

Dame Vera Baird QC

Victims' Commissioner for England and Wales

Office of the Victims' Commissioner for England and Wales
5th Floor, 70 Petty France
London SW1H 9EX

e: victims.commissioner@victimscommissioner.org.uk

30 January 2020

Geoffrey Cox QC MP

Attorney General

Sent by email

Dear Attorney,

End to end review of rape

I am writing to you with regards to the crisis of confidence held by rape victims in the justice system. This crisis will no doubt be further exacerbated following the CPS publication earlier today of its latest prosecution data, which, whilst lacking clarity, shows a continuing decline in the already low level of rape prosecutions.

In particular, I write in relation to the report produced by HMCPSP in December 2019 which was intended to help “...*understand the factors driving falls in charging outcomes particularly with regard to rape only flagged prosecutions*” (Priority 3 of the End to End Rape Review).

Unfortunately, it would seem this report has done nothing to improve victims' confidence in the system. As I explain below: (i) the credibility of the report is undermined by the fact that it was neither conducted independently nor did it seek input from those from outside the CPS; (ii) the report fails to consider the full background; and (iii) fails to answer the questions which were asked of it (and insofar as it does, indicates that there remain significant concerns as to the CPS's approach to cases of rape).

In light of these serious concerns, I ask you to agree that a further inquiry needs to be commissioned so as to attempt to understand why the CPS charge rate in rape has fallen so precipitously in the past two years. In particular, it is imperative that this is a fully independent inquiry, based upon transparent criteria and with a requirement that it seek input from criminal justice partners and civil society.

One of the key issues the inquiry must be asked to examine is the role the CPS has played in the drop in the charge rate, so that we can fully understand how it has happened and the necessary changes identified and implemented.

The December 2019 Report

HMCPST sought to answer the following question (a question which it has considered previously, and which was not specifically designed for priority 3):

“What level of confidence can the public have in the CPS to deliver fair and successful outcomes in the most efficient and effective way through the provision of high-quality decision-making by specially trained and experienced prosecutors in rape cases?”

In so doing, there were a number of sub-questions, including whether there has been a change in approach in the CPS impacting the numbers of cases charged, and what is driving the change in the balance of cases charged, recommended for no further action or administratively finalised (Annex A).

However, the December 2019 report fails to answer those questions. While the report makes clear the CPS is charging fewer cases, the analysis offers the reader no explanation as to why. Indeed, it appears the Chief Inspector himself accepts that: *“the relatively narrow scope of the inspection means that a number of assumptions have been made”* (1.11) and *“While this inspection provides some evidence for what happens once the CPS receives the case, it does not provide any view of the gap between the allegations of rape and cases charged”* (1.32). Even on its own face, therefore, it would appear that further work is urgently required.

Independence of the HMCPST

A key question in this report is whether the CPS is being *“risk averse”* in charging rape cases. There are real concerns as to whether HMCPST are best placed to provide an objective insight to this question.

The view of some external observers is that, until recently, HMCPST itself appeared to be a contributing factor to the fall in prosecutions. This is because, in conducting its inspections, it had focused exclusively on conviction rates, criticising regions with low conviction rates and praising improvement in such rates even if the volume of convictions had fallen.

An example of this can be seen from CPS Mersey Cheshire. In April 2018 it was told that its declining conviction rate (54.6%) was *“the greatest risk to the area”* and *“the most significant performance issue”* (particularly when contrasted with the improving national performance from 56.1% to 57.7%). Mersey Cheshire responded by increasing the conviction rate the following year to 68% and this was praised by HMCPST. But the praise ignored the fact that in 2017 Mersey Cheshire had achieved an increase in its volume of convictions from 96 to 138 (a 44% increase), whereas, in line with the direction by HMCPST to improve its conviction rates, the number of convictions dropped in 2018 to 81 (its lowest for many years). In short, the HMCPST drive to improve conviction rates led to a significant overall drop in convictions.

