IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

In the matter of an application for Judicial Review

BETWEEN:

THE QUEEN
On the application of
END VIOLENCE AGAINST WOMEN COALITION

Claimant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

WITNESS STATEMENT OF HARRIET WISTRICH

I, Harriet Wistrich, Director of the Centre for Women's Justice, say as follows:

INTRODUCTION

1. I am a solicitor of over twenty years' experience specialising in challenging failures and discrimination within the criminal justice system.

2. I acted for the two claimants in *DSD and NBV v the Commissioner of Police of Metropolis* which ultimately led to the landmark Supreme Court judgment ([2018] UKSC 11) last year confirming that the police have a duty under Article 3 ECHR to conduct effective investigations into rape and serious sexual assault. I also acted for the same two Claimants in the successful judicial review challenge of the parole board decision to release the serial rapist John Worboys: *R (DSD, NBV & Ors) v The Parole Board & Ors* [2018] EWHC 4949 (Admin). In 2016 I set up a new legal charity, the Centre for Women's Justice (which I refer to in this statement as the "Centre"), with the objectives of holding the state to account around violence against women and girls and to challenge discrimination within the criminal justice system.

3. I make this statement in support of the claim brought by the End Violence against Women coalition, which I refer to in this statement as "EVAW". EVAW is represented by the Centre, of which, as I say above, I am a Founding Director. EVAW

brings this claim in respect of a change of approach by the Crown Prosecution Service (the "CPS") to the prosecution of rape and other sexual offences.

4. Save that I have discussed and considered the content of this statement with my colleagues, I make the following statement based on my own knowledge and belief. Where I have referred to information that is not based on my own knowledge and belief I have stated so expressly, and in such cases I believe the information contained in the witness statement to be true.

5. In this statement I do five things:

    a. introduce as an exhibit the statement of a whistleblower (who I have termed "XX"), who has provided the Centre with a clear explanation of the change in approach which is the subject matter of EVAW's claim.

    b. describe the referrals received by the Centre in relation to the investigation and prosecution of rape and other sexual offences following the change of approach described in that statement, a number of which are summarised in further detail in an attached document;

    c. set out my experience with others who work closely in this sector in relation to the same change in approach;

    d. introduce as an exhibit a 'media bundle' comprising a selection of relevant national news reports which allude to a perceived change of approach to the prosecution of rape and other sexual offences led by the CPS and, in my view, also provide evidence of the degree of public concern that exists about this issue; and

    e. address the CPS's arguments in respect of 'delay', including the relevance of the case of *BT v DPP* [CO/4164/2018], documents relating to which I have also exhibited.

STATEMENT OF XX

6. Attached as Exhibit **HW/4** to this Statement is the witness statement of XX. XX's name and any and all identifying information has been redacted save to state that XX

is employed by the CPS and has specialised in the prosecution of rape and serious sexual offences (so-called RASSO) for a number of years.

7. XX is, in essence, a whistleblower. Due to the lack of transparency on the part of the CPS, the only way in which it has been possible for EVAW to find out the information necessary to bring this challenge has been by way of whistleblower information.

8. I confirm that I have met XX on a number of occasions. I confirm that to the best of my knowledge and belief, XX is indeed employed by the CPS and is a RASSO specialist. I also confirm that I have discussed with XX the possibility of making a statement which would reveal XX's identity. XX has made clear, as is stated in paragraph 4 of their witness statement, that XX is only prepared to make the statement on the condition that XX's identity is not revealed. I understand and respect that position, as it appears to me that there would indeed be a serious risk of repercussions if their identity were revealed.

9. I therefore introduce XX's evidence to the Court by exhibiting it to my statement. I do not repeat the contents of it in this statement, but refer the Court to the statement in full.

CASE STUDIES

10. Since the inception of the Centre, it has received numerous inquiries and requests for help from women who had reported rape or serious sexual assault and felt they had been let down by criminal justice agencies, usually either the police or the CPS.

11. Referrals increased when *The Guardian* newspaper published a series of reports in September 2018, some of which I have included in Exhibit **HW/2**, regarding dramatic falls in the prosecution of rape which appeared to have been associated with a significant and deliberate change in the approach taken by the CPS to making prosecution decisions around sexual offences. That is the change that XX describes in the attached witness statement. In one of the articles published in the Guardian I was quoted as saying that the Centre were preparing a legal challenge, and the news of that spread and attracted further inquiries. The Centre works with frontline advice and advocacy organisations working with victims of rape and sexual assault, training such

organisation to understand the duties of criminal justice agencies and the potential legal remedies when those duties are not complied with.

12. I thought it might assist the Court if I provided some examples of the types of referrals that the Centre has been receiving, from members of the public, from frontline organisations and from lawyers on our reference panel. I therefore provide as Exhibit **HW/1** a 'case studies summary' which contains summary details in relation to 20 different cases of rape/sexual assault that have recently been reported to us and where the complainants have given us consent to share information about their experiences. These are all cases where complainants have wanted, and sought, to challenge decisions made by the CPS not to charge or proceed with a prosecution for rape or other serious sexual offences, falling within the period of the change of policy/practice we have identified in this claim.

13. The approach I have taken in Exhibit **HW/1** is as follows:

    a. In each case, I have provided a short (one-two page) summary of the case, including (where necessary) the underlying incident and the CPS' response to the complaint made.

    b. In each instance I have referred to the complainant only by a cipher. This is because complainants in rape/sexual assault cases are entitled to life-long anonymity.

    c. I am also able to provide the Court and the Defendant with a confidential annex, comprising supporting documents provided to me in respect of each case, such as the relevant correspondence between the CPS and the complainant. However I am concerned that these documents should remain strictly confidential to the parties and the Court and therefore propose that there should be a court order requiring the claimant to disclose the confidential annex only upon the defendant signing an undertaking to keep its contents strictly confidential. Again, this is because of the entitlement of the complainants to life-long anonymity. I do not think such documents should be made publicly available.

d. I have obtained the express consent of each complainant to refer to her case in this way. The women in general have been happy to assist with this judicial review by providing their cases as examples, because they recognise the importance of challenging the CPS' change in policy/practice and also because they recognise that the chances of them obtaining justice in any other kind of way are very limited.

