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A CRITICAL EXPLORATION  
OF THE USE OF MENTAL  
HEALTH RECORDS IN RAPE  
TRIALS

CHARLOTTE ELIZABETH ADAMSON

Master of Jurisprudence

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2015



# A CRITICAL EXPLORATION OF THE USE OF MENTAL HEALTH RECORDS IN RAPE TRIALS

CHARLOTTE ELIZABETH ADAMSON

## ABSTRACT

Commentators discussing the cross-examination of rape complainants have tended to focus on sexual history evidence and character evidence more generally. The defence use of psychiatric evidence has, in contrast, received very little attention to date. This thesis examines the use of women's mental health records in rape trials, arguing that such use is a further demonstration of the resilient focus on the complainant's character and behaviour in rape trials. Against a backdrop of wide stigmatisation and victimisation of those with mental health problems, this thesis aims to analyse the existing literature on use of mental health records in rape trials, while also serving to highlight the need for more sustained critical research and reflection on the treatment of women with mental health problems within the criminal justice system. The thesis argues that the law governing the use of mental health records in rape trials is significantly flawed and requires reform, taking inspiration from the law in two other jurisdictions – Canada and New South Wales.



# A CRITICAL EXPLORATION OF THE USE OF MENTAL HEALTH RECORDS IN RAPE TRIALS



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Master of Jurisprudence

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2015



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## STATEMENT OF COPYRIGHT

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## INTRODUCTION

The main aim of this thesis is to examine the use of female complainants' mental health records in rape trials in England and Wales. In so doing, it aims to evaluate the current law on disclosure of mental health records, and to examine the effects and possible consequences of allowing such records to be introduced into the courtroom. A further subsidiary aim is to evaluate potential for reform by performing an exploration of the law governing use of such records in other jurisdictions.

While there is a vast amount of critical literature on the use of sexual history evidence,<sup>1</sup> and the use of character evidence more generally,<sup>2</sup> there is significantly less on the use of evidence relating to a complainant's mental health history,<sup>3</sup> making it an under-researched yet important area. Mental health records can be used in a similar way to sexual history evidence: to impeach the complainant's credibility, 'buying in' to the myth that women frequently make false allegations of rape. Furthermore, any overall effect may be similar, in that allowing both types of evidence may shrink the margins of who is 'rapeable' and what constitutes 'real rape'. The introduction of sexual history evidence implies that those who have had an active sexual history are more likely to have consented to intercourse on the particular occasion in question, and thus effectively disqualifies women's sexuality and suggests such women do not deserve the law's protection. Additionally, in cases where there has been a previous

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<sup>1</sup> Ian Dennis, 'Sexual History Evidence: Evaluating Section 41' (2006) *Criminal Law Review* 869-870; Neil Kibble, 'Judicial Perspectives on the Operation of S41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios' (2005) *Criminal Law Review* 190-205; Neil Kibble, 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot' (2005) *Criminal Law Review* 263-274; Jennifer Temkin, 'Sexual History Evidence - Beware the Backlash' (2003) *Criminal Law Review* 217-242; Georgina Firth, 'The Rape Trial and Sexual History Evidence - R v A and the (Un)Worthy Complainant' (2006) 57(3) *Northern Ireland Legal Quarterly* 442-464; Clare McGlynn, 'Feminist Judgment: R v A (No 2) [2001] UKHL 25' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010)

<sup>2</sup> Andrew Taslitz, *Rape and the Culture of the Courtroom* (New York University Press, 1999); Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219-248; Louise Ellison and Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202-219; Zsuzsanna Adler, *Rape on Trial* (London: Routledge, 1987); Susan Lees, *Carnal Knowledge: Rape on Trial* (2nd edn: The Women's Press Ltd, 2002)

<sup>3</sup> Those of note include: Jennifer Temkin, 'Digging the Dirt: Disclosure of Records in Sexual Assault Cases' (2002) *Cambridge Law Journal* 126-145; Louise Ellison, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13(1) *International Journal of Evidence and Proof* 28-49

relationship with the accused, the use of sexual history evidence may lead to the assumption that once a woman has consented to a particular individual in the past, she is more likely to consent in the future. The impact of this will be to seriously limit the circumstances in which women are able to say no to sexual activity with their partners or ex-partners.<sup>4</sup> In both cases, the law can be seen to fail to support women who do not consent to sexual intercourse.<sup>5</sup> Similarly, the use of mental health records in a rape trial may limit access to justice for women who have experienced a mental health problem at some point in their lives, either as a result of the rape or otherwise, and thus sex without consent for these women may be normalised in the same way.

This is of increased importance when considering the evidence that women with mental health issues appear to be subjected to assault at a considerably higher rate than other women.<sup>6</sup> It is therefore of paramount importance that there is an effective response to allegations of rape made by women who have a history of mental health problems, however serious, throughout the entirety of the criminal justice system.

Yet the use of mental health records is also distinct from the use of sexual history evidence. Rather than sexualising the complainant in rape cases, this defence tactic involves the hysterisation of the complainant,<sup>7</sup> thus utilising a unique overlap between myths relating to women and mental illness, and myths relating to victims of rape. It engages the unique belief that women frequently lie about sexual violence out of vindictiveness, fantasy and delusion, and it is often effective, as when someone is labelled as 'mentally ill', their accounts are often disqualified and their rendition of events is no longer viewed as fact.<sup>8</sup> Overall, 'intellectual disability and psychiatric instability ... tend to be viewed as diminishing the victim's credibility, rather than enhancing her vulnerability'.<sup>9</sup>

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<sup>4</sup> McGlynn, 'Feminist Judgment: *R v A*' (n1) 221

<sup>5</sup> Celia Wells and Oliver Quick, 'The Social Construction of Sexuality and Bodily Autonomy' in Nicola Lacey, Celia Wells and Oliver Quick (eds), *Reconstructing Criminal Law: Text and Materials* (New York: Cambridge University Press, 2010) 478

<sup>6</sup> Janine Benedet and Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50(1) *Osgoode Hall Law Journal* 1, 4

<sup>7</sup> Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 *Osgoode Hall Law Journal* 251, 283

<sup>8</sup> Dorothy Smith, 'K Is Mentally Ill: The Anatomy of a Factual Account' in Dorothy Smith (ed), *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London: Routledge, 1990) 12-52

<sup>9</sup> Jan Jordan, 'True 'Lies' and False 'Truths': Women, Rape and the Police' (PhD Thesis, University of Wellington, New Zealand, 2001) 349

Therefore, in order to achieve the aims of this study, this thesis must first examine such myths relating to women and mental illness, as well as to mental illness more generally, in order to understand how such evidence may impact upon juror decision-making. In so doing, it highlights the prejudicial use of records, as it is clear that such use often takes advantage of the myths and stereotypes relating to mental illness. The thesis will then go on to argue that women may become stuck in a 'cycle' of abuse, as research demonstrates that women who have been raped are more likely to experience mental health problems,<sup>10</sup> that women with mental health problems are more vulnerable to victimisation,<sup>11</sup> and that women who have been victimised are more vulnerable to re-victimisation.<sup>12</sup> This emphasises both the importance of women being able to freely access the help they require, whether this be access to counselling or a sense of justice achieved through a criminal conviction, and the irrationality of the argument that a woman with mental health problems is less credible, rather than more vulnerable.

In the second chapter, the thesis performs a critical analysis of the current procedures for pre-trial disclosure of evidence, arguing that the current law is flawed for several reasons. For example, it retains a focus on who has the evidence at the time, and the tests for disclosure are not stringent enough. Additionally, the limited availability of resistance to disclosure based on the public interest does little to protect complainants' interests. This chapter also considers how the law is operating in practice, and several possible effects of the current law, namely: increased 'secondary victimisation'; the risk of deterring those with mental health issues from reporting; and the risk of altering the client/counsellor relationship.

In the final chapter, the thesis will consider alternative approaches to the use of complainants' mental health records. It will take a comparative approach, examining the law in both New South Wales and Canada, and will evaluate the potential for reform in England and Wales. In conclusion, this thesis will argue that the law would benefit from distinct rules relating to disclosure of confidential records in sexual assault cases, as this would draw public and judicial

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<sup>10</sup> Catherine Itzin, *Tackling the Health and Mental Health Effects of Domestic and Sexual Violence and Abuse* (Joint Department of Health, National Institute for Mental Health in England and Home Office Victims of Violence and Abuse Prevention Programme Implementation Guide, 2006) 14-15

<sup>11</sup> Bridget Pettitt *et al*, *At Risk yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (London: Victim Support and Mind, 2013) 20-28

<sup>12</sup> Cathy Widom, Sally Czaja and Mary Dutton, 'Childhood Victimisation and Lifetime Revictimisation' (2008) 32 *Child Abuse and Neglect* 785, 793

attention to the particular issues raised in these circumstances and may go some way towards preventing focus on the complainant's character in rape trials.

The scope of the thesis is such that it will only discuss the use of female complainants' mental health records. This is for two reasons. Firstly, while male rape is problematic, the vast majority of rapes involve female victims.<sup>13</sup> Different issues surround each and there is not adequate space to give sufficient attention to both here. Secondly, sexual assault against people with mental illness, like sexual assault generally,<sup>14</sup> is highly gendered. Women with mental illness are affected by myths and stereotypes in ways that are sex-specific,<sup>15</sup> and thus the intersection of inequality based on gender and on disability justifies looking at women with mental illness as a group particularly vulnerable to sexual violence.<sup>16</sup> This thesis will also be restricted to the use of records in cases involving complainants who are adults at the time of trial. Given the specific procedural and contextual issues that arise in relation to children,<sup>17</sup> this issue merits its own dedicated analysis. Furthermore, this thesis will only be discussing the trial stage of the criminal justice process. This is not to say that this is the only problematic stage of the criminal justice system for women with mental health problems in terms of case progression. However, it is suggested that there is a certain circularity of criminal justice decision-making in this area. Cases are regularly abandoned at early stages of investigation, often on the basis that jurors at any subsequent trial are believed to be unwilling to convict.<sup>18</sup> Risk that defence will use mental health records only serves to increase belief of subsequent acquittal.<sup>19</sup> If cases do make it to the trial stage and mental health records are used, a subsequent acquittal serves to reinforce the very ideas that prevent such cases reaching trial in the first place. Thus, there is a 'vicious cycle' that creates a 'self-perpetuating feedback loop in which the prejudicial disbelief of women's experience is confirmed by the attrition process

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<sup>13</sup> Crown Prosecution Service, *Violence against Women and Girls Crime Report 2013-2014 Data: CPS Rape Victim Gender 2007-2014* (London: CPS, 2014)

<sup>14</sup> *Ibid*

<sup>15</sup> Janine Benedet and Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (2014) 22(2) *Fem Leg Stud* 131, 138

<sup>16</sup> Suzanne Doyle, 'The Notion of Consent to Sexual Activity for Persons with Mental Disabilities' (2010) 31 *Liverpool Law Review* 111, 113

<sup>17</sup> Emily Henderson, 'All the Proper Protections - the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses' (2014) *Criminal Law Review* 93-108; Louise Ellison *et al*, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimisation' (2014) *Criminology and Criminal Justice* 1, 4

<sup>18</sup> Vanessa Munro and Liz Kelly, 'A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales' in Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Devon: Willan Publishing, 2009) 284

<sup>19</sup> Pettitt *et al*, *At Risk yet Dismissed* (n11) 37

within the criminal justice system'.<sup>20</sup> Therefore, it is suggested that reforms on one stage of the criminal justice system may impact on decisions at all levels, and thus 'break the cycle'.

Having said this, a brief examination of attrition is important. The evidence that the more vulnerable victims, who might reasonably expect the protection of the law, actually fare the worst within the criminal justice system as a whole and are least likely to have their cases presented in court, is an significant background to this thesis and highlights the importance of further research in this area.

It is accepted in a wider context that most rape cases are never reported to the police<sup>21</sup> and, of those reported, only a minority result in conviction.<sup>22</sup> In 2005, Liz Kelly *et al* found that the vast majority of cases did not proceed beyond the investigative stage, and the conviction rate for all reported cases was eight per cent.<sup>23</sup> Despite a considerable number of government-body commissioned reviews, inspection reports and statistical bulletins to address the attrition problem,<sup>24</sup> efforts to remove legal barriers to reporting<sup>25</sup> and improvement of the treatment of victims of sexual offences and rape,<sup>26</sup> there is little evidence to suggest that this has improved.

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<sup>20</sup> Miranda Horvath and Jennifer Brown, 'Between a Rock and a Hard Place: The Vicious Cycle for Rape Victims' (2010) 23(7) *The Psychologist* 556, 558

<sup>21</sup> Ministry of Justice, Home Office and Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (London: ONS, 2013) 16-17

<sup>22</sup> *Ibid*, 7

<sup>23</sup> Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293, 2005) xi

<sup>24</sup> Cabinet Office, *The Government Response to the Stern Review* (Cabinet Office, London, 2011); Crown Prosecution Service, *Violence against Women and Girls Crime Report 2013-2014* (London: CPS, 2014); Crown Prosecution Service, *Violence against Women and Girls Crime Report 2012-2013* (London: CPS, 2013); Crown Prosecution Service, *Violence against Women and Girls Crime Report 2011-2012* (London: CPS, 2012); Andy Feist *et al*, *Investigating and Detecting Recorded Offences of Rape* (London: Home Office, Home Office Online Report 18/07, 2007); HMIC/HMCPSI, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (London: HMCPSI and HMIC, 2002); HMIC/HMCPSI, *Without Consent: A Report on the Joint Investigation and Prosecution of Rape Offences* (London: HMIC, 2007); HMIC/HMCPSI, *Forging the Links: Rape Investigation and Prosecution. A Joint Inspection by HMCPSI and HMIC* (London: HMCPSI and HMIC, 2012); Independent Police Complaints Commission, *Southwark Sapphire Unit's Local Practices for the Reporting and Investigation of Sexual Offences, July 2008 – September 2009* (London: IPCC, Independent Investigation and Learning Report, 2013); Kelly, Lovett and Regan, *A Gap or a Chasm?* (n23)

<sup>25</sup> The Sexual Offences Act 2003 introduced a new definition of rape and clarified the definition of 'consent to sex'

<sup>26</sup> For example, the creation of Sexual Assault Referral Centres (SARCs), the introduction of specially trained officers to attend to rape and sexual assault cases, video-recording of victim statements to spare vulnerable victims from giving evidence live in court, and new police guidelines on how to handle rape cases (Association of Chief Police Officers, Crown

Official data published in 2013 by the Ministry of Justice, the Home Office and the National Office for Statistics showed that the conviction rate is still as low as seven per cent,<sup>27</sup> one of the lowest in Europe.<sup>28</sup> As a result, commentators have expressed doubt as to the effectiveness of these measures in reducing attrition.<sup>29</sup> Overall, it is clear that in relation to convictions, rape has a poor ratio of reform effort to achievement,<sup>30</sup> and attrition is still high at every stage of the criminal justice process.

One of the earliest UK based attrition studies to make reference to rape complainants with mental illness investigated 483 rape cases reported in a year and followed their progress through the criminal justice system.<sup>31</sup> The rate of attrition for such complainants was not specifically examined; however, the authors did record that 40 cases discontinued by the police involved women who suffered from a mental disorder or a learning disability.<sup>32</sup> Similar reasons for discontinuance were cited in a subsequent study by Susan Lea *et al.* They found that in 3 per cent of cases (of the case sample of 379) the case did not progress on the grounds that the victim was deemed inconsistent, and it appeared that this judgement was more likely to be made in cases where the victim was vulnerable.<sup>33</sup> Although figures are not provided, the authors conclude that there is a 'very high' rate of attrition in cases where the alleged rape 'involved a victim with learning disabilities, psychiatric problems or physical disabilities'.<sup>34</sup> Kelly's study of 2500 rape cases found similar results. The authors did not address whether the likelihood of conviction was associated with a complainant's mental health history, but

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Prosecution Service and National Policing Improvement Agency, *Guidance on Investigating and Prosecuting Rape* (2010))

<sup>27</sup> Ministry of Justice, Home Office and Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (n21) 7

<sup>28</sup> Jo Lovett and Liz Kelly, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases across Europe* (London: Child and Women Abuse Studies Unit London Metropolitan University, 2009) 111

<sup>29</sup> Jennifer Brown, 'We Mind and We Care but Have Things Changed? Assessment of Progress in Reporting, Investigating and Prosecution of Rape' (2011) 17(3) *Journal of Sexual Aggression* 263-272; Kate Cook, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17(3) *Journal of Sexual Aggression* 250-262; Jan Jordan, 'Here We Go Round the Review-Go-Round: Rape Investigation and Prosecution - Are Things Getting Worse Not Better?' (2011) 17(3) *Journal of Sexual Aggression* 234-259

<sup>30</sup> Helen Reece, 'Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445, 451

<sup>31</sup> Jessica Harris and Sharon Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (London: Home Office, Home Office Research Study 196, 1999) 3

<sup>32</sup> *Ibid*, 23

<sup>33</sup> Susan Lea, Ursula Lanvers and Steve Shaw, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 *British Journal of Criminology* 583, 594

<sup>34</sup> *Ibid*

they did record that convictions were obtained in just 4 per cent of cases involving women with disabilities, meaning that they were almost twice as likely to drop out of the system.<sup>35</sup> Research by Her Majesty's Inspectorate for the Constabulary (HMIC) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPIS) also paid some attention to vulnerable complainants, finding that from a sample of 79 cases that had reached the charging stage, the conviction rate in cases involving complainants with mental health problems was 33 per cent.<sup>36</sup> This was compared to the overall conviction rate of 52 per cent.<sup>37</sup>

A few more recent studies have given more explicit and detailed attention to cases involving complainants with a background of mental health issues. Betsy Stanko and Emma Williams provided an analysis of 677 rape allegations recorded by the Metropolitan Police Service Crime Report Information Service during April – May 2005. They found that 87 per cent of complainants had at least one of four 'vulnerabilities', which included being recorded as having a mental health issue, and that this contributed significantly to the outcome of the case.<sup>38</sup> Victims with mental health issues were most disadvantaged; they were three times less likely to have their allegation classified as a crime of rape and had reduced odds of reaching a conviction.<sup>39</sup> Marianne Hester performed a smaller scale study, examining attrition in a sample of 87 cases reported across three police force areas in the North East of England.<sup>40</sup> Nearly one in five victims had a mental health problem according to the police record, and only about a third of such cases resulted in arrest, compared to half of cases where no such problem was recorded.<sup>41</sup> Furthermore, more recent data has been collected from the London Metropolitan Police Service; 679 allegations of rape received between April and May 2012 have been examined. The data reveals that complainants with mental illness are significantly more likely to have their case 'no-crimed' than complainants without recorded mental illness (11 per cent and 5 per cent respectively).<sup>42</sup> Additionally, they are significantly more likely to

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<sup>35</sup> Kelly, Lovett and Regan, *A Gap or a Chasm?* (n23) 72

<sup>36</sup> HMIC/HMCPIS, *Without Consent: A Report on the Joint Investigation and Prosecution of Rape Offences* (n24) at [13.36]

<sup>37</sup> *Ibid*

<sup>38</sup> Betsy Stanko and Emma Williams, 'Reviewing Rape and Rape Allegations in London: What Are the Vulnerabilities of Victims Who Report to the Police' in Miranda Hovarth and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Devon: Willan Publishing, 2009) 214

<sup>39</sup> *Ibid*, 215

<sup>40</sup> Marianne Hester, *From Report to Court: Rape Cases and the Criminal Justice System in the North East* (Bristol: University of Bristol in association with the Northern Rock Foundation, 2013) 6

<sup>41</sup> *Ibid*, 13

<sup>42</sup> Ellison *et al*, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimisation' (n17) 12

have their cases dropped through a police ‘no further action’ decision (45 per cent versus 38 per cent),<sup>43</sup> and significantly less likely to have their case referred to the CPS for a decision (1 per cent versus 21 per cent).<sup>44</sup> The CPS are also significantly less likely to charge in cases involving complainants with mental illness (4 per cent versus 10 per cent).<sup>45</sup> It is important to note that the significantly higher rate of attrition was not attributable to complainants with mental health problems withdrawing from the process any more frequently than other complainants.<sup>46</sup> It therefore follows that higher attrition must be due to a police or CPS decision not to continue with the case. Ultimately, this data shows that victims with mental health issues are associated with 2.3 times higher odds of attrition.<sup>47</sup>

This research has been backed up by examinations of the experience of victims with mental health problems more generally. Participants of research by Mind described negative experiences in their engagement with the police, such as not being believed, being perceived as unreliable or not credible and not being taken seriously. As one commented:

The police just wouldn’t believe me ... [It] didn’t matter what [police officer] was saying to my face but behind my back she was like “yeah, she’s not right, you know, it’s a bit dubious about her because she’s under the mental health team”. And the fact that they weren’t doing anything, I thought they’re not taking it seriously.<sup>48</sup>

Some also felt that the case was dropped by the CPS or other professionals because they had a mental health problem, and could therefore be easily discredited. For example:

She was writing, and she kind of stopped. “Bipolar?” I went, “Yeah, manic depressive, you know [...]”. And she went “Well, his [offender’s] barrister will probably tear you apart in court”. [...] It was almost like well, do I bother doing this statement or not. It was that kind of attitude.<sup>49</sup>

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<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> 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(3) *European Journal of Criminology* 324, 336

<sup>47</sup> Ibid, 334

<sup>48</sup> Female, victim of partner violence, antisocial behaviour, threats and harassment quoted in Pettitt *et al*, *At Risk yet Dismissed* (n11) 37

<sup>49</sup> Female, victim of partner violence, threats and harassment quoted in *ibid*, 37

Overall, it is clear that when victims with mental illness did report, they recounted a much less satisfactory experience than the general public.

Moreover, an examination of the available research highlights the lack of attention that has been paid to this group of vulnerable complainants. Many studies into attrition tend to publish only basic police recording statistics, and involve no in-depth analysis of patterns in attrition.<sup>50</sup> Some neglect victims with mental health issues entirely, while others, as Ellison notes, provide only a 'fairly rudimentary assessment of the passage of complainants with mental illness through the criminal justice system.'<sup>51</sup> Far more research is needed to begin to critically evaluate responses, and if necessary, make improvements. The need for further evidence is compounded, as Louise Ellison *et al* note, by statutory obligations imposed by the Equality Act 2010 on all public authorities to actively promote equality of opportunity for those with disabilities and to eliminate unlawful discrimination.<sup>52</sup> People with long term mental health conditions now come under the legislative framework of this Act, so criminal justice agencies must have an understanding of the potential barriers to equality of opportunity and access that may arise in their handling of such cases.

One of the reasons these cases may be dropped out of the system is a belief that they are a 'false allegation'. There is a wide belief that many women lie about rape; for example, one in five respondents to a study by the Havens agreed that 'most claims of rape are probably not true'.<sup>53</sup> In this context, where researchers have documented the existence of a substantial overestimation of the scale of false rape reporting among police officers,<sup>54</sup> a '(mis)understanding of mental illness' may provide an additional justification for scepticism.<sup>55</sup> For example, in Kelly's study, complaints by those with a disability were almost twice as likely

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<sup>50</sup> For example, *The Stern Review – a Report by Baroness Vivien Stern OBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales*, (London: Home Office, 2010); Her Majesty's Inspectorate for the Constabulary, *Rape Monitoring Group: Adult and Child Rape Data 2012/2013* (London: HMIC, 2014)

<sup>51</sup> Ellison *et al*, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (n17) 9

<sup>52</sup> *Ibid*, 16

<sup>53</sup> The Havens (Sexual Assault Referral Centres), *Wake up to Rape Research Summary Report* (2010) 7

<sup>54</sup> Kelly, Lovett and Regan, *A Gap or a Chasm?* (n23) xii ; Lesley McMillan, *Understanding Attrition in Rape Cases ESRC End of Award Report* (Swindon: ESRC, RES-061-23-0138-A, 2010)

<sup>55</sup> Ellison *et al*, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (n17) 9; Vanessa Lee and Corrine Charles, *Research into CPS Decision-Making in Cases Involving Victims and Key Witnesses with Mental Health Problems and/or Learning Disabilities* (London: CPS, 2008) 29

to be designated as false allegations as the non-disabled,<sup>56</sup> and mental illness was often cited as a reason for this. But as noted, many of these cases should not have been recorded as false because they did not comply with how police internal rules define a false complaint.<sup>57</sup>

However, contrary to this wide belief, no reliable evidence exists to show that fabrication occurs more often than in other crimes.<sup>58</sup> It is not possible to establish an exact figure for the prevalence of false allegations,<sup>59</sup> and research has produced widely varying estimates.<sup>60</sup> Nevertheless, those within the system felt there were very few. Judges have commented that they occur infrequently; one lawyer stated, ‘I have been prosecuting for 20 years and have prosecuted for a false allegation once’,<sup>61</sup> and while there is significant rhetoric among police officers about high numbers of false allegations, when asked, officers were unable to document individual cases.<sup>62</sup> Additionally, a number of commentators have distinguished between more and less robust studies.<sup>63</sup> Those considered more robust have consistently reported low prevalence rates, prompting Kimberly Lonsway to conclude ‘there is simply no way to claim that the “statistics are all over the map”. The statistics are now in a very small corner of the map’.<sup>64</sup> Moreover, there is no clear evidence that those with mental health problems are more likely to make a false allegation. Whilst 132 suspects were referred to the CPS for charging decisions to be made in relation to perverting the course of justice, only 28 of these had a mental health problem that had been identified by a medical assessor.<sup>65</sup> Of the 132 suspects, 38 were prosecuted, although it is not clear what proportion of these had a mental illness.

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<sup>56</sup> Kelly, Lovett and Regan, *A Gap or a Chasm?* (n23) 17

<sup>57</sup> *Ibid*, 50. Police internal rules on false complaints specify that the false complaint category should be limited to cases where either there is a clear and credible admission by the complainants, or where there are strong evidential grounds.

<sup>58</sup> Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford: Oxford University Press, 2002) 5

<sup>59</sup> *The Stern Review*, (n50) 40

<sup>60</sup> Phillip Rumney, ‘False Allegations of Rape’ (2006) 65(1) *Cambridge Law Journal* 128, 136

<sup>61</sup> *The Stern Review*, (n50) 40

<sup>62</sup> Temkin, *Rape and the Legal Process* (n58) 5

<sup>63</sup> David Lisak *et al*, ‘False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases’ (2010) 16 *Violence Against Women* 1318, 1318-1334

<sup>64</sup> Kimberly Lonsway, ‘Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports’ (2010) 16 *Violence Against Women* 1356, 1358

<sup>65</sup> Alison Levitt and Crown Prosecution Service Equality and Diversity Unit, *Under the Spotlight: Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (London: CPS, 2013) 17

Yet it is this threat of false complaints, fuelled by the long-standing belief that rape is an allegation 'easily to be made' and 'harder to be defended by the party accused, tho never so innocent',<sup>66</sup> that renders a sexual assault victim subject to a series of invasive defence practices designed to rigorously test and undermine credibility. It is often for this reason that defence may seek access to a complainant's personal records, including records of their mental health history.

## CONCLUSION

Overall, it is clear that there are still considerable concerns with the treatment of rape victims, who face tenacious cultures of scepticism and victim-blaming,<sup>67</sup> and must overcome a number of serious hurdles before a charge of sexual assault is approved. It is also clear that these challenges are magnified for complainants with a history of and/or current diagnosis of mental illness.<sup>68</sup> This thesis will focus on one particular aspect of this struggle: the use of women's mental health records in rape trials. In doing so, it will demonstrate that there is considerable room for improvement of the law in this area, which would serve to ease more than just this stage of the criminal justice process for women with mental health problems.

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<sup>66</sup> Matthew Hale, *The History of the Pleas of the Crown, Volume 1* (London: Professional books, 1971)

<sup>67</sup> Jennifer Brown and Miranda Horvath, 'Do You Believe Her and Is It Real Rape?' in Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Devon: Willan Publishing, 2009) 326-327; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008) 33

<sup>68</sup> Mind, *Another Assault: Mind's Campaign for Equal Access to Justice for People with Mental Health Problems* (London: Mind, 2007) 13-16; Pettitt et al, *At Risk yet Dismissed* (n11) 36-42

# CHAPTER 1: MENTAL ILLNESS; STIGMATISATION AND VICTIMISATION

Many rape cases lack evidence independent of the complainant. Therefore, with little evidence to guide juries, decision-making is vulnerable to influences from pre-existing understandings.<sup>1</sup> It is therefore important to build a picture of the wider context of mental health to understand how such evidence may influence a jury.

This chapter will first examine both historical and current stigmatisation of mental health, demonstrating that both the historical association between women and madness, and the widespread belief in myths relating to the mentally ill means that the use of mental health records in rape trials may be highly prejudicial. Furthermore, this chapter will provide evidence that women with mental health issues can become stuck in a 'cycle' of abuse, as they are more likely to be victimised and re-victimised. Moreover, women are more likely to experience a mental health problem due to high rates of sexual assault against them. Ultimately, this provides an important background for the argument that the current law on pre-trial disclosure of mental health records does not adequately protect women, and that the use of such records is highly illogical.

## 1.1 STIGMATISATION OF MENTAL ILLNESS

Mental illness has been around for as long as humans have existed,<sup>2</sup> and it is estimated that one in four people will experience a mental illness at some stage of their lives.<sup>3</sup> Despite this, reactions to mental disorder are still dominated by 'fear, pity and scorn',<sup>4</sup> and the stigma of mental illness remains a 'powerful negative attribute' in all social interactions.<sup>5</sup> Furthermore, women appear to have outnumbered men in diagnosis and treatment of mental illness, from the 'hysteria' of the eighteenth and nineteenth centuries, to mood disorders, depression and

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<sup>1</sup> Louise Ellison and Vanessa Munro, 'Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial' (2010) 30(1) *Legal Studies* 74, 79

<sup>2</sup> Stephen Hinshaw, *The Mark of Shame: Stigma of Mental Illness and an Agenda for Change* (Oxford: Oxford University Press 2007) ix

<sup>3</sup> Christopher Murray and Alan Lopez, 'Global Mortality, Disability and the Contribution of Risk Factors: Global Burden of Disease Study' (1997) 349 *Lancet* 1436, 1439

<sup>4</sup> Hinshaw, *The Mark of Shame* (n2) ix

<sup>5</sup> Peter Byrne, 'Stigma of Mental Illness and Ways of Diminishing It' (2000) 6 *Advances in Psychiatric Treatment* 65, 65

anxiety in the twenty first century.<sup>6</sup> These facts, along with a common belief that a woman may accuse an innocent man of raping her because ‘she is mentally sick and given to delusions’<sup>7</sup> mean that psychiatric evidence is likely to prove prejudicial in the context of rape.

The first section of this chapter will provide definitions for stigmatisation, stereotypes, discrimination and prejudice, as well as attempting to define mental illness. As the roots of stigmatisation of people with mental illness go back a long way, it will then discuss historical views of ‘madness’, before turning to evidence of stigmatisation in current society. It will conclude that individuals with mental disorder still suffer from stigmatisation, and, much like evidence of sexual promiscuity, evidence of mental illness has the power to invoke a ‘gender specific stigma of an unstable or manipulative accuser’.<sup>8</sup>

### 1.1.1 DEFINING STIGMATISATION AND MENTAL ILLNESS

Before considering historical and current stigmatisation of mental illness, a definition must be given. First, it is necessary to define ‘stereotypes’, ‘prejudice’ and ‘discrimination’, as these terms are strongly linked and often confused. Stereotypes are beliefs about a social group that are made about the group as whole, thus dismissing individuals’ differences.<sup>9</sup> Prejudice is an unreasonable or unjustifiable negative attitude towards others related to their group membership,<sup>10</sup> and discrimination is the unfair treatment of others, again based on their group membership.<sup>11</sup> Thus discrimination is the behavioural response of a prejudice.

The Oxford Dictionary defines stigma as ‘a mark of disgrace associated with a particular circumstance, quality or person’.<sup>12</sup> So stigma is the negative effect of a label,<sup>13</sup> which sets a person apart from others. Stigma therefore incorporates elements of stereotyping, prejudice and discrimination.<sup>14</sup> Furthermore, Bruce Link and Jo Phelan have made the point that social

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<sup>6</sup> Jane Ussher, *The Madness of Women: Myth and Experience* (Routledge, 2011) 1

<sup>7</sup> ‘Corroborating Charges of Rape’, (1967) 67 *Columbia Law Review* 1137, 1138

<sup>8</sup> Tess Wilkinson-Ryan, ‘Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant’ (2005) 153 *University of Pennsylvania Law Review* 1373, 1375

<sup>9</sup> Hinshaw, *The Mark of Shame* (n2) 21

<sup>10</sup> *Ibid*, 22

<sup>11</sup> *Ibid*

<sup>12</sup> Oxford Dictionaries, ‘Stigma’

<<http://www.oxforddictionaries.com/definition/english/stigma>> accessed 16/1/15

<sup>13</sup> Peter Hayward and Jenifer Bright, ‘Stigma and Mental Illness: A Review and Critique’ (1997) 6 *Journal of Mental Health* 345, 346

<sup>14</sup> Hinshaw, *The Mark of Shame* (n2) 24

power is a necessary component of stigma.<sup>15</sup> While there are many differences between people, only some result in stigmatisation, and the authors argue that for this to occur perceivers must be in a position of social power.

Additionally, some attempt must be made at defining mental illness. This is important as reactions from members of society depend on their understanding of mental illness. However it is very challenging, as the nature of mental disorder is one of the most controversial topics in human science.<sup>16</sup> There remains much disagreement between scientists, doctors, psychologists and others involved in mental illness, partly due to the fact that there are still gaps in knowledge about the brain, and that many symptoms of mental illness are mysterious in nature. Mental illness is essentially a concept that categorises some aspect of mental functioning as ‘abnormal, defective or disordered’.<sup>17</sup> It is generally considered that behaviour is shaped by a combination of biology and environment, although the exact relationship is much debated.<sup>18</sup> It is a term that covers a very wide variety and range of problems, however this thesis will be including both severe forms of mental illness and less serious forms when using the phrase ‘mental illness’. This is because behaviour is often stigmatised whenever the mental illness label is invoked, regardless of the specific form of underlying problem and the extremeness of its severity.<sup>19</sup>

### 1.1.2 HISTORICAL STIGMATISATION

It is important to understand historical ideas of mental illness, previously termed ‘madness’, to gain an idea of the origins of psychiatric stigma. Western societies have always linked ideas of morality and virtue with health and reason,<sup>20</sup> and early Christian societies tainted madness with ‘images of the demonic, the perverse, the promiscuous and the sinful’.<sup>21</sup> Throughout the medieval period, it was common for a patient’s own family to disown them: ‘such mentally

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<sup>15</sup> Bruce Link and Jo Phelan, ‘Conceptualising Stigma’ (2001) 27 *Annual Review of Sociology* 363, 375

<sup>16</sup> Hinshaw, *The Mark of Shame* (n2) 7

<sup>17</sup> Joan Busfield, ‘The Female Malady? Men, Women and Madness in Nineteenth Century Britain’ (1994) 28(1) *Sociology* 259, 260

<sup>18</sup> Joan Busfield, *Men, Women and Madness: Understanding Gender and Mental Disorder* (London: Macmillan, 1996) 143-164

<sup>19</sup> Simone Farrelly *et al*, ‘Anticipated and Experienced Discrimination Amongst People with Schizophrenia, Bipolar Disorder and Major Depressive Disorder: A Cross Sectional Study’ (2014) 14(1) *BMC Psychiatry* 157, 161

<sup>20</sup> Peter Byrne, ‘Psychiatric Stigma’ (2001) 178 *British Journal of Psychiatry* 281, 281

<sup>21</sup> Amy Schlosberg, ‘Psychiatric Stigma and Mental Health Professionals Stigmatisers and Destigmatisers’ (1993) 12(3-5) *Medicine and Law* 409, 410

sick people, most frequently women, were literally thrown out onto the streets'.<sup>22</sup> During the famous witch-hunts of the sixteenth and seventeenth centuries, many women with mental illness were branded as witches and persecuted.<sup>23</sup> After the witch hunts, treatments still included abandoning individuals, firing canons above their heads to frighten them 'back to sensibility', throwing them into water, twirling them to the point of unconsciousness and chaining them up in asylums that resembled dungeons,<sup>24</sup> most of which were located in physically and geographically isolated areas.<sup>25</sup> Many struggled to believe that disturbed behaviour was a result of biological processes, as opposed to being 'weak' and having a lack of personal control.<sup>26</sup> Furthermore, there remained a clear distinction between the 'normal' and the 'abnormal', with many of the upper classes amusing themselves by touring Bedlam and watching those with mental disorders, who were chained up and often screaming.