Furthermore, HMCPST does not appear to realise the risk of such targets. HMCPST's Chief Inspector refers to such targets as reflecting a "*level of ambition*" for conviction rates in rape (para 1.27). Yet the CPS has acknowledged that those "*levels of ambition*" were "*not appropriate as they may have been a perverse incentive*",¹ and were "*not an appropriate tool to measure our success in bringing the right cases to court*".²

HMCPST were aware of and drove that target from 2016 to 2019, although the Chief Inspector, writing elsewhere, stated that "*Conviction rate is not, in my view, a very helpful measure when looking at whether the CPS is doing a good job or not*".³

I should add that these levels of ambition were not made known outside of the CPS until revealed in an article by the Law Society Gazette.

In light of all of this, I am not sure HMCPST can be considered the appropriate organisation to carry out a review of the CPS' actions, in order to determine whether it has become more risk averse.

External Stakeholders

These concerns might have been ameliorated had external stakeholders been allowed to feed into the review. However, no criminal justice partners (such as third sector VAWG organisations, police, or criminal lawyers) were approached to contribute to the December 2019 report, nor were the National Rape Scrutiny Panel, area scrutiny panels or community accountability panels, all routinely used by the CPS as critical friends.

This omission of stakeholder engagement is of real concern. For example:

- Third sector VAWG organisations have expressed the view that the CPS has become increasingly risk averse in the last few years. Surely the evidence upon which their opinion is based needed to be considered as part of the report, yet it was not sought.
- Similarly, senior police partners are key CPS partners, and could have provided an informed view as to whether CPS prosecutors were becoming more risk averse. A letter from DCC Sarah Crew, National Lead on Adult Rape and Serious Sexual Offences, to Chief Constables and Force Rape and Serious Sexual Offence Leads, dated 13 June 2019, refers to a meeting with Max Hill to discuss the approach to charging in rape, and "*a move to a more risk averse approach*". The police might also have been able to provide specific information as to the increase in administratively finalised cases, an issue which is addressed only superficially in the report, but which is crucial to HMCPST's findings. This is important, given that when the CPS did an internal audit into administratively finalised cases, it found that 40% of the requests made to the police, in cases returned by CPS, were disproportionate, with many of them indicative of an over intrusive approach to the complainant. Many police officers say privately that CPS send files back for unnecessary data and/or irrelevant actions, effectively disguising

¹ K McGinty says targets he drove may have been a perverse incentive

² CPS press statement on Law Society Gazette article

³ Letter to EVAW

what is in substance a decision to take no further action as an administratively finalised decision. Such claims are very serious and should have been explored.

This failure to consider the views of other stakeholders is not usual practice (as is suggested at 1.3). By way of contrast to this HMCPST review, the 2016 review (which addressed the same question) sent out hundreds of electronic questionnaires to RASSO unit heads in all Areas, to specialist lawyers and crown advocates, to specialists from the independent Bar, to defence solicitors and to national and local third sector organisations. One hundred and seventeen responses were received from representatives within the criminal justice system and 26 responses were received from the third sector. HMCPST additionally interviewed members of the judiciary and consulted officers from specialist police units and teams. It created a project reference group from members of the third sector 'to provide guidance to the thematic review team on the conduct of the review and the methodology employed, to use their experience of the topic to help identify key issues affecting the review and to comment at agreed intervals on inspection findings and judgements and on the draft report'.⁴

This is in sharp contrast to the 2019 review, in which HMCPST declined to have any independent input into its inspections, even though encouraged to do so by Home Office officials and although it is considered good practice by the other criminal justice inspectorates. I also wrote to the Chief Inspector, urging him to bring in external academic oversight for the purpose of independence and rigour.

HMCPST also declined to attend the oversight group for the End to End Rape Review and refused, save for responding to my correspondence, to engage with the stakeholder group of victims' representatives specifically set up for that Review.

To compound the problem, HMCPST used former CPS staff to conduct the review. As letters from the chief inspector show and despite stakeholder concerns, one current senior CPS compliance and assurance official was also seconded onto the review. Indeed there is a suggestion that he may have acted as its head. Three permanent inspectors and one associate inspector were former RASSO lawyers. Thus, all of these inspectors had worked for months or years within a culture focussed on improving rape conviction rates, despite this resulting in a reduction in the number of cases prosecuted and convicted.

Fairly or unfairly, the question being asked is whose criteria these ex CPS RASSOs were using when conducting the review and whether their previous CPS role compromised their ability to provide a detached and objective assessment of CPS practices.

