

Version history

Course Title	RASSO Refresher (2016)		
Creator(s)	[REDACTED]		
Version	Date	Reviewed By	Summary
1.0	24 Mar 2016	[REDACTED]	
2.0	4 Apr 2016	[REDACTED]	
2.1	15 Apr 2016	[REDACTED]	
3.0			
4.0	oct 2016	[REDACTED]	update re Code section

Aims & objectives

Aims of course

To:

ensure continuing awareness of and compliance with CPS Rape and CSA Policy

ensure an overall consistent approach across the CPS in relation to the handling of rape and serious sexual assault cases and the application of the Code

raise awareness of victim issues in the context of gang related sexual violence

Course objectives

At the end of the course delegates will be able to:

state what is CPS Policy and good practice in relation to rape and serious sexual assault cases including the application of the evidential test and how to build effective cases

deal appropriately with requests for disclosure where there are linked family and criminal proceedings in RASSO cases

identify what are the current issues in relation to indictment drafting in particular in non-recent cases

use multiple incident counts when drafting indictments

state what issues are faced by victims of gang related sexual violence

Programme

09.00 – 09.30	Session 1 Introduction	Domestics and Introduction Course objectives Application of RASSO policies HMCPSP findings
09.30 – 10.30	Session 2 DVD	DVD Nina Burrowes Myths and stereotypes Applying the Code Lessons from VRR Case building
10.30 – 10.45	Coffee	
10.45 – 11.45	Session 3	Linked family and Criminal Proceedings Overview of third party disclosure Linked Family and Criminal proceedings R v Smith and Jones
11.45 - 13.00	Session 4	Indictments Common errors multiple incident counts non recent cases
13.00 – 13.45	Lunch	
13.45 – 15 : 15	Session 5	Case Studies Jack [REDACTED] Andrew [REDACTED] Scott [REDACTED] Mike [REDACTED]
15.15 – 16.45	Session 6	Sexual Violence and Exploitation in the context of gangs

Administrative overview

The course covers a range of material as highlighted by unit heads, the Appeals and Review unit (ARU) from VRR cases or as a result of the CPS's own internal review of RASSO handling and external reviews of our work by the inspectorate (HMCPPI) and the Judiciary. An analysis of child sexual abuse cases following the Janner case and the VAWG assurance returns have raised a number of areas of concern which are also addressed in this training material.

The over-riding objective is to achieve a consistent approach to the prosecution of all rape and serious sexual offences with the consistent and thorough application of the Code, the merits based approach and CPS RASSO policies in order to deliver improvements to the service we offer to victims and witnesses.

The course is mandated and has to be delivered to **all** RASSO prosecutors including those who have recently completed the induction training, CCU RASSO prosecutors and all RASSO CAs (including those CA's not working within the RASSO units). Unit heads or trainers need to be mindful of the different levels of experience amongst delegates and manage this accordingly during the course.

The delegates on each course should consist of both RASSO lawyers and advocates, wherever possible, as this ensures a consistent approach across roles and facilitates shared learning with lawyers benefitting from the trial perspective of Advocates and Advocates from the wide span of casework undertaken by lawyers. A youth specialist refresher course is also in development but falls outside the scope of this training.

The pre-course work is an essential element of the training due to the amount of work which needs to be covered and the in-depth nature of the case studies. Delegates should be allowed 3 hours preparation time. Unprepared delegates will slow the progress of the course and impact on the training experience of delegates who have taken the time to prepare properly.

The Nina Burrows DVD (which was created for use during the F2F induction RASSO course) emphasises the need to develop offender-centric prosecutions and is to be played to the delegates during the course. Some may have already seen this DVD but should nevertheless watch it again as it is relevant to the case studies.

The recording is subject to a licence agreement and **should not under any circumstances be copied or played to a non-CPS audience.**

The DVDs will remain under the control of Leadership and Development. They will be sent out prior to the agreed date of the training to the named trainer who will be responsible for returning the disc to L and D once the course has been delivered.

Administrative overview

Four short videos will be provided on a disc or via links within the presentation for the module on gang related sexual exploitation and violence.

Overview

RASSO Refresher (2016)	
Duration	Approx. 6 hours
Target Group	Specialist prosecutors and RASSO CAs
Maximum Delegate Numbers	12
Minimum Delegate Numbers	6
CPD Hours	tbc
Dress Code	Business
Learning Outcomes	

Trent Code

[TBA]

Venue

1 room to seat all delegates plus tutor.

Equipment required:

DVD player, screen and computer for PowerPoint presentation.

Room Layout

U shaped or boardroom.