In the twentieth century, disturbing responses to mental disorder were still common. Famously, the Nazis introduced a sterilization law in 1933 making sterilisation compulsory for people with a wide range of mental disabilities, and later those with mental illness were included in those to be rounded up and sent to death camps.<sup>27</sup> This idea was present in other countries too; in the US, the Supreme Court upheld a sterilisation order for a woman with alleged mental illness.<sup>28</sup> Following this, more and more states started to enforce compulsory sterilisation of women in state institutional facilities: by 1940, 30 states had enacted such legislation.<sup>29</sup> This related to an obsession with the sexual habits of people with disabilities, with states attempting to control those instincts and prevent the passing on of any mental defects. These attitudes were gendered, with women's sexuality marked as particularly dangerous.<sup>30</sup> As Hinshaw notes, it is difficult to imagine a 'more officially sanctioned and institutionalised form of stigmatisation than this'.<sup>31</sup>

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<sup>22</sup> Gregory Zilboorg, *A History of Medical Psychology* (New York: Norton, 1941) 141

<sup>23</sup> Gerald Davidson, John Neale and Ann Kring, *Abnormal Psychology* (9th edn, New York: Wiley, 2004) 8

<sup>24</sup> Hinshaw, *The Mark of Shame* (n2) 64

<sup>25</sup> *Ibid*, 77

<sup>26</sup> *Ibid*, 88, 90

<sup>27</sup> *Ibid*, 77

<sup>28</sup> *Buck v Bell* [1927] 274 US 200

<sup>29</sup> Daniel Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (New York: Knopf, 1985)

<sup>30</sup> Janine Benedet and Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (2014) 22(2) *Fem Leg Stud* 131, 139

<sup>31</sup> Hinshaw, *The Mark of Shame* (n2) 77

### 1.1.2.1 'Hysteria' and Women's Madness

The rise of the Victorian madwomen was significant, as it was during this period that the close association between femininity and madness became firmly established within the scientific, literary and popular discourse.<sup>32</sup> There is some controversy about the gender imbalance of the population deemed mad prior to the nineteenth century. For example, Michel Foucault argued that the gender balance was even,<sup>33</sup> whereas Elaine Showalter has argued that women were statistically overrepresented among the mentally ill from as early as the seventeenth century.<sup>34</sup> However all commentators appear to agree that after the mid nineteenth century, women dominated in the statistics of the mentally ill.<sup>35</sup> Furthermore, there was an association between female sexuality and madness, which fitted in with the idea of women as 'mad or bad'.<sup>36</sup> This was demonstrated in nineteenth century literature, where madness in male characters represented truth, for example Shakespeare's King Lear was described as the King who 'tears off the mask and speaks the sane madness of vital truth'.<sup>37</sup> In contrast, the mad woman is more usually condemned for being in possession of 'dangerous desire'.<sup>38</sup> There are constantly juxtaposed images of women as pure and innocent, often the heroines, with the evil, sexual witch or madwoman.<sup>39</sup> Examples include Snow White and her stepmother, Cinderella and her stepsisters, and Jane Eyre and Bertha Mason.<sup>40</sup>

The disease of 'hysteria' most clearly demonstrates the link between sexuality and madness. Hysteria is historically a woman's disease; the etymology of 'hyster' refers to the uterus.<sup>41</sup> It has been associated with a woman's repressed sexual desire,<sup>42</sup> and symptoms were said to include discomfort with situations in which the patient was not the centre of attention, interaction with others characterized by inappropriately sexually seductive or provocative

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<sup>32</sup> Jane Ussher, *Women's Madness: Misogyny or Mental Illness* (Harvester Wheatsheaf, 1991) 64

<sup>33</sup> Michel Foucault, *Madness and Civilisation: A History of Insanity in the Age of Reason* (London: Tavistock, 1967)

<sup>34</sup> Elaine Showalter, *The Female Malady: Women, Madness and English Culture, 1830-1980* (London: Virago Press, 1987) 3

<sup>35</sup> Ussher, *Women's Madness* (n32) 71

<sup>36</sup> Susan Edwards, *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981) 52

<sup>37</sup> Herman Melville, 'Hawthorne and His Mosses' in P Miller (ed), *Major American Writers* (New York, 1962) 894

<sup>38</sup> Philip Martin, *Mad Women in Romantic Writing* (Sussex: Harvester, 1987) 14

<sup>39</sup> Sandra Gilbert and Susan Gubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century* (New Haven: Yale University Press, 1979) 77-80, 359-362, 431, 463-465

<sup>40</sup> Ussher, *Women's Madness* (n32) 86

<sup>41</sup> Oxford Dictionaries, 'Hysteric'

<<http://www.oxforddictionaries.com/definition/english/hysteric>> accessed 16/1/15

<sup>42</sup> Ilza Veith, *Hysteria: The History of a Disease* (Chicago: University of Chicago Press, 1965) 201

behaviour, a rapid shifting and shallow expression of emotions, and theatrically exaggerated emotion.<sup>43</sup> Hysteria became a ‘metaphor for everything unmanageable in the female sex’,<sup>44</sup> and was described as a woman’s ‘natural state’.<sup>45</sup> Furthermore, in 1883 a French physician asserted that ‘all women are hysterical and ... every woman carries with her the seeds of hysteria’.<sup>46</sup> Such comments made by high profile doctors suggest to the public that all women are to be considered potentially unreliable. Freud went further, explicitly linking hysteria with fabrications of sexual assault.<sup>47</sup> He rejected the idea that his female patients’ hysterical symptoms were a result of their history of sexual abuse, and instead believed that ‘they were only phantasies which my patients had made up’.<sup>48</sup>

This association between allegations of rape and female psychopathology was frequent. Female sexuality was presented as related to the subconscious mind, manifesting in ‘sexual fantasies of sexual domination, violation and rape’.<sup>49</sup> For example, Freud argued that women were subject to erotic fantasies, and fantasies were actually wishes,<sup>50</sup> leading to the common rape myth that the woman ‘wanted it’. This was taken a step further in the notion that women could not be trusted to differentiate between their subconscious sexual desires and reality;<sup>51</sup> prominent medical figures were warning of women’s tendency to sexual delusion and the tendency of ‘neurotic individuals’ to transform ‘fantasies into actual beliefs and memory falsifications’.<sup>52</sup> Following this, a British False Memory Society emerged, where scientists came

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<sup>43</sup> Lisa Appignanesi, *Mad, Bad or Sad: A History of Women and the Mind Doctors from 1800 to the Present* (Virago Press, 2008) 161

<sup>44</sup> Mark Micale, ‘Hysteria Male/Hysteria Female: Reflections on Comparative Gender Construction in Nineteenth Century Medicine’ (paper presented at The Wellcome Symposium on the History of Medicine: History of Hysteria, 6th April 1990, London)

<sup>45</sup> Thomas Laycock, *An Essay on Hysteria* (Philadelphia: Haswell, Barrington and Haswell, 1840)

<sup>46</sup> Auguste Fabre quoted in Elaine Showalter, ‘Hysteria, Feminism and Gender’ in Sander Gilman and others (eds), *Hysteria Beyond Freud* (Berkeley, CA: University of California, 1993) 286-287

<sup>47</sup> Sigmund Freud, ‘An Autobiographical Study’ in Peter Gay (ed), *The Freud Reader* (New York: W W Norton, 1989) 20-21

<sup>48</sup> *Ibid*, 21

<sup>49</sup> Edwards, *Female Sexuality and the Law* (n36) 101

<sup>50</sup> Sigmund Freud, ‘Creative Writers and Day-Dreaming’ in Peter Gay (ed), *The Freud Reader* (New York: W W Norton, 1989) 439

<sup>51</sup> Louise Ellison, ‘The Use and Abuse of Psychiatric Evidence in Rape Trials’ (2009) 13(1) *International Journal of Evidence and Proof* 28, 29

<sup>52</sup> Karl Menninger (a psychiatrist) quoted in John Wigmore, *Evidence in Trials at Common Law* (Boston: Little Brown, 1940) 463-464

together to argue that memories could easily be changed by suggestion or wish.<sup>53</sup> Thus fears of false allegations of rape reached new heights.<sup>54</sup> This position was endorsed by many legal scholars, who called for evidentiary rules that allowed for the rigorous testing and careful scrutiny of rape complainants. For example, Machtinger argued that the admission of expert psychiatric evidence was necessary to protect innocent men from unfounded accusations:

[T]he fact that many of these charges stem from a psychopathic mind makes it essential that the rules of evidence permit complete investigation into the truth of the charges. The most useful kind of evidence in a sexual case is the opinions of psychiatrists, social workers and probation officers as to the moral and mental traits of the prosecutrix.<sup>55</sup>

More famously, John Wigmore argued that the criminal courts should order the psychiatric evaluations of rape complainants prior to prosecution to test their credibility,<sup>56</sup> as he argued that women's 'psychic complexes are multifarious and distorted', and this was often manifested through 'the narration of imaginary sex-incidents of which the narrator is the heroine or the victim'.<sup>57</sup> Similar warnings followed, with Glanville Williams suggesting rape complainants should have to take a lie-detector test as their evidence may be 'warped by psychological processes which are not evident to the eye of common sense',<sup>58</sup> and John Heydon commenting on the 'danger' of false accusations ensuing from 'all kinds of psychological neuroses and delusions'.<sup>59</sup>

#### 1.1.2.2 How Is This Relevant Now?

Throughout history, and particularly in the nineteenth century, there was a marked cultural affinity between women and madness. Therefore questions about a rape complainant's mental health may spark images of the link between female psychopathology and promiscuity,<sup>60</sup> and

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<sup>53</sup> Appignanesi, *Mad, Bad or Sad* (n43) 472; 'British False Memory Society', <<http://bfms.org.uk>> accessed 16/1/15

<sup>54</sup> Eugene Kanin, 'False Rape Allegations' (1994) 23 *Archives of Sexual Behaviour* 81, 84-87

<sup>55</sup> S Machtinger, 'Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases' (1949) 39(6) *Journal of Criminal Law and Criminology* 750, 752

<sup>56</sup> Wigmore, *Evidence in Trials at Common Law* (n52) 459-460

<sup>57</sup> *Ibid*, 459

<sup>58</sup> Glanville Williams, 'Corroboration - Sexual Cases' (1962) *Criminal Law Review* 662, 663

<sup>59</sup> John Heydon, *Evidence: Cases and Materials* (London: Butterworths, 1975) 81

<sup>60</sup> Mark Micale, *Approaching Hysteria: Disease and Its Interpretations* (Princeton, NJ: Princeton University Press, 1994) 191

while hysteria is no longer recognized as a mental disorder, it is an easy intuitive leap for a jurist to go from 'mental illness' to the stereotypical hysterical woman.<sup>61</sup> Furthermore, the association between false complaints and psychopathology is an important background to rape trials today, even if such views are not expressed so openly anymore. For example, when a defence lawyer questions a complainant about her mental health history, it is typically with the aim of undermining her credibility and this is likely to prove effective 'because it invokes the gender stereotyped image of a mentally unstable accuser'.<sup>62</sup>

Additionally, while Wigmore and Glanville Williams were writing many years ago, Lordships in the Supreme Court, and probably other judges, may have been educated and trained at a time when their ideas and influences were still pervasive. While judges are required to attend training throughout their careers, it is possible that the assumptions underpinning Wigmore and Williams' arguments may continue to be expressed. Furthermore, training on mental health is not included in legal education or judicial training and refresher courses. This means that judges are unlikely to have adequate mental health awareness or understanding of mental capacity.<sup>63</sup>

### 1.1.3 CURRENT STIGMATISATION

This section will aim to demonstrate that stigmatisation of people with mental health issues is not purely a historical problem, but a global phenomenon,<sup>64</sup> which is still prevalent and persists over time.<sup>65</sup> It will firstly consider the end of the twentieth century and the beginning of the twenty-first to gain an understanding of the way that stigmatisation has developed, before arguing that stigmatisation still affects the everyday lives of those with mental health problems, and despite some evidence of improvement, remains a substantial problem.

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<sup>61</sup> Wilkinson-Ryan, 'Admitting Mental Health Evidence' (n8) 1389

<sup>62</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n51) 31

<sup>63</sup> Mind, *Another Assault: Mind's Campaign for Equal Access to Justice for People with Mental Health Problems* (London: Mind, 2007) 23

<sup>64</sup> Graham Thornicroft *et al*, 'Global Pattern of Experienced and Anticipated Discrimination against People with Schizophrenia: A Cross-Sectional Survey' (2009) 373(9661) *Lancet* 408, 414; Antonio Lasalvia *et al*, 'Global Pattern of Experienced and Anticipated Discrimination Reported by People with Major Depressive Disorder: A Cross-Sectional Survey' 381(9860) *Lancet* 55, 58-59

<sup>65</sup> Bernice Pescosolido *et al*, "A Disease Like Any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence' (2010) 167 *American Journal of Psychiatry* 1321, 1325; Georg Schomerus *et al*, 'Evolution of Public Attitudes About Mental Illness: A Systematic Review and Meta-Analysis' (2012) 125 *Acta Psychiatrica Scandinavica* 440, 448

There is an abundance of evidence that suggests that despite an increase in public knowledge, stigmatisation of those with mental illness remains common. In 1996, Mind undertook a survey that produced shocking results in terms of the extent to which stigmas of mental health affected every area of life,<sup>66</sup> raising ‘deep concerns’ about the ‘staggering’ level of discrimination.<sup>67</sup> 47 per cent of respondents had been harassed or abused in public because of their mental health problems, including being shouted at and being physically attacked,<sup>68</sup> and over half felt afraid of attack.<sup>69</sup> The largest problem area in people’s lives was employment,<sup>70</sup> and this was often triggered by a history of mental disorder rather than a documented disability.<sup>71</sup> As one respondent commented:

It seems absurd to me that a criminal record can be ‘spent’ when we have to constantly declare our lifelong psychiatric history, which can be painful and distressing in itself and can even stop people seeking help when they are in need of it.<sup>72</sup>

This is backed up by evidence that less than a quarter of people with severe mental health conditions have a job<sup>73</sup> and fewer than four in ten employers said they would consider employing someone with mental health problems.<sup>74</sup> In addition, 80 per cent of organisations surveyed did not have a specific mental health policy.<sup>75</sup>

Furthermore, mental health issues have also affected the personal life of many. One study found that interpersonal interactions with family were consistently reported as a primary

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<sup>66</sup> Jim Read and Sue Baker, *Not Just Sticks and Stones: A Survey of the Stigma, Taboos and Discrimination Experienced by People with Mental Health Problems* (Mind, 1996) 4

<sup>67</sup> *Ibid*

<sup>68</sup> *Ibid*, 5

<sup>69</sup> *Ibid*, 6

<sup>70</sup> *Ibid*, 8

<sup>71</sup> Hinshaw, *The Mark of Shame* (n2) 124

<sup>72</sup> A woman, aged 42, diagnosed with depression, quoted in Read and Baker, *Not Just Sticks and Stones* (n66) 12

<sup>73</sup> The Sainsbury Centre for Mental Health, *The Future of Mental Health: A Vision for 2015* (2006) 14

<sup>74</sup> Social Exclusion Unit, *Mental Health and Social Exclusion* (Office of the Deputy Prime Minister, 2004) 27

<sup>75</sup> Shaw Trust, *Mental Health: The Last Workplace Taboo* (Shaw Trust, 2010) 4

source of discriminatory behaviour.<sup>76</sup> Stigmatisation can also influence court decisions relating to divorce or custody. For example, a woman with a history of depression lost custody of her children despite the fact that she ‘remained stable, worked and continued medication and therapy’.<sup>77</sup> This history of mental illness resulted in her being deemed the less fit parent even though her husband had a criminal record for driving under the influence and possessing drugs. Such prejudices may be a result of the myth that those with mental health problems are ‘crazy all the time’.<sup>78</sup> Many people seem to have the idea that those with mental illness are ‘ill-equipped to cope with life and to look after [themselves] in every way’.<sup>79</sup> In reality, people with mental health issues can get on with life perfectly well; as Premila Trivedi, a mental health service user, trainer and advisor, notes: mental health problems are just ‘one part of your personality and one part of your life’.<sup>80</sup> But this side to mental illness is not visible because it is not widely publicised.

Often a link is made between mental health problems and violence, which can have an affect on many areas of life. There is a damaging stereotype that people in mental distress are a danger to society,<sup>81</sup> and the high proportion of stories linking mental ill health with criminality and violence, discussed below, contributes to this. There have even been attempts to enshrine such discrimination in legislation; in 2000 the Labour government introduced a Dangerous People with Severe Personality Disorder Bill in an attempt to establish legislation that would enable people who ‘might’ commit serious violent crimes to be preventatively arrested.<sup>82</sup> Fortunately, the Bill was severely amended following an outcry from the Royal College of Psychiatrists and a warning from *The Lancet* that dangerous severe personality disorder was so vaguely defined that six people would have to be detained to prevent one from

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<sup>76</sup> Claire Henderson *et al*, ‘England’s Time to Change Antistigma Campaign: One-Year Outcomes of Service User-Rated Experiences of Discrimination’ (2012) 63(5) *Psychiatric Services* 451, 455

<sup>77</sup> Otto Wahl, *Telling Is Risky Business: Mental Health Consumers Confront Stigma* (New Brunswick, NJ: Rutgers University Press, 1999) 99

<sup>78</sup> Jim Read, *Myths About Madness: Challenging Stigma and Changing Attitudes* (Mental Health Media, 2009) accessed 12/10/14

<sup>79</sup> *Ibid*

<sup>80</sup> Premila Trivedi in *ibid*

<sup>81</sup> Gary Ward, *Mental Health and the National Press* (London: Health Education Authority, 1997) vi

<sup>82</sup> *Dangerous People with Severe Personality Disorder Bill*, (2000)

<<http://www.publications.parliament.uk/pa/cm199900/cmbills/088/2000088.htm>> accessed 15/05/15

acting violently.<sup>83</sup> Although there is a small association between mental illness and risk for violence, this link pertains only to certain forms of psychotic behaviour, and only to those currently displaying a mental health problem.<sup>84</sup> A review of evidence found that across eight economically developed countries, between 6-15 per cent of all homicides were committed by people with a clear diagnosis of schizophrenia,<sup>85</sup> with a more recent review concluding the range is between 5-10 per cent.<sup>86</sup> A survey with 8098 respondents has shown that having symptoms of an anxiety related disorder within the last year is associated with a modest increase in the risk of violence.<sup>87</sup> For those that had previously been diagnosed with depression, but had not had the condition in the previous year, the rate of violence was one per cent, which is half the rate of those who have never been given a psychiatric diagnosis.<sup>88</sup> Another study found that of 2000 murders, only 34 were committed by people who had been in touch with psychiatric services before the incident.<sup>89</sup> Those that were responsible were a tiny proportion of people experiencing mental health problems. In comparison, drug or alcohol misuse contributes to at least one quarter of all violent incidents.<sup>90</sup> These results show that it is misleading to speak of violence or danger in relation to the 'mentally ill', just as it would be in relation to the 'physically ill',<sup>91</sup> and that risk depends on the type of diagnosis and the nature and severity of symptoms.

Additionally, it is not just those who may lack knowledge who are accused of such stigmatizing attitudes; anecdotal, narrative and survey evidence reveals that those entrusted with the care and treatment of the mentally ill can also display similar views.<sup>92</sup> One Northern Ireland general practitioner wrote that neurotic patients:

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<sup>83</sup> Alec Buchanan and Morven Leese, 'Detention of People with Dangerous Severe Personality Disorders, a Systematic Review' (2001) 358(9297) *Lancet* 1955, 1958

<sup>84</sup> Hinshaw, *The Mark of Shame* (n2) 101

<sup>85</sup> Martin Erb *et al*, 'Homicide and Schizophrenia: Maybe Treatment Does Have a Preventive Effect' (2001) 11(1) *Criminal Behaviour and Mental Health* 6, 13-14

<sup>86</sup> Hans Schanda *et al*, 'Homicide and Major Mental Disorder' (2004) 110(2) *Acta Psychiatrica Scandinavica* 98, 103

<sup>87</sup> Patrick Corrigan and Amy Watson, 'Findings from the National Comorbidity Survey on the Frequency of Violent Behaviour in Individuals with Psychiatric Disorders' (2005) 136(2-3) *Psychiatry Research* 153, 160

<sup>88</sup> *Ibid*, 157

<sup>89</sup> The Royal College of Psychiatrists, *Report of the Confidential Inquiry into Homicides and Suicides by Mentally Ill People* (RCP, 1996) 24-25

<sup>90</sup> Jan Vevera *et al*, 'Violent Behaviour in Schizophrenia: Retrospective Study of Four Independent Studies from Prague, 1949-2000' (2005) 187 *British Journal of Psychiatry* 426, 427

<sup>91</sup> Graham Thornicroft, *Shunned: Discrimination against People with Mental Illness* (Oxford: Oxford University Press, 2006) 139

<sup>92</sup> Byrne, 'Stigma of Mental Illness' (n5) 66

[T]ake up far too much of our time and energy – people complaining, miserable, depressed, neurotically whining about how unhappy they are, pouring out all their problems in the surgery and dumping them on my doorstep. It would be really unbearable if I was actually listening to them.<sup>93</sup>

It is difficult to know the extent of such practices, but even a small percentage translates into thousands of communications.<sup>94</sup> More recent evidence suggests that professionals working in all areas of health care, including mental health, stigmatise and discriminate against people with mental illness.<sup>95</sup>

As a result of such overwhelming evidence of stigmatisation, there has been much focus on increasing public and professional understanding of mental health problems and therefore reducing stigma and discrimination. The Royal College of Psychiatrists launched a five-year long campaign to try and achieve this in 1997.<sup>96</sup> Similar to the above evidence, a population survey undertaken before the start of the campaign showed that negative opinions about people with mental illness were widely held.<sup>97</sup> The same survey was repeated five years later, and the pattern of responses found was similar,<sup>98</sup> indicating that stigmatisation may be deeply engrained in society. However, there was a small decrease in the percentages of people expressing negative opinions.<sup>99</sup> While the positive changes cannot solely be attributed to the campaign because opinions are subject to many influences simultaneously, the results may suggest stigmatisation is slowly decreasing.

Following this, the mental health anti-stigma programme Time to Change, which is run by Mind and Rethink Mental Illness, has stated that data shows public attitudes have improved

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<sup>93</sup> Liam Farrell, 'That Which Does Not Kill Us Makes Us Stronger' *Irish Medical News* (Ireland, 21st June 1999) 21

<sup>94</sup> Hinshaw, *The Mark of Shame* (n2) 123

<sup>95</sup> Claire Henderson *et al*, 'Mental Health-Related Stigma in Health-Care and Mental Health-Care Settings' (2014) 1 *Lancet Psychiatry* 467, 467

<sup>96</sup> The Royal College of Psychiatrists, *Changing Minds: Every Family in the Land* (1997-2003) <<http://www.rcpsych.ac.uk/about/campaigns/changingmindscampaign1997-.aspx>> accessed 14/1/15

<sup>97</sup> Arthur Crisp *et al*, 'Stigmatisation of People with Mental Illness' (2000) 177 *The British Journal of Psychiatry* 4, 5

<sup>98</sup> Arthur Crisp *et al*, 'Research Report: Stigmatisation of People with Mental Illness: A Follow-up Study within the Changing Minds Campaign of the Royal College of Psychiatrists' (2005) 4(2) *World Psychiatry* 106, 108

<sup>99</sup> *Ibid*, 110

significantly, and that the biggest annual improvement in the last decade has taken place in 2013;<sup>100</sup> the most recent data from the National Attitudes to Mental Illness survey shows that there was a 2.8 per cent improvement in attitudes between 2012 and 2013.<sup>101</sup> More people than ever before are acknowledging that they know someone with a mental health problem,<sup>102</sup> and there were declines in the proportion of people agreeing with statements such as ‘anyone with a history of mental problems should be excluded from public office’ and ‘it is frightening to think of people with mental problems living in residential neighbourhoods’.<sup>103</sup>

Furthermore, mental health can now fall under the Equality Act 2010. The Act protects those with a disability from discrimination, and now defines a disability as a ‘physical or mental impairment that has a substantial, adverse and long-term effect on your normal day-to-day activities’.<sup>104</sup> While this focuses on the effect of a mental health problem, rather than the diagnosis, it may still be the case that not all experiences of mental illness fall within this. Furthermore, while it is advantageous that mental illness is now legally recognised as a disability equal to a physical impairment, there is still a clear disparity in many employers’ treatment of those with mental and physical illness.<sup>105</sup>

So while there is some positive change, there is still a lot of work to be done to end stigma and discrimination faced by people with a history of mental illness in their everyday lives. While findings indicate that there have been improvements in how people intend to behave and a trend towards more positive attitudes, there has been no significant improvement in knowledge about mental illness or reported behaviour at a national level,<sup>106</sup> and it appears that many public attitudes and desire for social distance remain stable over time.<sup>107</sup> There are still worrying percentages of people agreeing with statements such as ‘less emphasis should be

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<sup>100</sup> ‘Survey Shows Greatest Improvement in Public Attitudes to Mental Health in 20 Years’, (*Mind*, 7th October 2014) <<http://www.mind.org.uk/news-campaigns/news/survey-shows-greatest-improvement-in-public-attitudes-to-mental-health-in-20-years/#.VLkqb0sjjwJ>> accessed 16/1/15

<sup>101</sup> TNS BRMB, *Attitudes to Mental Illness: 2013 Research Report* (Time For Change, 2014) 22

<sup>102</sup> *Ibid*, 5

<sup>103</sup> *Ibid*, 3

<sup>104</sup> s6 Equality Act 2010

<sup>105</sup> Chris Phillips, ‘The Equality Act 2010: Impact on Mental Health-Related Disability Claims’ (2012) 109 *Employment Law Bulletin* 2, 4

<sup>106</sup> Sara Evans-Lacko, Claire Henderson and Graham Thornicroft, ‘Public Knowledge, Attitudes and Behaviour Regarding People with Mental Illness in England 2009-2012’ (2013) 202(s55) *The British Journal of Psychiatry* s51, s54

<sup>107</sup> Schomerus *et al*, ‘Evolution of Public Attitudes About Mental Illness: A Systematic Review and Meta-Analysis’ (n65) 448

placed on protecting the public from people with mental illness' (only 34 per cent),<sup>108</sup> and there has been no significant changes in some views such as 'as soon as a person shows signs of mental disturbance, he should be hospitalised',<sup>109</sup> and 'one of the main causes of mental illness is a lack of self-discipline and will-power'.<sup>110</sup> It is clear that such attitudes are picked up on by those suffering with mental illness; 72 per cent of respondents in one study felt that they had to conceal their mental health status to some extent.<sup>111</sup> Furthermore, stigma associated with mental illness has also been found to act as a treatment barrier to professional mental health care.<sup>112</sup> Attitudes about employment are also still trailing behind. Although knowledge about the prevalence of mental health problems has improved, as has stated willingness to offer reasonable adjustments, there has been no increase in the existence of formal policies on workplace mental health.<sup>113</sup> A study conducted prior to the introduction of the Equality Act 2010 revealed that the extent to which employers and managers believe that employees suffering from stress can work effectively remained unchanged.<sup>114</sup> Following the implementation of the Equality Act 2010, views of disclosure in job applications did not change, with over three quarters of employers believing that people with mental health problems should disclose prior to employment, despite the legislative changes making this unlawful.<sup>115</sup> This is echoed in research into those with mental health problems, with 49 per cent of respondents in one study saying they would not feel comfortable talking to an employer about their mental health.<sup>116</sup> Ultimately, discrimination is still experienced by many with mental illness; 87.6 per cent of respondents in one study had experienced some form of discrimination in the last twelve months, and almost the entire sample (92.6 per cent)

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<sup>108</sup> TNS BRMB, *Attitudes to Mental Illness: 2013 Research Report* (n101) 4

<sup>109</sup> *Ibid*, 10

<sup>110</sup> *Ibid*, 21

<sup>111</sup> Elizabeth Corker *et al*, 'Experiences of Discrimination among People Using Mental Health Services in England 2008-2011' (2013) 202(s55) *The British Journal of Psychiatry* s58, s61

<sup>112</sup> Lisa Dockery *et al*, 'Stigma- and Non-Stigma-Related Treatment Barriers to Mental Healthcare Reported by Service Users and Caregivers' (2015) 228 *Psychiatry Research* 612, 614

<sup>113</sup> Kirsty Little *et al*, 'Employers' Attitudes to People with Mental Health Problems in the Workplace in Britain: Changes between 2006 and 2009' (2011) 20(1) *Epidemiology and Psychiatric Sciences* 73, 75

<sup>114</sup> Claire Henderson *et al*, 'Mental Health Problems in the Workplace: Changes in Employers' Knowledge, Attitudes and Practices in England 2006-2010' (2013) 202(s55) *The British Journal of Psychiatry* s70, s73

<sup>115</sup> Graeme Lockwood, Claire Henderson and Graham Thornicroft, 'The Equality Act 2010 and Mental Health' (2012) 200(3) *British Journal of Psychiatry* 182-183

<sup>116</sup> TNS BRMB, *Attitudes to Mental Illness: 2013 Research Report* (n101) 40

reported an anticipated discrimination.<sup>117</sup> While this is still the case, it cannot be assumed that stigmatisation of mental health problems is no longer an issue.

Furthermore, it may be hard to detect the full extent of stigmatisation. Public opinion surveys can be criticized for underestimating levels of stigmatisation, as those who are disinterested may refuse to participate in a survey, and some of those participating may be more aware of socially acceptable responses.<sup>118</sup> In the context of investigating rape myth acceptance, it was found that given subtler wording, a higher proportion of participants appeared to endorse them.<sup>119</sup> Additionally, people may not consciously engage in stigmatising those with mental health problems, and investigation thus far has mostly focused on overt attitudes, rather than deeper levels of stigma, meaning that the degree of hidden bias within the general public is unknown.

This chapter will now examine in more detail how mental illness is depicted both through our language and in the media, suggesting continued stigmatisation is widespread, and in some cases contributing to stigmatisation.

### 1.1.3.1 Language

Much of the language commonly used that is associated with mental illness provides further evidence that prejudice and ignorance remain widespread. Words used through history to describe mental illness are disparaging, for example, insanity, madness and lunacy. In modern times, many of the synonyms and slang phrases for mental illness are derogatory and rival racial and sexual epithets as sources of ridicule, such as ‘crazy’, ‘nuts’, ‘wacko’, ‘loony’, ‘out of your mind’ and ‘deranged’.<sup>120</sup> While it is now uncommon to hear racial or ethnic insults due to current social standards, there are few social restrictions on terms used to denote mental illness. Such stigmatising words are also common in the national press, with almost half of tabloid stories covering mental illness including terms such as ‘nutter’.<sup>121</sup> As well as this, there is no specific word for prejudice against mental illness, whereas there are lots of recognised

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<sup>117</sup> Farrelly *et al*, ‘Anticipated and Experienced Discrimination Amongst People with Schizophrenia, Bipolar Disorder and Major Depressive Disorder: A Cross Sectional Study’ (n19) 159

<sup>118</sup> Byrne, ‘Psychiatric Stigma’ (n20) 283

<sup>119</sup> Friederike Eyssel and Gerd Bohner, ‘Modern Rape Myths: The Acceptance of Modern Myths About Sexual Aggression (Ammsa) Scale 2008’ in Melanie Morrison and Todd Morrison (eds), *The Psychology of Modern Prejudice* (Nova Science Publishers, 2008) 271

<sup>120</sup> Hinshaw, *The Mark of Shame* (n2) xi

<sup>121</sup> Ward, *Mental Health and the National Press* (n81) 14

descriptions for other prejudiced beliefs, for example racism, sexism, and homophobia.<sup>122</sup> While it may fall under 'ableism', as mental illness now falls under the definition of disability,<sup>123</sup> this term does not serve to capture the unique prejudices in the same way. Furthermore, language used in everyday conversations is revealing, for example unpopular ideas are often dismissed as 'crazy' and unusual or eccentric plans are branded as 'madness'.<sup>124</sup> In this way, the same words used to describe mental illness are also used negatively and dismissively. Overall, this evidence suggests stigmatisation of mental illness is routinely accepted in everyday language, and therefore may be deeply embedded in society.

### 1.1.3.2 Media Coverage

Stereotyping and stigmatizing attitudes towards mental illnesses are maintained and often reinforced through the media, as images are distorted and negative stereotypes are over-emphasised. Media coverage is only one of a complex range of factors which influence beliefs about mental health,<sup>125</sup> but it is a crucial one as it is a main flow of information to the mass public, therefore playing an active part in shaping what mental illness means in our culture.<sup>126</sup>

The first area of media to consider is newspaper portrayals of psychiatric issues. Newspapers have come under criticism for focusing on the 'doom and gloom' side of mental illness,<sup>127</sup> in particular producing disproportionately large amounts of stories on dangerous actions of mentally ill individuals.<sup>128</sup> One study found that almost 46 per cent of press coverage on mental health was about crime, harm to others and self-harm, and that stories making the link between mental ill-health and violence were given greater prominence than more positive pieces.<sup>129</sup> Examples of such headlines include 'Maniac killed twin sisters'<sup>130</sup> and 'Knife maniac freed to kill. Mental patient ran amok in the park'.<sup>131</sup> While in reality such stories represent only a tiny minority, they are often portrayed as representative of anybody with such problems,

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<sup>122</sup> Byrne, 'Stigma of Mental Illness' (n5) 67

<sup>123</sup> s6 Equality Act 2010

<sup>124</sup> Hinshaw, *The Mark of Shame* (n2) 116

<sup>125</sup> Ward, *Mental Health and the National Press* (n81) vi

<sup>126</sup> Otto Wahl, *Media Madness* (New Brunswick, New Jersey: Rutgers University Press, 1995) 87-88

<sup>127</sup> Read and Baker, *Not Just Sticks and Stones* (n66) 21

<sup>128</sup> Read, *Myths About Madness: Challenging Stigma and Changing Attitudes* (n78)

<sup>129</sup> Ward, *Mental Health and the National Press* (n81) 1

<sup>130</sup> 'Maniac Killed Twin Sisters', *Evening Standard* (London, 18th April 2005)

<sup>131</sup> 'Knife Maniac Freed to Kill. Mental Patient Ran Amok in the Park', *Daily Mail* (London, 26th February 2005)

which skews public understanding.<sup>132</sup> These results were backed up by another UK study that compared coverage of mental health and physical health items. The authors found that not only were there five times more articles about physical rather than mental illness,<sup>133</sup> 64 per cent of psychiatric stories were negative compared with 46 per cent of general medical pieces.<sup>134</sup> Their analysis suggested that ‘negative articles about medicine tended to be about “bad doctors”, whereas negative articles on psychiatry tended to describe “bad patients”’.<sup>135</sup> While more recently, there has been a significant increase in the proportion of anti-stigmatising articles, there has been no concomitant proportional decrease in stigmatising articles.<sup>136</sup>

Evidence has shown that such stories can have an effect; a national survey on public attitudes to people with mental illness took place just before Michael Ryan killed 15 people in Berkshire and was repeated afterwards.<sup>137</sup> There was a significant increase after the event in the number who agreed that people who commit horrific crimes are likely to be mentally ill.<sup>138</sup> Importantly, newspaper reports of the stories suggested Michael Ryan was mentally ill, although there was no clear evidence of this. The authors concluded that ‘either the Hungerford massacre, or the media account of it, strengthened the public view of extreme violence as a product of mental illness’.<sup>139</sup> This same trend has also been found after other such events,<sup>140</sup> and in other research.<sup>141</sup>

Stigmatisation of mental health in television and film has also been studied. Glasgow Media Group in Scotland analysed one month’s output for national and local television, including

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<sup>132</sup> Ward, *Mental Health and the National Press* (n81) 17

<sup>133</sup> Stephen Lawrie, ‘Newspaper Coverage of Psychiatric and Physical Illness’ (2000) 24 *Psychiatric Bulletin* 104, 105

<sup>134</sup> *Ibid*

<sup>135</sup> *Ibid*

<sup>136</sup> Amalia Thornicroft *et al*, ‘Newspaper Coverage of Mental Illness in England 2008-2011’ (2013) 202 *British Journal of Psychiatry* S64, S64

<sup>137</sup> Louis Appleby and Simon Wessely, ‘Public Attitudes to Mental Illness: The Influence of the Hungerford Massacre’ (1988) 28(4) *Medicine, Science and the Law* 291, 292; Una Maclean, ‘Community Attitudes to Mental Illness in Edinburgh’ (1969) 23(1) *British Journal of Preventive & Social Medicine* 45-52

<sup>138</sup> Appleby and Wessely, ‘Public Attitudes to Mental Illness: The Influence of the Hungerford Massacre’ (n137) 293

<sup>139</sup> *Ibid*, 294

<sup>140</sup> Angela Hallam, ‘Media Influences on Mental Health Policy: Long-Term Effects of the Clunis and Silcock Cases’ (2002) 14 *International Review of Psychiatry* 26, 32

<sup>141</sup> Matthias Angermeyer *et al*, ‘Media Consumption and Desire for Social Distance Towards People with Schizophrenia’ (2005) 20(3) *European Psychiatry* 246, 247-248

content from factual news through to cartoons, and found that 66 per cent of those about mental illness reported on harm to others.<sup>142</sup> This is backed up by a US study that found that mentally ill characters were nearly 10 times more violent than the general population of television characters.<sup>143</sup> At the other extreme, people with mental illness are frequently portrayed as helpless victims,<sup>144</sup> forcing them into a mould which they may not fit. Mental illness is also frequently used as a 'substrate' for comedy, more usually laughing at rather than with the characters,<sup>145</sup> although this was more often the case in fictional representations.<sup>146</sup> Furthermore, 'mental illness' is often referred to generally, with no further specification as to diagnostic category, which can be constructed as stereotyping.<sup>147</sup> Research shows the pattern of portrayals of madness in films is very similar. Steven Hyler *et al* researched a number of Hollywood films and concluded that representations of mental illness are of 'over-privileged, oversexed narcissistic parasites'.<sup>148</sup> In a more complete assessment, many hundreds of productions were analysed and the author argued that media portrayals 'misuse or casually use psychiatric terms' and are fundamentally inaccurate.<sup>149</sup>

The media also serves to provide inaccurate images of mental illness to members of society who may not have encountered mental disturbance, including children. Claire Wilson *et al* studied children's television programmes and found that 46 per cent referred to mental illness using derogatory terms, such as 'bananas', 'twisted', 'cuckoo' and 'freak'.<sup>150</sup> They also found that characters were typically labelled as ill with no other redeeming characteristics and were 'losing control, constantly engaged in illogical and irrational actions'.<sup>151</sup> Research in the US

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<sup>142</sup> Greg Philo, Greg McLaughlin and Lesley Henderson, 'Media Content' in Greg Philo (ed), *Media and Mental Distress* (London: Longman, 1996) 48

<sup>143</sup> Donald Diefenbach and Mark West, 'Television and Attitudes toward Mental Health Issues: Cultivation Analysis and the Third-Person Effect' (2007) 35(2) *Journal of Community Psychology* 181, 188

<sup>144</sup> Peter Byrne, 'Psychiatric Stigma: Past, Passing and to Come' (1997) 90 (11) *Journal of the Royal Society of Medicine* 618, 619