⁴ HMCPST report on Rape February 2016 'methodology'

Problems with the analysis in the report: factual mistakes and failures to consider key questions

For many years, the CPS has followed the court-mandated “*merits-based approach*” to charging decisions. We now know, however, that this approach all but disappeared from CPS materials two years ago. The relevant chronology of that change is, as I understand it, as follows: that refresher training was delivered to RASSO prosecutors (by RASSO specialists) in the aftermath of a review of RASSO work by HMCPsi in 2016. The training was to promote “a consistent approach ...across the CPS ...in the application of the Code”⁵ since the HMCPsi 2016 review found that in 10% of 90 sample cases the Code test had not been applied correctly. There then followed a series of ‘roadshows’ conducted by the Director of Legal Services (Mr McGill) and the former Principal Legal Adviser (Mr Moore) in which Mr McGill and Mr Moore sought to move prosecutors away from the merits-based approach.

However, this chronology is confused in the report. At para 2.31, it refers to the training delivered by the Director of Legal Services (Mr McGill) and the former Principal Legal Adviser in 2017. This is not correct. The refresher training was earlier and different, as I understand the Director of Legal Services has acknowledged.

It is surprising HMCPsi do not discuss, in any detail, the content of the roadshows conducted by Mr McGill in 2017, given that they were reported in the press. As I understand it, he is quoted⁶ as advising that ‘weak’ cases should be ‘taken out of the system’ and only stronger cases taken to court, so as to achieve a better percentage conviction rate. He is alleged to have advised ‘a touch on the tiller’ to shed about 350 cases a year and win a conviction rate above 60%. One view is that this is exactly what happened and while the roadshows have been ‘successful’ the new practice has been catastrophic for many rape complainants. The numbers appear to support this view. Following the “touch on the tiller” in 2017, CPS charges have dropped from 3571 to 1758 and the conviction rate has increased from 57.6% to 63.4%. Yet because the report has failed properly to understand the true chronology, the nature of the roadshows and its consequences have not been considered at all.

Dozens of questions are asked of RASSO lawyers and their managers surveyed for this report but not a single question is asked about any past or ongoing impact of ‘the levels of ambition’ nor about the more recent roadshows conducted by Mr McGill which, like the predecessor ‘levels of ambition’ roadshows, was recorded nowhere and other than in the press. It raises the obvious question of why the inspectors did not ask the very people whose decisions are under scrutiny the reasons behind the fall in the number of cases charged and what were the influencing factors behind them. Instead, we are offered just opinion by a manager, at para 2.28, which seems to express concern.

⁵ Course materials CPS

⁶ Guardian article September 2018 by Alexandra Topping

No answers given to the fundamental issues asked to address

The report accepts the CPS charge rate dropped by 52.1% in two years (para 1.12)⁷ whilst finding that the CPS is not “risk averse” in charging rape. Yet it proffers no other answer as to why, if the CPS is not risk averse, the charge rate has dropped so dramatically.

It does attempt to consider a number of different explanations, but none of these stack up:

- The report notes the drop off in police referrals to the CPS as a potential reason for the drop in the charging rate, but CPS decisions to prosecute have fallen at almost double that rate (as para 1.12 acknowledges: by 52.1% rather than 22.6%).
- The report notes the length of time to make charging decisions. This may explain volume falls, in particular since it may, as the report says, be a reason why complainants withdraw. However, it doesn't explain why the proportion of cases charged has collapsed to lowest levels on record (34.4% compared to 55.5% in March 2017). When investigations are complete whatever the volume left, the simple fact is that the CPS are charging a much smaller proportion of those cases referred to them than previously was the case.
- It considers the 17.1% increase in ‘administratively finalised’ cases (‘AF’ cases) since 2017, noting that such cases may be returned to the CPS by the police at a later stage, leading to a charge. However, this is contradicted by HMCPSI’s own findings. Of 80 AF cases in one police force HMCPSI report only 48.7% were still active. When looking at the whole 200 AF cases which HMCPSI inspected (which include the 80) only 18% were still active (para 1.16). Yet HMCPSI (at Fig 2 and para 1.17) add 48.7% more cases onto the 2019 national total of rape offences charged and say that if that percentage of AFs were still active in every force and all were charged the CPS charge rate would not have collapsed by 52.1% this year but only by 38.9% (para 1.17). It is hard to follow why the higher ‘active’ rate for AF files in one force is preferred to the lower rate in the other forces across a larger sample. Why is it appropriate to extrapolate from one force to national level. It is important to note that police resending an administratively finalised case to the CPS is far from it resulting in a charge. Even if this tortuous thinking were defensible it leaves no explanation for a drop in charging by CPS of 38.9%.
- There is also a suggestion that cases where a CPS lawyer has decided that no further action should be taken has decreased (see 1.13 and p13). However, this is a dubious conclusion at best. The End Violence Against Women Coalition’s statistical expert has found from publicly available CPS data that the proportion of cases being ‘no further actioned’ by prosecutors is, in fact, increasing and not decreasing. (See appendix).