14. With that introduction in mind, it may be helpful if I provide an overview of the types of cases and the potential outcomes for individual victims that emerge from the case studies.

a. Most of the cases date from 2018 (in the sense that that was when the relevant CPS decision not to charge or to discontinue prosecution was taken), and a few a very recent. The earliest decision not to charge which I have included in Exhibit **HW/1** dates from 22nd February 2017 – however, I note this was a decision which was upheld later in 2017 despite seemingly compelling factual admissions.

b. Many of the case studies are cases where the CPS has made a decision not to charge. In these cases, victims often pursue the Victims' Right to Review ("VRR") process. As yet, none of those cases have resulted in a decision being overturned.

c. Others are cases where, following charge, the CPS has made a decision to discontinue the prosecution, the latter usually resulting in a formal acquittal of the defendant which means the case cannot be re-opened (unless exceptional fresh evidence arises and a re-trial is approved under terms set out in Criminal Justice Act 2003). Two of these decisions immediately followed the *R v Allen* case[1] (namely case studies [Anna and Freya] and others were later in 2018. In the cases dropped post *R v Allen* which were stated to be on the basis of disclosure found on devices that was said to weaken the case, it appears that the complainants were not given the opportunity to explain that evidence or to input into the irreversible decision to drop the prosecution (despite, in my

[1] A high profile case in which a prosecution for rape was discontinued following the disclosure of evidence to the defence.

view, having compelling explanations for the evidence found on their devices). Some of these complainants have pursued VRRs themselves, but these will not result in the re-opening of the case as I have already described.

15. There are a range of different decisions in the referrals I have seen. I do not comment on the strengths and weaknesses of individual decisions, which may vary, but draw out a number of common themes across those referrals.

16. **First**, the test for bringing a challenge to a decision not to prosecute and in particular a VRR decision by way of judicial review is very narrow. In many cases, judicial review is incapable of solving the issue for an individual claimant, particularly where the decision not to prosecute has happened post charge, but also where the suspect has died or left the jurisdiction. It is therefore, in my view and from the experience I outline above, very difficult for individual claimants to challenge the decisions being made in individual cases.

17. **Second**, in the majority of such cases, when the individual complainant is informed that no prosecution is to be brought, they are also told that this is <u>not</u> because their account has been disbelieved. When considered at a systemic level, this is problematic, as it suggests that a significant number of rapes are accepted as likely to have taken place by a known offender, but they are not being prosecuted.

18. **Third**, the drafting of individual, CPS decision letters often does not make it easy to determine whether a "merits-based approach", or at least an approach that is objective, and clear of stereotypes has been applied to the case, or whether a "bookmaker's", predictive approach has been taken. However, there are some instances where it would appear that there is at least a very strong risk that the latter approach is being taken. I set out some examples below:

    a. The Court will see that in case study number [13], a woman (Marie), who had made allegations of historic sexual violence committed against her by an ex-partner in the context of an abusive relationship, was told in a meeting with the decision-maker and his line manager (both RASSO prosecutors) that: "*The decision not to prosecute in this case is not based upon us not believing your account. Often, I have to ratify evidential decisions not to prosecute when I know that the complainant is telling the truth*". The prosecutors then

went on to add that "*juries are always very circumspect in terms of dealing with cases such as this because ... they are cases where there is often an absence of supporting evidence ... We have to a certain extent forecast what twelve members of a jury might think about all of the evidence*". This appears to me to stray into the 'book-maker's approach' by basing a charging decision on the views commonly taken in 'consent' cases by a hypothetical jury, even if those run contrary to the view taken on the evidence in the particular case by a number of well-informed prosecutors sitting in the room. The assumption appears to be that prosecutors cannot prosecute a case if it was forecast that a jury would be cautious based on the nature of the case, regardless of the view that they themselves took of the evidence.

b. Likewise, in a number of the case studies, it appears to me that CPS decision-makers have relied in their reasoning – at least in part – on myths and stereotypes about the behavior of rape victims, about which juries are now expressly warned in standard judicial directions. Examples include:

   i. In case study number [4], a schoolteacher (Daphne) had been sexually assaulted by a colleague after a school Christmas party, and later received an apology from the accused. Following a VRR process the CPS justified its decision not to prosecute with reference to Daphne's intoxication; and the fact that she did not appear to have "*protested or left the flat immediately after the incident*".

   ii. In case study number [9], a woman (Imogen) was told that a jury would not be sure that it could believe her account as (a) she was in a relationship with the suspect and there was evidence they had *"enjoyed an adventurous sex life"* prior to this incident; (b) she had been naked at the time and some aspects of the encounter appeared to have been consensual; (c) she had submitted to intercourse *"without protest or sound"*; and (d) she had made "*previous allegations of rape and sexual assault which were not pursued*".

   iii. In case study number [12], a woman (Louise) was told by the CPS that a jury could not be sure that she had been raped because of: (a) a text message she had sent to a friend in which she said that she *"finally gave*

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into the sex" after being assaulted by her husband; and (b) she had told the police that she felt there was "*no point fighting*". She was told that in these circumstances it would be unclear to a jury whether she was consenting.