Materials required

Slides

Consent Toolkit Vulnerable Victims Toolkit– paper copies

DVD – Nina Burrowes

DVD – Sexual exploitation and violence – link or DVD

Case studies:

R v Smith and Jones

Jack [REDACTED]

Administrative overview

Andrew [REDACTED]

Scott [REDACTED]

Mike [REDACTED]

Flip charts and pens

Target audience

All CPS RASSO prosecutors including CPSD, CCU prosecutors and RASSO CA's must undertake this refresher training by end of June 2016.

The training will be delivered by Area based trainers/unit heads to a maximum of 12 delegates per session. As far as possible, each session should contain a mix of lawyers and CAs.

Pre course reading

All case studies and the following material should be read in advance of the training course. Delegates should bring with them a copy of the case studies.

The National Rape Protocol

CPS response to HMCPSI thematic review into RASSO units published 02 Feb 2016

Vulnerable Victims Toolkit

2013 Protocol and Good Practice Model Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings

Case studies

Course Evaluation

Course evaluation is by electronic survey and candidates should be reminded of the need to complete this immediately following the session. An electronic link will be sent with the joining instructions.

Course acknowledgements

Thanks are extended to those who have contributed to the course content through feedback and case work examples including RASSO trainers, unit heads and specialist prosecutors who attended workshops during the development of the course.

Tutor brief

Domestics – 10 minutes

SESSION 1 – Introduction – 30 mins

Background

Rape and sexual abuse cases are amongst the most difficult cases we prosecute and have the potential to significantly impact on the lives of victims and witnesses for many years after the offence has taken place. These cases may be recent or historic and often attract high media interest and intense public scrutiny. RASSO prosecutions and the CPS handling of them continues to be a high profile area of work and subject to parliamentary scrutiny. Dame Elish Angiolini QC reported on the handling of rape in London. More recently the CPS received feedback from the investigation following the case of Janner conducted by Mr Justice Henriques, and also the HMCPSI thematic report into RASSO units. In approximately 12 months' time the Inspectorate will carry out a follow up inspection and will look at the actions that have been taken by CPS and implemented in Area to address the concerns raised.

RASSO steering Group and Delivery Board

In September 2016 a joint police /CPS Steering group was established by the Director to implement the recommendations from both recent internal and external reviews through the work of an operational delivery board. This steering group is building on the National Rape Action Plan of 2014-15 and through the work of the RASSO Delivery Board is addressing the recommendations of the HMCPSI and internal RASSO review. The work of the RASSO Delivery Board includes the development of the Optimum Resource Model and the optimum Business Model which will deliver a standard approach to RASSO.

The optimum resourcing model for all areas sets out the resourcing requirements for each unit and an optimal business model is under development to embed consistent and best practices across all CPS areas and to ensure compliance with the National Rape Protocol. By Feb 2016 we had recruited 83 additional lawyers plus managers and paralegal staff into RASSO units and delivered induction training to all lawyers new to the units in 2015. A further recruitment

Tutor brief

programme is underway to increase the new lawyer to 126. This has also been supported by the roll out of a welfare programme to support all RASSO staff.

RASSO Training Strategy and Training Programme Update 2016

National Rape Action Plan – Tools and skills

Rape training strategy:

2015:

- Regional workshops and toolkits
- Induction training and induction programme
- Consent Toolkit training /PCJ training

2016:

- Refresher training /consent master class webinar
- Victim /witness training – speaking to witnesses at court
- Handling vulnerable witnesses – Rook training
- Updating of legal guidance
- Development of Knowledge Hub RASSO pages
- E-learning
- Youth refresher training and youth specialist training

This refresher training is part of the national rape training programme which reflects the Director's commitment to support prosecutors by ensuring all RASSO specialists have the tools and skills to deliver a quality service to the victims of sexual offences.

The themes covered in the refresher training are:

- The consistent application of the Protocol and Policies
- The application of the Code, the Merits Based approach and case building
- Third Party material in linked family and criminal proceedings
- Indictments – common errors, multi incident counts and non-recent cases
- Vulnerable victims in the context of gang related sexual violence
- Youth refresher training (to be covered in a separate module)

Tutor brief

The Application of the Protocol - HMCPSI report Jan 2016 see slides

HMCPSI endorsed the findings of the CPS internal review in RASSO units carried out in 2014. Many of these recommendations were in the course of being implemented at the time of publication of the HMCPSI report in Feb 2016 through the work of the RASSO Steering Group and Delivery Board and we were able to respond in detail about the many positive aspects of our work.

The inspectorate visited 6 areas when we were in the early stages of developing the resourcing model and looked at a casework sample of 90 cases finalised between April and September 2014. Their findings did not reflect the position in January 2016 but notwithstanding that, the report highlighted a number of common themes which areas need to address. The report opened with an acknowledgement of the commitment of RASSO teams.