<sup>145</sup> Byrne, 'Stigma of Mental Illness' (n5) 66

<sup>146</sup> Philo, McLaughlin and Henderson, 'Media Content' (n142) 48

<sup>147</sup> Hinshaw, *The Mark of Shame* (n2) 119

<sup>148</sup> Steven Hyler, Glen Gabbard and Irving Schneider, 'Homicidal Maniacs and Narcissistic Parasites: Stigmatisation of Mentally Ill Persons in the Movies' (1991) 42 *Hospital and Community Psychiatry* 1044, 1046

<sup>149</sup> Wahl, *Media Madness* (n126) 35

<sup>150</sup> Claire Wilson *et al*, 'How Mental Illness Is Portrayed in Children's Television: A Prospective Study' (2000) 176(5) *British Journal of Psychiatry* 440, 441

<sup>151</sup> *Ibid*

found almost identical results,<sup>152</sup> and a Canadian study into Disney films found that 85 per cent of films contained verbal references to mental illness and they were mainly used to ‘set apart and denigrate’ the characters.<sup>153</sup>

From this, it is clear that the media perpetuate stigma, giving the public narrowly focused stories or programmes based around stereotypes and focusing public attention on the most negative attributes of mental illness. This appears to be because most programmes focus on entertainment rather than education,<sup>154</sup> news features emphasise the ‘newsworthy rather than the worthy’<sup>155</sup> guided by values such as novelty, universality and controversy,<sup>156</sup> and stereotypes allow for news production to be quick as they follow a ‘tried and tested formula’ known to work.<sup>157</sup>

### 1.1.3.3 How is This Relevant?

This section has aimed to show that stigmatisation of mental health, although reduced, remains common among the general public, and that this has ‘far-reaching’ consequences.<sup>158</sup> As one respondent commented, ‘I have suffered more because of ignorance of certain people than I have throughout my actual mental health problems’.<sup>159</sup> One such consequence is the way mental health records may be viewed in the courtroom. Jurors are selected from the general public, so if even a significant minority of the general public stigmatise those with mental illness, then it is possible that a significant minority of the jury will too. As Andrew Taslitz notes in relation to character evidence more generally, ‘even if character evidence is deemed relevant ... rape juries magnify it, giving it far more weight than it deserves’.<sup>160</sup> In the

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<sup>152</sup> Otto Wahl, ‘Depictions of Mental Illness in Children's Media’ (2003) 12(3) *Journal of Mental Health* 249, 255

<sup>153</sup> Andrea Lawson and Gregory Fouts, ‘Mental Illness in Disney Animated Films’ (2004) 49 *Canadian Journal of Psychiatry* 310, 312

<sup>154</sup> Elaine Sieff, ‘Media Frames of Mental Illness: The Potential Impact of Negative Frames’ (2003) 12(3) *Journal of Mental Health* 259, 262

<sup>155</sup> Thornicroft, *Shunned* (n91) 117

<sup>156</sup> Jesper Stromback, Michael Karlsoon and David Hopmann, ‘Determinants of News Content: Comparing Journalists' Perceptions of the Normative and Actual Impact of Different Event Properties When Deciding What's News?’ (2012) 13(5) *Journalism Studies* 718, 723, 725-726

<sup>157</sup> Thornicroft, *Shunned* (n91) 117

<sup>158</sup> Patrick Corrigan, *On the Stigma of Mental Illness: Practical Strategies for Research and Social Change* (Washington DC: American Psychological Association, 2005) 17-29

<sup>159</sup> A woman, aged 26, with clinical depression and psychosis, quoted in Read and Baker, *Not Just Sticks and Stones* (n66) 7

<sup>160</sup> Andrew Taslitz, *Rape and the Culture of the Courtroom* (New York University Press, 1999) 7

same way, when jurors hear evidence relating to the mental health of the complainant, they may give this more weight than they should. Moreover, the more they adhere to stigmatising beliefs, the more likely it is to skew their perception of the complainant unjustly. Therefore, a more tolerant and understanding society would bring both a great improvement to the lives of people with mental health problems, and an increased chance that mental health records will not be distorted to the detriment of the complainant. However, as Jennifer Rankin notes, ‘changing minds is slow work’.<sup>161</sup>

#### 1.1.4 WHY DOES STIGMATISATION EXIST?

There are various possible reasons people react to mental disorder in such a way. Many fear not having full control over mental and emotional faculties, and are reminded of their own shaky sense of rationality by mentally disordered behaviours.<sup>162</sup> Therefore the temptation to distance oneself from this, and by doing so exaggerate differences, can be strong.<sup>163</sup> As one woman suffering from mental health problems stated, ‘I think people are frightened by “the mind illness” whereas “physical illness” is there to be seen’.<sup>164</sup> Societal communication then consolidates these stereotypes, exploiting ‘deep anxieties about security, the unknown and the unpredictable’.<sup>165</sup>

Part of the reason for continuing stigmatisation may also be that mental illness is perceived as less real than physical illness, as there is a lack of ‘hard biological indicators’ underlying their presence.<sup>166</sup> Many subscribe to a ‘pull yourself together’ attitude,<sup>167</sup> indeed, one study found that several participants commented on people not believing in their mental illness.<sup>168</sup> This may come down to a lack of understanding: complete understanding about psychopathology is

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<sup>161</sup> Jennifer Rankin, *Mental Health in the Mainstream: Developments and Trends in Mental Health Policy* (London Institute for Public Policy Research, 2004) 14

<sup>162</sup> Hinshaw, *The Mark of Shame* (n2) 145

<sup>163</sup> Charles Stangor and Christian Crandall, ‘Threat and the Social Construction of Stigma’ in Todd Heatherton and others (eds), *The Social Psychology of Stigma* (New York: Guildford Press, 2000) 73-79

<sup>164</sup> ‘Linda’, quoted in Thornicroft, *Shunned* (n91) 119

<sup>165</sup> Greg Philo, ‘The Media and Public Belief’ in Greg Philo (ed), *Media and Mental Distress* (London: Longman, 1996) 103

<sup>166</sup> Hinshaw, *The Mark of Shame* (n2) 14

<sup>167</sup> Byrne, ‘Stigma of Mental Illness’ (n5) 66

<sup>168</sup> Sarah Hamilton *et al*, ‘Discrimination against People with a Mental Health Diagnosis: Qualitative Analysis of Reported Experiences’ (2014) 23(2) *Journal of Mental Health* 88, 90

not yet a reality, and furthermore, very little is taught about mental disorders within the education system.<sup>169</sup>

Following on from this, some may see mental illness as an ‘excuse’. The perception that mental illness can eliminate punishment, as a result of the insanity defence and the partial defence of diminished responsibility, may fuel the view that mental illness is a faked condition through which ‘guilty individuals can escape responsibility for criminal actions’.<sup>170</sup> In reality, the insanity defence is rarely invoked<sup>171</sup> and its success rate very low.<sup>172</sup> Often it is considered worse to be involuntary hospitalised than to go to prison, as release from prison may come sooner. However success in several highly publicised cases has led to increased stigmatisation.<sup>173</sup>

## 1.2 CYCLE OF ABUSE

This section will discuss evidence that rape and sexual violence can increase chances of mental distress, that mental distress can increase chances of victimisation, and that victimisation can increase chances of re-victimisation. In this way, it will argue that is it possible to enter into a spiral of mental health and victimisation, where once one has a mental health issue (whether as a result of sexual violence or not), it becomes increasingly difficult to break out of the ‘cycle’.

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<sup>169</sup> Vanessa Pinfold *et al*, ‘Reducing Psychiatric Stigma and Discrimination: Evaluation of Educational Interventions in UK Secondary Schools’ (2003) 182 *British Journal of Psychiatry* 342, 346

<sup>170</sup> Hinshaw, *The Mark of Shame* (n2) 127

<sup>171</sup> The Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper* (London: The Law Commission, 2013) 153; Ronnie MacKay and Gerry Kearns, ‘The Continued Underuse of Unfitness to Plead and the Insanity Defence’ (1994) *Criminal Law Review* 576, 579; Ronnie Mackay, Barry Mitchell and Leonie Howe, ‘Yet More Facts About the Insanity Defence’ (2006) *Criminal Law Review* 399, 400

<sup>172</sup> The Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper* 18, 228

<sup>173</sup> *Daniel M’nighten* [1843] 10 CL & Fin 200; Jamie Grierson, ‘Man Who Decapitated Elderly Woman Found Legally Insane’ *The Guardian* (23rd June 2015)

<<http://www.theguardian.com/uk-news/2015/jun/23/man-who-decapitated-elderly-woman-found-legally-insane>> accessed 20/8/2015; Benjamin Wright, ‘Sadie Jenkins Found Not Guilty of Attempted Murder of Two Children’ *Wales Online* (20th May 2015)

<<http://www.walesonline.co.uk/news/wales-news/sadie-jenkins-found-not-guilty-9294111>> accessed 20/8/2015

### 1.2.1 INCREASED CHANCE OF PSYCHOLOGICAL DISTRESS DUE TO RAPE

Sexual violence against women and girls is endemic in our society, and while we can only guess at the reality of its prevalence due to underreporting,<sup>174</sup> evidence makes it clear that it is very high.<sup>175</sup> It is also clear from research that rape and sexual assault in both adulthood and childhood can have devastating lifelong effects on both the physical and mental health of its victims.<sup>176</sup> This section will analysis such evidence, arguing that the result of high rates of sexual assault against women therefore makes the effect of mental health evidence ‘doubly discriminatory’<sup>177</sup> as women are ‘disproportionately likely to be clients of medical, therapeutic and counselling services’.<sup>178</sup>

However, there is a danger in analysing the psychological consequences of sexual assault simply in terms of negative ‘effects’, as not all survivors of sexual violence experience these psychological effects to the same extent.<sup>179</sup> This may serve to deny women’s ‘individual subjectivity’<sup>180</sup> and reinforce the perception of women as victims.<sup>181</sup> Therefore, the complexity of women’s responses to sexual abuse must be acknowledged.

There is a whole body of research about the detrimental impact rape and sexual assault can have on adult women.<sup>182</sup> Various studies report a range of mental health problems following

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<sup>174</sup> Ministry of Justice, Home Office and Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (London: ONS, 2013) 11-17

<sup>175</sup> Office for National Statistics, *Crime in England and Wales, Year Ending September 2014* (London: ONS, 2015) 2

<sup>176</sup> Catherine Itzin, *Tackling the Health and Mental Health Effects of Domestic and Sexual Violence and Abuse* (Joint Department of Health, National Institute for Mental Health in England and Home Office Victims of Violence and Abuse Prevention Programme Implementation Guide, 2006) 17-18

<sup>177</sup> Fiona Raitt, ‘Disclosure of Records and Privacy Rights in Rape Cases’ (2011) 15(1) *Edinburgh Law Review* 33, 49

<sup>178</sup> Julian Roberts and C Benjamin, *Prevalence of Sexual Assault and Therapeutic Records: Research Findings* (Ottawa: Department of Justice, 1998) cited in Susan McDonald, Andrea Wobick and Janet Graham, *Bill C-46: Records Applications Post-Mills, a Case Law Review* (Department of Justice, Canada, 2004) para 3.5

<sup>179</sup> Rebecca Campbell, Emily Dworkin and Giannina Cabral, ‘An Ecological Model of the Impact of Sexual Assault on Women’s Mental Health’ (2009) 10(3) *Trauma, Violence and Abuse* 225, 240

<sup>180</sup> Ussher, *The Madness of Women* (n6) 128

<sup>181</sup> Liz Kelly, *Surviving Sexual Violence* (Cambridge: Polity Press, 1988) 159

<sup>182</sup> For example, Jalna Hanmer and Catherine Itzen, *Home Truths About Domestic Violence* (London: Routledge, 2000); John Briere and Carol Jordan, ‘Violence against Women: Outcome Complexity and Implications for Treatment’ (2004) 19(12) *Journal of Interpersonal Violence* 1252-1282

rape, including post-traumatic stress disorder (PTSD), depression, anxiety and panic attacks, and substance abuse.<sup>183</sup> Liz Kelly's study of 60 women found that 78 per cent reported flashbacks, 69 per cent dreams or nightmares of the events, 61 per cent described how they forgot or 'cut off' the experience and 47 per cent spontaneously described their enhanced sense of vulnerability or fear.<sup>184</sup> These are close to typical symptoms of PTSD. Kelly's research has been backed up,<sup>185</sup> with one study finding that, on average, the rate of flashbacks among a group of people who had been raped was 83 per cent per year.<sup>186</sup> However the frequency with which flashbacks occur varied considerably across individuals. Furthermore, a review of the literature on the psychological impact of sexual assault found that 7-65 per cent of women with a lifetime history of sexual assault develop PTSD, with most studies reporting rates in the 33-45 per cent range.<sup>187</sup>

Along with feelings of fear and vulnerability, as noted by Kelly, feelings of anxiety, anger or depression can be consequences of sexual abuse. Research has found that 13-52 per cent of victims meet diagnostic criteria for depression,<sup>188</sup> 73-82 per cent develop fear or anxiety and 12-40 per cent experience generalised anxiety.<sup>189</sup> It is also not uncommon for victims to have suicidal ideation.<sup>190</sup> As well as this, there is evidence of a link between sexual violence and eating disorders.<sup>191</sup> One study compared women who had been raped recently with women who had experienced a different life-threatening trauma in the previous 9 months. It was found that 53 per cent of the women who had been raped had developed an eating disorder, in comparison to 6 per cent of those who experienced a different trauma.<sup>192</sup>

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<sup>183</sup> Sarah Ullman and Leanne Brecklin, 'Sexual Assault History, PTSD and Mental Health Service Seeking in a National Sample of Women' (2002) 30(3) *Journal of Community Psychology* 261, 272

<sup>184</sup> Kelly, *Surviving Sexual Violence* (n181) 190

<sup>185</sup> Steph Hellawell and Chris Brewin, 'A Comparison of Flashbacks and Ordinary Autobiographical Memories of Trauma: Content and Language' (2004) 42(1) *Behaviour Research and Therapy* 1143, 1152-1154

<sup>186</sup> Lisa Duke *et al*, 'The Sensitivity and Specificity of Flashbacks and Nightmares to Trauma' (2008) 22 *Anxiety Disorders* 319, 325

<sup>187</sup> Campbell, Dworkin and Cabral, 'An Ecological Model of the Impact of Sexual Assault' (n179) 226

<sup>188</sup> Carol Jordan, Rebecca Campbell and Diane Follingstad, 'Violence and Women's Mental Health: The Impact of Physical, Sexual and Psychological Aggression' (2010) 6 *Annual Review of Clinical Psychology* 607, 613

<sup>189</sup> *Ibid*

<sup>190</sup> *Ibid*

<sup>191</sup> Laura Chen *et al*, 'Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis' (2010) 85(7) *Mayo Clinic Proceedings* 618, 620

<sup>192</sup> Carlo Faravelli *et al*, 'Psychopathology after Rape' (2004) 161(8) *American Journal of Psychiatry* 1483, 1484

For many sexual assault survivors, these psychological distress symptoms decline within a few months, but it is not uncommon for women to continue to experience emotional distress for several years after the assault.<sup>193</sup> Some symptoms can remain long term for around 50 per cent of women, even with the intervention of counselling or therapy.<sup>194</sup> Overall, it is clear that it is not uncommon for women to experience some form of mental illness after being raped. Therefore, if anything, mental health records should back up an allegation of rape rather than being used to question the credibility of the complainant.

Sexual abuse and rape during childhood can also have a significant on mental health. The most commonly reported long-term effects include depression, anxiety, low self-esteem and PTSD.<sup>195</sup> Studies also suggest that as many as 70 per cent of involuntarily detained female psychiatric patients in the UK have been abused in childhood.<sup>196</sup>

Overall, there are gender differences in psychiatric diagnoses. In England, women are more likely than men to have a common mental health problem,<sup>197</sup> and are almost twice as likely to be diagnosed with anxiety disorders.<sup>198</sup> Additionally, women predominate in depression, with unipolar depression being twice as common in women as men.<sup>199</sup> In comparison, there are no marked gender differences in the rates of severe mental disorders like schizophrenia and bipolar disorder.<sup>200</sup> Many commentators believe that sexual violence can provide an explanation for these gender differences in psychiatric diagnoses, for example Natallia Sianko

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<sup>193</sup> Mary Koss and Aurelio Figueredo, 'Cognitive Mediation of Rape's Mental Health Impact: Constructive Replication of a Cross-Sectional Model in Longitudinal Data' (2004) 28(4) *Psychology of Women Quarterly* 273, 283

<sup>194</sup> Mary Koss and Takayo Mukai, 'Recovering Ourselves: The Frequency, Effects and Resolution of Rape: Research on Battered Women and Their Assailants' in Denmark Florence and Paludi Michele (eds), *Psychology of Women: A Handbook of Issues and Theories* (Westport, CT: Greenwood, 1993) 478-512

<sup>195</sup> Frank Putnam, 'Ten-Year Research Update Review: Child Sexual Abuse' (2003) 42(3) *Journal of the American Academy of Child & Adolescent Psychiatry* 269, 271

<sup>196</sup> Sam Warner, *Understanding the Effects of Child Sexual Abuse : Feminist Revolutions in Theory, Research and Practice* (London: Routledge, 2009) 19

<sup>197</sup> Sally McManus *et al*, *Adult Morbidity in England 2007: Results of a Household Survey* (NHS Information Centre for Health and Social Care, 2009) 12

<sup>198</sup> Elisa Martin-Merino *et al*, 'Prevalence, Incidence, Morbidity and Treatment Patterns in a Cohort of Patients Diagnosed with Anxiety in UK Primary Care' (2010) 27(1) *Family Practice* 9, 14

<sup>199</sup> World Health Organisation, 'Gender and Women's Health' <[http://www.who.int/mental\\_health/prevention/genderwomen/en/](http://www.who.int/mental_health/prevention/genderwomen/en/)> accessed 10/04/2016

<sup>200</sup> *Ibid*

comments that ‘the stunning incidence of violence against women undoubtedly contributes to these disparities’.<sup>201</sup> Given that these disparities exist, and are partly as a result of high rates of sexual assault, it becomes clear that using women’s mental health issues against them in rape cases can be highly illogical.

### 1.2.2 INCREASED CHANCE OF VICTIMISATION DUE TO MENTAL HEALTH ISSUES

Much has been written about the risk posed to members of the public by those with mental illness, as discussed above. Contrary to this popular perception, overall evidence shows that people with mental health problems are more likely to be victims of crime than perpetrators, and are disproportionately at risk of victimisation when compared to the general population.<sup>202</sup> Many studies have focused on violent crime, as people with mental illness are particularly vulnerable to this.<sup>203</sup> One such study compared the official statistics of prevalence of violent victimisation from the British Crime Survey with statistics of violent victimisation of those with mental health issues living in communities.<sup>204</sup> They found that the figure for those with mental health issues was more than twice that recorded from general population figures in the UK during the same time period.<sup>205</sup> A similar study has been repeated in America, and found similar results: more than a quarter of people with severe mental illness had been victims of a violent crime in the past year, which was higher than the National Crime Victimization Survey showed for the general population.<sup>206</sup> A more recent report published by Victim Support and Mind found that 45 per cent of people with severe mental illness were

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<sup>201</sup> Natallia Sianko, ‘Gender Equality and Women’s Mental Health: What’s on the Agenda?’ (2011) 81(2) *American Journal of Orthopsychiatry* 167, 168

<sup>202</sup> Katie McCracken, Amanda Perry and Coretta Phillips, *Access to Justice: A Review of Existing Evidence of the Experiences of Adults with Mental Health Problems* (London: Ministry of Justice, Ministry of Justice Research Series 6/09, 2009); Roberto Maniglio, ‘Severe Mental Illness and Criminal Victimization: A Systematic Review’ (2009) 119(3) *Acta Psychiatrica Scandinavica* 180-191; Chih Hoong Sin *et al*, *Disabled People’s Experiences of Targeted Violence and Hostility* (Manchester: Equality and Human Rights Commission, Research Report 21, 2009)

<sup>203</sup> John Brekke *et al*, ‘Risks for Individuals with Schizophrenia Who Are Living in the Community’ (2001) 52(10) *Psychiatric Services* 1358, 1364

<sup>204</sup> Elizabeth Walsh *et al*, ‘Prevalence of Violent Victimization in Severe Mental Illness’ (2003) 183(3) *The British Journal of Psychiatry* 233, 233

<sup>205</sup> *Ibid*, 236

<sup>206</sup> Linda Teplin *et al*, ‘Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey’ (2005) 62(8) *Archives of General Psychiatry* 911, 914

victims of crime in the past year,<sup>207</sup> and that they were five times more likely to be a victim of assault than people in the general population.<sup>208</sup> As one respondent commented:

[Having a mental health problem] it's a license, it makes you so vulnerable. It's awful. It's like this is a sitting duck we can do whatever we want to, however we want.<sup>209</sup>

It is also clear that women with mental health issues are at a heightened risk of sexual assault and rape<sup>210</sup> and that experiences of sexual violence among those with mental illness are alarmingly high. The research by Mind found that women are ten times more likely to be assaulted if they have a mental health problem.<sup>211</sup> Furthermore, women with long term psychiatric problems were found to have been more likely to have reported being pressurized into unwanted sexual intercourse,<sup>212</sup> and a New Zealand study found that almost a third of respondents with a mental illness had been sexually abused.<sup>213</sup> In the US, a study of women who were examined in an emergency department after sexual assault found that the prevalence of psychiatric illness was 26 per cent.<sup>214</sup> This was more than twice that of the baseline in the hospital.<sup>215</sup> The research by Victim Support and Mind found that 40-62 per cent of women with severe mental illness reported rape or sexual violence, compared to 10-24 per cent of control women.<sup>216</sup> Furthermore, this evidence may be limited as it only includes women who have reported the abuse, and there may be many women with mental health problems who have chosen not to report their rape.

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<sup>207</sup> Bridgett Pettitt *et al*, *At Risk yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (London: Victim Support and Mind, 2013) 18

<sup>208</sup> *Ibid*

<sup>209</sup> *Ibid*, 28

<sup>210</sup> Hind Khalifeh and Kimberlie Dean, 'Gender and Violence against People with Severe Mental Illness' (2010) 22(5) *International Review of Psychiatry* 535-546; Hind Khalifeh *et al*, 'Violence against People with Disability in England and Wales: Findings from a National Cross-Sectional Survey' (2013) 8(2) *PLoS ONE* 1-9

<sup>211</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 20

<sup>212</sup> John Coverdale, Sarah Turbott and Helen Roberts, 'Family Planning Needs and STD Risk Behaviours of Female Psychiatric out-Patients' (1997) 171(1) *British Journal of Psychiatry* 69, 71

<sup>213</sup> John Coverdale and Sarah Turbott, 'Sexual and Physical Abuse of Chronically Ill Psychiatric Outpatients Compared with a Matched Sample of Medical Outpatients' (2000) 188(7) *The Journal of Nervous and Mental Disease* 440, 443

<sup>214</sup> Linda Eckert, Naomi Sugar and David Fine, 'Characteristics of Sexual Assault in Women with Major Psychiatric Diagnosis' (2002) 186 *American Journal of Obstetrics and Gynecology* 1284, 1286

<sup>215</sup> *Ibid*, 1287

<sup>216</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 19

Qualitative interviews revealed that many participants felt that having a mental health problem was a factor in their victimisation. They believed that perpetrators sometimes picked up on visible signs of vulnerability, or targeted them because they understood that people with mental health problems were more easily discredited and commonly disbelieved when they report.<sup>217</sup> As well as this, some considered that isolation and social exclusion contributed to the increased risk of victimisation.<sup>218</sup> Furthermore, studies have also revealed that those with mental health problems are at risk of victimisation in psychiatric facilities, which should be offering care and safety. Nine participants in the Mind study were victimised in psychiatric inpatient wards, and they commented that they felt under threat from staff and other patients.<sup>219</sup> Earlier research by Mind also reported that 18 per cent of inpatients in mental health wards had been sexually harassed and that one in twenty had been sexually assaulted.<sup>220</sup> This was backed up by the National Patient Safety Agency, which found disturbingly high rates of sexual harassment and sexual assault, including 19 allegations of rape.<sup>221</sup> It is also clear that this situation is not improving, with much more recent evidence suggesting sexual violence is still soaring in hospitals, in particular mental health units.<sup>222</sup>

Research therefore clearly demonstrates that having a mental health problem alone increases the risk of crime by three fold for any crime, and to ten fold for women to be assaulted. Another layer is added to this when considering the chances of re-victimisation.

### 1.2.3 INCREASED CHANCE OF RE-VICTIMISATION DUE TO VICTIMISATION

In addition to sexual violence increasing the chances of mental health problems, and mental health problems increasing the chances of sexual violence, victimisation also increases the chances of re-victimisation.<sup>223</sup> Much research has been undertaken on the effect of childhood victimisation on subsequent victimisation. One such study found that about one third of child sexual abuse victims had a two to three times greater risk of adult victimisation than women

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<sup>217</sup> Ibid, 28; Benedet and Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (n30) 4

<sup>218</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 57

<sup>219</sup> Ibid, 29

<sup>220</sup> Mind, *Ward Watch Report: Mind's Campaign to Improve Hospital Conditions for Mental Health Patients* (London: Mind, 2004) 3

<sup>221</sup> National Patient Safety Agency, *With Safety in Mind: Mental Health Services and Patient Safety* (London: National Patient Safety Agency, 2006) 38

<sup>222</sup> Martin Williams, 'Sexual Violence Soars in UK Hospitals' *The Guardian* (London, 31st December 2014) <<http://www.theguardian.com/society/2014/dec/31/sexual-violence-soars-uk-hospitals>> accessed 16/1/15

<sup>223</sup> Teplin *et al*, 'Crime Victimization in Adults with Severe Mental Illness' (n206) 118

without a history of child sexual abuse.<sup>224</sup> Additionally, a study by Cathy Widom compared a group of physically and sexually abused children with matched controls and followed them into adulthood. Results provide strong support for the theory that childhood victimisation leads to increased risks for lifetime re-victimisation.<sup>225</sup> However, the findings also showed that this does not extend to all types of victimisation, rather only to what can be described as interpersonal violence, for example physical assault or sexual assault.<sup>226</sup> Similar studies have been undertaken to investigate the effect of adulthood abuse, and have found that those who have experienced victimisation are more likely to be repeatedly victimised and to experience a range of crimes.<sup>227</sup> One study that researched women with a history of sexual assault in childhood, adulthood or both life phases, found that victims of sexual assault in both life phases were more likely to report multiple traumatic events, PTSD and mental health service seeking than victims of sexual assault in one life phase.<sup>228</sup>

Additionally, not only are people with mental health problems at high risk of victimisation, as discussed above, but for some, the impact of the crime may also be more substantial. Compared to victims who did not have mental health problems, victims with serious mental illness were more likely to suffer 'social, psychological and physical adverse effects' as a result of the crime,<sup>229</sup> and their existing disorders may also be exacerbated.<sup>230</sup> The impact of sexual violence is particularly serious, with 40 per cent of women who experienced this having attempted suicide as a result.<sup>231</sup> The most common negative effect of crime was on victims' emotional well-being.<sup>232</sup> Many described their mental health as deteriorating, with some individuals being admitted into hospital. This can then increase their chances of re-victimisation, as they are more vulnerable as a result of their worsening mental health. As one respondent described;

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<sup>224</sup> Catalina Arata, 'Child Sexual Abuse and Sexual Revictimisation' (2002) 9(2) *Clinical Psychology-Science and Practice* 135, 157

<sup>225</sup> Cathy Widom, Sally Czaja and Mary Dutton, 'Childhood Victimization and Lifetime Revictimisation' (2008) 32 *Child Abuse and Neglect* 785, 793

<sup>226</sup> Ibid

<sup>227</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 62

<sup>228</sup> Ullman and Brecklin, 'Sexual Assault History, PTSD and Mental Health Service Seeking in a National Sample of Women' (n183) 279

<sup>229</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 7

<sup>230</sup> Teplin *et al*, 'Crime Victimization in Adults with Severe Mental Illness' (n206) 118

<sup>231</sup> Pettitt *et al*, *At Risk yet Dismissed* (n207) 20

<sup>232</sup> Ibid, 7

[I was] always [...] getting drunk by myself [...] because I felt really alone [...] I saw my ex, the guy I was with who thought I'd cheated on him by being raped [...] and just seeing him, hit me like a ton of bricks [...] And what do I do when I have negative emotions, I go and get drunk, and I went to a fish and chip shop, the people working there said something like "oh, we've got some weed in the back, do you want some?" I really wanted to just obliterate my mind so I said yes. And agreed to go to the back and [...] the next thing you know, I have men having sex with me in turn and I don't remember how I got there, I don't remember saying yes. [...] I don't remember if protection was used. At that time I didn't really care [...] I felt like people weren't taking me seriously with my depression because it was invisible so I had set out to try and catch AIDS [...] I figured that if I had this terminal condition [...] then people will take my suffering seriously.<sup>233</sup>

In summary, the evidence can be split into two parts. Firstly, the chances of being re-victimised following initial victimisation, particularly sexual abuse, are high. The reason for this is not clear, and requires further research. However, some commentators have argued that it may be because perpetrators of abuse are skilled at identifying, tracking and targeting women who show signs of vulnerability.<sup>234</sup> Secondly, the chances of being re-victimised following initial victimisation for those with mental health problems are also high, as victimisation can lead to worsening mental health and therefore increased vulnerability.

### 1.3 CONCLUSION

The overwhelming majority of evidence points towards widespread stigmatisation of mental illness, affecting the everyday lives of those with a mental health problem, from employment to aspects of their personal life. It is clear that there is a general lack of understanding of what different mental illnesses involve, and how these can affect a person's functioning. Additionally, the historical association between female sexuality and madness, and the subsequent belief in false accusations as a result of mental illness, remain an important background to rape trials. Together, this could translate to juries giving a lot of weight to mental health evidence and potentially viewing the complainant as less reliable as a result.

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<sup>233</sup> Ibid, 49

<sup>234</sup> Terri Messman-Moore and Patricia Long, 'The Role of Childhood Sexual Abuse Sequelae in the Sexual Revictimisation of Women: An Empirical Review and Theoretical Reformulation' (2003) 23(4) *Clinical Psychology Review* 537, 545, 562, 565

However, it is also clear that research on mental health may point to the opposite conclusion. Rather than mental health problems meaning the complainant is automatically less reliable, it may actually mean she is more vulnerable to victimisation and re-victimisation. Therefore she is increasingly likely to have been the victim of rape. Furthermore, evidence of mental health problems after the alleged assault may in fact be evidence of the veracity of the complainant's allegation, as it is clear that sexual assault can have devastating effects on the mental health of the victim. For these reasons, evidence of a complainant's mental health history is more likely to contribute to confusion and prejudice than shed light on the veracity of her account.

Following this, it is argued that the law should be strict on allowing use of mental health records by the defence in court, to prevent such prejudices and myths entering the courtroom. However, this is not the case. The next chapter will examine the ways in which the law on pre-trial disclosure of such evidence is in fact failing to protect those with past or present mental health problems.

## CHAPTER 2: MENTAL HEALTH RECORDS IN THE COURTROOM

Rape trials are beset with misinformation and mythology,<sup>1</sup> and there is a long history of trying to impeach the credibility of complainants by invoking misogynist stereotypes about women. This is often effective as the accused and the complainant are competing in a contest of credibility as there are rarely any other witnesses. A claim by the accused that the sexual contact did not happen, or more frequently, that it was consensual, is essentially an attack on the credibility of the complainant.<sup>2</sup> ‘Rape shield’ laws have attempted to restrict the use of sexual history evidence to protect complainants,<sup>3</sup> however this was not entirely successful and was subsequently broadened in *R v A*.<sup>4</sup> In comparison to the wealth of academic literature on sexual history evidence,<sup>5</sup> the use of mental health records has received very little attention to date, and thus there is a real risk that evidence in personal records becomes another, or alternative, source of humiliation, as it has in Canada and Australia.

Although no jurisdiction follows Wigmore’s lead in mandating psychiatric examinations for every accuser,<sup>6</sup> defendants may request disclosure of documents to enable cross-examination as to a complainant’s mental health history. The range of medical records that the defence

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<sup>1</sup> Emily Finch and Vanessa Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26(3) *Legal Studies* 303, 314-319; Louise Ellison and Vanessa Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49(2) *British Journal of Criminology* 202, 206-213

<sup>2</sup> Janine Benedet and Isabel Grant, ‘Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues’ (2007) 52 *McGill Law Journal* 515, 542

<sup>3</sup> s41 Youth Justice and Criminal Evidence Act 1999

<sup>4</sup> *R v A* [2001] UKHL 25

<sup>5</sup> For example: Ian Dennis, ‘Sexual History Evidence: Evaluating Section 41’ (2006) *Criminal Law Review* 869-870; Neil Kibble, ‘Judicial Perspectives on the Operation of S41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios’ (2005) *Criminal Law Review* 190-205; Neil Kibble, ‘Judicial Discretion and the Admissibility of Prior Sexual History Evidence under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot’ (2005) *Criminal Law Review* 263-274; Jennifer Temkin, ‘Sexual History Evidence - Beware the Backlash’ (2003) *Criminal Law Review* 217-242; Diane Birch, ‘Untangling Sexual History Evidence: A Rejoinder to Professor Temkin’ (2003) *Criminal Law Review* 370-383; Georgina Firth, ‘The Rape Trial and Sexual History Evidence - *R v A* and the (Un)Worthy Complainant’ (2006) 57(3) *Northern Ireland Legal Quarterly* 442-464; Kate Cook, ‘Sexual History Evidence: The Defendent Fights Back’ (2001) 151(6994) *New Law Journal* 1133-1134; Mike Redmayne, ‘Myths, Relationships and Coincidences: The New Problems of Sexual History’ (2003) 7 *International Journal of Evidence & Proof* 75-101; Regina Schuller and Patricia Hastings, ‘Complainant Sexual History Evidence: Its Impact on Mock Jurors’ Decisions’ (2002) 26(3) *Psychology of Women Quarterly* 252-261

<sup>6</sup> Chapter 1, section 1.1.2.1

might seek to recover in sexual offence prosecutions is very broad,<sup>7</sup> including historical records, or counselling records made after the offence occurred. Given the wide stigmatisation of mental health problems, the introduction of such evidence is particularly problematic, and provides another method for myths to be introduced into the courtroom.

This chapter will discuss the law relating to disclosure of such material. As women with mental health problems are significantly more likely to be sexually assaulted than other women,<sup>8</sup> the role of the law is important because the failure to provide an effective response to such assaults has the potential to reinforce the status of women with mental issues as targets for abuse.<sup>9</sup> This thesis will argue that judges have a very broad discretion in the determination of disclosure disputes, and that notions of relevance are often distorted by myths and stereotypes. Additionally, the use of such material has an adverse impact, further reinforcing these myths and stereotypes. Furthermore, it will pay particular attention to the way in which the complainant's interests are represented within a disclosure dispute, and how these can be viewed within the context of the defendant's right to a fair trial. It will then examine the law in practice, arguing that judges are often overly permissive in admitting evidence of the complainant's psychiatric history. Additionally, it will consider how defence lawyers use such evidence, arguing that disclosure can create prejudice and confusion for the jury, rather than assisting the court in its fact-finding role. Finally, it will argue that applications for access to records have a differential adverse impact on groups of women whose lives are more likely to be heavily documented, including women with mental health issues.<sup>10</sup>

## 2.1 PRE-TRIAL DISCLOSURE OF EVIDENCE

The law relating to disclosure of material such as mental health records is complex, and has been criticised as 'illogical' and 'arbitrary'.<sup>11</sup> This section will aim to outline the law in this area, before analysing in more detail the dual disclosure system, whereby the relevant test depends on who has seen it; the disclosure tests themselves and how issues of relevance are

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<sup>7</sup> Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (London: Home Office Online Report 20/06, 2006) 25

<sup>8</sup> Department of Health, *No Health without Mental Health: A Cross Government Mental Health Outcomes Strategy for People of All Ages* (London: HM Government, 2011) 61

<sup>9</sup> Janine Benedet and Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (2014) 22(2) *Fem Leg Stud* 131, 132

<sup>10</sup> Benedet and Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (n2) 539

<sup>11</sup> Laura Hoyano, 'Evidence: *R. v Doski* - Disclosure - Rape - Defendant Seeking Third Party Disclosure Following Conviction' (2011) *Criminal Law Review* 712, 716

decided; and the regime for resisting disclosure. Where such records are in the hands of the prosecution, then the disclosure regime that applies to all prosecution material applies here as well. But where such records are not in the hands of the prosecution, but rather still with the third party, a separate procedure applies if the defence seeks access and cannot obtain voluntary disclosure. These will each be examined in turn.