19. **Fourth**, in a number of other cases, complainants have been given information which suggests that the CPS were reluctant to proceed without directly corroborating evidence, despite the requirement for corroborating evidence having been abolished by Parliament in s.32 of the Criminal Justice and Public Order Act 1994, which applies to sexual offences as it does to any other offence. Given the circumstances in which the overwhelming majority of rapes take place, it is clear that there often will be no independent witnesses or other evidence on the central issues in dispute.

20. This is an issue that I understand the Divisional Court in *B* was very anxious to ensure was avoided. In rape cases, corroboration requirements are particularly problematic given the number of cases for which that can be an issue. Moreover, it has a disproportionate impact on women given that they make up the overwhelming majority of rape victims.

21. **Fifth**, I have found that even when prosecutors correctly state the principle in their decision letter – namely, that corroborating evidence is not a requirement to charge and a credible account from the complainant may be sufficient – they are often then placing a great deal of weight upon what in my view are objectively minor points concerning a complainant's credibility. Heavy reliance is often placed on extraneous factors like the fact of a complainant was on mental health-related medication, or had recovered memories of traumatic events during counselling; on complainants having once misrepresented or having provided inaccurate information about something, even if there is no evidence specifically suggesting that the complainant lied about the rape itself or had a motive to lie about the rape. For example, returning to case study [13] , one point which the prosecutors indicated to Marie that they may take into account (by way of example) was the existence of comments in school records suggesting that the complainant had fabricated things in the past.

22. The sample cases also include examples of cases dropped even where there was evidence which strongly supported the suspect's account: such as evidence of injuries (see e.g. case studies [1] (Anna), [3] (Charlotte), [12] (Louise) and [13] (Marie)); an

admission or partial admission of wrongdoing by the suspect (see e.g. case studies [1] (Anna) and [4] (Daphne); an arguable pattern of behaviour which could form the basis of a bad character application (see e.g. case study [14] (Nina)); or even, in some of the most troubling cases, evidence that a weapon was produced (see case study [1] (Anna) and [17] (Zoe). This is the type of approach that, as I understand it, the merits-based approach cautioned against.

23. **Sixth**, a common trend in the cases is the heavy reliance by the prosecutor on the possible interpretation of selected telephone or online messages downloaded by the police from the complainant's mobile telephone and on what messages might say about a complainant's attitude to sex (or to certain types of sex), to drinking, to the suspect, and so on. While messages exchanged between the parties, or about the incident, may of course in some cases be relevant and liable to be disclosed, it is very notable from the case studies I have seen that weight appears to be afforded to complainant messages whose relevance/importance to the case is seriously contestable by the prosecution at trial, while in hardly any of the cases was there any reference by the prosecutor to the possibility of interrogating the suspect's phone for evidence that might support a prosecution.

24. In one particularly concerning example of this (see case study [18] (Sophie)), a young woman's case was discontinued before trial and the suspect formally acquitted in court on the basis of a draft text message/note found on her mobile telephone suggesting that she had considered expressing romantic feelings to another man in her life at around the time of the alleged rape, which – it was said – was inconsistent with the impression she had given in her ABE interview that she was not interested in a sexual relationship at the time. The complainant was informed of the decision to discontinue after the fact, and has also learned from the police officers in her case – who remained supportive of prosecution – that they were not informed of the decision until the eve of the Crown's application to offer no evidence in court, and were not invited to express their views. The complainant in that case – who was adamant that this was not what she had meant in her ABE interview – has since obtained the transcript of the interview itself, which appears to confirm that in fact she had stated clearly that she did not want a sexual relationship with the suspect in particular, and not that she was uninterested in pursuing a sexual relationship with any other man.

Other examples of this include case studies [1] (Anna), [3] (Charlotte), [5] (Emily), [6] (Freya) and [11] (Katie).

25. The overall credibility of a complaint is of course an issue for a prosecutor to consider. Yet in every case I have reviewed where a prosecutor had decided there was 'undermining evidence', however minor, relating to the complainant's credibility, the complainant herself had no known bad character, and in many cases the suspect had been the subject of a number of previous complaints of violence, sexual violence or harassment towards the suspect or other women. In some case study allegations had been made against the same man within a short period of time [see case study [16] (Penny). Penny had accused her husband of raping her on multiple occasions during the breakdown of their relationship, when they were still co-habiting, as well as of coercive and controlling behaviour. While Penny's husband was on bail for the rape offences against Penny, he was accused of raping another woman. The two respective complainants did not have any connection to each other. The CPS decided, however, not to proceed with either complaint. Amongst other things, Penny was informed by the prosecutor who made the decision that a jury might think if she did not want her husband to force her into intercourse without her consent, she should have locked her bedroom door.

26. Some cases quite simply seemed to assume a 'lower' definition of consent and of reasonable belief in consent than exists in the law. I have already mentioned case study [12] (Louise's case) above. That is, in my view, a particularly concerning decision, since no evidence was identified at all to undermine the complainant's credibility but the CPS nonetheless concluded that since Louise had said to a friend that she had "given in" to sexual intercourse after being repeatedly assaulted and cornered by the suspect, and in front of her two children under three, she had admitted that he might have reasonably believed in her willing consent).

27. Since preparing the case studies summary at Exhibit **HW/1** some additional cases have come to the Centre's attention which I did not have time to include, but which also seemed to me to have involved decision-making that was concerning, including one case in which a lack of conclusive forensic evidence had been relied upon as a reason not to prosecute despite evidence from more than one witness which ostensibly disproved the suspect's account of his whereabouts at the time in question.