The inspectorate noted:

'Across the Areas there are many committed and professional individuals trying to deliver a quality and timely product'

Casework quality - Common themes which emerged from the HMCPSI report

These included:

- Inconsistent application of our policies and protocols throughout the life of the case – incl. failure to apply the Code and Merits based approach correctly
- Failure to record our decisions properly or keep accurate records to evidence compliance with policies
- Allocation to non-specialist prosecutors and a lack of continuity of prosecutor

Tutor brief

Casework Quality findings

The report looked at the structures of our units and also the quality of case work and found:

Code not applied correctly 10.1% of cases

ABE not viewed in 21/55 27.6% of relevant cases

Relevant CPS policies not applied 27/89 30.3% of cases

Case Strategy outlined in MG3 in 60/89 67.4% relevant cases

Reference to relevant applications in 23/62 37.1% relevant cases

Satisfactory action plan in 29/44 relevant cases

Poor MG3 in 16 cases 18%

Post charge – code applied incorrectly in 13.6% of cases

Third party disclosure dealt with appropriately in 37/49 75% of relevant cases

Victims policy complied with in 48/73 66.7% cases

All steps taken to protect victim in 59/69 85.5% relevant cases

PTWI considered in only 12/62 relevant cases and of 4 considered appropriate for PTWI none took place

The file sample consisted of 95 cases finalised between July and September 2014.

The RASSO Checklist - pre-course reading

The RASSO advice checklist has been updated into an electronic document to assist prosecutors to cover all the relevant policy requirements.

Relevant toolkits have been embedded to provide easy and quick access when making a charging decision.

If the checklist is used then it will ensure all the relevant areas are covered within the review.

ACTIVITY: Go through the key aspects of the checklist with the delegates

Tutor brief

CPS reviews should include reference to the following:

Consideration of unused material at pre charge stage for full code test cases including 'reasonable' lines of enquiry with third parties.

Evaluation of the case merits – strengths/weaknesses, reliability and credibility and admissibility issues including how to overcome or address the weaknesses in the case. The prosecution strategy and case theory and clear evidence that CPS policy and guidance has been applied/considered. This should include a critical analysis of the actions of the suspect. Reference to checks with the police re. other allegations or on-going prosecutions, plus consideration of any previous files incl. NFAs. (see later under Joinder).

Checks on CMS for linked offences (but note the limitations: spelling, aliases, data entry errors can lead to nil returns).

PI evaluation – a reasoned decision with reference to the relevant factors not a cut and paste of legal guidance.

Relevant enquiries of the local authority in youth suspect cases and clear consideration of the views provided should be evidence in the review.

AIM assessments in youth cases (action, intervention, moving on)

Acceptability of Pleas with need to refer to the victim if appropriate

PTWIs to be considered in all cases by lawyer

Feedback on quality of the ABE interview (applying the new NPCC Guidance on ABEs).

Instructions to advocates which comply with the legal guidance.

Conferences in all rape cases which includes forensic physician and any experts.

Advice from Counsel on evidence

Viewing of ABE interviews – should be endorsed on the file as having been undertaken.

Special measures considerations including reference to early special measures meetings with the victim to discuss special measures. This should be led and attended by the allocated lawyer and details provided in writing to the victim.

On-going reviews / communications should be recorded on CMS and any decisions to change the offence or discontinue which show consideration of CPS victim / witness policies. This is important in all cases but it has been suggested that in high profile or sensitive cases there appears to be a reluctance to record details of communications.

Tutor brief

Discuss

Why it is important to not simply record that you have complied with the policy or considered Rape myths and stereotypes?

Key Points include

Full evaluation of the evidential strengths and weaknesses is required and a strategy for addressing the weaknesses

Lawyers should be considering a case theory and setting this out in the review

Increased scrutiny of decisions and judicial review if policies are not complied with- see case

of [R. \(on the application of E\) v Director of Public Prosecutions](#) Queen's Bench Division (Administrative Court) 10 June 2011

Tutor brief

SESSION 2 – Applying the Code – Learning from VRR and Case Building

Objectives

By the end of this module prosecutors will be able to

- Describe the Merits based approach and how it should be applied to all cases
- Be able to explain the key principles of case building and describe common steps which can be taken to build cases including the principles of joinder

Materials required

- DVD – Dr Nina Burrowes
- Slides

Topics

- Myths and Stereotypes DVD
- Applying the Code
- Learning from VRR
- Case Building

MYTHS AND STEREOTYPES

This session will begin with a DVD on myths and stereotypes. Some prosecutors have already seen this presentation from Nina Burrowes and others, who are new to the unit, have already seen it as part of their induction training but it is still worth watching again as it serves to remind us of the need to focus on the actions of the offender and not the victim when making our decisions. It provides some insight in to how prosecutors might develop a case theory and a narrative which shows a jury how the defendant behaved before, during and after the incident in order to avoid detection.