### 2.1.1 THE DISCLOSURE PROCEDURE

The disclosure regime used when records are in the hands of the prosecution is set out in the Criminal Procedure and Investigations Act 1996 (CPIA), as amended by the Criminal Justice Act 2003. This is likely to be relevant when the victim or witness gives qualified consent to access to records, allowing their medical or counselling history to be disclosed to the police and prosecutor but not to the defence. The test in s3 states that material fulfils the test if and only if it might ‘reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused’, save to the extent that the court orders it is not in the public interest to disclose it.<sup>12</sup> It was stated in *R v H and C*<sup>13</sup> that:

[F]airness ordinarily requires that any material held by the prosecution that weakens its case or strengthens that of the defendant, if not relied upon as part of the formal case against the defendant, should be disclosed to the defence ... The Golden Rule is that full disclosure of such material should be made.<sup>14</sup>

This rule has been confirmed in the Judicial Protocol on the Disclosure of Unused Material In Criminal Cases.<sup>15</sup> The protocol also states that requests for disclosure should be rejected if they are not referable to any issue in the case,<sup>16</sup> and it has been stated that ‘[t]he trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good’.<sup>17</sup>

When considering if material fulfils the disclosure test, the prosecution may make an application for non-disclosure in the public interest. This requires the court to perform a

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<sup>12</sup> For full drafting of s3 CPIA, see Appendix 1

<sup>13</sup> *R v H and C* [2004] 2 CA 134, upheld in *R v H and C* [2004] UKHL 3

<sup>14</sup> *R v H and C* at [147]

<sup>15</sup> The Lord Chief Justice, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (Courts and Tribunals Judiciary, 2013) 5

<sup>16</sup> *Ibid*, 10

<sup>17</sup> *R v H and C* (n13)

balancing exercise, ‘balancing on the one hand the desirability of protecting the public interest in the absence of the disclosure against, on the other hand, the interests of justice’ in the sense of fairness to the defendant.<sup>18</sup> Further guidelines are set out in *R v H and C*, in the form of a set of questions for judges to address.<sup>19</sup> If it is considered that material may weaken the prosecution case, then judges must ask if there is a risk of serious prejudice to an important public interest. If yes, can the defendant’s interest be protected without disclosure or disclosure be ordered to an extent that will give adequate protection to the public interest in question and also afford adequate protect to the interests of the defence? If limited disclosure is ordered, judges must consider whether the effect is to render the trial process, as a whole, unfair to the defendant. If this is the case, then fuller disclosure should be ordered even if this leads to the prosecution discontinuing proceedings to avoid having to make a disclosure. While the categories of public interest are ‘not closed’,<sup>20</sup> it has been held that public interest immunity does apply to counselling records,<sup>21</sup> on the basis that it ‘does fall within the category of “sensitive material”’ and ‘there are sound and obvious reasons for holding that documents such as this should not ordinarily be disclosed’.<sup>22</sup>

If a victim or witness does not consent to the release of their medical records, the prosecution will need to consider whether to make further enquiries, bearing in mind that if they are granted access to material, it is also much more likely to end up in the hands of the defence.<sup>23</sup> The defence can also make their own enquiries unrelated to that of the prosecution. There is no specific procedure for disclosure of material held by third parties in criminal proceedings, however, s2 of the Criminal Proceedings (Attendance of Witnesses) Act 1965 provides that ‘where the crown court is satisfied that (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence ... and (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document of thing ... in such cases the Crown shall issues a summons’.<sup>24</sup> So therefore, where the third party in question declines to allow inspection of the material, or requires the prosecution or defence to obtain an order before providing copies, the prosecutor or defence will need to consider whether it is appropriate to obtain a witness summons under this act.

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<sup>18</sup> *R v Governor of Brixton Prison Ex Parte Osman* [1992] 1 All ER 108 at [116]

<sup>19</sup> *R v H and C* (n13) at [155]-[156]; for full details see Appendix 2

<sup>20</sup> *D v NSPCC* [1977] 1 All ER 589 at [605] per Lord Halisham

<sup>21</sup> *R v Azmy* [1996] 7 Med LR 415 at [420]

<sup>22</sup> *Ibid*, at [54]

<sup>23</sup> Jennifer Temkin, ‘Digging the Dirt: Disclosure of Records in Sexual Assault Cases’ (2002) *Cambridge Law Journal* 126, 133

<sup>24</sup> For full drafting of s2, see Appendix 3

Public interest immunity issues may also arise in this context, if a third party or the prosecution seeks to resist a witness summons. In this case, the court does not have to engage in the balancing act described above until it has first been decided whether or not the evidence is ‘material’.<sup>25</sup>

The critical issue at the hearing of an application of a witness summons is whether the documents concerned contain evidence that is ‘material’ to the case. The meaning of the word ‘material’ was first discussed in *R v Derby Magistrates Court ex parte B*,<sup>26</sup> in the context of s97 of the Magistrates Court Act 1980. This deals with disclosure applications in the Magistrates Court, however it has previously been held that jurisprudence on s97 applies equally to s2 of the Criminal Proceedings (Attendance of Witnesses) Act 1985. In *Derby*, it was held that s97 was not to be used to obtain discovery of documents for use in cross-examination.<sup>27</sup> This was later upheld in *R v Reading Justices ex parte Berkshire Country Council*,<sup>28</sup> which found that material evidence documents must not only be relevant to the issues raised in the criminal proceedings but also admissible as such evidence. Documents that are merely desired for the purpose of possible cross-examination are not admissible in evidence and thus are not material. Furthermore, the Court of Appeal have held that before taking steps to obtain third party material, it must be shown that there was not only a suspicion that the third party had relevant material, but also a suspicion that the material held by the third party was likely to satisfy the disclosure test.<sup>29</sup>

Additionally, it was held in *R v Stafford Crown Court*<sup>30</sup> that due to procedural fairness, complainants’ should be given notice of an application and have the opportunity to make representations if she wished before the witness summons was made. This resulted in the drafting of part 28 of the Criminal Procedure Rules 2010, now restated in the Criminal Procedure Rules 2014, which requires the court to consider the rights of those to whom the confidential information relates before a witness can be required to give evidence about them. This goes some way towards allowing those whose records are sought to have their wishes expressed to the court and taken into account, and has equal application in respect of applications made by the defence to access such third party material by way of witness summons.

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<sup>25</sup> *R v Reading Justices Ex Parte Berkshire County Council* [1996] 1 Cr App R 239 at [246]

<sup>26</sup> *R v Derby Magistrates Court Ex Parte B* [1996] 1 Cr App R 385

<sup>27</sup> *Ibid*, at [488]

<sup>28</sup> *Reading Justices* (n25)

<sup>29</sup> *R v Alibhai* [2004] EWCA Crim 681

<sup>30</sup> *R v Stafford Crown Court* [2006] EWCA 1645

To summarise, in the case of material in the hands of a third party, there is essentially a two-stage process. The first stage requires the defence to satisfy the materiality test from *Reading Justices*, and the second stage involves the court performing the balancing act required by public interest immunity (PII). When material is in the hands of the prosecution, there are still two elements that must be satisfied: the disclosure test in s3 CPIA, and the PII balancing act. However, this is not so clear-cut in terms of satisfying one stage before moving on to the next.

### 2.1.2 DISCLOSURE UNDER S3 CPIA VERSUS THE MATERIALITY TEST AND THE CREDIBILITY RULE

The current laws on disclosure have been criticised as operating erratically,<sup>31</sup> as it seems that the procedure depends upon not the content of the record, but rather the technicality of who holds the record, and who has seen it.

Where a prosecutor suspects that a third party has material or information that might satisfy the s3 disclosure test if in the hands of the prosecution, they will have to consider whether it is appropriate to seek access to the material or information. This decision is made more complex by the fact that if the prosecution does obtain disclosure of such documents, disclosure to the defence becomes far more likely. This is because courts have interpreted s2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 as requiring a more stringent test of materiality than merely ‘assisting the defence’, as in s3 CPIA.<sup>32</sup> Thus documents are subject to higher scrutiny under this materiality test;<sup>33</sup> they must be not only relevant to the issues at trial, but also immediately admissible in evidence.

Courts have attempted to solve this conflict in *Brushett*,<sup>34</sup> although not entirely successfully. In this case, the accused was charged with offences involving sexual abuse of children in a children’s home. The Court of Appeal noted that there were two lines of ‘irreconcilable’ authority on third party disclosure: the disclosure test under s3 CPIA applied to third party documents already seen by the prosecution and the materiality test from *Reading Justices* and approved in *Derby* applied to uninspected documents remaining in the possession of the third

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<sup>31</sup> Laura Hoyano, ‘Case Comment: *R v P* [2010] EWCA Crim 2438, Sexual Offences: Allegations of Historic Sexual Abuse - Credibility of Complainants at Issue’ (2011) 6 *Criminal Law Review* 502, 503

<sup>32</sup> *K (DT)* [1993] 97 Cr App R 342; *Reading Justices* (n25); *R v Derby Magistrates Court Ex Parte B* (n26)

<sup>33</sup> Temkin, ‘Digging the Dirt’ (n23) 133

<sup>34</sup> *R v Brushett* [2001] Crim LR 471

party.<sup>35</sup> At first instance, the judge decided to allow disclosure of documents suggesting that the complainants had been sexually abused previously and had made false allegations. Public interest immunity was claimed in respect of all records, both those in the prosecution's keeping and those still with the social services department. However, the judge decided that since the prosecution held some of the documents, it would be unfair to the defence to have to satisfy the demands of the materiality test in *Reading Justices*, as this was likely to result in little, if any, disclosure. Instead, he proceeded directly to the second stage, performing the balancing act required by the PII claim on all the material. This resulted in disclosure of all the documents. The judge emphasised that if none of the material had previously been disclosed to the prosecution, the test in *Reading Justices* would have applied, but no other reason was given for his approach. Furthermore, he advocated for a flexible approach, stating that he believed that there were two categories of documents which would not normally be disclosed under the materiality test, but that if he 'saw anything like that on the files, it would be immediately disclosed'.<sup>36</sup> These categories were previous false allegations and previous similar sexual activity with another adult. The Court of Appeal approved the decision, suggesting that this evidence had a bearing on the reliability of the complainants, and that the judge's approach was 'eminently sensible and pragmatic'.<sup>37</sup>

This has subsequently been interpreted in *Doski*<sup>38</sup> as 'making clear that disclosure should be granted where there had been alleged false allegations by the subject of the report, or where there had been sexual activity with another adult'.<sup>39</sup> This is problematic as it appears that disclosure of evidence of false allegations or past sexual activity has been 'elevated to the status of an established clear exception'<sup>40</sup> to the rule that evidence is not admissible if it relates to cross-examination on reliability. Almost invariably, the defence's purpose in using evidence of allegedly false allegations or of previous sexual activity with another person would be to attack the complainant's credibility,<sup>41</sup> so it should fall within the non-disclosure rule. It also implies that s41 of the Youth Justice and Criminal Evidence Act 1999 can be circumvented if such evidence is contained in mental health records. Given this section was enacted in an attempt to curb the use of sexual history evidence, it is unlikely that the courts intended to license fishing expeditions into women's previous sexual experiences whenever records might be

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<sup>35</sup> *Ibid*, at [19] per Lord Justice Otton

<sup>36</sup> *R v Brushett* [2000] All ER (D) 2432 at [49] per HW Peter Jacobs

<sup>37</sup> *R v Brushett* (n34) at [47]

<sup>38</sup> *R v Doski (Niwar)* [2011] EWCA Crim 987

<sup>39</sup> *Ibid*, at [14]

<sup>40</sup> Hoyano, 'Evidence: *R. v Doski*' (n11) 717

<sup>41</sup> Temkin, 'Sexual History Evidence' 218

available, just because she has been in contact with social services or counsellors.<sup>42</sup> It is argued that this exception needs to be reversed. Furthermore, the law would benefit from having one rule relating to disclosure, whether the evidence is in the hands of the prosecution or a third party, that is applied strictly and does not allow for fishing expeditions to find evidence that can be used to malign the complainant's credibility.

### 2.1.3 'MATERIAL' EVIDENCE AND THE QUESTION OF RELEVANCE

Despite the term 'material' being crucial to the disclosure of third party documents, there is no statutory definition of the term. As stated above, it has been held that 'material' documents must be relevant to the issues at trial and admissible as evidence. However, what is 'relevant' has not been explored, despite being a deeply contested issue in the literature concerning rape trials,<sup>43</sup> and the source of much disagreement over the introduction of sexual history evidence.<sup>44</sup> This is also true of the disclosure test in s3 CPIA, where there are no guidelines on what sort of material is relevant in relation to weakening the prosecution case or strengthening the defence case. The decision about disclosure or admissibility of records therefore turns on the exercise of judicial or prosecutorial discretion,<sup>45</sup> and so may be dependent on the views of the particular individual.<sup>46</sup> The result of this is that sensitive and personal information such as mental health history could be characterised as material and relevant information, when arguably it should not be.

While judicial discretion remains a useful tool, Jennifer Temkin points out that it does leave admissibility regimes at the 'mercy of any prejudiced assumptions a judge may have',<sup>47</sup> and Madame Justice L'Heureux-Dube has observed that decisions of relevance are 'particularly vulnerable to the application of private beliefs'.<sup>48</sup> Therefore, while relying on logic, common sense and experience may be unproblematic in many contexts, 'many judicial officers remain

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<sup>42</sup> Hoyano, 'Evidence: *R. v Doski*' (n11) 717

<sup>43</sup> Fiona Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (2011) 15(1) *Edinburgh Law Review* 33, 45

<sup>44</sup> Clare McGlynn, 'Feminist Judgment: *R v A (No 2)* [2001] UKHL 25' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) 211, 213

<sup>45</sup> Louise Ellison, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13(1) *International Journal of Evidence and Proof* 28, 38

<sup>46</sup> Linzi McDonald, 'Defending Child Abuse Cases - Tips and Pitfalls' (2001) 151(6967) *New Law Journal* 540, 541

<sup>47</sup> Temkin, 'Digging the Dirt' (n23) 142

<sup>48</sup> *Seaboyer* [1991] 2 SCR 577

uninformed about the issues affecting complainants in sexual assault trials',<sup>49</sup> and mental illness in particular is an area where this may be infected by stereotype and myth,<sup>50</sup> as demonstrated in Chapter One. Indeed, in the Canadian context, academics have concluded that disclosure decisions operate to reinforce rape myths in the same way that admissibility decisions relating to a complainant's sexual history do.<sup>51</sup>

Furthermore, as noted in relation to sexual history evidence, leaving relevance determinations to male judges can solidify a 'male perspective to questions of relevance',<sup>52</sup> which may undervalue women's experiences and interests.<sup>53</sup> Further to the commentary around *R v A*, there are additional instances where a woman's perspective has offered a markedly different approach: this is also illustrated through Lord Walker's comments in *Stack v Dowden*,<sup>54</sup> where he stated that Baroness Hale's perception of the 'human and social issues involved' in the case was so useful that he 'set aside as redundant most of the opinion' he had previously prepared.<sup>55</sup> It is therefore problematic that overall, just over a quarter of judges are female,<sup>56</sup> meaning that the majority of cases will be heard by a male judge. Additionally, female judges are still concentrated in the younger age bands and lower levels of the judiciary: only eight out of thirty eight Court of Appeal judges are women,<sup>57</sup> and the Supreme Court is currently made up of just one female and eleven male justices.<sup>58</sup> Unless this changes, future precedent is highly likely to be set by at least a majority male bench. While judicial gender diversity at all levels remains the same, women's experiences may not be properly and fully considered when decisions on the admissibility of mental health records are being made.

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<sup>49</sup> Anne Cossins and Ruth Pilkington, 'Balancing the Scales: The Case for Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19 *University of New South Wales Law Journal* 222, 262

<sup>50</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n45) 38

<sup>51</sup> Lise Gotell, 'Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the Criminal Code' (2008) 20 *Canadian Journal of Women and the Law* 111-154

<sup>52</sup> Kit Kinports, 'Evidence Engendered' (1991) 2 *University of Illinois Law Review* 413, 431

<sup>53</sup> Louise Ellison, 'Commentary on *R v A (No 2)*' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) 207

<sup>54</sup> *Stack v Dowden* [2007] UKHL 17

<sup>55</sup> *Ibid*, at [14]

<sup>56</sup> The Lord Chief Justice and The Senior President of Tribunals, *Judicial Diversity Statistics 2015* (Courts and Tribunals Judiciary, Judicial Office Statistics Bulletin, July 2015) 4

<sup>57</sup> *Ibid*

<sup>58</sup> The Supreme Court, 'Biographies of the Justices'

<<https://www.supremecourt.uk/about/biographies-of-the-justices.html>> accessed 24/04/16

In relation to s3 CPIA, this ‘vests an enormous discretion in the prosecution both as to any assessment of relevance of the material concerned and also as to the impact that such material might have on the outcome of the case’.<sup>59</sup> A major concern of commentators, which is demonstrated by Joyce Plotnikoff and Richard Woolfson’s empirical study,<sup>60</sup> is that no matter how professional a prosecutor is, this decision still relies on a subjective assessment of relevance,<sup>61</sup> thus may be a source of injustice for the same reasons as above. Additionally, it has been commented that in reality it is the police who retain ultimate influence in this scenario. The prosecution makes the decision to disclose based on the material generated by the attitudes and mythologies of others,<sup>62</sup> thus ‘in most cases, the issue of what material is to be disclosed ... will be made by the police’.<sup>63</sup> Research into police attitudes relating to rape complainants, and those who are mentally ill, is not favourable, and often shows that they do subscribe to rape myths,<sup>64</sup> which may influence assessments of relevance.

Additionally, there is little guidance to be derived from decided cases as to the question of relevance of mental health history. For example, in *R v Tine*,<sup>65</sup> the Court of Appeal upheld a trial judge’s decision to disallow questioning on the basis that the defence had insufficient material to justify an exploration of the psychiatric history of a burglary victim. But no guidance was offered on the issue of relevance, nor did the court draw attention to the potential prejudicial effect attached to psychiatric evidence and how this might be appropriately addressed when determining whether cross-examination should be permitted on this basis. Without guidance, it is very difficult for judges to determine what evidence is relevant, and therefore ‘material’. As Fiona Raitt points out in relation to jurors, but which also applies to individuals in the judiciary, it is not within common knowledge to be able to

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<sup>59</sup> Sybil Sharpe, ‘Article 6 and the Disclosure of Evidence in Criminal Trials’ (1999) *Criminal Law Review* 273, 275

<sup>60</sup> Joyce Plotnikoff and Richard Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law* (Home Office, RDS Occasional Paper No 76, 2001) 121

<sup>61</sup> David Ormerod, ‘Improving the Disclosure Regime’ (2003) 7 *International Journal of Evidence & Proof* 102, 105

<sup>62</sup> Ben Fitzpatrick, ‘Disclosure: Principles, Processes and Politics’ in Clive Walker and Keir Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Oxford: Oxford University Press, 1999) 165

<sup>63</sup> Roger Leng and Richard Taylor, *Blackstone’s Guide to the Criminal Procedure and Investigations Act 1996* (London: Blackstone Press, 1996) 15

<sup>64</sup> Jennifer Brown, ‘Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors’ (2007) 13(4) *Psychology, Crime and Law* 355, 359; *The Stern Review – a Report by Baroness Vivien Stern OBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales*, (London: Home Office, 2010) 47

<sup>65</sup> *R v Tine* [2006] EWCA Crim 1788

assess what effect, if any, a common illness such as depression might have on the credibility or reliability of a witness.<sup>66</sup> Neither are they equipped to assess the impact of a complainant's referral to counselling for self-harm or the probative value of medications prescribed years earlier, to name but a few examples.

While documents containing information relating to the mental health of a complainant may be relevant in some cases, it is argued that this is not often. Women with mental health issues, who often lead heavily documented lives, usually have no opportunity to read what is written about them in files, nor do they have an opportunity to correct or contribute to their own records.<sup>67</sup> When a woman alleges sexual assault, a whole new set of records may be generated by those involved in their care, including counsellors. The problem with introducing such records as evidence is that there are basic tenets of psychotherapy that may skew the interpretation of the documents. For example, within the context of therapy, feelings are discussed that relate to the inner world of the victim, rather than to the external reality of an event.<sup>68</sup> Patients are often permitted and sometimes encouraged to 'discuss fantasies, imagine hypothetical scenarios, or enact unlikely role-plays'.<sup>69</sup> In relation to counselling records following rape, it is a recognised aspect of rape trauma syndrome for victims to blame themselves and express feelings of guilt about what has occurred.<sup>70</sup> These should not be deemed relevant as they are not reliable records of matters at issue in a sexual assault trial. As Justice L'Heureux-Dube notes, 'the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial'.<sup>71</sup> Furthermore, the idea that a history of depression or history of suicide attempts and overdoses suggest a person is unreliable, unstable, incredible and liable to make a false claim is 'not supported by any medical evidence'.<sup>72</sup> Victims and witnesses in other crimes are rarely required to show their mental stability to prove their credibility unless their

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<sup>66</sup> Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (n43) 50

<sup>67</sup> Benedet and Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (n9) 138

<sup>68</sup> Temkin, 'Digging the Dirt' (n23) 129

<sup>69</sup> Tess Wilkinson-Ryan, 'Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant' (2005) 153 *University of Pennsylvania Law Review* 1373, 1391

<sup>70</sup> Ann Burgess and Lynda Holmstrom, 'Rape Trauma Syndrome' (1974) 131(9) *American Journal of Psychiatry* 981, 983

<sup>71</sup> *R v O'Connor* [1995] 4 SCR 411 at [299]

<sup>72</sup> Dr Gillian Mezey on *Still Getting Away with Rape*, (Dispatches Documentary, 2000) <[http://www.broadcaster.org.uk/section1/rapecampaign/date\\_rape\\_trans.htm](http://www.broadcaster.org.uk/section1/rapecampaign/date_rape_trans.htm)> accessed 22/11/14

mental capacities are clearly at issue in the case.<sup>73</sup> As well as this, questioning relating to events or episodes that occurred some years previously taps into the common but erroneous view of mental illness as inevitably unremitting. In reality, evidence of illness that precedes the current event or where symptoms are controlled by appropriate treatment is often irrelevant.<sup>74</sup>

In conclusion, there is a stereotyped and flawed understanding both of mental illness and the link between mental ill-health and witness credibility. As a result of this, having wide judicial discretion, with very limited guidance, on the issue of what evidence is 'material' is problematic, and can have serious implications for the fair administration of justice in rape cases. Irrelevant evidence, especially evidence that could mislead or distract the jury, should be excluded to protect the integrity of the trial,<sup>75</sup> and so introducing mental health records which are not directly relevant to the victim's ability to comprehend and recall the events of the sexual assault should not be permitted.

#### 2.1.4 PUBLIC INTEREST IMMUNITY AND THE COMPLAINANT'S INTERESTS

Disclosure of third party documents held either by the prosecution or still in the hands of the third party can be resisted by claiming public interest immunity. The PII regime was approved by the European Court of Human Rights in *Atlan v United Kingdom*.<sup>76</sup> However, it is problematic in this context, as it does not offer any obvious protection to the privacy interests of the victim or witness,<sup>77</sup> meaning their interests could be 'heavily compromised' in circumstances in which they have no access to independent legal advice.<sup>78</sup> Although these arguments were originally made in relation to Scottish law, they apply equally to the current situation in England and Wales.

The main concern with the PII regime is that it reduces the complainant's interests to one of a series of interests comprising the 'public interest'. Rather than resisting disclosure on the basis of the complainant's privacy rights alone, this argument has to be voiced in relation to the 'public interest' in keeping medical records confidential to prevent constraining the record

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<sup>73</sup> Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford: Oxford University Press, 2002) 6

<sup>74</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n45) 35

<sup>75</sup> McGlynn, 'Feminist Judgment: *R v A*' (n44) 214

<sup>76</sup> *Atlan v United Kingdom* [2002] 34 EHRR 833

<sup>77</sup> Peter Duff, 'Disclosure, PII and the Confidentiality of Personal Records' (2010) 33 *Scots Law Times* 181, 182

<sup>78</sup> Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (n43) 34

keeper, and the ‘public interest’ that victims of rape are not dissuaded from reporting such attacks because of a fear that all sorts of confidential information about them will be disclosed to the defence and potentially used in open court.<sup>79</sup> While these are legitimate arguments, the individual complainant’s private rights under the ECHR cannot be canvassed forcefully and competitively against other interests,<sup>80</sup> and so become lost.

Furthermore, the PII regime means that complainants are compelled to rely on prosecutorial discretion to identify sensitive information and seek an application for non-disclosure. However, prosecutors are under no obligation to protect the complainant’s privacy, and therefore may do nothing to prevent an application. As Raitt suggests, this is increasingly likely as applications for non-disclosure will not be a priority for the Crown’s increasingly stretched resources, which impose a massive workload on prosecutors.<sup>81</sup> Therefore, the third party may be left to defend the complainant’s interests, but this is something that they may feel ill-equipped for. The likelihood of this is increased by complex procedural rules relating to witness summons.<sup>82</sup> These provide that if a third party wishes to make representations concerning the issue of a witness summons at a hearing, the appropriate court officer must be informed within seven days.<sup>83</sup> If not, the application is referred straight to the judge who can decide on the matter with or without a hearing.<sup>84</sup> A counsellor, therapist or doctor who is not used to the ways of the court and who is not familiar with this procedure may fail to respond within the seven-day deadline. They may also feel reluctant to appear unrepresented at a hearing before a judge, or may be too busy.<sup>85</sup> Evidence from Jennifer Temkin and Barbara Krahe’s research also suggests that local authorities have different practices with regard to PII, and that some will never bother to claim it, while others will hand over any material requested by the defence to the judge without the need for any application to be made.<sup>86</sup> The result of this is that the complainant’s interests may be threatened, and disclosure of personal records could become routine.

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<sup>79</sup> *Sexual Abuse: Disclosure* [2012] UKSC 60 at [15] per Lady Hale; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171

<sup>80</sup> Raitt, ‘Disclosure of Records and Privacy Rights in Rape Cases’ (n43) 46

<sup>81</sup> *Ibid*, 41

<sup>82</sup> Crown Court Rules 1982 R 23 (as amended by the Crown Court (Miscellaneous Amendments) Rules 1999, SI 1999 No 598)

<sup>83</sup> Rule 23(5)

<sup>84</sup> Rule 23(6)

<sup>85</sup> Temkin, ‘Digging the Dirt’ (n23) 128

<sup>86</sup> Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008) 157

Additionally, it has been held that where the liberty of the defendant is at issue and disclosure might be of assistance to the defence, a claim of disclosure would often be strong.<sup>87</sup> Furthermore, in *R v H and C*, it was held that, where it is otherwise unavoidable, the accused's right to a fair trial under article 6 of the ECHR must trump the 'public interest' in non-disclosure.<sup>88</sup> In light of this, it must be considered whether the complainant's rights and interests are being given enough weight.

### 2.1.5 COMPLAINANTS' AND DEFENDANTS' RIGHTS

While disclosure of evidence is a fundamental component of a fair trial, in particular the principle of equality of arms, this section will argue that human rights law has developed to include victims' interests, and that this must be taken into account when considering the complainants' right to privacy in relation to medical records.

Defendant and complainant rights, and how best to balance these rights, is an issue that faces policy makers in many areas, and whether the right balance has yet been achieved is a much-discussed issue in England and Wales at the moment.<sup>89</sup> Research has suggested that there is a strong perception among victims that defendants have more rights within the criminal justice system,<sup>90</sup> and in the context of defence access to counselling records, the assiduity with which some judges scrutinised files for material which in their view could be useful to the defence in undermining the credibility of the complainant<sup>91</sup> does give rise to some concern in relation to issues of fairness between complainants and defendants.

Refusing to disclose material to the defence has the potential to violate the accused's right to a fair trial under article 6 of the ECHR. This right has often been described as 'fundamental and absolute',<sup>92</sup> and UK courts have noted that in balancing competing public interests, the right to a fair trial is of paramount concern.<sup>93</sup> However, British courts have also considered

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<sup>87</sup> *R v K* [1993] 97 Cr App R 342

<sup>88</sup> *R v H and C* (n13)

<sup>89</sup> Keir Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century' (2014) 11 *Criminal Law Review* 777, 785; Home Office, *The Code of Practice for Victims of Crime* (London: Home Office, 2013)

<sup>90</sup> Sara Payne, *Rape: The Victim Experience Review* (London: Home Office, 2009) 22

<sup>91</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap* (n86) 157

<sup>92</sup> *Brown v Scott* [2003] 1 AC 681 at [719]

<sup>93</sup> *R v Governor of Brixton Prison* (n18)

that article 6 can be ‘balanced’ against the interests of other participants in that trial.<sup>94</sup> Hoyano argues that this predilection for ‘balancing’ is fundamentally misconceived,<sup>95</sup> as it does not state within article 6 that the right to a fair trial is subject to qualification against other competing interests, in comparison to other rights, such as those within articles 8-11, which do include explicit sub-articles providing for such limitations.<sup>96</sup> However, it is suggested that it is not about balancing the defendant and complainants’ rights per se, but rather what the right to a fair trial actually means. The metaphor of ‘balance’ is confusing, as it reflects the idea that the rights of victims and offenders are strictly oppositional.<sup>97</sup> Rather, it is wrong to state that the concept of victims’ rights brings about a reduction in the rights of the accused,<sup>98</sup> and that the right to a fair trial is purely about the defendant’s rights.<sup>99</sup> Protection of the right to a fair trial is important to society as a whole, as we all have an interest in ensuring that trials are conducted fairly, and that the innocent are set free and the guilty convicted.<sup>100</sup> It therefore follows that when determining the scope of the right to a fair trial, the interests of the accused are part of a balance to be struck with the victim’s interests, those of the state and society as a whole. This interplay of factors was recognised by the European Court of Human Rights in a landmark judgment, *Doorson*, that read victims’ interests into the fair trials rights found in the European Convention on Human Rights. They stated that:

It is true that article 6 does not explicitly require the interests of witnesses in general [...] to be taken into account. However, their life, liberty or security may be at stake [...] against that background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.<sup>101</sup>

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<sup>94</sup> *Brown v Scott* (n92) at [693] and [704] per Lord Bingham; at [709] per Lord Steyn; at [727]-[728] per Lord Clyde

<sup>95</sup> Laura Hoyano, ‘What Is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial’ (2013) 1 *Criminal Law Review* 4, 6

<sup>96</sup> *Ibid*, 10

<sup>97</sup> John Spencer and Maureen Spencer, ‘Witness Protection and the Integrity of the Criminal Trial’ (paper presented at Second World Conference on the Investigation of Crime, 2001, Institute of Human Rights and Criminal Justice Studies, Durban); Rebecca Coen, ‘The Rise of the Victim - a Path to Punitiveness?’ (2006) 16(3) *Irish Criminal Law Journal* 10, 12

<sup>98</sup> Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publications, 2008) 147

<sup>99</sup> John Spencer, ‘Orality and the Evidence of Absent Witnesses’ (1994) *Criminal Law Review* 628, 636

<sup>100</sup> McGlynn, ‘Feminist Judgment: *R v A*’ (n44) 224

<sup>101</sup> *Doorson v Netherlands* [1996] 22 EHRR 330 at [70]

As a result, it is important that account be taken of victims' interests, including their right to respect of private life. Additionally, it has been held by Lord Justice May that the disclosure of a complainant's medical records does engage article 8 of the ECHR,<sup>102</sup> and the Grand Chamber of the ECtHR has confirmed that 'information about the person's mental health is an important element of private life'.<sup>103</sup>

Furthermore, the article 6 right does not require that any particular rules of evidence are followed.<sup>104</sup> The European Court stated that it 'does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law'.<sup>105</sup> Therefore, the article 6(3) right for defendants to call and cross-examine witnesses is not absolute. In *Baegen v The Netherlands*,<sup>106</sup> the Commission took the approach that regard should be had to a wide range of factors when considering this issue, and that in cases involving rape:

In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life. Therefore, the Commission accepts that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.<sup>107</sup>

The Law Commission has advised that there is 'no explicit right in the Convention to adduce whatever evidence the defence wishes to adduce',<sup>108</sup> and therefore the exclusion of relevant evidence does not in itself render a trial unfair, rather '[i]t depends how relevant the excluded evidence is to the crucial issues in the case'.<sup>109</sup> Subsequently, Strasbourg jurisprudence has also made it clear that the defence does not have an absolute entitlement to full disclosure.<sup>110</sup>

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<sup>102</sup> *R v Stafford Crown Court* (n30)

<sup>103</sup> S [2009] 48 EHRR 50 at [66]

<sup>104</sup> McGlynn, 'Feminist Judgment: *R v A*' (n44) 224

<sup>105</sup> *Schenk v Switzerland* [1988] EHRR 242 at [46]

<sup>106</sup> *Baegen v the Netherlands* [1995] App no 16696/90

<sup>107</sup> *Ibid*, at [77]

<sup>108</sup> The Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com. No. 273, 2001) para 9.30

<sup>109</sup> *Ibid*, para 9.32

<sup>110</sup> *PG and JH v United Kingdom* [2001] Application No 44787/98; *Jasper v United Kingdom* [2003] 30 EHRR 441

This means that where psychiatric evidence has little bearing on a witness's credibility, its consequent exclusion would be compatible with article 6(3)(d).<sup>111</sup>

Therefore, the extent of disclosure should be such as to impair the right to privacy as little as possible. The court must consider whether there is a need for interference, and if the means employed are proportionate to the legitimate aims pursued by the state.<sup>112</sup> So while it will sometimes be necessary to introduce evidence about a complainant's mental health, thereby constituting a necessary and justified interference with privacy rights, this is not invariably the case. Questions that are unnecessarily intrusive, are not strictly relevant and are asked as a matter of routine may potentially be in breach of the complainant's article 8 rights. Furthermore, in performing the balancing exercise required for public interest immunity, the court should consider whether, given the importance of complainants' interests within the fair trial right, the effects of disclosure of records on the individual would be so severe that it would not be justified by the purpose it is intended to serve. All of this must be considered in light of the argument that mental health evidence is rarely relevant, and is only viewed as such due to discriminatory and stereotypical ideas about mental health and female sexuality.

Where evidence or questioning is not necessary and reaches the requisite threshold of harm, article 3, prohibiting torture and inhuman or degrading treatment, may be directly engaged. As article 3 is a non-derogable right, other convention rights, such as the article 6 right to a fair trial, would not take precedence. However, it has been held that disclosure of records relating to mental health does not constitute a violation under article 3, as this has too high a threshold.<sup>113</sup> This case related to a father's contact with his daughter. A young woman, X, alleged she had been abused by the father, however she did not want to take any further action. Yet, the mother wanted these allegations to be tested and resolved. X was suffering from a long history of physical illness, which worsened as an apparent result of stress relating to the pressure arising from the legal issues. She argued that both disclosure of her social services records and requiring her to give evidence in person would interfere with her article 3 right not to be subject to inhumane or degrading treatment, because of the effect this would have on her health.<sup>114</sup> Other parties to the case questioned whether mere disclosure can amount to degrading treatment within the meaning of article 3.<sup>115</sup> The court highlighted that

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<sup>111</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n45) 44

<sup>112</sup> *Sexual Abuse: Disclosure* (n79)

<sup>113</sup> Ibid

<sup>114</sup> Ibid, at [26]

<sup>115</sup> Ibid, at [27]

a high threshold was required, going beyond the ‘inevitable element of suffering or humiliation connected with a given form of legitimate treatment’.<sup>116</sup> Therefore, they required attention to be paid to context: not only was the state acting in support of some important public interests, X was under the specialist care of a consultant psychiatrist, who would act to mitigate further suffering which disclosure may cause. This case is made more complicated by the fact that it involved two sets of complex conflicting interests – those of the vulnerable young woman who made an allegation in confidence and those of the girl and her parents in having the allegation properly investigated and tested. As Lady Hale stated, the court was being asked to ‘reconcile the irreconcilable’.<sup>117</sup> However, the basis for the decision that disclosure does not reach the threshold for article 3 may be applicable in a wider range of cases.

Despite this, article 3 could be engaged indirectly, as Clare McGlynn has argued in relation to sexual history evidence.<sup>118</sup> Restrictions on the admission of mental health evidence that is not strictly relevant may be necessary to ensure compliance with a State’s positive obligations, inherent in article 3, to bring perpetrators of rape to justice. States’ human rights obligations have changed and developed, moving towards greater responsibility for harms caused by private individuals. One such development is a growing recognition that States need to be more proactive in ensuring protection of rights.<sup>119</sup> This has meant that human rights obligations on States now extend ‘far beyond the traditional confines of negative rights, towards more positive requirements or obligations to take action to secure and protect rights’.<sup>120</sup>

There are two types of situations that have been classified as involving the State’s positive obligations. Firstly, where the State is aware of the harm or possible harm, but fails to take action. An example of this occurred in *Z v UK*,<sup>121</sup> where a local authority failed to take steps to protect children known to be at risk of ill-treatment by their parents. In relation to the offence of rape, this situation is most likely to occur in the context of other forms of sexual or gender-based violence.<sup>122</sup>

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<sup>116</sup> *Kudla v Poland* [2005] 35 EHRR 198

<sup>117</sup> *Sexual Abuse: Disclosure* (n79) at [1]

<sup>118</sup> McGlynn, ‘Feminist Judgment: *R v A*’ (n44) 214

<sup>119</sup> Doak, *Victims’ Rights, Human Rights and Criminal Justice* (n98) 163

<sup>120</sup> Clare McGlynn, ‘Rape, Torture and the European Convention on Human Rights’ (2009) 58(3) *International and Comparative Law Quarterly* 565, 587

<sup>121</sup> *Z v UK* [2002] 34 EHRR 3

<sup>122</sup> McGlynn, ‘Rape, Torture and the European Convention on Human Rights’ (n120) 593

Secondly, and of more relevance here, this doctrine of positive obligations has been deployed to bring to account more generic State failures regarding the investigation and prosecution of rape.<sup>123</sup> This will be applicable where the State was unaware of a particular risk by non-state actors, so cannot be held directly responsible for not preventing it. But it can be held responsible for either administrative failings in terms of investigations, or for general inadequacies of the legislative framework.<sup>124</sup> For example, in *X and Y v the Netherlands*,<sup>125</sup> the Dutch state was held to have failed to proscribe to a sufficient extent the rape of a mentally disabled individual, and in *MC v Bulgaria*,<sup>126</sup> the Bulgarian state was held responsible for its failure to ensure that all rapes were appropriately investigated and proscribed by law. The court acknowledged that States have positive obligations in terms of article 3 to ‘enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution’.<sup>127</sup> Thus the failure in law to proscribe all forms of rape violates the positive obligation inherent in article 3. As Clapham notes, ‘if the national criminal system is unable or unwilling to prosecute certain acts of violence, it becomes a matter for the European Court of Human Rights, which will hold the State responsible for failing to protect individuals from non-state actor violence by ineffectively securing their human rights’.<sup>128</sup> Thus, to the extent that the admission of mental health evidence impedes proper investigation by causing prejudice, restrictions may be justified on this ground.