28. From the witness statements of XX and Sarah Green, and from my experience in this field more generally, my understanding is that it was due to the concerns outlined above, following the Divisional Court's clear direction in *B*, that the CPS introduced the 'merits-based approach' for rape cases, which encouraged prosecutors to consider in applying the Full Code Test how a case for the prosecution could be further built between charge and trial, with the benefit of input from specialist RASSO prosecutors, to overcome the usual issues that plague rape cases – like the absence of direct independent evidence to assist in relation to consent, and the suspicions that juries may have about the credibility of rape complainants in a range of scenarios. While the number of case studies I have referred to is relatively small, and not all of them raise precisely the same issues, taken in the round they do in my view indicate that there is a real risk that such an approach is being applied in these cases – whether directly or otherwise (insofar as the prosecutors dealing with these cases are no longer being told that they should interpret the Full Code Test in line with the merits based approach).

29. In all the cases which have not been charged or where prosecutions have been discontinued, the women concerned have been distressed if not devastated by the decision. As is well known, the majority of rape victims (approximately 85%) do not report rape at all, often because they cannot face going through the criminal justice process and because they fear they will be judged or disbelieved. Supporting a police investigation and potential prosecution, according to the women I have worked with, is often traumatic, invasive, time consuming, hugely inconvenient and sometimes terrifying (where repercussions are feared). Aside from the very serious harm that is done to victims when their cases are dropped, the simple fact is that when rape cases are not prosecuted, rapists go unpunished. In the facts that emerged around the serial offender John Worboys, we discovered that a total of ten women reported his crimes before a decision was eventually made to charge him. In those cases, the police made a series of assumptions about the women's allegations and did not pursue him. The sorts of assumptions made are not dissimilar to those that can be seen in the series of case studies I have now assembled. Before Worboys was eventually charged with any offences, he was free and indeed emboldened to continue his campaign of rape and sexually assault with a sense of impunity. Many women have suffered lifelong harm as a consequence of the earlier police failures. It is difficult to distinguish the

sorts of decisions that were made in the Worboys case from those made in the case studies exhibited to this witness statement.

THE APPROACH OF THE CPS AND ITS EFFECT ON THE BROADER SYSTEM

30. Alongside the legal work undertaken by the Centre, the Centre is an active participant in the women's sector. Firstly, the Centre operates a programme of legal training for Independent Sexual Violence Advisor ("ISVAs") services and other frontline organisations that provide support for rape victims. Last year, I addressed Rape Crisis England and Wales about the work of the Centre, while my colleagues provide trainings at individual rape crisis centres and other organisations. We also frequently provide tailored 'second-tier' legal advice in circumstances where ISVAs and other advocates seek our assistance on individual cases: for example, where a service-user that they are supporting has reported sexual offences to the police and needs advice regarding the police or CPS' actions following that complaint. Members of our team sometimes advise on issues arising from these cases directly, or in other instances we may offer to refer the cases to a member of our external legal references panel.

31. There are two themes in particular arising out of this collaborative work.

32. **First**, there is a universal and overwhelming concern in the sector relating to the drop in the number of cases being taken forward by both the police and the CPS. I have worked in this sector for many years, and as such am well aware that difficult decisions are often required to be taken in respect of the prosecution of rape cases. For many years, including during the application of the merits-based approach, difficult decisions were made that I would not always agree with. However, now, the concerns are much more deeply held both with respect to the huge drop but also the failure to address it. I have set out above the themes emerging from those cases in the Centre's direct experience.

33. **Second**, a further theme emerging from my discussions and experience within the sector is that the change in approach that has taken place within the CPS appears to be having major repercussions at the level of police decision-making as well.

34. To put these changes in context, it may first of all be helpful to set out the structure of decision-making at the pre-charge stage:

a. First, the police will receive a complaint. Assuming that a victim and a recordable offence are identified, the police must record a crime, and investigate it. For the avoidance of doubt, sexual offences are recordable offences.

b. During the police's investigation there may be early consultation with a specialist RASSO prosecutor at the CPS. The CPS' legal guidance on Rape and Sexual Offences states that in rape cases in particular, early consultation is essential and the investigating officer should arrange an early consultation with a rape specialist prosecutor. The CPS may, during this process, provide the police with 'early investigative advice'. In those circumstances, the CPS do not take a formal decision, but can indicate to the police what further evidence or 'case-building' would be necessary to bring the case to charge, and indeed can provide an indication of whether the case is likely to be charged at that point. This is not the same, in procedural terms, as a CPS charging decision.

c. If the police formally refer the complaint to the CPS for a charging decision, the CPS can then make one of the following decisions: (i) to charge the defendant; (ii) to take no further action; or (iii) to seek more information from the police before making a decision. In relation to the final category, if the CPS decide to seek more information, and nothing further is received, this case may be categorised as 'administratively finalised' in the CPS' system.

d. If the CPS decides to take no further action, it is open to the complainant to pursue a Victims' Right to Review.

35. By far the most common observations identified from our recent work with ISVAs and, since 2018, our own second-tier advice service, are:

a. That it appears to be increasingly rare for police officers to refer cases involving rape or other serious sexual offences to the CPS for a charging decision (as distinct from a referral for early investigative advice which appears to be continuing);

b. That, instead, the police are very frequently deciding to take no further action: in other words, neither to refer to the CPS nor to charge. Indeed the vast majority of case referrals received by CWJ itself from ISVAs since 2018 have been cases where a decision has been made not to proceed with a rape complaint by the police, rather than the CPS;

c. According to many ISVAs and others within the sector, this represents a marked, recent trend, with many commenting that they have been surprised by the number of cases being decided by the police rather than by the CPS.

36. Notably, the Director's Charging Guidance requires that once police officers complete an investigation they should only refer a case to the CPS if they consider that there is sufficient evidence to proceed, although it also cautions that where cases are serious (or complex) it will be appropriate to refer to the CPS. The CPS Policy for Prosecuting Cases of Rape notes that rape is one of the most serious of all criminal offences. It can therefore only be assumed that if the police are no longer routinely referring rape and serious sexual offences to the CPS it is either because they are under the impression that they are not required to do so – despite the inherent seriousness of these cases – or that they are much more frequently concluding that the evidential threshold of the CPS' Full Code Test has not been met.