⁷ Note: this drop is to the charge rate of the volume of files sent to the CPS. it is not affected by the undoubted cut in police referrals which reduces the volume considered by CPS has no impact on the percentage CPS choose to charge. ⁷ There is also a serious concern that the HMCPSI figures appear to contradict the description of AF cases by the CPS in previous reports. The VAWG reports issued by the CPS describe AF cases as cases “*where the police do not respond to CPS requests for additional evidence or reasonable lines of enquiry within 3 months*”, yet it is apparent from paragraph 4.19 that this figure also includes decisions where the police have themselves decided to take no further action. This encompasses a substantial number of cases (26.9%, as appears from Table 8; and which may have been higher had evidence from police been sought). No assessment of this interaction has been undertaken by HMCPSI.

As such, not one of the other HMCPST explanations is made good. In the absence of any credible alternative suggestion, the explanation offered by VAWG organisations, that there is an increasingly risk averse approach, remains, in my view, the most likely explanation.

In fact, the evidence in the report might appear to support the view that there has been a more risk averse approach to charging. At para 1.29 of their report HMCPST acknowledge that "if the CPS was being risk averse this might show a rise in the conviction rate after a contested trial" (see also para 2.28). They further note that there was a 10.4% rise between 16/17 and 18/19. It is important to register that this represents a massive increase in conviction rate in the context of historical relative stability. Quarter by quarter charge and conviction after contest ('CAC') rate changes for the time period show that with the exception of one quarter the CAC rate was below 50% the entire time between Q1 16/17 and Q3 17/18). In Q4 17/18 it rose to 53.8% and since then it has always been well above 50% peaking at 59.6% in Q3 18/19. So there has indeed been an increase in the conviction rate after contested trials for HMCPST to consider as potential evidence of a risk averse approach.

In para 1.30 and 4.8 HMCPST suggest that the increase in the CAC rate could be down to successful efforts to turn weaker cases into stronger cases at the pre-charge stage e.g. through improved handling of evidence/disclosure or generally. The problem with this analysis is that in the time period in question the proportion of non-convictions which were cases dropped by CPS at the post charge stage increased from 12.4% in 16/17 to 14% in 18/19 as set out in the VAWG annual report for 2018/19 (graph 23 in rape data section at page A22) annexed. On that evidence the CPS seem have got worse not better at strengthening cases at the pre-charge stage. This assertion in the HMCPST report is simply that: it is not supported by any evidence.

Conclusion

Overall, there is no explanation within the HMCPST report for what is now accepted to be a substantial reduction in CPS charging of rape in recent years. The HMCPST report has been widely greeted with dismay and, I am afraid, scepticism by external stakeholders. On this alone, it seems that the report has failed to deliver what was required of it. It is simply not an adequate inquiry. It was done in haste and offered nothing on which the End to End Review can rely to explain the recent and dramatic increase in the conviction rate and the catastrophic cut in charging decisions.

I therefore would ask you to consider indicating in strong terms that the December 2019 HMCSPI report is not the final investigation into this issue, and to seek a further, independent and properly resourced inquiry into the subject, which is of grave importance to victims of rape.

A copy of this letter is being sent to Victoria Atkins, the Minister responsible for overseeing the End to End Rape Review.

In line with my usual practice, a copy of this letter is being placed on my website.

Kind regards

A handwritten signature in black ink, appearing to read 'V Baird', written in a cursive style.

Dame Vera Baird QC
Victims' Commissioner for England and Wales