Same sex sexual violence- myths and stereotypes

Following the DVD, invite discussion about the key learning points followed by a facilitated discussion about the myths and stereotypes which are prevalent in cases of same sex sexual violence. Work is underway by the Policy team to explore further myths and stereotypes in same sex and transgender cases. The police are concerned that their officers are not taking these into account when investigating cases and making decisions about the evidential

Tutor brief

strengths or weaknesses

Discuss

How do the delegates approach myths and stereotypes in same sex sexual violence cases?
Are there additional considerations?

Feedback from our Stakeholders have included the following points :

Whilst there are similarities between sexual violence in a heterosexual context and same sex sexual violence, there are differences which should not be ignored; there are additional factors which must be taken into consideration, for example:

Possible homophobic response – men who identify as heterosexual can show extreme reactions to situations where they have engaged in sexual activity with another man – these reactions do not necessarily indicate a lack of consent.

The question of whether either party is or is not gay is not an absolute and is of limited relevance.

It is important to bear in mind the impact of internalised homophobia, which can cause distress to a man who defines as straight but gets involved in "gay" activities – although it is equally important not to fall into victim-blaming.

Sexual violence against lesbians and gay men is seldom reported for a number of reasons, one of which is the internalised homophobia of the victim, who feels that they are not worthy of better treatment and will dismiss incidents as "bad sex", or blame themselves because of their lifestyle.

Perpetrators of violence against LGBT people often seek to justify their behaviour by claiming that the violence was provoked by unwelcome sexual advances.

The Violence Against Women agenda is important as central to it is the power imbalance between men and women. In same sex situations, the gender power imbalance is not present – but it is important to look at other power imbalances and consider how they operate as between the two individuals involved (e.g. class; wealth; physical strength; length of time and degree of being 'out' etc). It is not necessarily appropriate to approach decision-

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Tutor brief

making based on the conclusions which would be drawn were the suspect male and the victim female.

Where one party is HIV positive it is important to consider how this might contribute to myths and stereotypes, and the potential impact on the individual if their HIV status is made public. This means that consideration should be given to, for example, reporting restrictions for the duration of the proceedings, even if it is the Defendant whose status needs to be protected. NB . If the victim was not aware of the defendant's HIV status he could still consent to sexual activity, R v B [2006] EWCA 2945. NB refer to DLA's office for cases involving transmission of HIV.

In cases involving transgender people, one of the most common misconceptions is that there is some equivalence to being gay, lesbian or bisexual. Sexual orientation is separate and unrelated to transgender identity. The sexual orientation of transgender people may be heterosexual, gay, lesbian, bisexual or non-binary.

THE CODE FOR CROWN PROSECUTORS

The Code for Crown Prosecutors

The starting point for all prosecutions is the Code for Crown Prosecutors. The Code is the basis of our decision to prosecute and no legal guidance replaces it or takes precedence over it.

The CPS Policy for Prosecuting Offences of Rape makes it clear that the CPS's aim is to prosecute cases of rape effectively, and that the CPS is committed to improving our performance, particularly by ensuring that myths or stereotypes play no part in our decision-making. That said, the Rape Policy does not supersede the Code for Crown Prosecutors. The test for rape prosecutions is the same as for any other offence: is the prosecutor satisfied that there is sufficient evidence to provide a realistic prospect of conviction.

The evidential stage of the Code test requires prosecutors to conduct an "objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely."

The Code says that the evidential stage is met where "an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged."

Tutor brief

What is meant by the merits based approach? How is the question of whether there is a realistic prospect of conviction to be approached?

The phrase "merits based approach" was first used in the context of prosecutorial decision making in the judgment in *R (FB) v DPP* [2009] EWHC 106 (Admin). It simply means that a prosecutor must make a decision based on an objective assessment of the evidence rather than a predictive approach based on the experience of past similar cases.

In this context, the Court drew attention to so-called "date rape" cases as ones in which it is notoriously difficult to secure a conviction. This is because a jury might be tempted to resort to myths and stereotypes in reaching a verdict. The merits based approach simply means that a decision to prosecute should be made on the basis that a jury will not resort to such matters but, rather, will consider the evidence objectively and impartially and in accordance with the directions given to them.

When assessing whether a jury is more likely than not to convict, the prosecutor should proceed on the basis of a notional jury, which is intelligent, unaffected by any myths or stereotypes, and which will apply legal directions in a rational, informed and unprejudiced manner.

Therefore, it must follow that the merits based approach:

- Is not a different test but merely reinforces the approach we must take in applying the Code test;
- Does not change, or differ in any respect from, the Code test that still applies, namely, that there should sufficient evidence to provide a realistic prospect of conviction and that it is in the public interest to prosecute the suspect;
- Is not new - it is a different way of expressing what has always been there;
- Applies in all cases, not just rape and serious sexual offence cases;
- Reflects the requirement to assume that every case will be considered by an objective, impartial and reasonable tribunal, properly directed and acting in accordance with the law;
- Does not involve suspending judgment but it does require prosecutors to take objective decisions that are fair and reasonable.