37. During the training sessions run with ISVAs, a number of ISVAs have disclosed that the police commonly refer explicitly to the CPS' risk-averse approach (or perceived approach) in justifying their decisions not to prosecute, and have led ISVAs to understand that a decision to NFA has been made either because they anticipate that the CPS will not wish to proceed with the case or because they have received express early advice from the CPS to curtail the investigation. By way of example:

e. At a recent training with one Rape Crisis Centre in the South East of England, ISVAs reported that they are frequently being told by the police that they are now routinely seeking early investigative advice ("EIA) from CPS, and then in the course of the EIA prosecutors are telling police officers that the cases are 'going nowhere' and should not be referred to the CPS. Police officers are then NFA-ing cases on the basis of this advice, often without investigating

further lines of enquiry. As a result they are effectively omitting the 'investigation' and 'case-building' stages of a criminal investigation required under both police and CPS guidance.

f. Whether intentional or not, it therefore seems that prosecutors are now using the EIAprocess for the exact opposite purpose, or in any event with the exact opposite outcome, from that intended when the concept of EIA was introduced, which was to help police identify lines of enquiry and build stronger cases *before* referral to CPS. Instead, the ISVAs' experience was that prosecutors were using EIA to close down investigations and reaching a view on merits at an early stage – before all available lines of enquiry have been pursued, *and* without making a 'formal' charging decision applying the Full Code Test – so as to reduce the number of cases referred. As a result, complainants are being told by the police that the case is NFA'd on the basis of CPS' advice, but because it is being recorded as a police 'NFA', complainants are not being offered a CPS VRR because the case was never formally referred to the CPS for a charging decision. This new trend is further confirmed by my colleague Nogah Ofer's review of cases referred to us following police NFA, which similarly flagged a number of concerning cases which had been NFA'd by the police who cited early investigative advice from the CPS.

g. We also received a case referral from the same Rape Crisis Centre, involving a woman who has now reported that in 1992, at the age of 12, she was raped by a priest. Her ISVA had been told expressly by a police officer that "EIA is used so we do not build a full file".

h. Another member of Centre staff when providing training recently to an ISVA service in the South West of England, was informed by an ISVA that she had recently seen her clients' cases recorded, purportedly investigated, and then NFA'd, by the police within days, in her view without obtaining all of the evidence that could be available. The ISVA had been told by the police that the CPS had recently told them to do a quick, "bare bones" investigation to get to what they think is the "nitty gritty" of the case and then drop cases that

seem challenging without wasting further time. She had also heard from the police that they were not encouraged to follow case-building guidance.

38. One detective sergeant I spoke to on behalf of a client, whose complaint of rape he had just NFA'd, told me:

'I was a DC for a number of years doing sex offence cases – things have definitely changed – they did sometimes charge in cases of one person's word against another if they felt the complainant was credible. Now they are much more cautious in consent cases – since R v Allen'.

39. In relation to the same client's case, my colleague, Ms Ellis, was told by the investigating officer who had been working on SOIT cases for a number of years, that it had "*definitely*" become more difficult for the police to secure a charging decision from the CPS since 2017. The Detective Sergeant present at the meeting also stated to Ms Ellis that the CPS "*had been burned too many times*" and had introduced changes to avoid being "*caught out again*" when cases did not succeed at trial.

40. We have good reason to suspect that a similar approach is being taken in other areas of the country, as we are frequently receiving enquiries from ISVAs and members of the public about cases that have been dropped by the police in which the police have claimed that the CPS have provided negative advice at an early stage, and that as a result of this advice the police have decided not to investigate any further. Indeed, we are frequently hearing from some regional ISVA services that most cases are not even being referred to the CPS for a charging decision and are instead being NFA'd by the police. This is a concerning change in itself, as it suggests that responsibility for decision-making under the Code for Crown Prosecutors – even in challenging rape and serious sexual offences cases – is increasingly being delegated to the police, where traditionally it would have been more common for such decisions to be made by specialist lawyers.

41. Finally, although the majority of the case studies to which I have referred in the attached Exhibit **HW/1** concern negative charging decisions which have been made by the CPS after a referral from the police, CWJ has received referrals of at least as many cases of concerning decision making in which the police have made the 'NFA' decision without even formally referring it to the CPS, either after anticipating or receiving negative CPS advice.

42. Clearly, there will be other factors at play which affect the approach that police forces in any particular region take with respect to their cases and the success of that approach. It does appear however from all of the information I have seen that where decisions are being made not to proceed or refer cases to the CPS this is often being attributed by police officers themselves to a strict or increasingly risk-averse approach by the CPS which is effectively deterring or 'gate-keeping' a large number of complaints from even being reviewed by a prosecuting lawyer. Certainly this is consistent with public reports indicating that some police officers have openly spoken about a perceived change in the evidential standard required by prosecutors in rape and serious sexual offences cases. On the 2nd November 2018 for example, the *Independent* newspaper reported that at least two senior police officers had raised concerns of prosecutors 'raising the bar' on the level of evidence required before a rapist could be charged. Putting this in the wider context of the collapsed rape trials scandal in late 2017, the article reported that the then vice chair of the NPCC (and former national lead for sexual offences) Martin Hewitt had stated at a national conference that the police, prosecutors and judges had been responding "*cautiously and nervously*" to rape allegations since 2017. It also quoted Assistant Chief Constable Ben Snuggs of Hampshire Police stating that the bar for charging had started to "feel very high" and said "I'm concerned about the impact that may be having on victims' confidence". Finally the article reported that Dame Vera Baird, the APCC lead for victims, had disclosed that whistleblowers from inside the CPS had claimed they had been encouraged to drop 'weak' cases to improve conviction rates.