## 2.2 THE LAW IN PRACTICE

While there are severe problems with the law itself, there are also issues with the way it is used in practice. Disclosure has been described as ‘one of the most important – as well as one of the most abused – of the procedures relating to criminal trials’.<sup>129</sup> A range of serious misunderstandings exist, relating to the exact scope of material that can be disclosed and the role to be played by the judge in ensuring the law is properly applied. Too frequently, applications by the parties and decisions made by the judges have been made ‘based either on

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<sup>123</sup> Ibid, 592

<sup>124</sup> Ibid, 593

<sup>125</sup> *X and Y v the Netherlands* [1985] ECHR 4

<sup>126</sup> *MC v Bulgaria* [2005] 40 EHRR 20

<sup>127</sup> Ibid, at [153]

<sup>128</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 376

<sup>129</sup> *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, (Ministry of Justice, 2006) 1

misconceptions as to the true nature of the law or a general laxity of approach'.<sup>130</sup> This section will discuss this in greater detail, first considering how frequently third party disclosure applications are made and the judicial approach to such applications, and then examining the basis on which defence appear to make such applications and how they use the evidence.

### 2.2.1 FREQUENCY OF THIRD PARTY DISCLOSURE APPLICATIONS

Canadian research indicates that restrictions on the use of sexual history evidence have resulted in an increase in applications for third party disclosure of written records relating to the complainant.<sup>131</sup> While this area lacks considerable research in England and Wales, this strategy has also been documented.<sup>132</sup> It has been suggested that applications for disclosure have become 'standard practice',<sup>133</sup> with judges also agreeing that third party disclosure applications are 'frequent'.<sup>134</sup> This thesis will use the existing research to argue that third party disclosure applications are made often, and that there is no uniform judicial response to such applications, which is troubling.

Although its focus was on sexual history evidence, the Home Office study by Liz Kelly, Jennifer Temkin and Sue Griffiths was the first study in England and Wales to investigate the extent to which applications for disclosure of confidential records are made in sexual assault cases.<sup>135</sup> It found that a total of 71 applications were made, out of a case sample of 236.<sup>136</sup> These occurred across 54 separate cases, which is nearly a quarter of the sample. Furthermore, the proportion of cases in which applications were made was roughly equal to those in which section 41 applications were made.<sup>137</sup> Although the study did not monitor whether applications were accepted or not, it did find that in cases where an application was made, 55 per cent resulted in acquittal, whereas in cases where no application was made, 47 per cent of cases resulted in acquittal.<sup>138</sup> Scottish research has found similar results; out of 47

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<sup>130</sup> Ibid

<sup>131</sup> Karen Busby, 'Discriminatory Use of Personal Records in Sexual Violence Cases' (1997) 9 *Canadian Journal of Women and the Law* 148, 151; Margaret Denike, 'Sexual Violence and Fundamental Justice: On the Failure of Equality Reforms to Criminal Proceedings' (2000) 20(3) *Canadian Women's Studies* 151, 155-156

<sup>132</sup> Temkin, 'Digging the Dirt' (n23) 126

<sup>133</sup> *Re H (L)* [1997] Cr App R 176 at [176] per Sedley LJ

<sup>134</sup> Kelly, Temkin and Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (n7) 54

<sup>135</sup> Ibid

<sup>136</sup> Ibid, 25

<sup>137</sup> Ibid

<sup>138</sup> Ibid, 28

applications to introduce prohibited evidence (including sexual history evidence and character evidence), a quarter concerned evidence relating to the complainants' character, which includes mental health evidence.<sup>139</sup> In addition to this, Canadian research has found that in a number of cases, the content of records was used without any reference to a formal application being made.<sup>140</sup> While research has not been undertaken in England and Wales to examine if this is the case here too, it must be considered as a possibility. In the context of sexual history evidence, it certainly is the case that evidence is sometimes introduced without a formal s41 application,<sup>141</sup> and again, research from Scotland has shown that both sexual history evidence and 'character' evidence are admitted in the absence of any application.<sup>142</sup> Furthermore, the Criminal Procedure Rule Committee has drawn attention to reports it has received that applications for the production of confidential documents held, for example, by health and local authorities, often were made late.<sup>143</sup> While this is objectionable in itself, it also raises the possibility of further disobedience of procedural rules.

Temkin and Krahé have undertaken qualitative research, interviewing those within the legal profession in relation to third party disclosure applications. These suggest that there is a judicial failure to apply the law properly. Several judges interviewed in the study stated that the courts were willing to accede to disclosure requests on a much broader basis than the case law permits, and that the term 'material evidence' was being interpreted far more widely than the decision in *Reading Justices* would allow.<sup>144</sup> Furthermore, one judge stated that not only did he personally ignore the law, but that at the refresher courses judges are required to attend, they were asked "How do you approach disclosure in these cases?" and nobody stuck by the strict letter of the law at all.<sup>145</sup> Instead, it appears that judges would look for, and then order disclosure of, evidence broadly relevant in their view to the complainant's credibility, or material that would be in the interests of the defence to have.<sup>146</sup>

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<sup>139</sup> Michele Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56(4) *Probation Journal* 379, 390

<sup>140</sup> Benedet and Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (n2) 541

<sup>141</sup> Dennis, 'Sexual History Evidence: Evaluating Section 41' (n5) 870

<sup>142</sup> Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (n139) 389

<sup>143</sup> Lord Justice Auld, *Review of the Criminal Courts in England and Wales* (London: Stationery Office, 2001) 474-475

<sup>144</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap* (n86) 153

<sup>145</sup> *Ibid*, 153-154

<sup>146</sup> *Ibid*, 154

It is also clear that despite the law stating fishing expeditions are not to be accepted, these are frequent, with one judge commenting that he believed most applications were fishing expeditions. The Criminal Procedure Rule Committee commented that applications were often made 'without adequate consideration being given to the relevance and admissibility of the documents concerned',<sup>147</sup> despite the fact that when one is made, it should identify the documents in question and the grounds on which it is believed they are likely to constitute material evidence.<sup>148</sup> A barrister in Temkin and Krahe's study also confirmed that fishing expeditions were made regularly by defence counsel and that there were frequently no problems in getting them accepted. This may be a result of the fact that there is no uniform judicial response to such applications. While some took a tough approach, others commented that fishing expeditions are 'legitimate'<sup>149</sup> or believed that even if they are aware that an application was a fishing expedition and therefore improper, if it turns up documents that could assist the defence, these should still be disclosed.<sup>150</sup>

While this research does not mean that records are invariably ordered, produced or disclosed, and there may be numerous cases involving complainants with a mental health history where applications for third party disclosure have been denied, it is worrying that there is no predictable pattern in judicial decision making with respect to such applications. It appears that stereotypical beliefs about complainants play a role in the assessments of some judges as to what should be disclosed to the defence, and that many differ in their approach to disclosure, with some being very lenient. Furthermore, it is clear that the law, which does not offer complainants much protection in the first place, is not being strictly adhered to. This increases the likelihood that use of medical records will become standard practice.

The limited research available also gives an indication as to the types of documents being requested. The Home Office study found that the combination of social service and medical records accounted for over 80 per cent of all third party disclosure applications.<sup>151</sup> Furthermore, interviewees in Temkin and Krahe's study believed applications were often made in the case of child complainants or complainants who were children at the time of the alleged abuse, although applications in relation to adult complainants could also occur where

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<sup>147</sup> Department for Constitutional Affairs, *Criminal Procedure Rules: Notes to Accompany 4th Update, March 2007* (Department for Constitutional Affairs, 2007)

<sup>148</sup> Rule 28.3 of the Criminal Procedure Rules 2014

<sup>149</sup> Temkin and Krahe, *Sexual Assault and the Justice Gap* (n86) 155

<sup>150</sup> Ibid

<sup>151</sup> Kelly, Temkin and Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (n7) 25

there was some psychiatric or medical history.<sup>152</sup> Defence would be looking for evidence of counselling, mental health problems, previous sexual abuse or previous allegations of abuse.<sup>153</sup> The next section of this chapter will examine how defence aim to use such material.

### 2.2.2 DEFENCE USE OF MENTAL HEALTH EVIDENCE

In most rape cases, defence arguments focus on the issue of consent. Where the alleged offence occurs in private, as it almost always does, it comes down to the word of the complainant against that of the accused.<sup>154</sup> Numerous studies have been conducted on the range of tactics used to cast doubt on a complainant's testimony, in particular, testing their credibility and consistency as a witness,<sup>155</sup> and there has been a lot of research affirming that such tactics do impact on (mock) jurors' perceptions and judgments in rape trials.<sup>156</sup> It is often with the same purpose of attacking and destroying the complainant's credibility that the defence may seek access to documentation including psychiatric or psychological records, reports and notes. This is likely to prove effective as it taps into common prejudices about mental health and the link between mental ill health and witness credibility in ways that 'undermine prospects for fair and just outcomes'.<sup>157</sup> Furthermore, there is a high probability that the cross-examination process will distort or misinterpret information in records.<sup>158</sup> Defence lawyers have a tendency to exploit the 'dramatic resonance' of certain mental illnesses, so that they can magnify the impact of the illness to support their assertion of the relevance of the records.<sup>159</sup>

A complainant might seek advice from a counsellor or therapist in the wake of a sexual assault. Alternatively, she may have received therapy in the past, or received psychiatric treatment for mental illness. The assumptions behind requests for disclosure of such records is that mental illness affects a person's ability to provide credible and reliable evidence, and thus

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<sup>152</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap* (n86) 152

<sup>153</sup> Ibid, 153

<sup>154</sup> Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (n139) 382

<sup>155</sup> Ellison and Munro, 'Reacting to Rape' (n1) 204-206

<sup>156</sup> Louise Ellison and Vanessa Munro, 'Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) *Social and Legal Studies* 291, 295-306; Louise Ellison and Vanessa Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *British Journal of Criminology* 363, 373-377

<sup>157</sup> Louise Ellison *et al*, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimisation' (2014) *Criminology and Criminal Justice* 1, 10

<sup>158</sup> Busby, 'Discriminatory Use of Personal Records' (n131) 170-171

<sup>159</sup> Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (n43) 49

it can be used to suggest that the complainant is fabricating the allegation. The defence therefore use such evidence to interrogate the complainant's honesty in several different ways.

One of the more common ways to use mental health evidence is to suggest that the complainant is a fantasist, or a disturbed individual, who is confusing illusions and reality.<sup>160</sup> This assumption reflects earlier medical myths about women as prone to hysterical delusions,<sup>161</sup> and implies a link with 'hysterical women' and female sexuality. Generally, while certain mental illnesses may include a tendency to confuse fantasy and fact, it is erroneous to suggest that mental illness impairs a person's ability to differentiate between the two.<sup>162</sup> Yet the attitude that the defence is trying to encourage in the jury is one of disbelief in these women, similar to the idea that 'hysterics shout, much ado about nothing'.<sup>163</sup>

Similarly, if the complainant has been raped before, defence may use counselling or medical notes relating to the historic abuse to suggest that the traumatic effects of this have left the complainant unable to distinguish between the previous assault and the consensual sex she was having with the defendant.<sup>164</sup> For example, when a complainant has been diagnosed with post-traumatic stress disorder, defence lawyers have proposed that flashbacks to a prior sexual assault could have caused confusion between consensual sexual intercourse and rape on the occasion in question.<sup>165</sup> However, this is based on a misconception about the nature of flashbacks. While these may be consuming and painful, they are not hallucinations, and a person who experiences a previous traumatic event is aware of their pathological nature, as opposed to a person suffering from a psychotic delusion who lacks insight into the nature of the problem.<sup>166</sup> Thus, there is no evidence to suggest that rape victims experience confusion between traumatic flashbacks and contemporaneous encounters.

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<sup>160</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n45) 32; Benedet and Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (n2) 537

<sup>161</sup> Simon Bronitt and Bernadette McSherry, 'The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the "Rape Shield"?' (1997) 8(2) *Criminal Law Forum* 259, 262

<sup>162</sup> Charles Dike, Madelon Baranoski and Ezra Griffith, 'Pathological Lying Revisited' (2005) 33 *Journal of the Academy of Psychiatry and the Law* 342, 345

<sup>163</sup> Jean-Martin Charcot, a clinician working in Paris at the end of the 19<sup>th</sup> century, quoted in Georges Didi-Huberman, *Invention De L'hystérie* (Paris: Editions Macula, 1982) 32

<sup>164</sup> Wilkinson-Ryan, 'Admitting Mental Health Evidence' (n69) 1394

<sup>165</sup> *Ibid*, 1396

<sup>166</sup> *Ibid*

Counselling records made after the alleged rape also provide a novel ground for ‘repackaging defence claims of fabricated allegations’.<sup>167</sup> The defence may attempt to suggest that the complainant’s memory has been distorted or falsified by the type of counselling employed,<sup>168</sup> which may prove effective if couched in scientific terms relating to ‘false memory syndrome’, discussed in chapter one. This phenomenon could be inappropriately used to discredit large categories of complainants, even though only a small proportion apparently recover memories in therapy.<sup>169</sup> Furthermore, they may seek to adduce statements made during counselling in which the complainant explores her own feelings of guilt and shame, in an effort to show that either she wanted sex to occur, or that her conduct led the accused to mistakenly believe she was consenting.<sup>170</sup> This allows for an introduction of rape myths into the courtroom.

The defence may also seek to demonstrate that the complainant is ‘emotionally unstable’ as a result of mental illness, and therefore more likely to fabricate the allegation. This is one of the natural implications that follow from cross-examination as to a history of treatment for mental or emotional problems. A Dispatches documentary monitored every rape trial in England and Wales over a two-week period (about 30), and carried out a survey of 120 women who said they had been raped in the last five years. This provides some examples of the types of questions put to rape complainants during cross-examination. One woman descried how the defence raised the fact that she had experienced post-natal depression in an attempt to impugn her credibility, and it seems that this evidence was deemed relevant as if it alone could supply a satisfactory motive for fabrication.<sup>171</sup> The trial judge also adhered to this view, referring directly to the complainant’s depression in his summing up, where he noted that it had caused her to have ‘mood swings’.<sup>172</sup> In reality, mood disorders do not typically cause a complainant to have difficulty remembering events or relating testimony in a truthful way,<sup>173</sup> and it is estimated that one in five will suffer from a depressive illness at some point in their life.<sup>174</sup> As the woman herself stated, ‘my depression’s controlled by anti-depressants. I do

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<sup>167</sup> Bronitt and McSherry, ‘The Use and Abuse of Counselling Records’ (n161) 264

<sup>168</sup> Ibid

<sup>169</sup> Elizabeth Sheehy, ‘Evidence Law and "Credibility Testing" of Women: A Comment on the E Case’ (2002) 2 *Queensland University of Technology Law and Justice Journal* 157, 171

<sup>170</sup> Bronitt and McSherry, ‘The Use and Abuse of Counselling Records’ (n161) 264

<sup>171</sup> *Still Getting Away with Rape*, (Dispatches Documentary) (n72)

<sup>172</sup> Ibid

<sup>173</sup> David Englert, Ashleigh Diserio and Kate Ryan, ‘The Prosecutor's Guide to Mental Health Disorders’ (2007) 1(10) *The Voice - American Prosecutors Research Institute Newsletter* 1, 5

<sup>174</sup> Jen Beaumont and Helen Lofts, *Measuring National Wellbeing - Health, 2013* (Office for National Statistics, 2013) 5

everything just like a normal person, I am a normal person'.<sup>175</sup> The defendant in this case was found not-guilty. Another case involved a complainant who had self-harmed ten years prior to the case.<sup>176</sup> This was brought up in court to attempt to supply jurors with an explanation as to why a woman would not only fabricate an allegation of rape, but would also subject herself to demeaning and violent sexual encounters. Yet, typically, those who engage in self-harm do so privately, and attempt to conceal it. It is not a means of manipulation but a way of coping with acute stress and other strong emotions.<sup>177</sup> By using such evidence, defence lawyers are feeding into 'the common prejudices and myths about people with mental illness'.<sup>178</sup>

While further research is needed to work out ways in which assessments of credibility and reliability of complainants are made in cases involving complainants with mental health problems, findings from mock juror studies suggest that certain case characteristics, such as the complainant's consumption of intoxicants or incomplete recall in her account can damage her credibility in the eyes of the (mock) jurors.<sup>179</sup> Therefore, it is likely that evidence relating to past or present mental health problems will have a similar, if not more, damaging effect, as jurors are likely to attach exaggerated significance to psychiatric evidence. Furthermore, use of such evidence reinforces several rape myths, such as the myths relating to false allegations and women fantasising about rape, and the idea that 'mad women can't be raped'.<sup>180</sup> Additionally, it introduces a false identification of mental illness.

### 2.3 THE EFFECTS OF ALLOWING MENTAL HEALTH EVIDENCE

Allowing mental health evidence has several consequences for rape trials, such as the enhanced 'secondary victimisation', which is something that has already been discussed in great detail in relation to rape trials generally, and the use of sexual history evidence more specifically. Furthermore, there are several consequences that flow from the (rational) fear that mental health evidence will be disclosed. These include a reluctance to report, which may

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<sup>175</sup> *Still Getting Away with Rape*, (Dispatches Documentary) (n72)

<sup>176</sup> *Ibid*

<sup>177</sup> 'National Self Harm Network', <<http://www.nshn.co.uk>> accessed 14/05/2015

<sup>178</sup> Dr Gillian Mezey on *Still Getting Away with Rape*, (Dispatches Documentary) (n72)

<sup>179</sup> Emily Finch and Vanessa Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16 *Social and Legal Studies* 591, 603; Neil Brewer and Anne Burke, 'Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments' (2002) 26 *Law & Human Behaviour* 353, 363

<sup>180</sup> Sadie Bond, 'Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance' (1993) 16 *Dalhousie Law Journal* 416, 421

serve to increase the chances that those with mental health problems become victimised in the first place, a reluctance to disclose information relating to mental health problems when reporting, and a potential altering of the client/counsellor relationship, which in the worst case scenario, may manifest in complainants having concerns about remaining in therapy at all.<sup>181</sup> These will each be discussed in turn.

### 2.3.1 SECONDARY VICTIMISATION

A wealth of research has highlighted that victims find giving evidence 'gruelling at best',<sup>182</sup> and cross-examination has been described as 'secondary victimisation',<sup>183</sup> with many likening it to a repeat of the initial violation.<sup>184</sup> It has been noted that events that lead to victims experiencing such intense negative emotions include having friends, family members and the general public see and hear them talk about intimate violation,<sup>185</sup> and it is argued here that this is worsened by also having their psychiatric history made public and used against them. As Justice L'Heureux-Dube has observed:

[T]hese people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of family and friends.<sup>186</sup>

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<sup>181</sup> Elisabeth McDonald, 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending: Does the Law Effectively Protect Clinician and Client Rights?' (2013) 5(2) *Sexual Abuse in Australia and New Zealand* 12, 15

<sup>182</sup> Jennifer Brown *et al*, *Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape* (London: Government Equalities Office, 2010) 27

<sup>183</sup> Linda Regan and Liz Kelly, *Rape: Still a Forgotten Issue* (London: CWASU/RCNE, 2003) 17; Susan Lees, *Carnal Knowledge: Rape on Trial* (2nd edn: The Women's Press Ltd, 2002) 112-129; Rebecca Campbell, 'What Really Happened? A Validation Study of Rape Survivors Help-Seeking Experiences with the Legal and Medical Systems' (2005) 20(1) *Violence And Victims* 55, 56; Shana Maier, "'I Have Heard Horrible Stories...': Rape Victim Advocates Perceptions of the Re-Victimisation of Rape Victims by the Police and Medical System' (2008) 14(7) *Violence Against Women* 786, 792

<sup>184</sup> McDonald, 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending' (n181) 12

<sup>185</sup> Amanda Konradi, 'Pulling Strings Doesn't Work in Court: Moving Beyond Puppetry in the Relationship between Prosecutors and Rape Survivors' (2001) 10(1) *Journal of Social Distress and the Homeless* 5, 17; Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Westport, CT: Praeger, 2007) 103-104

<sup>186</sup> *R v O'Connor* (n71) at [112]

For example, one of the woman on the Dispatches documentary stated that her reaction when her GP told her he had to give up her medical records was outrage, as ‘they’re very private, personal things, your medical records. It’s like reading your personal diary and they’ve no right to do that’.<sup>187</sup> If the records sought were made after the rape, it is possible that complainants are further psychologically traumatised by the knowledge that the accused may find out about the effects of the assault.<sup>188</sup> In the Australian context, one woman described how she ‘felt sick when this happened, because he was allowed to have access to my thoughts and fears ... all the things I had discussed with my counsellor’.<sup>189</sup> Another woman commented that it ‘was like having him invade my life again’.<sup>190</sup> This distress is more extreme when the victim does not know her medical records are going to be brought up in court. Although this should be prevented by part 28 of the Criminal Procedure Rules 2014, if evidence is indeed adduced without a formal application, suggested as a possibility above, then this could occur. Victim Support reported a case in which a complainant’s confidential psychiatric records were, unbeknown to her, discussed in open court while family members sat in the public gallery, and commented on how this caused her ‘intense dismay’.<sup>191</sup>

Furthermore, if the woman is suffering from a mental health problem at the time, disclosing her mental health evidence and allowing it to be discussed in court may be more distressing to her than otherwise, depending on the nature and severity of the condition. Additionally, subjecting such women to rigorous cross-examinations with repeated and leading questions, in a confrontational and often accusatory manner, may make them less able to get their story heard,<sup>192</sup> and so may interfere with the fact-finding role of the court. While it is a very varied group of complainants, and so it would be wrong to assume that every complainant has precisely the same difficulties or needs,<sup>193</sup> the available social science literature supports the view that witnesses with mental health problems are able to give accurate, useful and truthful

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<sup>187</sup> ‘Sam’ on *Still Getting Away with Rape*, (Dispatches Documentary) (n72)

<sup>188</sup> Cossins and Pilkington, ‘Balancing the Scales’ (n49) 225

<sup>189</sup> Anne Cossins *et al*, *Submission to the New South Wales and Commonwealth Attorneys-General (Working Party Concerning Confidentiality of Counsellors Notes in Sexual Assault Court Matters*, 1996) 5

<sup>190</sup> *Ibid*, 5-6

<sup>191</sup> Victim Support, *Disclosure of Information to and About Victims and Witnesses* (Unpublished paper for Steering Group, 2001) cited in Temkin, ‘Digging the Dirt’ (n23) 135

<sup>192</sup> Janine Benedet and Isabel Grant, ‘Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases’ (2012) 50(1) *Osgoode Hall Law Journal* 1, 5

<sup>193</sup> Louise Ellison, ‘The Mosaic Art?: Cross Examination and the Vulnerable Witness’ (2001) 21(3) *Legal Studies* 353, 354

evidence that furthers the truth seeking process, but that their ability to do so may be hindered by current cross-examination practices.<sup>194</sup>

As one of the main purposes of the current rape shield law is to protect witnesses from intrusive and humiliating cross-examination, it is reasoned that the same argument can be made for evidence of psychiatric history.

### 2.3.2 DETERRING REPORTING AND/OR DISCLOSURE OF MENTAL HEALTH PROBLEMS

Fear of not being believed or of attacks on their credibility during cross-examination is already a renowned disincentive for those considering whether to report a sexual assault.<sup>195</sup> The chance that victims with a psychiatric history will have to answer questions on their mental health, and may be discredited on this basis, may be yet another reason not to report an assault. For example, 30 per cent of respondents to a Mind study elected to tell no one of their assault, for fear that involvement in the criminal justice system would expose them to further discrimination or vulnerability.<sup>196</sup> This is neither in the public interest nor in the interests of justice. The Canadian experience has shown similar concerns over the possibility of records disclosure, with women saying ‘that they were unwilling to risk being re-victimised by “being put under a microscope during the trial”’.<sup>197</sup>

Furthermore, victims have no adequate assurance of how their privacy interests will be safeguarded in this scenario,<sup>198</sup> and may be afraid that the decision whether to allow defence access to records will be made without taking their view into account,<sup>199</sup> leading to private information becoming public knowledge. They may also have concerns about the potential detrimental impact that involvement in the criminal process could consequently have on their mental health.<sup>200</sup> This may affect victims’ decision-making, from the decision to report to

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<sup>194</sup> Mark Kebbell, Christopher Hatton and Shane Johnson, ‘Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?’ (2004) 9(1) *Legal and Criminological Psychology* 23, 23

<sup>195</sup> Regan and Kelly, *Rape: Still a Forgotten Issue* (n183) 8

<sup>196</sup> Mind, *Another Assault: Mind's Campaign for Equal Access to Justice for People with Mental Health Problems* (London: Mind, 2007) 9

<sup>197</sup> Tina Hattem, *Research Report: Survey of Sexual Assault Survivors* (Ottawa: Department of Justice, Canada, 2000) 15

<sup>198</sup> Raitt, ‘Disclosure of Records and Privacy Rights in Rape Cases’ (n43) 55

<sup>199</sup> McDonald, ‘Resisting Defence Access to Counselling Records in Cases of Sexual Offending’ (n181) 15

<sup>200</sup> M Pedlar, S Baker and C Williams, *Silenced Witnesses* (London: Mind, 2000) cited in Ellison *et al*, ‘Challenging Criminal Justice? Psychosocial Disability and Rape Victimisation’ (n157) 6;

their appearance in court.<sup>201</sup> It will have a detrimental impact on a particularly vulnerable group of people who have had contact with mental health services at some point in their lives, and whose decision to withdraw from the criminal justice system may reinforce their already vulnerable status.<sup>202</sup>

Moreover, even if the rape itself is reported, fear of the use of psychiatric records may deter victims from disclosing their mental health problems as they do not want it being used against them or affecting their credibility. This may result in them not receiving adequate support that they are entitled to, including practical support such as special measures,<sup>203</sup> and emotional support such as counselling.

While there is limited research specifically concerned with the experiences of court users with mental health conditions, findings indicate that where court users were not assured their condition would be treated sympathetically, were unsure of its relevance to the situation, or were concerned that the information would discredit their evidence, they were less likely to disclose it.<sup>204</sup> Additionally, those with mental health conditions tended to be more reluctant than other groups, such as those with learning disabilities, to disclose their condition, because they believed that doing so would negatively impact on their case.<sup>205</sup> As one court user stated, 'I didn't really want to mention my suicidal tendencies or depression; my brother said it wouldn't help my case'.<sup>206</sup> Another commented that she was 'frightened that all my mental health issues would come out, and my drugs and medication would be seized on, and it would

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Bridget Pettitt *et al*, *At Risk yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (London: Victim Support and Mind, 2013) 49-50

<sup>201</sup> Payne, *Rape: The Victim Experience Review* (n90) 10; *Home Office Victims' Experience Review, WNC Report from Women's Discussion Groups, September - October 2009* (WNC, 2009)

<sup>202</sup> Karen Busby, 'Third Party Records Cases since *R v O'Connor*' (2000) 27(3) *Manitoba Law Journal* 355, 357, 387

<sup>203</sup> Special measures are provided for in ss16, 17 and 19 of the Youth Justice and Criminal Evidence Act 1999, and the range of special measures available is detailed in ss23-29 of the Act.

<sup>204</sup> Rosie McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (London: Ministry of Justice, Ministry of Justice Research Series 8/10, 2010) iii

<sup>205</sup> Rosie McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 3: At Court* (London Ministry of Justice, Ministry of Justice Research Series 10/10, 2010) 7

<sup>206</sup> *Ibid*

be used against me'.<sup>207</sup> This is problematic, as it may prevent complainants getting the support that they might need. As the police and CPS are the first points of contact for a complainant,<sup>208</sup> and are under an obligation to identify 'vulnerable or intimidated victims',<sup>209</sup> court staff, legal representatives and the judiciary often work on the assumption that the police and witnesses care unit have already identified eligible vulnerable witnesses.<sup>210</sup> They suggested that if a mental health condition was not picked up during contact with these practitioners, it was unlikely to be thereafter as there was no other agency that had direct contact.<sup>211</sup> However, research suggests that police officers have difficulty identifying vulnerable witnesses in practice, particularly those with mental disorders.<sup>212</sup> Practitioners across the board suggested that they lack the necessary skills to identify a condition themselves,<sup>213</sup> and thus they are heavily reliant on individuals choosing to self-disclose.

If a current mental health condition is not disclosed to police or the CPS, complainants who may benefit from support fail to receive it. This encompasses practical support, which includes general assistance and care required to enable full engagement with, and understanding of, the case, and emotional support, which consists of the care provided to court users to ensure their emotional well-being and confidence. Overall, practical and emotional support received in criminal cases was viewed positively by court users and practitioners,<sup>214</sup> and those complainants who felt supported were more likely to continue with the case.<sup>215</sup> Furthermore, where legal representatives were aware of the court users' needs and took steps to ensure they understood what was happening, court users reported feeling respected and listened to, and as a result, they were generally more positive about their court

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<sup>207</sup> Rosie McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 2: Before Court* (London: Ministry of Justice, Ministry of Justice Research Series 9/10, 2010) 34

<sup>208</sup> *Ibid*, 31

<sup>209</sup> Home Office, *Code of Practice for Victims of Crime* (Home Office, 2013) 32

<sup>210</sup> McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 2* (n207) 33

<sup>211</sup> *Ibid*

<sup>212</sup> Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) *International Journal of Evidence & Proof* 1, 7

<sup>213</sup> McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 2* (n207) 39

<sup>214</sup> *Ibid*, 18

<sup>215</sup> *Ibid*, 16

experience.<sup>216</sup> Even those with milder conditions, who did not disclose, regretted this because they would have wished for support if they had known it was available.<sup>217</sup>

Ultimately, complainants appear to be aware that informing the police or CPS that they have a mental health condition may lead to such evidence being disclosed, and therefore choose to keep it quiet. However, this means they cannot access support which may make the process easier for them, and may also increase the chances that they will be able to give the best evidence they can. It is therefore argued that if the laws around disclosure of mental health evidence were stricter, and notions of relevance were not distorted, complainants may feel more comfortable informing those within the criminal justice system that they have a mental health issue and require support.

### 2.3.3 ALTERING THE CLIENT/COUNSELLOR RELATIONSHIP

It is clear from literature discussed in chapter one that sexual assault is particularly detrimental to women's mental health. Yet, if victims have received counselling to assist them to come to terms with what has happened, and deal with any resulting mental health issues, 'the counsellors' notes will be unused material, which may fall to be disclosed'.<sup>218</sup> As complainants should be encouraged to obtain counselling as part of their recovery, and evidence suggests that such support is an important resource for victims coping with sexual violence,<sup>219</sup> this is problematic, and could have several consequences.

One such consequence is that if confidential communications are revealed in the courtroom, or there is a fear that this will be the case, then relationships within which such confidences are imparted with suffer.<sup>220</sup> If complainants are not guaranteed confidentiality within a counselling relationship, they may be inhibited in their discussions<sup>221</sup> and therefore hinder

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<sup>216</sup>McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 3* (n205) 9

<sup>217</sup>McLeod *et al*, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 2* (n207) 37

<sup>218</sup>HMIC/HMCPSI, *Without Consent: A Report on the Joint Investigation and Prosecution of Rape Offences* (London: HMIC, 2007) para 11.12

<sup>219</sup>Sarah Ullman, 'Correlates and Consequences of Adult Sexual Assault Disclosure' (1996) 11 *Journal of Interpersonal Violence* 554, 562; Catherine Kaukinen and Alfred DeMaris, 'Sexual Assault and Current Mental Health: The Role of Help-Seeking and Police Response' (2009) 15(11) *Violence Against Women* 1331, 1333

<sup>220</sup>Bronitt and McSherry, 'The Use and Abuse of Counselling Records' (n161) 266

<sup>221</sup>*Ibid*

their recovery process as they will be unable to receive the full benefit of counselling. Many may not feel comfortable revealing information to a psychiatrist or rape crisis counsellor that is of a sensitive nature, including feelings of guilt or embarrassment about the rape, if they are aware it could be disclosed as evidence. As commented in an American case:

[S]uch communications are likely to be among the most personal imaginable – the women is traumatised ... by the offensive intrusion into her human sexuality, compounded by the unique social reaction to the victim as influenced by the cultural myths of rape.<sup>222</sup>

In the Canadian context, it has been noted that '[d]iscovering that the one place they thought was safe for them is another place where they have no control is counter therapeutic ... [T]his is one of the major roadblocks to recovery for individuals who have been sexual assaulted'.<sup>223</sup> As such, it is 'crucial' to the recovery of the victim that post-assault interventions do not 'contribute to the client's existing feelings of violation, helplessness and powerlessness'.<sup>224</sup> In the worst case scenario, victims may feel that they are faced with the choice between counselling or the criminal justice process,<sup>225</sup> which may result in them being deterred from seeking counselling at all,<sup>226</sup> or delaying it until the trial concludes, which could be a number of years. Indeed, this has been the case in Canada; one counsellor commented how 'when I told my clients that the counselling notes of our session may be subpoenaed I have had direct experience of clients leaving counselling'.<sup>227</sup>

There are also practical consequences if defence are given routine access to counselling records. Counsellors will inevitably curtail their note taking and recordkeeping to attempt to protect complainants if they are aware of this. There is evidence from Nicole Westmarland and Sue Alderson's study that Rape Crisis Centres have been extremely cautious in keeping

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<sup>222</sup> *Aultman v Pennsylvania* [1992] 504 US 977

<sup>223</sup> Ms Sarah Kaplan, Cornwall Community Hospital Assault and Sexual Abuse Program, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, (Issue 6, 1st Session, 41st Parliament, 24 November 2011)

<sup>224</sup> Lisa Gardiner and Michelle Roberson, 'Client Files and Confidentiality: Legal and Ethical Issues for Sexual Assault Counsellors' (paper presented at First National Conference on Sexual Assault and the Law, 28-30 November 1995) 7

<sup>225</sup> Temkin, 'Digging the Dirt' (n23) 132; Busby, 'Discriminatory Use of Personal Records' (n131) 174-175

<sup>226</sup> Anne Cossins, 'Contempt or Confidentiality?: Counselling Records, Relevance and Sexual Assault Trials' (1996) 21(5) *Alternative Law Journal* 223, 226

<sup>227</sup> Cossins *et al*, *Submission to the New South Wales and Commonwealth Attorneys-General* (n189) 10-11

any form of permanent client records due to concerns about them being requested by defence lawyers and used in court.<sup>228</sup> This is backed up by similar evidence from Canada, where the spokeswoman for the Ontario Coalition of Rape Crisis Centres was quoted as saying that ‘centres have adopted all kinds of measures to protect files. We are using every means at our disposal to protect records’.<sup>229</sup> One result of this is that research into the impact and effectiveness of such intervention outcomes in England and Wales is very limited.<sup>230</sup> Another is that such methods of file-keeping can be detrimental to the on-going welfare of a client, as well as counsellor accountability, since they do not satisfy the therapeutic and professional needs for keeping files and reduce the ability of other counsellors to understand the complete history of a client.<sup>231</sup> As Justice L’Heureux-Dube notes, attempts to pressure the integrity of counselling by altering or destroying notes makes it ‘extremely likely that the therapeutic process ... is being harmed in their absence’.<sup>232</sup>

Additionally, there is potential for cases to be dropped as a result of defence not being able to access this evidence when they believe it may be relevant. Indeed, this problem has occurred in Canada. In *Carosella*,<sup>233</sup> a teacher was charged with the historic sexual abuse of a former pupil. The sexual assault crisis centre that had offered counselling to the complainant had adopted a policy of destroying files with police involvement before any court order could be served, to protect the privacy rights of clients. Thus, when the centre was ordered to disclose notes of its counselling sessions, the file was empty. The Supreme Court agreed that the trial judge had been correct to halt the prosecution as the accused’s right to a fair trial had been compromised by the destruction of the interview notes. In Sopinka J’s opinion the defence had a right to the material because it ‘could have assisted the defence in the preparation of cross-examination ... [and] revealed the state of the complainant’s perception and memory’. As the documents had been held to be relevant, denial of access was therefore a denial to make full answer and defence. Clear parallels can be seen between both the test for disclosure of third party documents in Canada at the time of the *Carosella* decision and the current test in England and Wales, and the fair trial discourse that surrounds these tests. So although there has not been a case like this in England and Wales, if Rape Crisis and other counselling

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<sup>228</sup> Nicole Westmarland and Sue Alderson, ‘The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counselling’ (2013) 28(17) *Journal of Interpersonal Violence* 3265, 3274

<sup>229</sup> Kirk Martin, ‘Court Rules against Rape Victims’ *Globe and Mail* (Toronto, 15th December 1995)

<sup>230</sup> Brown *et al*, *Connections and Disconnections* (n182) 7

<sup>231</sup> Cossins and Pilkington, ‘Balancing the Scales’ (n49) 231

<sup>232</sup> *Carosella* [1997] 1 SCR 80 at [147]

<sup>233</sup> *Ibid*, at [45]

organisations are being cautious in their note-taking as evidence suggests,<sup>234</sup> it is not a stretch of the imagination to consider that this could happen.