The Code requires prosecutors to consider what the defence may be and factors which may potentially undermine the prosecution case. But that does not mean every point that may be made by the defence will be a good one, let alone one fatal to the prosecution. Prosecutors must assess each undermining feature objectively and then the cumulative effect of such features objectively in the context of strengths of the case.

Tutor brief

Ultimately a prosecutor must decide if the combined effect of such factors after an objective analysis is such that the evidential stage is not met. If such factors are not objectively undermining to that extent or at all then a prosecution should follow; otherwise it should not. Prosecuting flawed cases undermines public confidence, raises unrealistic expectations for complainants and diverts resources from other cases, which are delayed as a result.

Prosecutors must not introduce a requirement for corroboration in the review process - one person's word can be enough (and often is) but the quality of the evidence must be assessed in the manner described above.

Tutor brief

Reference to clothing V wearing in ABE – e.g. comment that a teenager wearing a t-shirt with 'dork' written on it is inappropriate but then saying they have not taken this into consideration.

Over-reliance on police views / counsel's views and others

Views of the police or family court, for example, on the credibility or reliability of a victim – these might be important but we need to remain independent and objective. The police officer may not have had the benefit of training on this issue or experience in investigating rapes.

Weight given to suspect's account – greater than that given to the victim

ARU "there is little that can be contradicted in his denial save that he has not been entirely straightforward with his wife."

Delays in reporting

There may be good reasons for the delay in reporting rape or sexual offences and, as highlighted by Dr Nina Burrowes, this may be explained by any number of factors. Delay needs to be addressed in the pre charge advice and considered. It is now widely accepted and understood that delays in reporting may depend upon the circumstances of the case and the vulnerabilities of the victim. Context is all important as vulnerable people (children or family members) may be influenced to withdraw support or not to report in the first place. There may be evidence of controlling or co-ercive behaviour or an abusive relationship where one party exerts control over the other e.g. prostitute and drug dealer.

ARU example from a review decision, "she did not call police for several days. She explained why, but this is still a weakness."

Tutor brief

Inconsistencies in the account

Prosecutors should explore the possibility of innocent explanations and discuss these with the police. Guard against over-reliance on small inconsistencies to conclude the victim lacks credibility or is unreliable or that the evidence is fundamentally flawed. And remember to consider these in light of the issues in the case and the case theory. Context is all important.

Word against word – lack of corroboration. Corroboration is not an essential element of a case but may strengthen the evidence.

Appeals unit – general observations on the application of CSA policy

Child victims deemed 'liars' because they have told a fib about something trivial – e.g. 13 year old telling friends at school she had two horses when she only had one.

References to the complainant being sexually active and this being undermining.

References to explicit language used by the child (which apparently shows they are sexualised) or switching between adult and childlike language (which apparently shows they may have been coached by an adult).

Inappropriate emphasis placed on credibility of the complainant rather than the credibility of the allegation.

Child has disclosed that someone else has made inappropriate sexual advances towards her which suggests she is profligate with her allegations (unless there is any substance to that allegation)

"C has been surrounded all her life by dishonesty and to some extent by her mother's allegations, including sexual allegations. The concept of making accusations can hardly be unknown to C."

Continuing to associate with the suspect.

Opinions of family members that they are lying – e.g. a comment that another family member "is adamant that her father would never touch children".

Tutor brief

CASE BUILDING

Develop a case theory

Develop a case narrative which focuses on the actions of the offender

Explore all evidential avenues which point towards and away from the suspect's guilt

Consciously build cases to address issues and discrepancies, offender behaviours etc.

There are various stages to case building but all are interlinked and are essential if we are to change how we investigate and prosecute rape and deliver more successful outcomes. A case theory will assist case building by encouraging investigators to focus on the actions of the defendant.

The case theory should demonstrate how the defendant made choices to avoid detection – offender tactics, consider the vulnerabilities of the victim and how they explain why the victim was targeted, address Defence points and evidential weaknesses, and address the reasonableness of the suspects belief in consent.

Offender Tactics and behaviours

Focus on the actions of the offender before, during and after the assault.

What steps did the suspect take to find out if the complainant was consenting?

We have got so used to approaching cases from the angle of how would the suspect know the complainant was not consenting, and putting the onus on the complainant, it feels **unfamiliar** to ask

– “what steps did the suspect take to find out if the complainant was consenting?”

Sometimes it will be obvious from the suspect's account that (s)he is saying the complainant clearly consented, but other times no effort would have been made, and assumptions made.

