in these interactions, however, was the absence of reflection on whether, or what, strategies might be deployed during the investigation or trial to ensure that complainants were given the impartial, objective, and reasonable appraisal by the jury against which case progression was to be judged. Indeed, notwithstanding CPS training that underscores the importance of addressing myths and stereotypes, there was a distinct sense of resignation to misconceptions that might be harboured by jurors and which, if relied upon in deliberations, would likely support an acquittal.

This speaks partly to difficulties, also evidenced in the preceding sections, in bringing consistent attitudinal change amongst professionals in respect of previously held assumptions. However, it also relates to wider challenges asso-

ciated with the compartmentalised nature of the criminal process. A need to diversify recruitment pools to meet staffing demands, together with substantial workload pressures, means that it is increasingly rare for reviewing lawyers in RASSO units to have had significant or recent advocacy experience, with minimal opportunity to observe trial proceedings. This lack of familiarity with the courtroom environment can make it difficult to deploy the degree of 'downstream' orientation[90] required in relation to charge decision-making and may make prosecutors apt to both over- and under-estimate the likelihood of conviction. On the one hand, it has recently been suggested to be common that 'Crown Prosecutors with little or no such experience will flatly disregard the advice of experienced trial counsel, who will often be tendering advice to drop a case against their own private financial interests'.[91] In such instances, reviewing lawyers' appraisals of what is 'realistic' – perhaps especially where they have been encouraged to be emboldened as a consequence of Soteria – may be perceived by counsel as too optimistic, which can lead to incoherence in the execution of trial strategy and tensions in professional relationships. In this context, Judge2 worried that 'the way juries think and are influenced is not the way that the police and the CPS look at it', while Judge6 reflected that 'it's all very well compiling the papers and thinking about what might happen in an ideal environment, but the court is much more of a battlefield'. On the other hand, our data also evidenced concern about reviewing lawyers' lack of confidence around RASSO trial strategy, which inclined them to accept the advice of counsel even where they did not agree with it.[92]

This is complicated further, moreover, by the fact that there is no 'ideal' rate of conviction to be sought. There is a complex relationship between maintaining public confidence in the justice process, ensuring that victims are treated with sensitivity and care, and encouraging a prosecutorial strategy that does not take for granted dated or unfounded perceptions of gender/socio-sexual norms, all of which impact on what success in this context looks like. Too high a conviction rate should trigger scrutiny that prosecutors are being risk-averse just as too low a rate should raise concerns around case strategy or overzealous charging. In the context of Australian rape cases, Lievore concludes that 'it has to be acknowledged that prosecutors' decisions are not necessarily objective'.[93] The same is true in England and Wales, and is perhaps unsurprising given the malleability of the evidential test, lack of trial familiarity amongst reviewing lawyers, and paucity of insight regarding how juries in fact assess evidence and deliberate in rape cases.[94] Scrutiny of charge decision-making has increased, and

90 Lisa Frohmann, 'Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections' (1991) 38 *Social Problems* 213.

91 Wolchover and Heaton-Armstrong, n 82 above, 18.

92 For further discussion, see Alice King, Vanessa E. Munro and Lotte Young Andrade, 'Operation Soteria: Improving CPS Responses to Rape Complaints and Complainants – Final Findings from Independent Academic Research, December 2023' (University of Warwick report, 2024) at https://wrap.warwick.ac.uk/id/eprint/183258/7/Operataion%20Soteria_Full%20Report%202024.pdf [https://perma.cc/QT6A-PL9Z].

93 Lievore, n 55 above, 5; Jennifer Temkin, *Rape and the Legal Process* (Oxford: OUP, 2nd ed, 2002).

94 Given legal prohibitions, in England and Wales, on asking jurors about the content of their deliberations, researchers have often relied on trial simulations using volunteer participants. Sev-

become more transparent during Soteria; and there has been, at least amongst some professionals, a greater willingness to pursue cases that might previously not have been taken forward. It is too early to assess what impact this will have on conviction rates given the ongoing and substantial delays in cases progressing to trial.[95] What is clear, though, is that the evidential test under the Code relies on predictions of what is 'realistic' and 'reasonable' that assert a greater level of objectivity and surety than is achievable. Moreover, in making these assessments, we found that reviewing lawyers still too often legitimated patriarchal legacies, invoking their own or jurors' anticipated prejudice and partisan perspectives to undermine the credibility of complaints and complainants; in some cases, doing so prematurely and at such an early stage in the criminal process that it was likely to disincentivise police from conducting a full and robust investigation.

CONCLUDING THOUGHTS: BREAKING THE CYCLE OF RAPE INJUSTICE?

The history of successive interventions in rape law and policy, propelled by recurring cycles of crisis and condemnation, attests to the non-linear nature of progress and the fact that improving responses to complaints and complainants will require candid confrontation with the scale of rape injustice, professional reflexivity, institutional transparency, and sustainable resourcing. The level of ambition, degree of governmental investment, and operational focus that drove Operation Soteria do give it a somewhat distinctive character relative to previous interventions in England and Wales; and one that might better capture a recognition that the fix does not come simply (or primarily) from law reform, but also requires radical reimagining of the investigative processes and organisational decision-making cultures that have proven impervious to change.

There have indeed been some indications of success following Soteria, for example, in terms of an increased volume of cases being investigated and submitted to the CPS by police for a charge decision and improving proportions of prosecutions then being taken forward.[96] In July 2023, building on insight gen-

eral such studies have yielded consistent findings in respect of mock jurors' use of misconceptions in rape deliberations. However, critics highlight the 'role-play' involved, which undermines transferability: James Chalmers, Fiona Leverick and Vanessa E. Munro, 'Why the Jury Is, and Should Still Be, Out on Rape Deliberation' [2021] *Criminal Law Review* 753.