Both a reduction in those seeking counselling in the aftermath of rape and a lack of research into how effective such counselling can be is problematic, as what evidence there is suggests that counselling can be very useful and important for victims of rape.<sup>235</sup> Victims often 'live and relive the event',<sup>236</sup> to the extent that their lives can be defined as a traumatic on-going survival process.<sup>237</sup> It is therefore crucial that victims receive responsive treatment, where their needs are prioritised, to enable them to move on from the experience.<sup>238</sup>

In England and Wales, a study into Sexual Assault Referral Centres (SARCs) found that counselling was accessed by between one third and two thirds of SARC users, and most of the research participants who used it valued it.<sup>239</sup> Many appreciated the opportunity to talk about the consequences of the assault to a professional who was disconnected from their circle of friends or family,<sup>240</sup> with one user commenting that 'a counsellor is definitely the best person to talk to. And because they're removed from it, because somebody who's close, you're aware of the effect on them'.<sup>241</sup> Furthermore, Westmarland and Alderson have conducted a study that attempts to measure the impact of rape crisis counselling on mental health and well-being over time. The results showed that most change was made in relation to the statement 'I feel

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<sup>234</sup> Westmarland and Alderson, 'The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counselling' (n228) 3274

<sup>235</sup> Kaukinen and DeMaris, 'Sexual Assault and Current Mental Health: The Role of Help-Seeking and Police Response' (n219) 1333; Amanda Robinson, Kirsty Hudson and Fiona Brookman, *A Process Evaluation of Ynys Saff, the Sexual Assault Referral Centre in Cardiff: Final Evaluation Report* (Wales: South Wales Criminal Justice Board 2009) 63-64; Verena Schönbacher, Liz Kelly and Miranda Hovarth, *Archway: Evaluation of the Pilot Scottish Rape and Sexual Assault Referral Centres* (Final Report for Greater Glasgow and Clyde NHS Trust, 2008); Amanda Robinson and Kirsty Hudson, 'Different yet Complementary: Two Approaches to Supporting Victims of Sexual Violence in the UK' (2011) 11(5) *Criminology and Criminal Justice* 515, 518

<sup>236</sup> Patricia Martin, *Rape Work: Victims, Gender and Emotions in Organisation and Community Context* (New York: Routledge, 2005) 3

<sup>237</sup> Jan Jordan, *Seriel Survivors: Women's Narratives of Surviving Rape* (Annandale, Australia: Federation Press, 2008) 203

<sup>238</sup> Rebecca Campbell *et al*, 'Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers' (2001) 16(12) *Journal of Interpersonal Violence* 1239, 1240; Amanda Konradi and Tina Burger, 'Having the Last Word: An Examination of Rape Survivors' Participation in Sentencing' (2000) 6(4) *Violence Against Women* 351, 369-373

<sup>239</sup> Jo Lovett, Linda Regan and Liz Kelly, *Sexual Assault Referral Centres: Developing Good Practice and Maximising Potentials* (London: Home Office, 2004) xi

<sup>240</sup> *Ibid*, 58

<sup>241</sup> REACH service user, quoted in *ibid*, 59

empowered and in control of my life’, with 61 per cent strongly disagreeing or disagreeing at the first data collection point compared to 31 per cent at the last.<sup>242</sup> A level of perceived control over one’s life is an important factor of psychological wellbeing,<sup>243</sup> thus traumatic events, especially those involving a loss of control, can have serious implications for an individual’s mental health.<sup>244</sup> Rape in particular has been shown to threaten assumptions and beliefs victims have about themselves,<sup>245</sup> and this may be especially pertinent in cases of acquaintance rape.<sup>246</sup> Furthermore, one aspect within the notion of control is perceived control over the recovery process, and access to counselling may help achieve this. Studies have found that, among sexual assault victims, those who had higher levels of perceived control over their recovery process were less depressed and had lower levels of post-traumatic stress.<sup>247</sup> Indeed, counsellors described their role as exploring thoughts and feelings, as well as enabling service users to regain a sense of control,<sup>248</sup> ‘empowering [them] so that [they] can carry on [their] life in a positive way’.<sup>249</sup>

Large shifts were also seen in relation to ‘I have “flashbacks” about what happened’, and ‘I have panic attacks’.<sup>250</sup> Overall, some degree of positive change was seen for all measures, although this was small for some.<sup>251</sup> In addition to this research, there is a range of positive, often life-changing feedback from women in England and Wales who have accessed rape crisis and other sexual violence services available,<sup>252</sup> for example, in focus group data collected by

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<sup>242</sup> Westmarland and Alderson, ‘The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counselling’ (n228) 15

<sup>243</sup> Patricia Frazier *et al*, ‘Perceived Past, Present, and Future Control and Adjustment to Stressful Life Events’ (2011) 100(4) *Journal of Personality and Social Psychology* 749, 761

<sup>244</sup> *Ibid*

<sup>245</sup> Mary Koss, Lori Heise and Nancy Russo, ‘The Global Burdening of Rape’ (1994) 18 *Psychology of Women Quarterly* 509-537

<sup>246</sup> Steven Lawyer *et al*, ‘Mental Health Correlates of the Victim-Perpetrator Relationship among Interpersonally Victimized Adolescents’ (2006) 21(10) *Journal of Interpersonal Violence* 1333, 1345

<sup>247</sup> Ryan Walsh and Steven Bruce, ‘The Relationship between Perceived Levels of Control, Psychological Distress and Legal System Variables in a Sample of Sexual Assault Survivors’ (2011) 17(5) *Violence Against Women* 603, 610

<sup>248</sup> Lovett, Regan and Kelly, *Sexual Assault Referral Centres* (n239) 57

<sup>249</sup> St Mary’s counsellor, quoted in *ibid*, 58

<sup>250</sup> Westmarland and Alderson, ‘The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counselling’ (n228) 16

<sup>251</sup> *Ibid*. The statement ‘I use non-prescribed drugs ... to help me cope’ had only a 3% change between the first and last data collection points – this was the only statement where the percentage of change was below 10%.

<sup>252</sup> Brown *et al*, *Connections and Disconnections* (n182) 38

the Women's National Commission, which was used across three policy reviews.<sup>253</sup> This found that women consistently spoke of the crucial role of women's services in 'empowering them to aid recovery from abuse and to regain control of their lives'.<sup>254</sup> Additionally, women appreciated their holistic approach, in the way that they 'responded to complex and multiple needs and focussed on their safety and empowerment, without labelling or judging them, or limiting the services to times of crisis'.<sup>255</sup> Overall, the evidence indicates that where there was good practice in responding to violence against women, women felt 'valued, confident and safe, that their human rights were being realised and that they were able to participate in their community'.<sup>256</sup> Counselling may also be particularly important for those with a mental health problem pre-existing the rape, as evidence suggests that such cases are more likely to drop out the criminal justice system earlier, and therefore may rely on alternative service provision more heavily. Both SARCs and Rape Crisis Centres are premised on the idea of believing women, and respecting their confidentiality and autonomy.<sup>257</sup> Therefore, the importance of uninhibited access to counselling, whether this is through a SARC or a voluntary organisation such as a rape crisis centre, cannot be overstated.

Moreover, it is also very important to encourage research into determining effective responses.<sup>258</sup> A lack of research demonstrating effectiveness of counselling, such as that provided by rape crisis centres, may affect funding, which voluntary organisations rely on<sup>259</sup> and often struggle to obtain.<sup>260</sup> For example, evidence suggests that Rape Crisis Centres' role in dealing with the causes of many issues relating to mental health and well-being is

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<sup>253</sup> HM Government, *Together We Can End Violence against Women and Girls - a Strategy* (London: HM Government, 2009) 88-89; Payne, *Rape: The Victim Experience Review* (n90) 14; *Responding to Violence against Women and Children - the Role of the NHS*, (The report of the Taskforce on the Health Aspects of Violence Against Women and Children, 2010) 16-17, 19-20

<sup>254</sup> Women's National Commission, *Still We Rise: Report from WNC Focus Groups to Inform the Cross-Government Consultation "Together We Can End Violence against Women and Girls"* (Home Office, 2009) 55

<sup>255</sup> *Ibid*, 50

<sup>256</sup> *Ibid*, 100

<sup>257</sup> Helen Jones and Kate Cook, *Rape Crisis: Responding to Sexual Violence* (Dorset: Russell House Publishing, 2008) xi; Amanda Robinson, Kirsty Hudson and Fiona Brookman, 'Multi-Agency Work on Sexual Violence: Challenges and Prospects Identified from the Implementation of a Sexual Assault Referral Centre (SARC)' (2008) 47(4) *Howard Journal of Criminal Justice* 411, 417

<sup>258</sup> World Health Organisation, *World Report on Violence and Health* (Geneva: WHO, 2002) 173

<sup>259</sup> Lovett, Regan and Kelly, *Sexual Assault Referral Centres* (n239) 70

<sup>260</sup> Survivors Trust, *Developing Stability, Sustainability and Capacity for Specialist Third Sector Rape, Sexual Violence and Abuse Services* (2010) cited in Robinson and Hudson, 'Different yet Complementary' (n235) 518

overlooked, as in 2006-2007 just 8 per cent of funding came from local health authorities,<sup>261</sup> and the health commissioners often disregarded them, viewing them as ‘niche’ or even irrelevant to health commissioning.<sup>262</sup> As a result, Rape Crisis Centres in England and Wales faced a crisis of their own, as their numbers declined from 68 centres in 1984 to just 38 in 2008.<sup>263</sup> As demonstrated by Jo Lovett *et al*’s research, in areas where SARCs and Rape Crisis Centres are present, support is much more readily available,<sup>264</sup> so it is a relief that this number has since risen again. It does, however, remain crucial for centres to maintain and even increase funding, which can only be assisted by detailed research into the long-term effectiveness of counselling and other services provided.

Routine disclosure of such notes could therefore be said to undermine the culture and infrastructure created to support women in the aftermath of sexual violence, which has provoked much critical commentary in the Canadian context,<sup>265</sup> and which should be taken seriously in England and Wales too.

## 2.4 CONCLUSION

Other jurisdictions have documented a shift in focus from a complainant’s sexual history to their psychiatric history, and although this issue has not yet received adequate attention in England and Wales, existing research has showed that there is a significant possibility this is the case here too. This is problematic, as it is based upon unwarranted generalisations about women who seek professional counselling.<sup>266</sup> Rather than trying to show that the complainant is ‘bad’, this defence strategy attempts to show she is ‘mad’, or at the very least, untrustworthy and incredible.

The law in England and Wales is unfortunately not equipped to deal with this strategy. The courts rely on out-dated and inaccurate conceptions of relevance, making it too easy for defendants to introduce evidence that has no logical bearing on the complainant’s credibility,

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<sup>261</sup> *The Crisis in Rape Crisis*, (London: Women's Resource Centre and Rape Crisis, 2008) 16

<sup>262</sup> *Why Women-Only? The Value and Benefits of by Women, for Women Services*, (London: Women's Resource Centre, 2007) 88

<sup>263</sup> *The Crisis in Rape Crisis*, (n261) 8

<sup>264</sup> Lovett, Regan and Kelly, *Sexual Assault Referral Centres* (n239) 66

<sup>265</sup> Aileen McColgan, *Women under the Law: The False Promise of Human Rights* (London: Longman, 2000) 316; Lise Gotell, ‘Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law’ (2001) 10(3) *Social & Legal Studies* 315, 325-327

<sup>266</sup> Bronitt and McSherry, ‘The Use and Abuse of Counselling Records’ (n161) 265

but will nonetheless prejudice the jury against her and humiliate her. This is worsened by a failure to protect complainants' interests in many cases, as these can only be represented as part of a 'public interest'. It is also clear that implementation remains inconsistent, and that many judges allow disclosure of mental health evidence when the law would not allow it.

It is argued that the law should be stricter, and evidence related to the complainant's mental health should only be adduced in rare cases when it is strictly relevant to her credibility or to an issue in the case. Furthermore, its relevance must outweigh the prejudicial effects of allowing it. The stigma attached to promiscuity is qualitatively different than that associated with psychopathology, but the underlying principle justifying protection is the same:<sup>267</sup> it is the defendant on trial, not the complainant, and thus the focus of the evidence should relate to the defendant's actions rather than the complainant's character.

Moreover, if women with mental health problems are in fact more likely to find themselves participating in court proceedings and more likely to be sexually assaulted, as it is suggested in chapter one, then the need for procedures and policies designed with their needs in mind is all the greater.<sup>268</sup> Just as general rape myths must be eliminated from the courtroom, so too must myths about the veracity and credibility of women with mental health problems.

The next chapter will consider alternative approaches to restricting the use of mental health records taken in other jurisdictions, and will evaluate the potential these systems could have in England and Wales.

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<sup>267</sup> Wilkinson-Ryan, 'Admitting Mental Health Evidence' (n69) 1378

<sup>268</sup> Benedet and Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (n2) 520

## CHAPTER 3: ALTERNATIVE APPROACHES

Having analysed the current structure of the law relating to disclosure of personal records in England and Wales, it is necessary to consider ways that it could be improved. This chapter will take a comparative approach, exploring the different systems used in other jurisdictions and critically evaluating the potential for each.

First, this chapter will examine the law in New South Wales, Australia. It will consider the drafting of the sexual assault communications privilege that exists there, before examining the judicial response to this. It will then describe the more recent change to the law and the provision of free independent legal representation to victims, before analysing the potential of these provisions for England and Wales. It will then go on to consider the law in Canada. Although the law has not been developed as recently as in New South Wales, and therefore the research relating to the law is not as current, it is still a helpful comparison as the way the provisions have been drafted would potentially solve several of the problems the law faces in England and Wales. This chapter will therefore outline the law in Canada, and the way it has been subsequently eroded in the Supreme Court decision of *Mills*,<sup>1</sup> before arguing that although the drafting has potential to improve the law in England and Wales, judicial interpretation has severely limited the law and would need to be overcome to make the provisions successful.

### 3.1 NEW SOUTH WALES

In New South Wales, there exists a sexual assault communications privilege (SACP), which prevents disclosure of a communication made for the purpose of counselling a complainant of a sexual assault in circumstances prescribed by the provisions of the legislation.<sup>2</sup> Prior to the passing of the legislation, there were no specific provisions to protect confidential communications between a counsellor and a sexual assault victim, and the defence were able to subpoena witnesses and records for trial purposes, leaving the record holder with little choice other than to produce the record and testify. However, concerns grew that the defence were attempting to circumvent rape shield laws<sup>3</sup> by accessing counsellors' notes in order to discredit victims. By invading the privacy and confidentiality of counselling in this way, the

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<sup>1</sup> *R v Mills* [1999] 3 SCR 668

<sup>2</sup> s295-306 Criminal Procedure Act 1986, outlined fully in Appendix 4

<sup>3</sup> s105 Criminal Procedure Act 1986

effectiveness of counselling is impaired.<sup>4</sup> Then in 1995, Di Lucas, of the Canberra Rape Crisis Centre, was subpoenaed to produce a client's counselling records to the court. She refused, and was charged with contempt of court and held in custody for a number of hours. This attracted a large amount of publicity and public debate, and following this, the NSW government passed the Evidence Amendment (Confidential Communication) Act 1997, introducing a statutory SACP.<sup>5</sup>

The primary aims of the SACP were twofold: firstly, to protect a sexual assault victim from the harm that may be caused if their records are revealed; and secondly, to safeguard the broader public interest in maintaining the integrity of counselling and encouraging the reporting of sexual assault.<sup>6</sup> As the Attorney General recognised, 'knowing a perpetrator has had access to counselling files can further traumatise victims and increase their sense of powerlessness', and as 'the primary purpose of counselling is not investigative', but rather therapeutic,<sup>7</sup> the defence counsels' use of personal records 'is not a justifiable use of the laws of evidence'.<sup>8</sup>

### 3.1.1 THE DRAFTING OF THE SACP

The Sexual Assault Communications Privilege is covered in sections 295-306 of the Criminal Procedure Act 1986 (CPA).<sup>9</sup> The SACP may be claimed to prevent production of a document recording a protected confidence, or the adducing of evidence disclosing a protected confidence.<sup>10</sup> A protected confidence is defined as a 'counselling communication' that is made by, to or about a victim or alleged victim of a sexual assault offence.<sup>11</sup> Counselling communications fall within s296 even if the communication is made before the acts constituting the relevant sexual offence occurred, and even if the communication was not

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<sup>4</sup> Glenn Bartley, 'Sexual Assault Communications Privilege under Siege' (2000-2001) *NSW Bar Association Journal* 6, 6

<sup>5</sup> Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform: Keeping Sexual Assault Victims' Counselling Records Confidential' (2012) 37 *Alternative Law Journal* 254, 254

<sup>6</sup> Jeffrey Shaw (Attorney-General), *NSW Parliamentary Debates (Hansard) Legislative Council* (22 October 1997) 1120-2121

<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid*

<sup>9</sup> Initially ss57-69, firstly renumbered by the Crimes Legislation Amendment (Sentencing) Act 1999 (schedule 2 [43]-[47]) as ss147-159, and then renumbered again in the Criminal Procedure Amendment (Justices and Local Courts) Act 2001 (schedule 1 [126]) as ss295-306

<sup>10</sup> s296 CPA 1986

<sup>11</sup> s296(1) CPA 1986

made in connection with the alleged sexual assault or any condition arising from it.<sup>12</sup> A person counsels another person if they have undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm,<sup>13</sup> and the persons listens to and gives verbal or other support or encouragement to the other person,<sup>14</sup> or advises, gives therapy or treats the other person,<sup>15</sup> whether or not for a fee or reward.<sup>16</sup> Any document containing a protected confidence does not have to be disclosed, and evidence disclosing a protected confidence or the contents of a document recording a protected confidence cannot be adduced, unless the court sees it and determines that three conditions are fulfilled.<sup>17</sup> First, the document concerned must either by itself, or in combination with other evidence, have substantial probative value.<sup>18</sup> Secondly, other evidence of the matters contained in the document must be unavailable.<sup>19</sup> Finally, the public interest in preserving the confidentiality of protected confidences and protecting the confider from harm must be substantially outweighed by the public interest in allowing inspection of the document.<sup>20</sup> In carrying out this exercise, the court must take into account the likelihood, nature or extent of the harm that would be caused to the alleged victim if the document is produced or the evidence adduced.<sup>21</sup> Harm is defined to include ‘actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm such as shame, humiliation and fear’.<sup>22</sup>

### 3.1.2 RESISTANCE TO THE LAW AND RESULTING CHANGE

This statutory innovation has ‘surprised and perturbed’ many legal practitioners and judicial officers since its inception,<sup>23</sup> and there has been a clear tension between attempts by Parliament to implement a strong, broad and effective privilege, and restrictive interpretations of the legislation by the New South Wales Court of Criminal Appeal.

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<sup>12</sup> s296(2) CPA 1986

<sup>13</sup> s296(5)(a) CPA 1986

<sup>14</sup> s296(5)(b)(i) CPA 1986

<sup>15</sup> s296(5)(b)(ii) CPA 1986

<sup>16</sup> s296(5) CPA 1986

<sup>17</sup> s299D CPA 1986

<sup>18</sup> s299D (1)(a) CPA 1986

<sup>19</sup> s299D (1)(b) CPA 1986

<sup>20</sup> s299D (1)(c) CPA 1986

<sup>21</sup> s299D (2) CPA 1986

<sup>22</sup> s295(1) CPA 1986

<sup>23</sup> Bartley, ‘Sexual Assault Communications Privilege under Siege’ (n4) 6

The first challenge to the legislation came in *R v Young*.<sup>24</sup> In this case, the Court of Criminal Appeal held that the privilege could only be claimed at the adduction of evidence stage, and not at an earlier stage, when the documents are produced upon subpoena. The majority refused to extend the meaning of the words ‘adduced in a proceeding’<sup>25</sup> to ‘embrace production [of documents] pursuant to a subpoena’.<sup>26</sup> This narrow interpretation negated much of the intent of the original legislative scheme,<sup>27</sup> as the defence could still gain access to the records by subpoena and thus the privacy of the complainant was still invaded.<sup>28</sup> The New South Wales legislature quickly acted to reverse this decision by enacting the Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999. This Act inserted a new Part 7 into the Criminal Procedure Act 1986, attempting to strengthen the SACP by broadening several important definitions and inserting new provisions intended to prevent future weakening of the legislation. As a result, the privilege now expressly and irrefutably applies to the production of documents upon subpoena.<sup>29</sup> The definition of ‘counselling communication’ was expanded in s296(4) (at the time s148(4)) to incorporate all communications by or to or about the victim made in confidence in the course of counselling. Previously, the only communications that were protected were the alleged victim’s own ruminations or, in other words, the alleged victim’s own confidential communications. This meant that defendants could still access, for example, the counsellors response to the complainant, and so resulted in the therapeutic basis for the counselling being undermined in just the same way as if the protected confider’s own ruminations were accessible.<sup>30</sup> There is also a tougher requirement for establishing the consent of a principal protected confider to production or adduction of a protected confidence; for example, it must now be given in writing.<sup>31</sup>

Provisions of the legislation were challenged for a second time in *R v Norman Lee*.<sup>32</sup> In this case, the subpoenaed records comprised 73 pages of notes of communications relating to the

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<sup>24</sup> *R v Young* [1999] 46 NSWLR 681

<sup>25</sup> Evidence Act 1995 (NSW) ss126G-126H

<sup>26</sup> *R v Young* (n24) at [37] per Spigelman CJ

<sup>27</sup> Anna Longdill, ‘Regulating Access to Therapeutic Records of Sexual Assault Complainants: An Analysis and Critique of Current New Zealand Procedure’ (2000-2003) 9 *Auckland University Law Review* 764, 794

<sup>28</sup> The Attorney-General in *NSW Parliamentary Debates (Hansard)*, (Legislative Council, 20 October 1999) 1594, 1595

<sup>29</sup> Bartley, ‘Sexual Assault Communications Privilege under Siege’ (n4) 8

<sup>30</sup> The Attorney-General in *NSW Parliamentary Debates (Hansard)*, (n28) 1959

<sup>31</sup> Bartley, ‘Sexual Assault Communications Privilege under Siege’ (n4) 10

<sup>32</sup> *R v Norman Lee* [2000] NSW CCA 444

complainant of a sexual assault. The communications took place between the complainant and a youth support worker of the Sydney City Mission, who did not provide counselling herself, but instead arranged referrals of the complainant for counselling, therapy or treatment, as well as listening to accounts of her visits to those other persons. The original definition of a counselling communication included confidences made ‘in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition’.<sup>33</sup> The court held that the relationship in this case amounted to the social worker ‘look[ing] after her in a general way, but not in a way which fell within s148(4)’,<sup>34</sup> and thus the documents should be produced for inspection.

To reach this conclusion, the court interpreted both ‘any emotional or psychological condition’ and ‘counselling’ very narrowly. When considering what ‘any emotional or psychological condition’ might include, Heydon JA said that:

An emotional condition is a state of consciousness turning on emotions like pleasure, pain, desire, aversion, surprise, hope, joy, sorrow, fear or hate ... which reveals or reflects some defect or illness or disease or abnormality. Similarly, a psychological condition refers to a particular condition of health – a state of health which is poor or abnormal or diseased or otherwise defective from the emotional or psychological point of view ... a psychological condition is a state of mind in which there is some defect or illness or disease or abnormality in the victim’s mental states and processes.<sup>35</sup>

This interpretation was problematic, as it implied that s148(4) required a recognisable psychiatric illness to be established, and appeared to equate an ‘emotional condition’ with a ‘psychological condition’.<sup>36</sup> However, many survivors of sexual assault do not develop a recognisable psychiatric illness,<sup>37</sup> and if they do, sexual assault counsellors do not make or record such diagnoses. Moreover, it is impracticable and expensive to obtain a diagnosis from a psychiatrist years after the records have been made. Thus, not all victims would be able to access the privilege.

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<sup>33</sup> s148(4) of Part 7 of the Criminal Procedure Act 1986 (NSW) (now s296(4))

<sup>34</sup> *R v Norman Lee* (n32) at [27]

<sup>35</sup> *Ibid*, at [23]

<sup>36</sup> Bartley, ‘Sexual Assault Communications Privilege under Siege’ (n4) 11

<sup>37</sup> Longdill, ‘Regulating Access to Therapeutic Records of Sexual Assault Complainants’ (n27) 796

Heydon JA also defined counselling as:

[T]he provision of expert advice and procedures by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble. The expression does not include persons who merely seek to assist others suffering from an emotional or psychological condition.<sup>38</sup>

This narrow construction of ‘counselling’ does not necessarily fit well with all sexual assault counselling, as this can involve ‘reactive listening and drawing out of innermost thoughts, feelings and insecurities’, and the ‘subtle guiding of the counselled person towards identifying options and making choices’.<sup>39</sup> If sexual assault counselling does not constitute the provision of expert advice, sexual assault counsellors may adjust their methods, feeling forced to give some prescriptive advice so that they trigger the legislation. Indeed, the women’s legal resources centre at North Lidcombe advised counsellors of ways to distinguish from *Lee* or to fit within it.<sup>40</sup> If they did not, there may be potential for defence counsel to access records.

Overall, the Criminal Court of Appeal in *Lee* construed section 148(4) in a way that would severely limit the scope of the privilege. However, once again, the legislature responded to the judgement by changing the provisions. The Act now reflects a wider definition of counsellor, as well as the type of assistance that can be given to a victim, avoiding the necessity of the victim being diagnosed as mentally ill. A counsellor includes a person who has undertaken training or study or has experience that is relevant to the process of counselling, and counselling now occurs when the counsellor ‘listens to and gives verbal or other support or encouragement’ to another person,<sup>41</sup> as well as when they ‘advise, give therapy or treat the other person’.<sup>42</sup> This therefore encompasses persons such as psychiatrists and psychologists as well as more general medical practitioners and those who have no formal qualifications but do have training or experience in counselling and other support services. It also includes listening and support, which is often associated with sexual assault counselling. The changes therefore broaden the scope of the privilege considerably.

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<sup>38</sup> *R v Norman Lee* (n32) at [23]

<sup>39</sup> Bartley, ‘Sexual Assault Communications Privilege under Siege’ (n4) 11

<sup>40</sup> *Ibid*

<sup>41</sup> s296(5)(b)(i) CPA 1986

<sup>42</sup> s296(5)(b)(ii) CPA 1986

### 3.1.3 LEGAL REPRESENTATION AND FURTHER REFORM

In December 2010, the New South Wales government announced that it was reforming the Criminal Procedure Act 1986 again, to enhance victims' participation in decisions affecting the confidentiality of their counselling and therapeutic records.<sup>43</sup> This was accompanied by an announcement by the Attorney-General that \$4.4 million in funding would be given for a specialist victims' advocacy service, which would ensure that victims can receive advice and representation when asserting the privilege.<sup>44</sup> These reforms were largely informed by the Sexual Assault Communications Privilege Pilot Project, coordinated by Women's Legal Services NSW.

The project grew from a concern that the lack of legal services for sexual assault victims seeking to protect the confidentiality of their counselling notes meant that the laws limiting disclosure or use of counselling records were in effect 'an empty promise'.<sup>45</sup> The project partners collaborated to provide free legal assistance to victims seeking to protect the confidentiality of their counselling and therapeutic records, and data collected during the project revealed the extent and nature of legal need, whilst also identifying problems with the operation of the privilege.

One issue encountered was a person's right to assert the privilege in relation to counselling records about them. The capacity to object to production on the basis of the privilege technically rested in the person subpoenaed, and so did not extend to the 'protected confider' (the victim).<sup>46</sup> This meant that the production of documents was at the discretion of the subpoenaed person, rather than the victim, and so could mean that if the subpoenaed party did not object, the protected confider was technically bereft of standing to object. The project highlighted that this did indeed happen, and that subpoenaed services did regularly provide documents containing protected confidences to the court without objecting.<sup>47</sup> Out of 80 subpoenas raising privilege issues, 32 rejections were lodged, with only 24 of those specifically mentioning the privilege, and just 10 actually involving someone asserting the privilege in

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<sup>43</sup> Attorney General Hon. John Hatzistergos MLC, 'New Laws and \$4.4 Million to Protect Sex Assault Victims' (NSW Government, 2010)

<<http://www.nswbar.asn.au/circulars/2010/nov/sacp.pdf>> accessed 20/04/2015

<sup>44</sup> Ibid

<sup>45</sup> Jillard, Loughman and MacDonald, 'From Pilot Project to Systemic Reform' (n5) 255

<sup>46</sup> s297-298 CPA 1986

<sup>47</sup> Jillard, Loughman and MacDonald, 'From Pilot Project to Systemic Reform' (n5) 256

court, with the others only made in writing.<sup>48</sup> This may indicate a general lack of awareness of the privilege among service providers. The Courts and Crime Legislation Further Amendment Act 2010 (NSW) has attempted to address this issue of standing. A protected confider now has an automatic right to appear in criminal proceedings and to object to the production of documents or adducing of evidence containing protected confidences.<sup>49</sup> Furthermore, the court must now satisfy itself that the protected confider is aware of the protections and has been given a reasonable opportunity to seek legal advice.<sup>50</sup> It is hoped that this will ensure all complainants can resist access to their records if they so wish.

Concerns were also raised in relation to compliance with the notice provisions. In all cases in which the project was involved, formal notice requirements in the Criminal Procedure Act, requiring notice to be given to the principal protected confider,<sup>51</sup> were not complied with. This could have been a result of general lack of awareness of the privilege, the absence of sanctions for non-compliance, or reliance on the issuing party to identify which subpoenas would result in the SACP claim. However, whether through oversight or otherwise, section 299 has been described as a provision ‘honoured more in breach than in observance’.<sup>52</sup> In addition to absence or inadequacy of notification to victims, orders for subpoenas were frequently made late.<sup>53</sup> This can have a devastating impact on victims, and lack of notice can significantly reduce a victim’s capacity to seek legal advice, and a lawyer’s capacity to prepare a case to maintain privilege; often the barrister participants in the scheme were only asked to appear the day before the return date of the subpoena, or on the first day of the trial.<sup>54</sup> Difficulties can also arise with the provision of notice by the police and prosecution. In several matters described by Catherine Gleeson, protected confidences appeared in the police brief, sometimes with the consent of the complainant but sometimes without.<sup>55</sup> It then becomes very difficult to sustain an argument that other protected confidences should not be revealed when some are already ‘out in the open’. The recent reforms have now introduced tighter requirements for notice of an application for leave to produce or adduce a protected

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<sup>48</sup> Ibid

<sup>49</sup> s299A CPA 1986

<sup>50</sup> s299 CPA 1986

<sup>51</sup> former s299 and 303 Criminal Procedure Act 1986

<sup>52</sup> Catherine Gleeson, ‘The Sexual Assault Communications Privilege Pro Bono Scheme’ (2010-2011) *Bar News: The Journal of the NSW Bar Association* 73, 75

<sup>53</sup> Jillard, Loughman and MacDonald, ‘From Pilot Project to Systemic Reform’ (n5) 256

<sup>54</sup> Gleeson, ‘The Sexual Assault Communications Privilege Pro Bono Scheme’ (n52) 75

<sup>55</sup> Ibid

confidence, in an attempt to rectify some of these problems.<sup>56</sup> For example, there is a new statutory notice period of 14 days, except where exceptional circumstances can be demonstrated.

A further problem identified was related to the requirement of harm. The project demonstrated the need to clarify the degree of evidence required to establish and quantify the harm to the protected confider, and to the public interest, that would flow from disclosure of their protected confidences. One aspect of the public interest test, as described above, requires the court to take into account the likelihood, and the nature and extent of harm that would be caused to the protected confider if the document were adduced in proceedings. However, there is uncertainty among practitioners and the judiciary about what evidence the protected confider was required to provide.<sup>57</sup> Reliable and useful evidence of the likely harm arising from disclosure tends to reveal the very type of confidential information the privilege is designed to protect.<sup>58</sup> For example, if a written statement of harm was provided to a judicial officer, this would be open to inspection and the maker of the statement could be cross-examined on it, thus negating the purpose of the privilege. It is therefore very difficult for the complainant's representative to satisfy the court that harm will be caused to a complainant in anything but the most general sense.<sup>59</sup> Under the Courts and Crimes Legislation Further Amendment Act 2010, a protected confider can now provide an affidavit outlining the harm likely to be suffered if the protected confidence is disclosed. This would be disclosed to the duty officer only, and would not be subject to cross-examination. In this way, confidential harm statements address the difficulty previously faced in trying to describe how a complainant might suffer if protected confidences were disclosed without revealing the substance of the protected confidence in question.

Furthermore, in 2011, the funding provided established the sexual assault communications privilege unit at legal aid. This provides specialist solicitors to represent sexual assault victims in privilege matters, and to oppose either the production of protected confidences or the offering of evidence in relation to protected communications.<sup>60</sup> So this means that sexual assault complainants in New South Wales now have access to free, specialised legal advice and

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<sup>56</sup> s299C CPA 1986

<sup>57</sup> Jillard, Loughman and MacDonald, 'From Pilot Project to Systemic Reform' (n5) 256

<sup>58</sup> Ibid

<sup>59</sup> Gleeson, 'The Sexual Assault Communications Privilege Pro Bono Scheme' (n52) 76-77

<sup>60</sup> Elisabeth McDonald, 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending: Does the Law Effectively Protect Clinician and Client Rights?' (2013) 5(2) *Sexual Abuse in Australia and New Zealand* 12, 14

representation to assist them in protecting the confidentiality of their records.<sup>61</sup> It was clear from the pilot that this is a valuable service. In 91 per cent of cases in which the complainant was represented between February 2009 and December 2010 the complainant was able to successfully assert the privilege, and prevent or limit the defendant's access to their records.<sup>62</sup> Furthermore, in its first full year of operation, the service provided free legal representation in 122 matters where complainants asserted the privilege.<sup>63</sup> A legal representative for the victim has also brought significant benefits to prosecutors, with many being very positive about the availability of free representation for victims, as this helps to create positive experiences for victims and saves time for prosecutors, allowing them to focus on other issues.<sup>64</sup> The unit is also responsible for raising awareness of the changes to the law surrounding the privilege, particularly among the legal profession, government departments and organisations likely to receive subpoenas for counselling records of sexual assault victims. In its first year, the service provided specialist legal advice and information to 83 organisations, such as health practitioners and lawyers.<sup>65</sup> Overall, the education initiative appears to have been successful, with reports of increased awareness of the privilege and its use across courts in New South Wales.<sup>66</sup> Ultimately, the introduction of this service, along with the recent reforms, provides stronger protection for victims and gives them a greater voice in the criminal justice process.

### 3.1.4 POTENTIAL FOR ENGLAND AND WALES

The law in New South Wales offers many advantages. By ensuring that counselling records are automatically protected by privilege, it sets a higher hurdle. It begins from the opposite presumption of both the Canadian and the English and Welsh legislation;<sup>67</sup> counselling records are not to be disclosed unless the defence can satisfy the three separate elements of the test. Furthermore, the requirement that the records be of substantial probative value involves

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<sup>61</sup> Communications Unit of Legal Aid NSW, *Annual Report 2013-2014* (Legal Aid NSW, 2014) 17; 'Legal Aid New South Wales', <<http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>> accessed 17/05/2015

<sup>62</sup> McDonald, 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending' (n60) 15

<sup>63</sup> Communications Unit of Legal Aid NSW, *Annual Report 2012-2013* (Legal Aid NSW, 2013) 24

<sup>64</sup> Jillard, Loughman and MacDonald, 'From Pilot Project to Systemic Reform' (n5) 255

<sup>65</sup> Communications Unit of Legal Aid NSW, *Annual Report 2012-2013* (n63) 24

<sup>66</sup> Jillard, Loughman and MacDonald, 'From Pilot Project to Systemic Reform' (n5) 258

<sup>67</sup> McDonald, 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending' (n60) 17

a higher standard than that of the materiality test in England and Wales<sup>68</sup> so should prevent irrelevant evidence from being adduced. It is suggested that by both starting from this presumption, and having a distinct privilege for sexual assault communications, the law in New South Wales draws public and judicial attention to particular issues raised by the disclosure of confidential records in sexual cases, and this is something from which the law in England and Wales would benefit.

The SACP scheme also offers real protection for victims. With stricter notice provisions, complainants should not be ambushed in trials,<sup>69</sup> and moreover, they are able to make representations and appear in the proceedings that follow the application. With the added benefit of access to free legal representation, complainants in New South Wales are able to be involved in the decision making process relating to their personal records, and are given a real chance of defending their right to privacy. There is a strong case for alteration of the current procedure in England and Wales to give complainants a right to oppose disclosure of confidential records at a hearing, and to entitle them to legal representation in order to do this more effectively. In theory, there is no reason why this could not be implemented. The feasibility of some form of independent legal representation in adversarial jurisdictions is often dismissed on the ground that affording legal standing to complainants would be incompatible with the principle of equality of arms that is integral to a fair trial.<sup>70</sup> Commentators have argued that as a criminal trial is a contest between the state and the defendant, the defendant starts from a position of profound disadvantage, as a result of resources accessible to the state.<sup>71</sup> Thus, fairness has been achieved by measures built into the trial to redress this balance, for example the burden and standard of proof.<sup>72</sup> If both the victim advocate and the prosecution counsel were seen to be 'joining forces'<sup>73</sup> against the accused, it 'would seem like having two pitchers throwing possible strikes at the batter'.<sup>74</sup>

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<sup>68</sup> Jennifer Temkin, 'Digging the Dirt: Disclosure of Records in Sexual Assault Cases' (2002) *Cambridge Law Journal* 126, 141

<sup>69</sup> Longdill, 'Regulating Access to Therapeutic Records of Sexual Assault Complainants' (n27) 796

<sup>70</sup> Andrew Ashworth, 'Crime, Community and Creeping Consequentialism' (1996) *Criminal Law Review* 220, 224-225; Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publications, 2008) 143-147

<sup>71</sup> Andrew Hall, 'Where Do the Advocates Stand When the Goal Posts Are Moved?' (2010) *International Journal of Evidence & Proof* 107, 110; John Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?' (2003) 30(2) *Journal of Law and Society* 309, 315

<sup>72</sup> Hall, 'Where Do the Advocates Stand When the Goal Posts Are Moved?' (n71) 111

<sup>73</sup> Doak, *Victims' Rights, Human Rights and Criminal Justice* (n70) 146

<sup>74</sup> George Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Reading: Addison Wesley, 1995) 195-196

However, this view is misplaced, as versions of independent legal representation operate in several adversarial jurisdictions, including New South Wales and Ireland.<sup>75</sup> If it is perceived as a threat to the adversarial concept of a fair trial, this may be based on misplaced assumptions about what it actually involves. Models can be designed, as in New South Wales, which protect the complainant's interests at key procedural stages without infringing upon those of the accused.<sup>76</sup> However what may prove a bigger problem in England and Wales is funding for such a scheme. Given the current economic climate, and the cuts that have already been made to legal aid for defendants,<sup>77</sup> it is highly unlikely that the government would provide a budget for complainants to access free legal representation.