This goes to the heart of whether the suspect “reasonably believed” the complainant was consenting

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Tutor brief

We often refer to victims as vulnerable – young / old / physical disability / MH issues / drunk / drugs / power position of suspect etc.

Although cases where the victim is vulnerable makes the offence more serious, more importantly it helps us to understand the suspect’s tactics and behaviour

The reason that the vulnerability of a victim is important is because vulnerable victims are often targeted, for a number of reasons:

- More likely to succumb to advances
- Less likely to report abuse
- Less likely to follow it through
- Less likely to be believed
- Less likely to be detected and prosecuted.

TARGETING A VULNERABLE VICTIM HELPS US TO ASSESS THE CREDIBILITY OF THE OVERALL ALLEGATION

Understanding issues relating to victims account see Toolkit table 2

Recall and concentration

Cognition and interpretation of events

Communication

Understanding / explanation of Victim actions -

Inconsistencies or loss of memory may in fact be entirely consistent with having been drinking or may be due to trauma, and are entirely understandable

Loss of forensic evidence through shower / washing sheets – may be because the victim feels “dirty” or ashamed.

Medical evidence may show that the Victim is suffering from PTSD

We need to understand the responses victims often exhibit when being raped – freeze/flop; flight or fight.

Tutor brief

Response afterwards – acting “normal” – trying to forget what happened / being unnaturally calm – “disassociating” from the rape.

Failure to report may be because of ‘gender’ issues e.g. if transgender or gay and victim fears being outed, or community issues.

Example of an offender-centric narrative by ██████████, CA South West

A case properly built should evidentially close off all the exits open to a suspect to escape justice. By thinking ‘Trial’ at the outset prosecutors can develop a narrative that will be presented to the jury which focusses on the actions of the offender and in doing so strengthens the prosecution case. By developing a case theory and narrative prosecutors can ensure myths and stereotypes do not play a part in the investigation, charging and review decisions and ultimately the presentation of the case to the jury.

Old narrative

Victim went out and got drunk. She got talking to the doorman even though she didn’t know him. She vomited. She agreed to go with Defendant in his car although expressed reluctance. She held his hand. He drove them to his house. Victim said she didn’t want to go in but didn’t put up a fight when he carried her in. He took her to his room where she lay on the bed and he raped her.

Defence Points

- When they arrived at his house and not her house, she must have known what was coming.
- She could have screamed to stop him.
- She could have hit him. She didn’t.
- She need not have remained on his bed.
- She could have closed her legs.
- She has a boyfriend so needs to cry rape.

Suspect's belief in consent

Ask Suspect:

- Out of all the sober people in the nightclub why pick the drunken girl?
- Why pick one staggering rather than dancing?

Tutor brief

Why pick the one whose speech was incomprehensible?

Why did you want sex with her given she had vomited?

Why did he do this?

Turn the attention on Suspect's conduct.

Show he targeted Victim because:

of her state (drunk)

Which would make it easier for Suspect to persuade her to go with him

Which would make it easier for him to penetrate Victim without a fight (Surprise of it) or knowledge of what was happening

New case theory/narrative

Suspect chose a girl who was drunk rather than sober. He didn't know the girl but approached her to talk to. She merrily chatted back. Despite having vomited and some reluctance on her part, Suspect took her hand and escorted her to his car. She had to follow. He put her into his car saying he would take her home. He then drove to his own house. She didn't want to go in so he picked her up and carried her.

Despite her protests she was too drunk to get away from him. Having carried her to his room, despite her objections, and with the risk she would vomit in his bed, he laid her down, held her legs open, moved her pants to the side and penetrated her with his penis. He was sober and strong. She was drunk and unable to resist. The next day, although hungover, she went straight to the police to report what had happened.

CASE BUILDING - EXPLORE ALL EVIDENTIAL AVENUES

The CPS has made a public commitment to improving our performance. To achieve this we need to ensure we build strong and robust cases. We need to guard against missing obvious opportunities to build the case especially in the case of multiple victims.

Invite the delegates to suggest how cases might be built. Cover the following points and invite them to provide examples where this has been achieved on Area.

Tutor brief

Previous allegations

In all cases the charging lawyer should ask the police to check for other potential offences and to provide case files for previous reports of offending whether prosecuted or not. The answer to these enquiries should be endorsed on CMS as part of your review decision. The charging lawyer should also check CMS for any related or linked offences and joinder considered as above. These should also be endorsed on CMS – even if a ‘nil Return’.

It is widely accepted that a case is more likely to succeed if there are multiple complainants. Any previously reported complaint should be considered as part of the full file review and consideration given to using this as bad character evidence, restarting a prosecution or for further charges. In all cases the pre charge lawyer should ask the police for details of previous allegations which may have been NFA'd and endorse that these have been considered on CMS as part of the decision to prosecute. This information may show a pattern of behaviour which when viewed as a series of offending casts a different light on the criminality. The suspect may use a specific defence and have succeeded in pulling the wool over police eyes because he commits them in different areas or because the police are sympathetic to his predicament.