43. I have provided this report as part of the attached Exhibit **HW/2**.

DELAY

44. I address here the reasons why we have not been able to issue proceedings before now.

45. In September 2018 Sarah Green, Director of EVAW, alerted me to the fact that journalists at the *Guardian* newspaper had been investigating the apparent decline in the rate of rape prosecutions with a view to releasing a series focusing on rape and the criminal justice system. She informed me that the *Guardian* series would be likely to reveal intelligence concerning a controversial training 'roadshow' that had been

taking place in RASSO units around England and Wales, led by the then Principal Legal Advisor and the Director of Legal Services personally, which allegedly suggested to frontline prosecutors that they remove 'weak' rape cases at the charging stage and reminded them of the need to improve conviction rates. Ms Green informed me that this was consistent with reports she had herself received from people working within the CPS whom she had met through her involvement in the CPS VAWG strategy meetings. This included XX, who had attended one of the RASSO training roadshows mentioned. From her discussions with XX and others, Ms Green suggested that there appeared to have been a decision to withdraw from the 'merits-based approach' to prosecution decisions in rape and sexual offences cases. This was the first indication that I received that there might have been a deliberate change in policy at the CPS in relation to its approach to charging rape cases.

46. As indicated above, this information seemed to chime in with the series of enquiries and third party referrals CWJ was receiving from rape survivors who were distressed and concerned by recent CPS decisions to either not charge their cases or discontinue prosecutions sometimes where evidence seemed very compelling and the alleged perpetrator potentially very dangerous and/or a repeat offender.

47. On the 13th September 2018, my colleague, Ms Ellis, and I met with a woman who I intend to refer to in this witness statement as 'BT'. She was a complainant of rape who had received notice in January 2018 of a decision by the CPS not to charge her attacker with any offence. BT had been particularly shocked by the decision in light of the fact that in a Facebook message exchange she had confronted him with the substance of the allegation – that he had penetrated her with his penis while she was asleep, without obtaining her consent – and he had responded in apologetic terms. The CPS had informed her that it was not prepared to proceed, because the accused had subsequently claimed that he did not know (or verify) whether she was asleep, and his Facebook messages were arguably capable of supporting an interpretation that he 'stopped' when she indicated she wanted him to stop. BT had pursued an appeal of the decision not to prosecute under the Victim's Right to Review and had been informed in July 2018 that she was unsuccessful. She was therefore still in time to judicially review that final decision if advised that there were grounds to do so.

48. We were mindful that the 3-month limitation was due to expire in her case on the 11th October 2018. We agreed to review her case, instruct Counsel, and send a letter before action to the CPS, on grounds that the decision not to prosecute had been unreasonable or irrational and/or represented a failure to follow its own policy around the meaning of consent.

49. At around the same time, on the 24th September 2018, the *Guardian* published its anticipated piece revealing the allegations that had been made about the CPS' recent RASSO training 'roadshow' for prosecutors and that the message delivered at this training appeared to represent an 'undeclared change in policy'. The article, which is provided among the news articles attached to this statement as Exhibit **HW/2**, approximately coincided with the release of the CPS' latest VAWG report, which appeared to provide further evidence of a steady, significant decline in the charging rate over time.

50. By letter dated 4th October 2018, the CPS indicated that they would not overturn the VRR decision in BT's case. On 11th October 2018, BT therefore issued a challenge by way of judicial review. The application challenged both the individual decision in BT's case but also the application of an unlawful secret policy directing prosecutors to apply the bookmaker's approach rather than the MBA. This challenge arose from the content of the Guardian articles.

51. The Director of Public Prosecutions (the "DPP") was requested to provide disclosure of material relating to the reported changes pursuant to his duty of candour, and the court was requested to direct that the claim be stayed pending that disclosure. In the meantime, the *Independent* newspaper published the article that I have referred to at paragraph 41 above (and provided in Exhibit **HW/2**), alluding to concerns raised by senior police officers regarding a perceived change of approach led by the CPS.

52. Due to issues around the court's service of the sealed claim form, rather than through any fault of the CPS, the DPP's Acknowledgment of Service and Summary Grounds of Defence were not served on us until mid-December 2018. In summary however, the DPP denied any secret change in policy and therefore accordingly that he was under any duty to make disclosure in response to the allegations made in the

Guardian article. He relied upon an attached witness statement from the prosecutor within the Appeals and Reviews Unit of the CPS who ultimately reviewed BT's decision, in which it was asserted that the prosecutor in question was not aware of the trainings referred to or of any change in policy. The Summary Grounds of Defence also asserted that the allegations made in the *Guardian* article amounted to *'inaccurate anonymous multiple hearsay'*. It stated that this combined with the ARU prosecutor's witness statement amounted to *'a total answer to this claim'*.

53. The DPP's response conflicted with the information we had by then received from various sources, and indeed with the numerous representatives of policing bodies quoted in the *Independent*'s coverage.

54. Therefore on the 19th December 2018 we applied to the court for a stay of proceedings to enable the Claimant to gather and submit evidence rebutting the Defendant's denial of the existence of an undeclared policy at the time of the decision in BT's case.

55. However, by order dated the 21st January 2019 the court refused BT's application for a stay of proceedings and refused permission in the case. At this time despite steps having been taken to gather evidence to explain or shed light on the reasons for the stark contradiction between the Defendant's position with respect to a secret policy and the evidence contained the Guardian article, the evidential picture was far from complete. The decision was taken therefore not to renew the application for permission.

56. I attach as Exhibit **HW/3** the documents in BT's proceedings to which I have referred in paragraphs 49 to 54 above.