The courts in NSW also have the additional advantage of being able to make a range of orders designed to limit the harm that may be caused by disclosure. They can order that all or part of the evidence be heard, or the document be produced in camera.<sup>78</sup> Furthermore, they can seek to protect the safety and welfare of the complainant or counsellor by regulating the production and inspection of the document, by suppressing the publication of all or part of the evidence, and by ensuring that addresses and telephone numbers are withheld.<sup>79</sup> The public interest in open justice and fair reports of court proceedings would need to be weighed in the balancing exercise articulated in the SACP provisions when considering these measures.<sup>80</sup> While the need to protect sensitive witnesses and avoid deterrence from giving evidence has been recognised as providing an exception to the principle of open justice,<sup>81</sup> this will not be the case in relation to every complainant. However, there will be circumstances in which the harm that is likely to be caused by publication of the contents of counselling communications will outweigh the need for open justice, and may not be overcome by the restrictions on disclosure of the complainant's identity by s578A of the Crimes Act. As the publication of intensely private counselling communications in association with the event to which the proceedings relate, or to historical events, and the discussion of those records by the public at large, may cause significant shame and humiliation to the complainant and may interrupt the

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<sup>75</sup> Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) *Criminal Law Review* 729, 730

<sup>76</sup> *Ibid*, 742

<sup>77</sup> Ministry of Justice, *Transforming Legal Aid - Next Steps: Government Response* (London: Ministry of Justice, 2014)

<sup>78</sup> s302(1)(a) CPA 1986

<sup>79</sup> s302(1)(b) CPA 1986

<sup>80</sup> *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* [1986] 5 NSWLR 465 at [481] per McHugh JA

<sup>81</sup> *R v Savvas* [1989] 43 A Crim R 331 at [336]; *R v CAL* [1993] 67 A Crim R 562 at [564]

complainant's continuing treatment, such orders may well be appropriate.<sup>82</sup> It is argued here that courts in England and Wales should be given greater powers to regulate the manner of disclosure in order to enhance protection of the complainant's privacy. Currently, under *R v H and C*, disclosure short of full disclosure may be ordered. However, any measures proposed must represent the minimum derogation from the 'golden rule of disclosure'.<sup>83</sup> Thus, any edits made to records must represent the minimum derogation necessary to protect the public interest in question.<sup>84</sup> So judges are not given room to consider providing records that have been edited or anonymised to reduce harm to individual complainants.

There are also some remaining problems with the scheme, which would need to be overcome if it were to be effectively implemented in England and Wales. The New South Wales example demonstrates the importance of clarity in statutory language of this kind,<sup>85</sup> as their attempts to implement a strong, broad and effective SACP have been curtailed through judicial interpretation several times, and thus the legislation has been amended repeatedly. If similar legislation were to be implemented here, lessons could be learnt from the experience in NSW, and the statute would need to be drafted with more focus and precision.

However, it is possible that this may not be enough. The scheme in New South Wales has faced resistance, both from legal practitioners and the judiciary. It may be that even if the provisions were drafted with more precision, judges would still find any new law wanting, or difficult to accept, as in New South Wales.<sup>86</sup> The New South Wales Bar Association strongly opposed the introduction of an SACP<sup>87</sup> on the basis that it involved 'a substantial infringement on the rights of the accused persons and carries with it a grave risk of miscarriages of justice'.<sup>88</sup> Although it is suggested that this is not the case, as the privilege is not absolute and so disclosure will be ordered where clearly necessary, if similar arguments were made in England and Wales they may be detrimental to any legislation. It is already the case that the judiciary allow disclosure requests on a much broader basis than the case law

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<sup>82</sup> Gleeson, 'The Sexual Assault Communications Privilege Pro Bono Scheme' (n52) 77-78

<sup>83</sup> *R v H and C* [2004] 2 CA 134 at [36]; *R v H and C* [2004] UKHL 3

<sup>84</sup> *R v H and C* (n83)

<sup>85</sup> Longdill, 'Regulating Access to Therapeutic Records of Sexual Assault Complainants' (n27) 796

<sup>86</sup> Danuta Mendelson, 'Judicial Responses to the Protected Confidence Communications Legislation in Australia' (2002) 10(1) *Journal of Law and Medicine* 49, 60

<sup>87</sup> New South Wales Bar Association, *Submissions on Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999* 1

<sup>88</sup> Letter from Bar Association Acting President Ruth McColl S.C to NSW Attorney-General Shaw QC MLC (11th November 1999)

would allow,<sup>89</sup> and some permit fishing expeditions when the evidence produced assists the defence.<sup>90</sup>

Furthermore, when considering the history of rape shield legislation in England and Wales, arguments against infringing the defendant's right to a fair trial have featured heavily. In the context of sexual history evidence, the judiciary were quick to subvert the legislative intent of s41 of the Youth Justice and Criminal Evidence Act in the case of *R v A*<sup>91</sup> by reintroducing the discretion that the provision aimed to check.<sup>92</sup> The case involved a challenge under the Human Rights Act 1998 to the rape shield enacted in s41, and the House of Lords agreed that certain evidence made inadmissible by s41 might endanger a fair trial for the accused. They aimed to show that it was a matter of 'common sense' that restrictions on sexual history evidence had never intended to include evidence relating to a sexual relationship with the accused,<sup>93</sup> but it is clear that the desire to admit such evidence was based on distorted notions of relevance.<sup>94</sup> Research has since shown that trial judges have typically interpreted *A* to mean they now have a very broad discretion to admit sexual history evidence in order to ensure a fair trial under Article 6.<sup>95</sup> Arguably, it may therefore be the case that any new legislation introducing a privilege for sexual assault communications would meet the same fate. This would not necessarily be insurmountable; in New South Wales, the legislature intervened and amended the legislation to reverse the broad interpretations by the courts. However, this is rare and, in England and Wales, no such move has been made since the decision in *R v A*.

Furthermore, the scheme is still a discretionary one, leaving it to the judges to decide when records are of substantial probative value.<sup>96</sup> 'Substantial probative value' is not defined in this Division of the Act, and there is little guidance provided as to matters which should be taken into account in the exercise of this discretion. Probative value is however defined in the Dictionary to the Evidence Act as follows: "probative value" of evidence means the extent to

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<sup>89</sup> Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008) 153

<sup>90</sup> *Ibid*, 155

<sup>91</sup> *R v A* [2001] UKHL 25

<sup>92</sup> Louise Ellison, 'Commentary on *R v A* (No 2)' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) 209

<sup>93</sup> *R v A* (n91) for example at [10] per Lord Slynn; [31] and [45] per Lord Steyn

<sup>94</sup> Georgina Firth, 'The Rape Trial and Sexual History Evidence - *R v A* and the (Un)Worthy Complainant' (2006) 57(3) *Northern Ireland Legal Quarterly* 442, 455

<sup>95</sup> Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (London: Home Office Online Report 20/06, 2006) vi

<sup>96</sup> Temkin, 'Digging the Dirt' (n68) 142

which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue', and 'substantial' has been held to refer to a greater degree of relevance than 'significant'.<sup>97</sup> In contrast to these definitions, the phrase 'substantial probative value' has been analysed by the NSW Court of Criminal Appeal in *R v El-Azzi*<sup>98</sup> in relation to s103 of the Evidence Act 1995. This section provides an exception to the credibility rule, permitting cross-examination of a witness if the evidence is of substantial probative value. In this case, the court held that the definition of probative value as defined in the Dictionary to the Evidence Act does not apply to the use of the term in this section. Rather, 'evidence adduced in cross-examination must therefore have substantial probative value in the sense that it could rationally affect the assessment of the credit of the witness'.<sup>99</sup> This has led some practitioners to conclude that, given the nature of sexual assault trials where the prosecution typically relies solely on the evidence of the complainant, and where the reliability and credibility of the complainant can be challenged by a document or evidence that has a bearing on the jury's assessment of the complainant's credibility in a significant or substantial way, it must have substantial probative value.<sup>100</sup> As mentioned in Chapter Two, it is not within the standard knowledge of judges to be able to assess what effect a mental illness might have on the credibility or reliability of a witness,<sup>101</sup> nor how far statements made in counselling can be taken as evidence of fact. This means that the scheme may run into similar problems that the current law in England and Wales faces; namely that sensitive and personal information could be characterised as of 'substantial probative value', when it should not be.

### 3.1.5 SUMMARY

There is a lot that is good about the SACP in New South Wales. Having a specific privilege highlights the particular issues related to disclosure of medical records, and starting from the presumption of non-disclosure increases the burden on the defence. Through this, and by offering free legal representation, clear steps have been taken to afford protection to complainants. However, the New South Wales experience also teaches a couple of clear

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<sup>97</sup> *R v Lockyer* [1996] 89 A Crim R 457; *AW v the Queen* [2009] NSWCCA 1 at [47]; *R v Fletcher* [2005] NSWCCA 338 at [33]; *R v Zhang* [2005] NSWCCA 437 at [139]

<sup>98</sup> *R v El-Azzi* [2004] NSWCCA 455

<sup>99</sup> *Ibid*, at [181]

<sup>100</sup> Jason Watts, *Sexual Assault Communication Privilege: Notes for Panel Discussion* (2012) <[www.legalaid.nsw.gov.au/\\_\\_data/assets/word\\_doc/0003/14088/Sexual-Assault-Communications-Privilege.doc](http://www.legalaid.nsw.gov.au/__data/assets/word_doc/0003/14088/Sexual-Assault-Communications-Privilege.doc) - doc - 88k> accessed 21/04/2015

<sup>101</sup> Fiona Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (2011) 15(1) *Edinburgh Law Review* 33, 50

lessons; firstly, even the most detailed and careful legislation will come to little with a judiciary that does not want to follow through and implement in the intended spirit of such legislation. Yet, secondly, this can be overcome, as demonstrated in NSW, by a persistent legislature. This chapter will now turn towards the legislation enacted in Canada.

### 3.2 CANADA

The production and disclosure of confidential records is now governed by s278 of the Canadian Criminal Code.<sup>102</sup> Historically, defence lawyers have been advised to obtain personal records,<sup>103</sup> in order to scour them for evidence of inconsistency, faulty memories or reason to lie.<sup>104</sup> The tactic flourished following the 1992 passage of Bill C-49, which restricts questioning of complainants about their sexual history,<sup>105</sup> and with the growing public and judicial interest in 'false memory syndrome'.<sup>106</sup> Research reflected this, with one study finding that interviewees, including Crown attorneys, judges and court officers, felt that the use of personal records had increased since the early 1990s, and one judge commented that he had had twelve recent requests for personal records, which all went unchallenged.<sup>107</sup> Access to information relating to a complainant's personal history has been assisted by the Canadian Court's general concern with protecting the rights of the defendant,<sup>108</sup> and by the ruling in *Stinchcombe*,<sup>109</sup> which greatly expanded the scope of disclosure required in a criminal trial. It was held that 'the right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted', and thus 'all relevant information' must be disclosed to the defence.<sup>110</sup> Some rape crisis centres, counsellors and others began to resist or deny requests to produce records, citing

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<sup>102</sup> See Appendix 5 for the full provision

<sup>103</sup> Cristin Schmitz, 'Whack' Sexual Assault Complainants at Preliminary Inquiry' (27th May 1988) 8(5) *The Lawyers Weekly* 22

<sup>104</sup> Lise Gotell, 'Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law' (2001) 10(3) *Social & Legal Studies* 315, 319

<sup>105</sup> Karen Busby, 'Discriminatory Use of Personal Records in Sexual Violence Cases' (1997) 9 *Canadian Journal of Women and the Law* 148, 148

<sup>106</sup> Connie Kirstansen, Susan Haslip and Katherine Kelly, 'Scientific and Judicial Illusions of Objectivity in the Recovered Memory Debate' (1997) 7(1) *Feminism & Psychology* 39-45

<sup>107</sup> Katherine Kelly, "'You Must Be Crazy If You Think You Were Raped": Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials' (1997) 9 *Canadian Journal of Women and the Law* 178, 186

<sup>108</sup> Aileen McColgan, *Women under the Law: The False Promise of Human Rights* (London: Longman, 2000) 316

<sup>109</sup> *R v Stinchcombe* [1991] 3 SCR 326

<sup>110</sup> *Ibid*, at [17] per Sopinka J

confidentiality and the need to protect the interests of their female clients.<sup>111</sup> As the Criminal Code was silent on the availability and use of such records, there was confusion about when, if ever, they might be producible to the defence.

### 3.2.1 *R v O'CONNOR* AND A PERIOD OF OPEN ACCESS TO RECORDS

The Supreme Court attempted to resolve this uncertainty in 1995 in *O'Connor*.<sup>112</sup> This case involved a bishop charged with sexual offences committed twenty-five years previously in a Catholic school. He sought access to school records and an order for 'all therapists, counsellors, psychologists and psychiatrists who have treated any of the complainants with respect to allegations of sexual assault or sexual abuse to produce to the Crown copies of their complete file contents and any other material'.<sup>113</sup> The majority of the Supreme Court ruled that access to such confidential material, even though in the possession of third parties, could be relevant to the accused's right to a fair trial. Thus, they endorsed permitted defendants' access to complainants' personal records.

The majority set out a two-part procedure for the release of records held by third parties. Firstly, the defence must demonstrate the 'likely relevance; defined as 'a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify'.<sup>114</sup> The Court cautioned that the accused's burden should not be 'onerous',<sup>115</sup> thus they should not be required to demonstrate the specific use to which they might put the information as it is not possible to do more than speculate about what the documents contain. Furthermore, the decision expressly excluded any consideration of complainants' rights. The second part requires the judge to determine, upon considering the records itself, whether the information is relevant, that is, 'logically probative to an issue at the trial or the competence of a witness to testify'.<sup>116</sup> If this test is met, the judge must 'examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence'.<sup>117</sup> They should consider the following factors: the extent to which the

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<sup>111</sup> Janine Benedet and Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (2007) 52 *McGill Law Journal* 515, 538

<sup>112</sup> *R v O'Connor* [1995] 4 SCR 411

<sup>113</sup> *Ibid*, at [39]

<sup>114</sup> *Ibid*, at [436]

<sup>115</sup> *Ibid*, at [437]

<sup>116</sup> *Ibid*, at [172]

<sup>117</sup> *Ibid*, at [177]

record is necessary for the accused to make full answer and defence; the probative value of the record in question; the nature and extent of the reasonable expectation of privacy vested in the record; whether production of the record would be premised upon any discriminatory belief or bias; and the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.<sup>118</sup> It was also stated that records were likely to be relevant, and thus should be disclosed, in a number of situations, including: where the record was created close in time to the date of the incidents; where it may contain information concerning the unfolding of events underlying the criminal complaint; and where it may reveal the use of therapy influencing the complainant's memory of the events.<sup>119</sup> Records that were already in the hands of the prosecution were to follow the rule in *Stinchcombe*,<sup>120</sup> and be disclosed to the defence if they were likely relevant.<sup>121</sup>

The test for production and disclosure established in *O'Connor* was problematic for several reasons, and 'ushered in a period of wide-open access to complainants' records'.<sup>122</sup> As many analysts have argued, it rests on a presumption of the *de facto* relevance of third party records.<sup>123</sup> Furthermore, the test does not take into account the equality rights of sexual assault complainants,<sup>124</sup> and as Justice L'Heureux-Dube noted in dissent, nor does it consider the integrity of the trial process and the societal interests in reporting sexual crimes.<sup>125</sup> Thus, the court made it clear that an accused could rely on discriminatory beliefs and prejudicial fact-finding techniques without regard to adverse impacts of records release on complainants. Furthermore, the initial threshold for production was also low, on the assumption that the complainant's privacy was not comprised by mere production to the trial judge. Research has demonstrated the disastrous effect of *O'Connor* for women who have been sexually violated, with judges ordering disclosure in 52 per cent of cases where production and disclosure decisions could be found.<sup>126</sup> Furthermore, often records were not specifically identified, rather requests were made for 'all medical records' or 'all records ... kept by the department of

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<sup>118</sup> Ibid

<sup>119</sup> Ibid, at [175]-[176]

<sup>120</sup> *R v Stinchcombe* (n109)

<sup>121</sup> *R v O'Connor* (n112) at [13]-[14]

<sup>122</sup> Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 *Osgoode Hall Law Journal* 251, 260

<sup>123</sup> Bruce Feldthusen, 'Access to the Private Therapeutic Records of Sexual Assault Complainants' (1996) 75 *The Canadian Bar Review* 537, 551

<sup>124</sup> Benedet and Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (n111) 538

<sup>125</sup> *R v O'Connor* (n112) at [504]

<sup>126</sup> Karen Busby, 'Third Party Records Cases since *R v O'Connor*' (2000) 27(3) *Manitoba Law Journal* 355, 373

social services in connection with services provided to the complainants',<sup>127</sup> and frequently the defence did not give reasons for why they were seeking disclosure, instead simply asserting that the record related to credibility or contained a reference to the defendant.<sup>128</sup>

As a result of the clear evidence of a rising tide of applications,<sup>129</sup> and a response to feminist concerns about the manner in which records applications were being used,<sup>130</sup> the federal government enacted Bill C-46 in 1997, creating a legislative regime designed to subject requests to a higher level of scrutiny.

### 3.2.2 BILL C-46 AND THE DRAFTING OF THE PROVISIONS

In 1997, Bill C-46 inserted sections 278.1-278.91 into the Canadian Criminal Code.<sup>131</sup> These sections set out a fully comprehensive regime for dealing with confidential records in sexual offence cases, and, among other things, give trial judges more guidance on the factors to be considered. Framed by the goals of protecting complainants and encouraging police reporting, while at the same time respecting fair trial rights, these provisions established a rigorous two-stage test for the production and disclosure of records.<sup>132</sup>

Initially, an application for disclosure must be made in writing to the trial judge and no one else,<sup>133</sup> and must specify how the record is not only 'likely relevant' but also how production is 'necessary in the interests of justice'.<sup>134</sup> The statute sets out a list of assertions which will, on their own, be insufficient to establish that the record is of likely relevance to an issue at trial or

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<sup>127</sup> Ibid, 371

<sup>128</sup> Ibid, 373

<sup>129</sup> By 1996, 120/140 disclosure decisions were in sexual offences cases in which records were sought by defence counsel. Diane Oleskiw, Nicole Tellier and National Association of Women and the Law, *Submissions to the Standing Committee on Bill C-46: An Act to Amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings* (Ottawa: National Association of Women and the Law, 1997) 11

<sup>130</sup> Women's Legal Education and Action Fund, *Submissions to the Standing Committee on Justice and Legal Affairs: Review of Bill C-46* (Ottawa: LEAF, 1997) 10-11; Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) 427

<sup>131</sup> *Bill C-46, an Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, (2d Sess 35<sup>th</sup> Parl, 25th April 1997)

<sup>132</sup> Lise Gotell, 'Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the Criminal Code' (2008) 20 *Canadian Journal of Women and the Law* 111, 116

<sup>133</sup> s278.3(1) and (2)

<sup>134</sup> s278.3(b)

to the competence of a witness to testify.<sup>135</sup> For example, it is not sufficient to apply simply on the basis that: the record exists; the record relates to medical or psychiatric treatment, therapy or counselling that the complainant is receiving or has received; the record relates to the incident that is the subject matter of the proceedings; the record may disclose a prior inconsistent statement of the complainant; and the record may relate to the credibility of the witness or complainant. The aim of this is to rule out speculative applications and fishing expeditions based on stereotypical assumptions.<sup>136</sup>

At the first stage, the issue is whether the document should be produced to the judge. A hearing in camera takes place, at which the owner of the document, the complainant and any other person to whom the record relates may make representations.<sup>137</sup> When considering whether to order production of the record, the judge must consider 'the salutary and deleterious effects of the determination on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant or witness and any other person to whom the record relates'.<sup>138</sup> The judge must take into account the following factors in particular: the extent to which the record is necessary for the accused to make full answer and defence; the probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on discriminatory belief or bias; the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; society's interest in encouraging reporting of sexual offences; society's interest in encouraging obtaining of treatment by complainants; and the effects of the determination on the integrity of the trial process. Having considered these factors, the judge must be satisfied that the record is likely to be relevant to an issue at trial or to the competence of a witness to testify, and that production is necessary in the interests of justice.<sup>139</sup> If the judge decides to view the document, the second stage is to decide whether the defence should view it. In arriving at the decision, the judge must consider the same factors as at the first stage. Where disclosure is ordered, the judge may impose a series of conditions to protect the privacy of the complainant, for example, they could order that the record is edited,

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<sup>135</sup> s278.3(4)

<sup>136</sup> Heather Holmes, 'An Analysis of Bill C-46: Production of Records in Sexual Offence Proceedings' (1997) 2 *Canadian Criminal Law Review* 71, 89

<sup>137</sup> s278.4(1) and (2)

<sup>138</sup> s278.5(2)

<sup>139</sup> s278.5(1)

that no copies are made, that it cannot be disclosed to other people or that information relating to names or addresses are removed.<sup>140</sup>

The legislation applies to any record containing personal information for which there is a reasonable expectation of privacy, including medical, psychiatric, therapeutic, counselling, education, employment, adoption and social services records.<sup>141</sup> Records held by third parties as well as those in the hands of the prosecution are included, so the same regime applies in both scenarios.<sup>142</sup> If the record is in the hands of the prosecution, the complainant may waive the application of the regime but if there is no such waiver the prosecution must notify the defence that it has the document without disclosing its contents.<sup>143</sup>

This procedure is different from the *O'Connor* regime in several important ways. Crucial among the changes is the requirement that a wider set of concerns be weighed before records can be released to the trial judge. By inserting production provisions, equality rights and the implications of records access at a societal level into the balancing exercise governing access, judges were clearly meant to engage in a more complex balancing process extending well beyond a narrow contest between the privacy of individual complainants and the legal rights claims of individual defendants.<sup>144</sup> Parliament therefore recognised that much more is implicated in records production than simply confidentiality and informational privacy. The provisions contemplate a contextual analysis of records applications, in which the individual rights of complainants and defendants are set against a backdrop of sexual violence as a serious social problem, and ‘framed by a recognition of the need to curtail the circulation of discriminatory myths within sexual assault trials’.<sup>145</sup>

### 3.2.3 *R v MILLS* AND THE EROSION OF CONTEXTUAL ANALYSIS

No sooner was s278 passed than it was constitutionally challenged in *R v Mills*<sup>146</sup> as a violation of the fair trial guarantees of the Canadian Charter of Rights and Freedoms. *Mills* confirmed

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<sup>140</sup> s278.7(3)

<sup>141</sup> s278.1

<sup>142</sup> s278.2(2)

<sup>143</sup> s278.2(2)

<sup>144</sup> Lise Gotell, ‘When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records’ (2006) 43 *Alberta Law Review* 743, 755

<sup>145</sup> *Ibid*

<sup>146</sup> *R v Mills* (n1)

the constitutionality of the statutory regime,<sup>147</sup> and so could be viewed as a feminist legal victory. However, at the same time, it weakened the meaning of the regime,<sup>148</sup> as discussed below, and is riddled with ambiguities, giving rise to a situation in which complainants remain vulnerable to disclosure of their records.<sup>149</sup>

The subsection 278.3(4) lists a number of myth-ridden assertions, which, on their own, are insufficient to meet the criteria of likely relevance. However, the meaning of this phrase came under contention in the pre-*Mills* case law. The reading which will curtail disclosure of complainants' records is that the assertion, in the sense of ground or rationale, is impermissible *per se*, and will never be sufficient to support the production or disclosure of a complainant's private records. The defendant's reason for disclosure would have to be a reason other than those assertions set out in the legislation.<sup>150</sup> The alternative reading, which has little effect in curtailing defence access to records, is that an allegation unsupported by any evidence is insufficient to support an application. Unfortunately, the majority in *Mills* argued that this provision does not prevent defence counsel from relying on any other of the listed assertions, but that they must also show an evidentiary or additional informational foundation in order to meet the test of likely relevance. In other words, there must be 'case-specific' evidence or information that goes beyond the general assertion.<sup>151</sup> Following this, the defendant need only produce some evidence that the record, for example, relates to the incident or recent complaint in order to secure production.

Furthermore, the ruling repeatedly stressed that s278 retains judicial discretion, positioning the final decision of likely relevance in the subjective hands of the trial judge.<sup>152</sup> For example, even though subsection 278.5(2) codified a list of considerations to frame this analysis, the *Mills* majority transformed these criteria into a 'checklist' of factors which 'may come into play during a judge's deliberation'.<sup>153</sup> Thus 'through the majority's slight of hand, societal considerations are effectively reconstructed as optional concerns that need not be used in reaching decisions on production and disclosure'.<sup>154</sup> Furthermore, the majority insisted that where there is any doubt about the likely relevance of the records, the 'interests of justice'

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<sup>147</sup> Ibid, at [671]-[673]

<sup>148</sup> Gotell, 'Colonization through Disclosure' (n104) 339-340

<sup>149</sup> Gotell, 'The Ideal Victim' (n122) 255

<sup>150</sup> Busby, 'Third Party Records Cases since *R v O'Connor*' (n126) 380

<sup>151</sup> *R v Mills* (n1) at [741]

<sup>152</sup> Ibid, at [742]

<sup>153</sup> Ibid, at [749]

<sup>154</sup> Gotell, 'The Ideal Victim' (n122) 271

require that the judge must 'take the next step in viewing the documents'.<sup>155</sup> In its insistence that 'in borderline cases, the judge should err on the side of production'<sup>156</sup> the majority has effectively redefined and eroded the meaning of Bill C-46. Ultimately, they have amended the test for disclosure laid out in the legislation in such a way that the fair trial rights once again assume a position of pre-eminence, undermining the protections that the legislative regime sought to erect.<sup>157</sup>

### 3.2.4 POTENTIAL FOR ENGLAND AND WALES

There are several elements of the Canadian law that offer advantages. Firstly, it wisely rejects the distinction made in *Brushett* in England and Wales, between documents retained by third parties and records in the possession of the Crown.<sup>158</sup> In *Mills* it was stated that 'it is constitutionally permissible for the Crown ... to end up with documents that the accused has not seen as long as the accused can make full answer and defence and the trial is fundamentally fair'.<sup>159</sup> This would make the prosecutions' task simpler, as they will not feel conflicted by their duty to investigate thoroughly versus the increased risk of disclosure once information is in their hands. Additionally, similar to New South Wales, the law in Canada allows conditions to be placed on the viewing of disclosed documents. As argued in relation to NSW, this is highly desirable in order to protect complainants' privacy as much as is possible even when disclosure of records is considered necessary, and thus should be implemented in England and Wales.

The law also requires judges to provide reasons for their decisions in s278 applications.<sup>160</sup> It is suggested that England and Wales would benefit from a similar law that would mean judges have to give reasons for decisions on witness summons applications, as this may reduce the chance of judges making records decisions on the basis of discriminatory myths and stereotypes. However, judicial analysis of whether records are 'necessary in the interests of justice' in Canada is mostly very succinct and economical.<sup>161</sup> Judges often render a decision

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<sup>155</sup> *R v Mills* (n1) at [751]-[752]

<sup>156</sup> *Ibid*, at [748]

<sup>157</sup> Steve Coughlan, 'Complainants' Records after *Mills*: Same as It Ever Was' (2000) 33(5th) *Criminal Reports, Canada* 300, 307, 309

<sup>158</sup> Temkin, 'Digging the Dirt' (n68) 139

<sup>159</sup> *R v Mills* (n1) at [673]

<sup>160</sup> s278.8(1) and (2)

<sup>161</sup> Shelia McIntyre *et al*, 'Tracking and Resisting Backlash against Equality Gains in Sexual Assault Law' (2000) 20(3) *Canadian Women's Studies* 72, 75; Colin Meredith, Renate Mohr and

without showing their actual reasoning, and without any analysis.<sup>162</sup> Therefore while this may be advantageous in theory, it is difficult to know whether in practice, judicial commentary would amount to mere recitation.

Furthermore, complainants and record holders have legal standing to resist disclosure, as in NSW. In Renate Mohr's key informant study, Crown prosecutors who were interviewed stated that 'everyone takes it more seriously' when there is independent counsel for the complainant.<sup>163</sup> All those interviewed agreed in the importance of having independent counsel for the complainant at applications for disclosure of third party records, particularly crown counsel and the third party record holders themselves. However, in contrast to NSW, there is no scheme of free legal representation. This difference highlights how important such a scheme is to make these provisions more than just a theoretical advantage and actually change women's lives. For example, Jennifer Koshan's examination of decisions delivered between 1999 and 2001 found that legal representation was not standard,<sup>164</sup> and there is little indication that legal representation had become more common by 2006.<sup>165</sup> As Lise Gotell notes, lack of representation is in no doubt related to the patchwork nature of funding sources,<sup>166</sup> as record holders and complainants are not eligible for general legal aid services.<sup>167</sup> The crucial importance of legal representation to the purposes of subsections 278.1-278.9 was articulated in *R v JGC*;<sup>168</sup> 'the quality of justice will be diminished and the very mischief that Parliament attempted to curb, the inappropriate disclosure of third party records, either to the judge or the accused, will continue'.<sup>169</sup> Furthermore, independent counsel in Mohr's study believed that independent representation should be automatically provided for all complainants.<sup>170</sup> More recently, the Standing Senate Committee heard evidence from a wide range of those involved in Criminal Justice, who all emphasised repeatedly that the most

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Rosemary Cairnsway, *Implementation Review of Bill C-49* (Ottawa: Department of Justice, 1997) quoted in Gotell, 'Tracking Decisions' (n132) 141

<sup>162</sup> Jennifer Koshan, 'Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*' (2002) 40 *Alberta Law Review* 655, 682

<sup>163</sup> Renate Mohr, "*Words Are Not Enough*": *Sexual Assault Legislation, Education and Information* (Ottawa: Department of Justice, Bill C-49 and C-46 Key Informant Study, 2002) 16-17

<sup>164</sup> Koshan, 'Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*' (n162) 685

<sup>165</sup> Gotell, 'Tracking Decisions' (n132) 126

<sup>166</sup> *Ibid*

<sup>167</sup> The Canadian Bar Association, *Canadian Bar Association's Position on Legal Aid* (2001) <<http://www.cba.org/CBMAAdvocay/legalAidAdvocacyResourcekit>> accessed 12/12/2014

<sup>168</sup> *R v JGC* [2003] OTC 508

<sup>169</sup> *Ibid*, at [9]

<sup>170</sup> Mohr, "*Words Are Not Enough*" (n163) 19

effective way for complainants to protect their privacy, security and equality interests is to have their own lawyer.<sup>171</sup> It is therefore clear that, although providing for complainant standing in the decision relating to disclosure is to be recommended, to really make the difference, funding for legal representation is required. As analysed above, this is currently unlikely in England and Wales.

The provisions are also advantageous in the amount of guidance they provide to judges. As analysed in Chapter Two and in relation to New South Wales, discretionary regimes can be problematic as they rely on the views of the individual judge, and so can be influenced by discriminatory stereotypes.<sup>172</sup> However, the Canadian legislation attempts to define the scope and exercise of judicial discretion by specifying those situations in which disclosure should not be permitted and those factors which must be taken into account in arriving at a decision whether to permit disclosure or not. Furthermore, the guidance frames sexual violence within gendered power relations, constructing sexual violence as a systemic social problem, gesturing to the societal impact of judicial decisions and locating these legislative changes within a concept of substantive equality.<sup>173</sup> This draws attention powerfully not only to the privacy rights of the complainant, but their equality rights, their dignity, the sway of discriminatory myths and the impact on reporting rates and counselling. This is important because, for example, equality must be considered as the rules and practices permitting disclosure will have disproportionately invasive consequences for women and children<sup>174</sup> and will, as a result, threaten the equality guaranteed to these vulnerable groups under the Charter.<sup>175</sup> It is therefore suggested that the law in England and Wales would benefit from such a contextual approach to weighing the rights of the accused and the rights of complainants, as is contemplated in the text and wording of s278.

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<sup>171</sup> For example, Ms Jennifer Stoddart, Privacy Commissioner of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, (Issue 3, 1st Session, 41st Parliament, 20 October 2011); Mr Phil Downes, Canadian Council of Criminal Defence Lawyers, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, (Issue 4, 1st Session, 41st Parliament, 3 November 2011); Professor Karen Busby, *Proceedings on the Standing Senate Committee on Legal and Constitutional Affairs*, (Issue 19, 3rd Session, 40th Parliament, 3 February 2011)

<sup>172</sup> Temkin, 'Digging the Dirt' (n68) 142; Louise Ellison, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13(1) *International Journal of Evidence and Proof* 28, 38

<sup>173</sup> Gotell, 'When Privacy Is Not Enough' (n144) 755

<sup>174</sup> Mary Marshall, 'Canada: Production of Private Records of Victims in Sexual Assault in *R v Shearing*' (2004) 2(1) *International Journal of Constitutional Law* 139, 140

<sup>175</sup> *R v Osolin* [1993] 2 SCR 595 at [669]

However, subsequent judicial interpretation of these provisions has been problematic, and would need to be avoided if similar provisions were to be implemented in England and Wales. Judicial decisions have narrowed the reach of s278, ‘carving out a series of exceptions’ to their application,<sup>176</sup> and thereby avoiding the complex balancing of individual and societal concerns that was intended as a core component of records applications.<sup>177</sup> And even when this provision is applied, its meaning has been transformed. The courts have reduced the legislative protections to a narrow and unelaborated conception of privacy, which is incapable of expressing the complex harms involved in access to confidential records.<sup>178</sup> This judicial reconstruction finds its roots in the *Mills* decision. The majority’s stress on the importance of judicial discretion,<sup>179</sup> their reframing of the subsection s278.5(2)’s guidance as simply a ‘checklist’,<sup>180</sup> their narrowing of complainants privacy interests and their argument that fair trial rights must prevail in ‘uncertain’ situations<sup>181</sup> continues to be relied upon in court decisions where records applications have been made.<sup>182</sup>

This has been evident in academics’ investigation of case law. While there have been some cases that have relied on equality analysis or raise concerns about how contents of records might detract from the fairness of the trial by introducing discriminatory myths,<sup>183</sup> these are remarkably few and are noteworthy only as exceptions.<sup>184</sup> Furthermore, in most decisions in which these issues were considered,<sup>185</sup> records applications had already been dismissed on the basis of a failure to meet the threshold of ‘likely relevance’.<sup>186</sup> Moreover, the contest between privacy and fair trial rights appears to become the only focus of judicial analysis;<sup>187</sup> early case law following *Mills* suggests that the lower courts have followed the Supreme Court in holding that the rights of the accused must prevail when there are doubts about ordering disclosure.<sup>188</sup>

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<sup>176</sup> Gotell, ‘When Privacy Is Not Enough’ (n144) 759

<sup>177</sup> Gotell, ‘Tracking Decisions’ (n132) 153

<sup>178</sup> Gotell, ‘When Privacy Is Not Enough’ (n144) 759

<sup>179</sup> *R v Mills* (n1) at [22]

<sup>180</sup> *Ibid*, at [134]

<sup>181</sup> *Ibid*

<sup>182</sup> Gotell, ‘Tracking Decisions’ (n132) 141

<sup>183</sup> For example, *R v Tatchell* [2001] 207 Nfld & PEIR 131

<sup>184</sup> Gotell, ‘When Privacy Is Not Enough’ (n144) 767; Susan McDonald, Andrea Wobick and Janet Graham, *Bill C-46: Records Applications Post-Mills, a Case Law Review* (Department of Justice, Canada, 2004) 26

<sup>185</sup> *R v Tompkins* [2004] PESCTD 51; *R v K.W.T* [2003] OJ No 5937

<sup>186</sup> Gotell, ‘Tracking Decisions’ (n132) 142

<sup>187</sup> Gotell, ‘When Privacy Is Not Enough’ (n144) 767

<sup>188</sup> *R v D.P.F* [2001] 199 Nfld & PEIR 224 at [36]; *R v L.G* [2000] OJ No 5090 at [76], [85]; *R v C.S* [2000] 195 Nfld & PEIR 104 at [17]

Later decisions reveal the same emphasis, for example the trial judge in *J.M.S.*,<sup>189</sup> having reviewed the therapeutic files with consent, emphasised that the right to full answer and defence must take precedence when a record contains potentially probative material, and on this basis, ordered full disclosure of the entire record.<sup>190</sup> More recent analysis of Supreme Court decisions in 2011 demonstrates that trial and appellate courts continue to find it difficult to avoid stereotyped reasoning in sexual assault cases,<sup>191</sup> and attention to equality has not yet infused trial practice or appellate reasoning.<sup>192</sup> Overall, the post-*Mills* decisions analysed are marked by persistent judicial refusals to consider the complex concerns implicated within access to personal records.

The privileging of the accused's rights, the tenuous protections afforded by privacy and the potential to avoid the legislative regime for the disclosure of confidential records are starkly illustrated in the Supreme Court decision in *Shearing*.<sup>193</sup> In this case, the court held that the usual production regime established through the statutory provisions does not apply if the accused is able to gain access to the complainant's private records. The case involved a diary, which the complainant had left in a previous residence around 20 years prior, and which had fallen into the hands of the defendant. The diary made no mention of any abuse, which was alleged to have occurred at the time it was written, and the defence sought to use the diary to contradict the complainant's evidence. The trial judge allowed cross-examination on entries considered probative, but refused permission to cross-examine on the absence of entries recording abuse. Following this, the Supreme Court held that the procedural machinery in s278 was not appropriate here because the defence already had possession of the diary, so it was not a matter of deciding whether evidence should be produced to the defence. Furthermore, questions dealing with the absence of entries were held to be no more intrusive into the complainant's privacy than those the trial judge had already permitted.<sup>194</sup> Moreover, the nature and scope of the complainant's diary did not raise privacy or other concerns of such importance as to 'substantially outweigh' the appellant's fair trial right, and thus cross-examination on the diary was allowed to test the accuracy and completeness of the

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<sup>189</sup> *R v J.M.S.* [2003] NSJ No 117

<sup>190</sup> *Ibid.*, at [5]

<sup>191</sup> For example in *R v A(J)* [2008] OJ No 1583, 2008 ONCJ 195; *R v I (D.A)* [2012] SCJ No5 280 CCC (3d) 127 (SCC)

<sup>192</sup> Emma Cuncliffe, 'Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality' (2012) 57 *Supreme Court Law Review* 295, 301

<sup>193</sup> *R v Shearing* [2002] 214 DLR (4th) 215

<sup>194</sup> *Ibid.*, at [250]-[251], [257]

complainant's recollection.<sup>195</sup> Justice L'Heureux-Dube dissented on two grounds. Firstly, she argued that the diary should have been returned to the complainant, and the defendant should have had to seek production through s278.<sup>196</sup> By allowing the defendant access to the diary, he was able to 'circumvent the statutory scheme through unlawful or wrongful means' and benefit from his 'disreputable behaviour'.<sup>197</sup> Secondly, she commented that even if the defendant had acquired the diary through the proper channels initially, the prejudicial effect of the proposed questioning on the absence of entries would substantially outweigh its probative value.<sup>198</sup>

The Supreme Court majority in this case failed to explore the possibility that modern technology could make the complainant's records accessible to a number of third parties including the accused.<sup>199</sup> The Court's ruling of 'if you can get it, you can cross-examine on it' is out of date, as third parties may be able to access private information by 'hacking' through inadequate security arrangements.<sup>200</sup> Furthermore, the majority decision does not recognise the substantive privacy and equality rights of complainants that are infringed in such cases, nor the discriminatory nature of allowing such evidence. A complainant's right to privacy should be protected by the regime in s278 regardless of physical possession or property interests.<sup>201</sup> In this way, the decision effectively undermines the protection established in Bill C-46.