Repeat offending is not uncommon and we should be prepared to revisit previous decisions to NFA on evidential grounds when further complainants come forward.

For example in Thames Valley a former soldier claimed *sexsomnia* as a defence to rape. Psychological evidence was provided to show he was suffering from PTSD which was initially accepted by the police/CPS. He went on to offend several times citing his *sexsomnia* until eventually he was prosecuted and convicted.

If a matter has been disposed of in an inappropriate way, for instance, by way of caution when clearly it is too serious to justify a caution, then consideration should be given to whether this was wrong and if appropriate CCP approval sought to overturn the decision.

Tutor brief

What might be regarded as a wrong charging decision includes:

- An unreasonable decision to disregard compelling evidence;
- A failure to consider, or an unreasonable decision to ignore relevant CPS policy;
- An incorrect application of the law;
- A significant misinterpretation of the evidence.

Assessing whether a previous review decision was wrong may involve identifying any flawed reasoning that may have had a significant impact on the decision (either on its own or in combination with other factors). This could include considering whether disproportionate weight has been attributed to factors such as: victim or witness credibility; any initial reluctance of the victim to report the allegation; potential defences not actually raised by the suspect; an account given by the accused which the prosecution cannot expressly or completely rebut; or where undue regard was had to myths and stereotypes surrounding a particular type of offence.

See London 'Double Jeopardy' case of R v H [2014]ECWA Crim 1816 where CPS successfully recharged an offence which had previously been to trial and ended with a judge directed acquittal due to non-attendance by the victim.

Joinder

An understanding of the principles of joinder and relevant case law is important as it can positively influence the outcome.

Joinder is now covered by CPR 10.2.(3) Under Rule 10 2.(3) An indictment may contain more than one count if all the offences charged are

- (a) Founded on the same facts
- (b) Form part of a series of offense of the same or similar character

What amounts to a series? See Annex - Tutor resource material for links to key cases

Tutor brief

SESSION 5 – Case Studies – 150 mins

Case Study 1

R v Jack [REDACTED] – a facilitated discussion

The purpose of this case study is to ask the delegate to think through how we might take an offender-centric approach in a 'typical' rape case and to evaluate the merits of the case as a whole.

Ask the delegates to read the case study and consider in groups

- Potential myths and stereotypes

- Offender tactics

- The evidential strengths and weaknesses

- Any additional enquires they would request in order to strengthen or build the case against the suspect.

Tell the delegates that there are no issues with the CCTV which shows the victim before and after the incident as detailed in the CCTV log.

Points to discuss

Strengths

- Immediate complaint

- CCTV shows he targeted her

- CCTV of her leaving the flat a short time later partly clothed and staggering – she takes a significant amount of time to walk a short distance along the road

- Bruising

- Age difference

- Opportunistic

- Phone call and text to friends

Weaknesses – to what extent are these influenced by myths/stereotypes and what can be done to build the case or to address these weaknesses?

- Suspect of good character

- Gaps in victim's recollection

- Appears to go willingly to flat

- Doesn't resist or run away

- Other people around when outside chip shop – could she have alerted them?

Offender tactics

- Vulnerable victim in drink. Late at night and alone.

- Seen to target her walks past her back and forwards and seen to look at her whilst on the phone.

Tutor brief

Appears to be offering assistance to her
Gives her his telephone number on a slip of paper

His account - Is it plausible?

Case Building points

The suspect's **telephone records** show he made an international call shortly before crossing the road to sit down next to her at the chip shop. (he was on his way home from working in a restaurant kitchen)

Telephone records confirm that victim called her boyfriend and left a voicemail message at a time consistent with her leaving the chip shop and walking to the suspects flat. She told him she was scared and walking with a strange man to his flat as she had lost her friends.

The complainant is aged 19 years, of **good character** and has never made any previous allegations of rape. The suspect is aged 46, a foreign national and as far as can be ascertained from PNC he is of **good character**.

Medical records show a small tear to the posterior fourchette and minor bruising on the upper arms and upper legs. The doctor provides a statement (not included) which says these are inconclusive regarding the issues of whether the victim has been raped. Case conference with Doctor required.

Case Outcome

The Jack [redacted] case went to trial in 2015. The case was charged on the strength of the CCTV which showed the suspect targeting a drunken student outside a chip shop. The CCTV was compelling as he walked past her several times whilst making a phone call.