95 Rape Crisis England and Wales, n 24 above. In April 2021, RCEW provided updated figures demonstrating record highs in the number of sexual offence cases waiting to go to Crown Court (n = 11,918).

96 Ministry of Justice, 'Rape Review Progress Update' (July 2023) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1168481/rape-review-progress-report-year-2.pdf [https://perma.cc/S43H-WK5L]; CPS, 'Police-CPS Joint National Rape Action Plan Final Report 2024' (CPS Publication, Sexual offences, 2024) at https://www.cps.gov.uk/publication/police-cps-joint-national-rape-action-plan-final-report-2024 [https://perma.cc/P34W-PN6T]; HMICFRS, 'Progress to Introduce A National Operating Model for Rape and Other Serious Sexual Offences Investigations in Early Adopter Police Forces' (22 August 2024) at https://hmicfrs.justiceinspectorates.gov.uk/publications/progress-to-introduce-a-national-operating-model-for-rape-and-other-serious-sexual-offences-investigations/ [https://perma.cc/T43U-7QGE].

erated from Soteria pilots, new national operating models for adult rape were launched by the College of Policing and CPS.[97] With additional infrastructure to support implementation and accountability though the National Police Chiefs Council and Ministry of Justice 'Rape Review' updates, the hope is that these new models will ensure improved practice.

The longer-term effects of these developments, and their ability to substantially assist the UK Government in its ambition to reduce by half in the current parliament the levels of violence being encountered by women and girls, remain to be seen.[98] However, a recent Inspectorate report into early advice and pre-charge decision-making in adult rape cases echoed many of the cautionary findings we arrived at during Operation Soteria, indicating not only that these challenges remain but that they are replicated at the national level despite the new operating model.[99] In particular, the review found evidence of 'superficial' advice discussions with police that 'overlooked important aspects impacting on reasonable lines of enquiry',[100] and a failure to consistently apply a suspect-focussed approach, resulting in 'a continued focus on investigating victim credibility' in many cases.[101] Supporting our observations, the Inspectorate also noted that 'prosecutors found it harder to adopt a suspect-centric approach in domestic abuse scenarios compared to stranger-type scenarios'.[102] This is troubling not only because of the former's comparatively higher incidence, but because the foundations for this disparity are clearly linked to tenacious individual and cultural misconceptions about 'real rape' and its perpetrators.[103]

In this article, we have drawn on previously inaccessible original data to provide novel and timely insight into the processes and outcomes of prosecutorial engagement with adult rape complaints in England and Wales. In particular, we have explored the extent to which improved substantive and procedural justice is achievable in a process that remains anchored to assessments of reasonableness, highlighting the barriers and opportunities that this threshold might present at key stages in the progression of rape cases. Without alteration to procedural or evidential tests themselves, we did find some signs under Soteria of a more open and ambitious approach to case-building, which was matched, at least in some instances, by a careful and reflective assessment of investigative remit and critical attention to the motivations and beliefs of the accused in

97 College of Policing, 'National Operating Model for the Investigation of Rape and Serious Sexual Offences' at https://www.college.police.uk/national-operating-model-rasso (last visited 30 September 2025); and Crown Prosecution Service, 'The National Operating Model for Adult Rape Prosecution' (2023) at https://www.cps.gov.uk/publication/national-operating-model-adult-rape-prosecution [https://perma.cc/RN94-LYMB].

98 In the King's Speech to Parliament on 17 July 2024, it was stated that the incoming UK Government 'will bring forward plans to halve violence against women and girls': https://www.gov.uk/government/speeches/the-kings-speech-2024 [https://perma.cc/QBY4-2NR6].

99 HMCPSI, 'An Inspection of Early Advice and Pre-Charge Decision Making in Adult Rape Cases: A Thematic Inspection of the Quality of the Crown Prosecution Service's Early Advice and Pre-Charge Decision-Making Following Implementation of the National Operating Model for Prosecuting Adult Rape Cases' (HMCPSI, July 2025) at https://hmcpsi.justiceinspectorates.gov.uk/report/a-thematic-rape-inspection-report/ [https://perma.cc/7MGA-V6YL].

100 *ibid*, para 2.21.

101 *ibid*, para 2.28.

102 *ibid*, para 2.28.

103 Estrich, n 35 above; Ellison and Munro, n 50 above.

relation to sexual consent. We also located some evidence of increased willingness amongst prosecutors to take forward 'marginal' cases or those that would require greater efforts to address undermining material, even at times against the advice of external counsel. Even where such cases ultimately resulted in acquittal, that their progression might benefit victim and public confidence was acknowledged, as was the potential to shift less progressive attitudes held by professionals and the public by exposing them to a more diverse range of rape scenarios and victim-survivor responses. At the same time, our data indicated that professionals' assessments of reasonableness – around lines of enquiry, consent or prospects of conviction – were often presented as objective and rational when in fact they were subjective and partial, meaning that the legitimacy of their foundations was left unchallenged. Despite training initiatives, juror directions, and legislative requirements to subject the suspect's behaviour to scrutiny, we found a stubborn preoccupation in many cases with the credibility of the complainant, and evidence of patriarchal tropes and misconceptions about the realities of sexual violence continuing to inform decision-making. In the final analysis, this suggests that reliance on the concept of reasonableness need not *necessarily* be a barrier to rape justice, since its malleability and variability allows for more progressive interpretation and application. However, bringing about meaningful 'end to end' change will require far greater transparency around, critical scrutiny of, and systemic interventions into, the processes and cultures of prosecutorial decision-making in rape cases than has yet been achieved in England and Wales.

(2025) 88(6) MLR 1176–1204