Following on from this, the standard of 'likely relevance' deserves some analysis. It appears that a high threshold test for finding that records were 'likely relevant' was elaborated, as the court insisted that record applications must be based upon 'case specific' evidence that goes beyond general assertion.<sup>202</sup> This has had a positive impact for complainants, leading to a declining frequency of production orders.<sup>203</sup> The test was developed in *Batte*,<sup>204</sup> where it was held that records would pass the threshold of 'likely relevance' 'only if there was some basis for concluding that statements have some potential to provide the accused with some added

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<sup>195</sup> Ibid, at [258]

<sup>196</sup> Ibid, at [260]-[262]

<sup>197</sup> Ibid, at [262]

<sup>198</sup> Ibid, at [262]-[271]

<sup>199</sup> Marshall, 'Canada: Production of Private Records of Victims in Sexual Assault in *R v Shearing*' (n174) 147

<sup>200</sup> Ibid

<sup>201</sup> Ibid, 148

<sup>202</sup> *R v Mills* (n1) at [118]

<sup>203</sup> Gotell, 'The Ideal Victim' (n122) 256

<sup>204</sup> *R v Batte* [2000] 49 OR (3d) 321 (CA)

information not already available to the defence, or have some potential impeachment value'.<sup>205</sup> This goes some way to protecting complainants from speculative production requests,<sup>206</sup> however, while the *Batte* decision is binding on lower courts in Ontario, the decision does not bind courts across Canada.<sup>207</sup>

A low threshold for production is one of the key problems with the current law in England and Wales, as research suggests that disclosure applications are frequent,<sup>208</sup> with fishing expeditions being made regularly and often successfully.<sup>209</sup> Therefore, a regime whereby the defendant must raise an assertion from the level of general to specific would be beneficial. However, as with the systemic, societal and equality factors, judges have avoided analysing the 'likely relevance' of records and in some cases, production has been ordered on the basis of consent of complainants and/or record holders, even though the legal foundation for this is uncertain.<sup>210</sup> Moreover, records are sometimes disclosed without case specific evidentiary foundations, with defence rationales amounting to bare assertions or discriminatory generalisations.<sup>211</sup> This may therefore reveal that while decisions on production and disclosure of records rest on the 'likely relevance' standard, which allows for discretion and as a result is inconsistently applied, complainants are at risk of being discredited through the contents of records.

The legislation also encounters problems due to its broad nature. Bill C-46 defined the scope of records subject to its strict procedures extremely broadly, as 'any form of record that contains personal information for which there is a reasonable expectation of privacy',<sup>212</sup> thus it covers a broad range of documents that do not involve an identical set of considerations.<sup>213</sup> While it is advantageous to include protection of such a range of documents, the Supreme Court of Canada has distinguished between those records in which there is a high expectation

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<sup>205</sup> Ibid, at [72]

<sup>206</sup> *R v D.M* [2000] 49 WCB (2d) 217 (Ont Sup Ct J) at [37]; *R v Sutherland* [2001] 156 C C C (3d) 264, 2002 NSSC 49 at [13]; *R v Thompson* [2001] 52 OR (3d) 779 (CA) at [6]

<sup>207</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings): Final Report* (2012) 21

<sup>208</sup> Kelly, Temkin and Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (n95) 25-28

<sup>209</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap* (n89) 153-155

<sup>210</sup> Gotell, 'Tracking Decisions' (n132) 129-131

<sup>211</sup> Ibid, 139

<sup>212</sup> s278.1 CPA

<sup>213</sup> Temkin, 'Digging the Dirt' (n68) 140

of privacy, and those in which there is a lower expectation of privacy:<sup>214</sup> ‘privacy rights will be most directly at stake where a record concerns aspects of one’s individual identity or where confidentiality is crucial to a therapeutic or trust-like relationship’.<sup>215</sup> The effect of this is to provide therapeutic records with a uniquely confidential nature, thus implying that other records deserve less protection and justifying the release of non-therapeutic records.<sup>216</sup> It may therefore be the case that more specific legislation, such as the sexual assault communications privilege in New South Wales, is more effective.

### 3.2 SUMMARY

As in New South Wales, the statutory drafting of s278 offers many benefits. Additionally, the legislation attempts to guide judges to consider context, and therefore draws attention to complainants’ equality rights. As Janine Benedet notes in relation to sexual history evidence, but is also relevant to records disclosure, the use of such evidence is not purely wrong because it constitutes an invasion of privacy, but because it undermines sexual equality.<sup>217</sup> However, the judicial approach to this legislation has been to relegate substantive equality to a ‘second-order principle’, only coming into play when the legal question cannot be resolved by more conventional tools.<sup>218</sup> Moving beyond this notion of equality as a second-order principle will require the court to develop and exercise a habit of reasoning in accordance with its equality jurisprudence, and this remains to be seen. It has also been noted that there is a paucity of recent and comprehensive research available that examines how the third party records scheme has developed in more recent years,<sup>219</sup> which does make it difficult to make concrete conclusions on how the legislation is being interpreted and applied across Canada. However, outstanding research has found that 64 per cent of victim-survivors believed that sections 278.1-278.91 fail to provide adequate protections for those who choose to report rape.<sup>220</sup>

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<sup>214</sup> Busby, ‘Third Party Records Cases since *R v O’Connor*’ (n126) 370

<sup>215</sup> *R v Mills* (n1) at [672]

<sup>216</sup> Gotell, ‘Tracking Decisions’ (n132) 153

<sup>217</sup> Janine Benedet, ‘Legal Rights in the Supreme Court of Canada in 2000: Seeing the ‘Big Picture’’ (2001) 14 *Supreme Court Law Review* 97, 107

<sup>218</sup> Cuncliffe, ‘Sexual Assault Cases in the Supreme Court of Canada’ (n192) 310

<sup>219</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act* (n207) 31

<sup>220</sup> Lise Gotell, Melanie Beres and Barbara Crow, *National Survey of Sexual Assault Centres: Analysis of Results* (2005) 18 reported in Melanie Beres, Barbara Crow and Lise Gotell, ‘The Perils of Institutionalisation in Neoliberal Times: Results of a National Survey of Canadian Sexual Assault and Rape Crisis Centres’ (2009) 34(1) *The Canadian Journal of Sociology* 135-163

### 3.3 CONCLUSION

There are several aspects of both the New South Wales and Canadian law that would benefit England and Wales. Firstly, starting from the presumption of non-disclosure, as in New South Wales, sets a higher hurdle and offers more protection to victims. Secondly, the ability of both jurisdictions to seek redaction of parts of the records to protect the safety and welfare of the complainant or counsellor would be a useful tool for the judiciary in England and Wales, who are only able to edit records to protect the broader public interest, as discussed in section 2.1.4. This would ensure maximum protection even when records must be disclosed, and therefore attempt to lessen 'secondary victimisation'. Thirdly, a requirement to give reasons for disclosure, as in Canada, would hold judges accountable and may help to reduce decisions based on myths and stereotypes. Fourthly, having one set of provisions that covers both material held by third parties and material in the hands of the prosecution, similar to Canada, would be beneficial as would mean that the disclosure decision is not merely based on the technicality of who holds the record. And finally, on paper, the context-sensitive guidance given in the Canadian legislation is very significant, as it draws attention to many important factors that should be considered, for example it includes specific reference to complainant rights, and to broader interests such as encouraging reporting and counselling. In this way, it attempts to limit the scope of discretion whilst also influencing judges to think more widely about the impact of the decision.

Ideally, provisions allowing standing for complainants and record holders should also be implemented in England and Wales, as this gives complainants a voice and a means to resist disclosure in the statute. This would be preferable to the current situation in England and Wales, where complainants have to rely on the prosecution for this, who are often not able to prioritise defending their privacy interests,<sup>221</sup> and who can only argue against disclosure in terms of the public interest. However, it is clear from both the Canadian research and research from New South Wales that this is really only effective when coupled with a scheme of free legal representation. Therefore, as such a scheme is currently unlikely, such provisions may seem hollow. Yet, they may still be able to provide some limited benefit, for example through pro bono help or help from organisations such as Rape Crisis. Furthermore, if such provisions were enacted, this could lead to increased funding to such organisations for this

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<sup>221</sup> Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (n101) 41

purpose, and so in the future more and more women may have access to the necessary support.

However, it is clear from both the experience in New South Wales and in Canada that judicial resistance to provisions that provide more protection for complainants is strong. Both the sexual assault communications privilege and s278 of the Canadian Criminal Code have been seriously eroded by judicial interpretation, and the legislature in England and Wales would have to find a solution to this if they were to introduce new legislation. In New South Wales, the legislature overcame this problem by redrafting the provisions several times, but in contrast, the law has remained unchanged in Canada, and as Gotell notes, the problem of the use of complainants' personal records against them seems to have 'fallen off the collective register of Canadian feminist legal studies'.<sup>222</sup> While there is no recent research from Canada, there is nothing to suggest that the situation has improved. Attention would perhaps have to turn to judicial and societal education as a whole before any provisions could be successful, and this may take time.

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<sup>222</sup> Gotell, 'Tracking Decisions' (n132) 112

## CONCLUSION

Rape is a unique crime, presenting distinct challenges. Identifying an incident of sexual intercourse as non-consensual and labelling the behaviour of its perpetrator as criminal has frequently given rise to difficulty, and the majority of women who are raped do not receive justice in terms of a conviction.<sup>1</sup> This is amplified for women with current, or historic, mental health problems, with most of these cases dropping out of the system very early on. It appears from the limited research available that one reason for this is linked to the perceived credibility of those with mental health problems.<sup>2</sup> This is then reinforced, for those that do reach trial risk invasive cross-examination on the content of their mental health records. In no other crime is the credibility of the complainant considered relevant to the issue of whether the defendant's behaviour is criminal, and this means that while personal records can be sought in any criminal case, in reality, they are rarely of interest to defence lawyers in other cases.

This thesis argues that the use of mental health records in rape trials is often based on unwarranted generalisations about women with mental health problems. Records are requested, and their use is effective in maligning the complainant's credibility, because of the wide stigmatisation of mental health problems. Historically, many women were branded as 'hysterics' and accused of making false accusations of rape against men, and this remains a potent backdrop for modern-day rape trials. A juror who does not have specialised knowledge of mental health may hear evidence of mental problems and may, perhaps unwittingly, come to the same conclusion. Alongside these historical associations between mental illness and sexuality, the overwhelming majority of evidence points towards wide stigmatisation of mental illness in modern times. While this manifests in a variety of different views and attitudes towards those with mental illness, the overall effect is to increase the chance that a juror may hear evidence relating to a woman's mental health and give it more weight than it deserves, or may come to conclusions that are unjustified based on this evidence.

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<sup>1</sup> Clare McGlynn, 'Feminism, Rape and the Search for Justice' (2011) 31(4) *Oxford Journal of Legal Studies* 825, 825-826; Clare McGlynn, Nicole Westmarland and Nikki Godden, "I Just Wanted Him to Hear Me": Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) *Journal of Law and Society* 213, 231

<sup>2</sup> Vanessa Lee and Corrine Charles, *Research into CPS Decision-Making in Cases Involving Victims and Key Witnesses with Mental Health Problems and/or Learning Disabilities* (London: CPS, 2008) 25; Susan Lea, Ursula Lanvers and Steve Shaw, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 *British Journal of Criminology* 583, 594; Jessica Harris and Sharon Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (London: Home Office, Home Office Research Study 196, 1999) 23

It is also clear that the use of records unfairly disadvantages those who have experienced mental illness. As Justice L'Heureux-Dube notes:

[R]outine disclosure of [therapeutic] records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.<sup>3</sup>

When this is viewed alongside the evidence that women with mental health problems are far more likely to be raped in the first place, and that women are more likely to have undergone counselling or some other form of mental health treatment due to the high incidence of sexual assault against them, it becomes clear that such use of mental health records is highly prejudicial. It is unacceptable that the law does not adequately protect this group of highly targeted women, and that those vulnerable to victimisation should be deterred from seeking justice. Furthermore, allowing the use of mental health records shrinks the margins of who is rapeable.<sup>4</sup> Through the presumption that such women's accounts need to be more carefully scrutinised, sex without consent for those with mental health problems is normalised as being something other than 'rape', and is therefore 'effectively decriminalised'.<sup>5</sup> Therefore, just as we must avoid general rape myths about rape complainants, so too must we avoid myths about the veracity and credibility of women with mental health problems.

While it is difficult to evaluate the effects of the law on disclosure of mental health records due to lack of research, it is clear that the law relies on out-dated and inaccurate conceptions of relevance, whilst also failing to adequately protect the complainants interests. In the

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<sup>3</sup> *R v Osolin* [1993] 2 SCR 595 at [496]

<sup>4</sup> Katherine Kelly, "You Must Be Crazy If You Think You Were Raped": Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials' (1997) 9 *Canadian Journal of Women and the Law* 178, 195

<sup>5</sup> 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(3) *European Journal of Criminology* 324, 325

absence of any clear framework governing the admissibility of psychiatric evidence in criminal proceedings, rape complainants are 'likely to face continued gratuitous attacks against their credibility during cross-examination'.<sup>6</sup>

Therefore, a coherent principled approach is required in England and Wales. The law would benefit from distinct rules relating to disclosure of mental health records in rape cases, as this would draw public and judicial attention to the particular issues raised in relation to these, and would serve to provide specific protection for this vulnerable group of women. Firstly, these rules should be the same regardless of who has the record or who has seen it, as the distinction made in the current formation of the law is arbitrary and illogical. Secondly, the rules should start from the presumption of non-disclosure, as in New South Wales. This would be beneficial both in practical terms, as would place a higher burden on the defence, and in symbolic terms, as would serve to show that it is rare for mental illness to affect credibility, rather than this being the norm.

Thirdly, these distinct rules should also place a higher burden on the defence in terms of the assertion of the relevance of any records. As Christine Boyle and Marilyn MacCrimmon argue, any underlying assumption of relevance should not be misleading or discriminatory,<sup>7</sup> and the defence should have to do more than just show that a witness has been diagnosed with a specific psychiatric condition or has received psychiatric treatment, regardless of the severity of the witness's current or past mental health problem.<sup>8</sup> Rather, the defence should have to demonstrate a scientific link between the record and the credibility of the complainant,<sup>9</sup> showing how a complainant's capacity to provide reliable evidence is affected by the mental illness. Furthermore, when judges are assessing the relevance of any mental health records requested by the defence, a contextual approach should be taken, as was intended by the legislature in Canada. Given that there is such strong evidence demonstrating the wide stigmatisation of mental illness, it is clear that in this area there are many myths and stereotypes. It is therefore important that any decision of relevance takes into account the potential prejudicial effect of such evidence. In addition, it is important to also consider the

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<sup>6</sup> Louise Ellison, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13(1) *International Journal of Evidence and Proof* 28, 42

<sup>7</sup> Christine Boyle and Marilyn MacCrimmon, 'The Constitutionality of Bill C-49: Analysing Sexual Assault as If Equality Really Mattered' (1998) 41 *Criminal Law Quarterly* 198, 232

<sup>8</sup> Ellison, 'The Use and Abuse of Psychiatric Evidence' (n6) 42

<sup>9</sup> Tess Wilkinson-Ryan, 'Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant' (2005) 153 *University of Pennsylvania Law Review* 1373, 1376

wider issues surrounding rape more generally, such as low reporting rates and high attrition rates, and how allowing the use of such evidence may impact upon these.

Moreover, the law in England and Wales would benefit from several procedural rules that are in place in other jurisdictions. These include enforcing stricter notice provisions, to ensure that the complainant and third party are adequately warned that records are being requested; complainant standing and legal representation, to ensure that her interests are fully protected; the ability for judges to make a range of orders to limit the harm if records are disclosed, such as ordering evidence to be heard in camera, suppression of some sections of evidence or removal of names and addresses; and a requirement of judicial reasons for decisions made in relation to disclosure of mental health records, to hold judges accountable and to increase transparency in the decision-making process in an attempt to remove mythical bases of decision-making. Even without substantial reform, these procedural requirements are a very useful tool and would by themselves greatly improve the protection offered to the complainant.

The enactment of any progressive legislation may however be undermined by prevailing attitudes and assumptions which reform of the substantial law does little to change. In both Canada and New South Wales, it has been the case that reform has been met with counter-moves by the judiciary in the form of resistance and subsequent interpretation. For example, in Canada, the failure to pay adequate attention to equality is not caused by the absence of legal tools or a lack of helpful precedent.<sup>10</sup> Rather, the equality reasoning that characterised legislative reforms and judicial decisions in the 1990s seems to have been marginalised within subsequent trial practice, leading Lise Gotell to conclude that 'once again this gesture in the direction of complainants is pulled back by the majority's virtual rewriting of the legislative regime'.<sup>11</sup> This pattern has also been clear in reform of law that has been generated to overcome sex discrimination in the adjudication of rape in England and Wales. For example, the failure of firstly s2 of the Sexual Offences (Amendment) Act 1976<sup>12</sup> and secondly s41 of

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<sup>10</sup> Emma Cuncliffe, 'Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality' (2012) 57 *Supreme Court Law Review* 295, 301

<sup>11</sup> Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 *Osgoode Hall Law Journal* 251, 270

<sup>12</sup> Zsuzsanna Adler, 'The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation' (1985) *Criminal Law Review* 769-780; Zsuzsanna Adler, *Rape on Trial* (London: Routledge, 1987) 79; Jennifer Temkin, 'Sexual History Evidence - the Ravishment of Section 2' (1993) *Criminal Law Review* 3, 20

the Youth Justice and Criminal Evidence Act 1999<sup>13</sup> to restrict the use of sexual history evidence shows that the success of statutory intervention rests heavily on the attitudes and behaviour of legal professionals involved in its implementation. This has also been an issue with drunken consent. As Lacey notes, s74 of the Sexual Offences Act 2003 points ‘in the direction which cogent feminist analyses have argued to be desirable’,<sup>14</sup> and in *R v Bree*,<sup>15</sup> principled statements have been made regarding both the need for positive consent, and the idea that capacity can be lost before unconsciousness. However, this does not appear to be the general assumption in later case law. For example, in *R v H*<sup>16</sup> the argument was made that the sixteen year old complainant was still functioning as she was walking and talking, despite being extremely drunk and having sexual intercourse with a man within minutes of meeting him. So again, it is the operationalisation of such principles that appears to be elusive.<sup>17</sup> Experience therefore shows the potential limitations of evidentiary innovation in effecting change in the absence of institutional support.

So what does this mean for reform of the law relating to use of mental health records in rape trials? Although it is difficult to predict with any certainty, evidence suggests that there may be resistance to tighter restrictions on the use of mental health records, even though this may go unacknowledged, and may perhaps be unconscious and unrecognised.<sup>18</sup> Temkin and Krahe’s research into legal professionals’ attitudes suggests that many believe that it is in the interests of the defence to have access to records, and that they are often relevant.<sup>19</sup> This, along with evidence of wide stigmatisation of mental health, lack of general knowledge relating to how mental health affects credibility and belief in false allegations, points towards the possibility

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<sup>13</sup> Jennifer Temkin, ‘Sexual History Evidence - Beware the Backlash’ (2003) *Criminal Law Review* 217, 227; Ian Dennis, ‘Sexual History Evidence: Evaluating Section 41’ (2006) *Criminal Law Review* 869, 870; Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (London: Home Office Online Report 20/06, 2006) 23; Clare McGlynn, ‘Feminist Judgment: *R v A (No 2)* [2001] UKHL 25’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) 225; Jennifer Temkin, ‘Rape Myths and Rape Trials’ (paper presented at Representations of Sex: Criminal Evidence and the Impact on Jury Decision-Making, 17th April 2015, Northumbria University)

<sup>14</sup> Nicola Lacey, ‘Beset by Boundaries: The Home Office Review of Sexual Offences’ (2001) *Criminal Law Review* 3, 12

<sup>15</sup> *R v Bree* [2007] EWCA Crim 256

<sup>16</sup> *R v H* [2007] EWCA Crim 2056

<sup>17</sup> Clare McGlynn, ‘Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Oxford: Routledge, 2010) 150

<sup>18</sup> *Ibid*

<sup>19</sup> Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008) 154-155

that some members of the judiciary would continue to allow disclosure. Having said this, reform may still encourage positive change. As Victoria Nourse suggests, feminist reform of the criminal law involves both success and failure, so is not futile.<sup>20</sup> While successes may be neutralised in practice, the situation may still be better than it was before any reform, even if only marginally. Thus, in this way, important improvements to the law on rape can be made, albeit slowly.<sup>21</sup> This could also be supported by education initiatives to increase the chance of significant change. It is clear from the experience in both New South Wales and Canada that education relating to any new law is important. In NSW, the specialist legal aid sexual assault communications privilege service also aims to raise awareness of the changes to the law, and evidence suggests that this education initiative has been successful, and awareness of the privilege has increased.<sup>22</sup> In contrast, research from Canada has found that very few legal actors were even aware of the preambles of s278, and seemed surprised when informed that the provisions direct judges to consider the equality interests of the complainant.<sup>23</sup> As well as this, many complainants are still unaware that they are entitled to representations by independent counsel during records production applications.<sup>24</sup> Any education initiative could also be extended to mental health more generally. For example, Mind called for compulsory mental health awareness training for all criminal justice personnel.<sup>25</sup> This may help to reduce mythical basis for decision-making.

Ultimately, the focus in a rape trial needs to be shifted back towards the defendant; the existence of any rape supportive attitudes he may have, the reasons he thought the complainant consented, and his credibility. Retaining a focus on the complainant's character through the use of mental health records not only reinforces rape myths, but also myths about those who suffer from mental illness.

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<sup>20</sup> Victoria Nourse, 'The "Normal" Successes and Failures of Feminism and the Criminal Law' (1999-2000) 75 *Chicago-Kent Law Review* 951, 951

<sup>21</sup> McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales' (n17) 151

<sup>22</sup> Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform: Keeping Sexual Assault Victims' Counselling Records Confidential' (2012) 37 *Alternative Law Journal* 254, 255

<sup>23</sup> Renate Mohr, "Words Are Not Enough": *Sexual Assault Legislation, Education and Information* (Ottawa: Department of Justice, Bill C-49 and C-46 Key Informant Study, 2002) 20

<sup>24</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings): Final Report* (2012) 27

<sup>25</sup> Mind, *Another Assault: Mind's Campaign for Equal Access to Justice for People with Mental Health Problems* (London: Mind, 2007) 23

## APPENDICES

### APPENDIX 1: S3 OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996

#### 3 Initial duty of prosecutor to disclose

- (1) The prosecutor must—
  - (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
  - (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).
- (2) For the purposes of this section prosecution material is material—
  - (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
  - (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.
- (3) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section—
  - (a) by securing that a copy is made of it and that the copy is given to the accused, or
  - (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.
- (4) Where material consists of information which has not been recorded the prosecutor discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and—
  - (a) by securing that a copy is made of it and that the copy is given to the accused, or
  - (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.
- (5) Where material does not consist of information the prosecutor discloses it for the purposes of this section by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.
- (6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.
- (7) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000.

- (8) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section.

APPENDIX 2: GUIDANCE ON APPLICATIONS FOR NON-DISCLOSURE IN THE PUBLIC INTEREST SET OUT IN *R v H AND C* [2004] UKHL 3 AT [36]

When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

- (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.
- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see para 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

- (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
- (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
- (7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

APPENDIX 3: S2 OF THE CRIMINAL PROCEEDINGS (ATTENDANCE OF WITNESSES) ACT 1965

**2 Issue of witness summons on application to Crown Court.**

- (1) This section applies where the Crown Court is satisfied that—
  - (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
  - (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing.
- (2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to—
  - (a) attend before the Crown Court at the time and place stated in the summons, and
  - (b) give the evidence or produce the document or thing.
- (3) A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.
- (4) Where a person has been committed for trial, or sent for trial under section 51 of the Crime and Disorder Act 1998, for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after the committal.
- (5) Where the proceedings concerned have been transferred to the Crown Court, an application must be made as soon as is reasonably practicable after the transfer.
- (6) Where the proceedings concerned relate to an offence in relation to which a bill of indictment has been preferred under the authority of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill preferred by direction of Court of Appeal, or by direction or with consent of judge) an application must be made as soon as is reasonably practicable after the bill was preferred.
- (7) An application must be made in accordance with Crown Court rules; and different provision may be made for different cases or descriptions of case.
- (8) Crown Court rules—
  - (a) may, in such cases as the rules may specify, require an application to be made by a party to the case;
  - (b) may, in such cases as the rules may specify, require the service of notice of an application on the person to whom the witness summons is proposed to be directed;
  - (c) may, in such cases as the rules may specify, require an application to be supported by an affidavit containing such matters as the rules may stipulate;
  - (d) may, in such cases as the rules may specify, make provision for enabling the person to whom the witness summons is proposed to be directed to be present or represented at the hearing of the application for the witness summons.
- (9) Provision contained in Crown Court rules by virtue of subsection (8)(c) above may in particular require an affidavit to—

- (a) set out any charge on which the proceedings concerned are based;
- (b) specify any stipulated evidence, document or thing in such a way as to enable the directed person to identify it;
- (c) specify grounds for believing that the directed person is likely to be able to give any stipulated evidence or produce any stipulated document or thing;
- (d) specify grounds for believing that any stipulated evidence is likely to be material evidence;
- (e) specify grounds for believing that any stipulated document or thing is likely to be material evidence.

(10) In subsection (9) above—

- (a) references to any stipulated evidence, document or thing are to any evidence, document or thing whose giving or production is proposed to be required by the witness summons;
- (b) references to the directed person are to the person to whom the witness summons is proposed to be directed.

## APPENDIX 4: S295-306 OF THE CRIMINAL PROCEDURE ACT 1986 (NSW)

### 295 Interpretation

(1) Definitions In this Division:

**"criminal proceedings"** means:

- (a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence) including pre-trial and interlocutory proceedings but not preliminary criminal proceedings, or
- (b) proceedings relating to an order under the *Crimes (Domestic and Personal Violence) Act 2007*.

**"harm"** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

**"preliminary criminal proceedings"** means any of the following:

- (a) committal proceedings,
  - (b) proceedings relating to bail (including proceedings during the trial or sentencing of a person),
- whether or not in relation to a sexual assault offence.

**"principal protected confider"** means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made.

**"protected confidence"** -see section 296.

**"protected confider"**, in relation to a protected confidence, means:

- (a) the principal protected confider, or
- (b) any other person who made the protected confidence.

**"sexual assault offence"** means:

- (a) a prescribed sexual offence, or
- (a1) acts that would constitute a prescribed sexual offence if those acts:
  - (i) had occurred in this State, or
  - (ii) had occurred at some later date, or
  - (iii) had both occurred in this State and occurred at some later date, or
- (b) any other offence prescribed by the regulations for the purposes of this definition.

(2) Document recording a protected confidence In this Division, a reference to a document recording a protected confidence:

- (a) is a reference to any part of the document that records a protected confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence made by a protected confider, and
- (b) includes a reference to any copy, reproduction or duplicate of that part of the document.

(3) Electronic documents For the purposes of this Division, if a document recording a protected confidence is stored electronically and a written document recording the protected confidence could be created by use of equipment that is usually available for retrieving or collating such stored information, the document stored electronically is to be dealt with as if it were a written document so created.

296 What is a protected confidence?

- (1) In this Division: "**protected confidence**" means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence.
- (2) A counselling communication is a protected confidence for the purposes of this Division even if it:
  - (a) was made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred, or
  - (b) was not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence.
- (3) For the purposes of this section, a communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication or to otherwise further the counselling process.
- (4) In this section: "**counselling communication**" means a communication:
  - (a) made in confidence by a person (the "**counselled person**" ) to another person (the "**counsellor**" ) who is counselling the person in relation to any harm the person may have suffered, or
  - (b) made in confidence to or about the counselled person by the counsellor in the course of that counselling, or
  - (c) made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or
  - (d) made in confidence by or to the counsellor, by or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.
- (5) For the purposes of this section, a person "**counsels**" another person if:
  - (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and
  - (b) the person:
    - (i) listens to and gives verbal or other support or encouragement to the other person, or
    - (ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.

297 Protected confidences-preliminary criminal proceedings

- (1) A person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any preliminary criminal proceedings.
- (2) A document recording a protected confidence cannot be produced in, or in connection with, any preliminary criminal proceedings.
- (3) Evidence cannot be adduced in any preliminary criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence.

## **298 Protected confidences-criminal proceedings**

- (1) Except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings.
- (2) Except with the leave of the court, a document recording a protected confidence cannot be produced in, or in connection with, any criminal proceedings.
- (3) Except with the leave of the court, evidence cannot be adduced in any criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence.

## **299 Court to inform of rights under Division**

If it appears to a court that a witness, party or protected confider may have grounds for making an application under this Division or objecting to the production of a document or the adducing of evidence, the court must satisfy itself (or if there is a jury, in the absence of the jury) that the person is aware of the relevant provisions of this Division and has been given a reasonable opportunity to seek legal advice.

### **299A Protected confider has standing**

A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider.

### **299B Determining if there is a protected confidence**

- (1) If a question arises under this Division relating to a document or evidence, a court may consider the document or evidence.
- (2) If there is a jury, the document or evidence is to be considered in the absence of the jury.
- (3) A court must not make available or disclose to a party (other than a protected confider) any document or evidence to which this section applies (or the contents of any such document) unless:
  - (a) the court determines that the document does not record a protected confidence or that the evidence would not disclose a protected confidence, or
  - (b) a party has been given leave under this Division in relation to the document or evidence and making available or disclosing the document or evidence is consistent with that leave.
- (4) A court may make any orders it thinks fit to facilitate its consideration of a document or evidence under this section.
- (5) This section has effect despite sections 297 and 298.

### **299C Notice of application for leave**

- (1) An applicant for leave under this Division must, as soon as is reasonably practicable, give

notice in writing of the application to each other party and each relevant protected confider (or the protected confider's nominee) that:

- (a) specifies the document that is sought to be produced or the evidence that is sought to be adduced, and
  - (b) in the case of a notice to a protected confider who is not a party to the proceedings—advises the protected confider that the protected confider may appear in the proceedings concerned, and
  - (c) in the case of an application for leave to compel (whether by subpoena or any other procedure) a person to produce a document—specifies the day on which the document is to be produced, and
  - (d) in the case of an application for leave to adduce evidence—specifies the day (if known) when the proceedings are to be heard, and
  - (e) includes any other matter that may be prescribed by the regulations.
- (2) A requirement to give notice to a protected confider who is not a party to proceedings is satisfied for the purposes of this section if the notice is given to:
- (a) the prosecutor in the criminal proceedings, or
  - (b) if the regulations prescribe a different person or body, that person or body.
- (3) A prosecutor (or person or body) who is given a copy of a notice under subsection (2) must ensure that a copy of the notice is given to the protected confider within a reasonable time after its receipt.
- (4) A court cannot grant an application for leave under this Division until at least 14 days (or such shorter period as may be fixed by the court) after the relevant notices have been given under subsection (1) or (2).
- (5) A court may waive the requirement to give notice if:
- (a) notice has already been given in respect of an application under this Division, being an application that relates to the same protected confidence and the same criminal proceedings, or
  - (b) the principal protected confider has consented in writing to the notice being waived, or
  - (c) the court is satisfied that there are exceptional circumstances that require the notice to be waived.
- (6) The regulations may make provision for or with respect to the giving of notices under this section.

#### **299D Determining whether to grant leave**

- (1) The court cannot grant an application for leave under this Division unless the court is satisfied that:
- (a) the document or evidence will, either by itself or having regard to other documents or evidence produced or adduced or to be produced or adduced by the party seeking to produce or adduce the document or evidence, have substantial probative value, and
  - (b) other documents or evidence concerning the matters to which the protected confidence relates are not available, and
  - (c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a

document of substantial probative value.

- (2) Without limiting the matters that the court may take into account for the purposes of determining the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm, the court must take into account the following:
  - (a) the need to encourage victims of sexual offences to seek counselling,
  - (b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,
  - (c) the public interest in ensuring that victims of sexual offences receive effective counselling,
  - (d) that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person,
  - (e) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias,
  - (f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.
- (3) For the purposes of determining an application for leave under this Division, the court may permit a confidential statement to be made to it by or on behalf of the principal protected confider by affidavit specifying the harm the confider is likely to suffer if the application for leave is granted.
- (4) A court must not disclose or make available to a party (other than the principal protected confider) any confidential statement made to the court under this section by or on behalf of the principal protected confider.
- (5) The court must state its reasons for granting or refusing to grant an application for leave under this Division.
- (6) If there is a jury, the court is to hear and determine any application for leave under this Division in the absence of the jury.

### **300 Effect of consent**

- (1) This Division does not prevent the production of any document recording a protected confidence or the adducing of evidence disclosing a protected confidence or the contents of a document recording a protected confidence, in, or in connection with, any proceedings, if the principal protected confider to whom the proceedings relate has consented to the production of the document or adducing of the evidence.
- (2) Consent is not effective for the purposes of this section unless:
  - (a) the consent is given in writing, and
  - (b) the consent expressly relates to the production of a document or adducing of evidence that is privileged under this Division or would be so privileged except for a limitation or restriction imposed by this Division.

### **301 Loss of sexual assault communications privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of a communication made, or the production or adducing of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person

liable to a civil penalty.

- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
- (a) the fraud, offence or act was committed, and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,
- the court may find that the communication was so made or document so prepared.

### **302 Ancillary orders**

- (1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:
- (a) order that all or part of the evidence be heard or document produced in camera, and
  - (b) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.
- (2) Nothing in this section limits the power of a court to make an order under section 106 or 119 of this Act or section 578A of the Crimes Act 1900.

### **305 Inadmissibility of evidence**

Evidence that, because of this Division, cannot be adduced or given in proceedings is not admissible in the proceedings.

### **305A Subpoenas for production of counselling communications**

The regulations may make provision for or with respect to the issue and service of subpoenas requiring the production of a document recording a counselling communication (within the meaning of section 296) in, or in connection with, any criminal proceedings or preliminary criminal proceedings, including the following:

- (a) the manner and time in which a subpoena must be served,
- (b) the form of a subpoena,
- (c) any documents or information that must be included with a subpoena.

### **306 Application of common law**

- (1) This Division does not affect the operation of a principle or rule of the common law in relation to evidence in criminal proceedings, except so far as this Division provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Division does not affect the operation of such a principle or rule so far as it relates to the inspection of a document required to be produced in, or in connection with, criminal proceedings.

## APPENDIX 5: S278.1-278.91 OF THE CANADIAN CRIMINAL CODE

### **278.1 Definition of “record”**

For the purposes of sections 278.2 to 278.9, “record” means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

### **278.2 Production of records to accused**

- (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:
  - (a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or
  - (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.
- (2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.
- (3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor’s possession but, in doing so, the prosecutor shall not disclose the record’s contents.

### **278.3 Application for production**

- (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.
- (2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.
- (3) An application must be made in writing and set out
  - (a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and
  - (b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.
- (4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a

witness to testify:

- (a) that the record exists;
  - (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
  - (c) that the record relates to the incident that is the subject-matter of the proceedings;
  - (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
  - (e) that the record may relate to the credibility of the complainant or witness;
  - (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
  - (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
  - (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
  - (i) that the record relates to the presence or absence of a recent complaint;
  - (j) that the record relates to the complainant's sexual reputation; or
  - (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.
- (5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least 14 days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.
- (6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

#### **278.4 Hearing in camera**

- (1) The judge shall hold a hearing in camera to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.
  - (2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.
- (2.1) The judge shall, as soon as feasible, inform any person referred to in subsection (2) who participates in the hearing of their right to be represented by counsel.
- (3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

#### **278.5 Judge may order production of records for review**

- (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing

referred to in subsection 278.4(1), the judge is satisfied that

- (a) the application was made in accordance with subsections 278.3(2) to (6);
- (b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
- (c) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:

- (a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d) whether production of the record is based on a discriminatory belief or bias;
- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process.

#### **278.6 Review of record by judge**

- (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.
- (2) The judge may hold a hearing in camera if the judge considers that it will assist in making the determination.
- (3) Subsections 278.4(2) to (3) apply in the case of a hearing under subsection (2).

#### **278.7 Judge may order production of record to accused**

- (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).
- (2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.
- (3) If the judge orders the production of the record or part of the record to the accused, the

judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy, personal security and equality interests of the complainant or witness, as the case may be, and of any other person to whom the record relates, including, for example, the following conditions:

- (a) that the record be edited as directed by the judge;
  - (b) that a copy of the record, rather than the original, be produced;
  - (c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
  - (d) that the record be viewed only at the offices of the court;
  - (e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and
  - (f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.
- (4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.
  - (5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.
  - (6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

#### **278.8 Reasons for decision**

- (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).
- (2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

#### **278.9 Publication prohibited**

- (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:
  - (a) the contents of an application made under section 278.3;
  - (b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
  - (c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.
- (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

## 278.91 Appeal

For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law.

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