57. Despite the blanket denial by the DPP of an adoption of a secret policy, EVAW remained deeply concerned about the contents of the Guardian article, the growing feeling in the women's sector that there had been a change in approach, as described above, and the information it had heard from XX. All this evidence strongly pointed to there having been a significant change within the CPS to the application of the charging test.

58. We were instructed by EWAV to continue to gather evidence in order to try to understand precisely what had happened within the CPS with regard to the application of the Full Code Test and in particular the merits based approach and the apparent contradiction between the DPP's position and other evidence. Despite at all times acting with expedition, this exercise has necessarily taken considerable time.

59. In particular it has been necessary to consider whether, in the event that there has been no change in policy, for example through the secret adoption of a bookmaker's approach, there have nonetheless been changes that have resulted in a change in practice on the part of individual prosecutors such that they are no longer applying the merits based approach. Evidencing a change in practice is a much more difficult exercise, not least because exactly what had taken place within the CPS lies exclusively within the Defendant's knowledge. XX has provided very helpful information but was for some considerable time understandably reluctant to give evidence for the purpose of a judicial review. Moreover, to determine whether there has been a change in practice requires evidence as to how those events and changes within the CPS have been acted upon by prosecutors. Accordingly, we have sought to build the evidential picture through multiple different channels including through the instruction of a statistician. Her ability to provide meaningful evidence is however dependent upon the nature and quality of the CPS data. It has been possible to source some data through FOIA requests and other important evidence has only been forthcoming as a result of pre-action requests for disclosure.

60. As to the former, in March 2019 Ann Coffey MP was at last met with a response to her FOI request showing year-on-year rape charging data from 2013-14 to the present date, including from the first two quarters of 2018-19. We also increasingly started monitoring data relating to 'administratively finalised' cases so that these could be distinguished from cases in which the outcome was charge or NFA.

61. Between April and June 2019 we sought more formally to identify how ISVAs and rape crisis centres might be able to add to the evidential picture.

62. By June 2019, we considered that the evidence gathered was sufficient to indicate that there had either been a change in the CPS policy or that there had been events and changes that had led to a change in practice. We considered it appropriate to send an unusually detailed letter before action with extensive references to sources and evidence gathered in order to provide the Defendant with a fair opportunity to respond. In that letter we sought extensive disclosure of material exclusively within the possession of the CPS that we considered necessary to a determination of the issues. We did not consider it proper to issue a claim before that evidence was provided and we had an opportunity to assess its impact on the claim.

63. We received the CPS' response on the 24th June 2019. As the CPS is aware, almost no disclosure was provided with that response letter and it was only after three subsequent letters on behalf of our client that the CPS provided more substantial tranches of disclosure, the latest of these being sent by the CPS on the 22nd August 2019. That tranche was in excess of 900 pages and was provided by the CPS with very little in the way of accompanying explanation as to its contents. Since that date we have acted as promptly as possible to consider this disclosure, prepare a detailed Statement of Facts and Grounds of Judicial Review, and draw together the significant amount of evidence we have gathered from individuals and organisations in preparation for filing. We have also had to liaise with all individuals who have provided confidential evidence – including the numerous rape survivors who have provided their case studies – to ensure that anonymity is protected where possible. Finally, in August 2019, we also became aware that further data and information was likely to shortly be published by the CPS in relation to the prosecution and charging of rape and other sexual offences for the year 2018-19. That data was indeed published, in the form of the CPS' 2018-19 VAWG Report, on 12 September 2019. Since publication of that report we have sought to consider the most recent data as swiftly as possible. Our expert statistician has also produced a supplementary report dealing with that data, which accompanies the claim.

64. Thus while there has been delay since EVAW first became aware of a possible change of charging policy by the CPS in late 2018, it was not possible to evidence such a change and/or a change in practice any sooner than now. Moreover, it has been necessary to undertake an enormous amount of time-consuming work in

gathering evidence in this case. I respectfully submit that the Claimant has done so as promptly as possible and that such delay as there has been has been entirely reasonable.

APPLICATION FOR A COSTS CAP

65. In addition to providing the above information I wish to provide evidence in support of the Claimant's application for a cost capping order.

66. I will first address the Claimant's own legal costs and disbursements (actual and estimated), and explain the nature of the funding agreement with our client. I will then address the Defendant's estimated costs. I hope that this information will assist the court in understanding the risks that have already been made by the Centre for Women's Justice to protect the Claimant in recognition of the limited funding available; the likelihood that an adverse costs order would be beyond our client's means to pay; and the reasons our client is seeking an asymmetrical costs cap that allows the Claimant's legal team to recover a fair proportion of its costs.

67. In my experience as a public law solicitor, a Claimant's legal costs and disbursements alone – that is, excluding adverse costs – from the initial building of a case through to trial can easily exceed £100,000 + VAT if (i) the material relied upon by the parties is likely to be substantial and (ii) any preliminary hearings are necessary prior to trial, for example to determine costs or costs capping applications; applications for disclosure; or for the Claimant to renew an application for permission. Any of the aforementioned applications could arise in the present proceedings. As a minimum, our client's costs capping application will need to be determined at a hearing after the permission stage since the Defendant has thus far indicated that it will contest it.

68. Furthermore, even with significant care being taken not to duplicate work or time recording where possible, solicitors and Counsel have already incurred an enormous amount of billable time in preparing this challenge. This has been unavoidable. Earlier efforts over the course of 2018/19 to obtain information and acknowledgment from the Defendant regarding the matters claimed in this application for judicial review have been met with resistance, and the consistent message from the CPS has

been the denial of any change in approach. As I hope my statement indicates, it has taken several months of research to gather the evidence upon which the claim rests, working with a wide range of sources including: our client's own staff; representatives of other stakeholder organisations who have attended meetings with the Defendant or his colleagues; reviewing material published by the Defendant and by other third parties; online archives; the witness known as 'XX', and other 'off the record' professionals working within the criminal justice system; survivors and their independent sexual violence advisers; multiple data sources and statistical experts; as well as multiple Freedom of Information requests. This extensive investigative work proved entirely necessary in order to (i) resolve factual matters that were extremely unclear absent a transparent response from the Defendant, and ascertain whether our Claimant had a case; (ii) enable Counsel to advise, properly, on the merits of the case; and (ii) enable our client to clarify in pre-action correspondence – insofar as possible – precisely what information the Defendant has and is obliged to disclose to us pursuant to his duty of candour.

69. The Centre for Women's Justice was formally instructed to prepare this challenge on the 9th May 2019. While we have not yet generated a bill, we estimate that time spent within the solicitors' team alone – through the pre-action correspondence, the disclosure stage and the preparation of the claim – has exceeded 250 hours. At standard private rates this would equate to total profit costs in excess of £60,000 exclusive of VAT, even with the majority of these hours being billed by the junior solicitor at a junior solicitor's rate. Our junior solicitor's hourly rate is £200/hour exclusive of VAT, while mine as a senior solicitor is £375/hour. Paralegals have also assisted with the preparation of this case, which would normally be charged at a rate of £50/hour exclusive of VAT.

70. The Counsel team's combined hours to date are approximately 152. We initially instructed two Counsel but later had to instruct a third as there was too much work for one Junior Counsel to undertake alone. Their normal hourly rates are £750/hour + VAT for Leading Counsel, £175 + VAT for First Junior Counsel, and £125 + VAT for Second Junior Counsel. This means that their total combined fees to date are approximately £80,000 + VAT.

71. If our client is granted permission on the papers, and the case proceeds relatively swiftly to trial without the need for further hearings – besides the costs capping hearing – then I would expect that the Claimant's legal costs from issue of the claim up to trial are unlikely to be as substantial as the Claimant's pre-action costs, but it seems fair to assume that they could be relatively substantial, bearing in mind that the pleadings and evidence served by the Defendant in contesting the claim after permission is granted may be complex. I would expect therefore that the Claimant's overall, total legal costs up to trial if billed at private rates – encompassing the billable hours already incurred by solicitors and Counsel and the billable hours likely to be incurred by both up until trial – could easily be in excess of £180,000. This is based in part on a staged estimate of hours up to trial provided to us by Counsel, which is necessarily approximate.

72. As regards disbursements, our statistical expert's invoiced fees to date are £5,000. It is likely that some further work may be necessary at a lesser fee to supplement her report if further disclosure is provided by the Defendant or significant new data becomes otherwise available. This is not, therefore, a final figure. Finally, court fees up to trial will be at least £924 (encompassing the initial application for permission and any continuation fees), and may be in excess of £1,000 if any further applications are necessary. It is not anticipated that any further significant disbursements are likely to be necessary but additional costs will be incurred for reprographics and travel, for example. We would therefore estimate that total disbursements up to trial could be approximately £10,000.

73. EVAW has instructed the Centre for Women's Justice under a 'no win no fee' Conditional Fee Agreement, so if our client loses the claim and a costs order is made in favour of the Defendant we will find ourselves in the position of recovering none of our profit costs and disbursements. As the Centre is itself a charity this 'loss' will have to be taken into account in our budget going forward. We have nonetheless taken on this risk because we are a strategic legal charity and we consider this to be a meritorious case, of very significant public interest, central to our core aims and objectives, which cannot be resolved without litigation.

74. I have not been furnished with an estimate of the Defendant's costs to trial but the Defendant's solicitors have indicated in correspondence by way of indication that his costs to date including disbursements are approximately £20,000 excluding VAT. I would expect based on this estimate of costs to date, and the volume of material to be considered in these proceedings, that their legal costs including Counsel's fees are likely to exceed the cap sought by EVAW (of £30,000). I would respectfully submit however that a reasonable estimate of the Defendant's costs is likely to be very significantly less than the Claimant's legal costs, given the additional months of work that has been undertaken by the Claimant's legal team in investigating this claim. It seems likely, in conclusion, that the Defendant's likely costs up to trial will be less than the Claimant's legal costs but more than the cap the Claimant is seeking.

75. For the reasons set out in the statement of Sarah Green, on behalf of EVAW, the Claimant cannot be liable for more than £30,000 in costs without jeopardizing the future of the organisation. I refer to her account that the Claimant will be unable to pursue the challenge in the event that a higher costs cap is imposed.

76. In all of the above circumstances, I invite the Court to grant a costs capping Order capping the Defendant's recoverable costs at £30,000. By way of reciprocal cap, the Claimant's entire legal team has offered to cap the Claimant's own legal costs at Treasury rates, which are significantly lower than private rates. It is understood that the current rates for Treasury solicitors range from £170 to £260 per hour dependent on experience, with an hourly fee for administrative staff of £110 per hour. Counsel's rates are understood to range from £80 per hour to £120 per hour for Junior Counsel, with a standard fee of £180 per hour for Leading Counsel (Silks).

77. This would therefore mean a reduction in fees across the legal team – particularly for Counsel – while still allowing them to continue with all reasonable work up to trial, and a significant reduction in the costs that the Defendant could be ordered to pay in the event the claim succeeds. The Claimant's legal team are willing to accept such a reduction to their costs only because they firmly believe that there is merit in this claim and that it concerns matters of particularly wide and significant public interest. Such a cap is fair as between the parties and will also ensure that the important matters of public concern raised by this claim can be resolved in the public interest.

Statement of truth

I believe that the facts stated in this witness statement are true.

Signed .....

Dated .....19/9/19.....