The case was listed for trial several times and shortly before the trial the FME indicated he could not attend. A decision was made to proceed with the trial and the injuries were dealt with by way of a section 10 admission. The victim refreshed her memory by watching the DVD the day before and turned up at court in time for cross examination in accordance with the Criminal Practice Direction on memory refreshing. During her evidence the victim was unable to recollect in detail what happened whilst she was in the defendant's flat but she was adamant that she did not consent. In cross examination she repeatedly replied to defence questions that she could not remember.

A half time submission was rejected by the judge who made the point that the defendant had clearly targeted the victim. Verdict: Acquittal.

Tutor brief

Case Study 2

R v Andrew [REDACTED]

Analysis and Decision

1. This is a finely balanced case but consideration needs to be given to whether perceived weaknesses are in fact an application of myths and stereotypes and should be set to one side.

2. The weaknesses are:

- (i) There is a lack of memory
- (ii) Alcohol was drunk
- (iii) There is no reliable evidence of being incapable to consent
- (iv) There is no scientific evidence of drugging
- (v) K was apparently able to use her mobile to text her friend and call her mother
- (vi) She provided information about her sexual partners to the suspect
- (vii) The suspect has given an account of apparent consent
- (viii) That account includes vigorous sexual behaviour
- (ix) The medical evidence is said not to be inconsistent with consensual activity
- (x) The suspect has admitted more behaviour, vaginal & oral, than K alleges
- (xi) There is no evidence of injury to the anus, despite those to the orifices where penetration is accepted

3. Possible weaknesses include:

- (i) Her friend thought that she acted out of character and regretted it– that is inadmissible opinion, though it could be put to K as a theory
- (ii) Her conduct on waking may be identified as not consistent with someone who has been raped in that she remained to wait for a lift to the station – there is a danger of falling into myths and stereotypes
- (iii) The suspect’s mother hearing pleasurable moaning may be identified as a possible weakness – that is not the evidence.

4. Despite that list there are many strengths:

- (i) There is a straightforward factual dispute about the anal sex

Tutor brief

- (ii) K knows what that feels like so it cannot readily be suggested that she was mistaken
 - (iii) There is the evidential presumption of lack of consent, if it is accepted that she was asleep
 - (iv) There were injuries, which were significant
 - (v) K gives a very clear and compelling account in her ABE, in particular, the menacing words that were used towards her
 - (vi) The report was made relatively swiftly, once in an area where she was likely to have felt safe and away from the suspect
 - (vii) Both she and her friend suffered a significant loss of recollection for some time, starting at about the same time, after the men had bought them drinks and they were conscious for a time thereafter
 - (viii) The report to the fiancé who was away in another country is most inconsistent with someone seeking to complain of rape to explain behaviour that is regretted
5. Although there are fewer strengths enumerated than weaknesses, it is a matter of weight to be given to each of those factors. The test is not whether a conviction is certain but there is a realistic prospect of that outcome. There are many points that can be made against K, but she gives a compelling account and there are strong circumstantial supporting factors. If that is right it is plainly in the public interest to prosecute.
 6. A significant factor at trial was the evidence given by the forensic expert to explain why traces of drugs might not be found in her system. Ensure this is discussed as part of case building.

Summary and Outcome

Complainant appeared to have been drugged before being anally raped.

The Area declined to prosecute on the basis that lack of consent could not be proved.

Decision discussed with a second rape specialist and the Head of CCU, who wrote an explanatory letter to the complainant prior to forwarding the case to the ARU.

The ARU overturned the decision on the basis that too much weight was given to discrepancies, myths and stereo types and insufficient consideration given to the overall credibility of the complainant.

Case reinstated and a trial took place.

The Defendant was found guilty after trial on three counts of rape and sentenced to 8 years imprisonment.

Annex - Tutor resource material

Session 2

1. If the victim was not aware of the Defendant's HIV status he could still consent to sexual activity, [R v B \[2006\]](#) EWCA 2945
2. The judgment in [The Queen on the application of B v. DPP \[2009\]](#) EWHC

106 (Admin) sets out a helpful analysis of the approach to be taken (para 48); it is of particular assistance when considering difficult cases:

"There was also discussion whether in applying the "realistic prospect of conviction test" a prosecutor should adopt a "bookmaker's approach" (as it was referred to in argument) or should imagine himself to be the fact finder and ask himself whether, on balance, the evidence was sufficient to merit a conviction taking into account what he knew about the defence case. In many cases it would make no difference, but in some it might. Mr Perry QC submitted that the latter was the correct approach. Mr Bowen made no submissions on the point. I agree with Mr Perry.

There are some types of case where it is notorious that convictions are hard to obtain, even though the officer in the case and the crown prosecutor may believe that the complainant is truthful and reliable. So-called "date rape" cases are an obvious example. If the crown prosecutor were to apply a purely predictive approach based on past experience of similar cases (the bookmaker's approach), he might well feel unable to conclude that a jury was more likely than not to convict the defendant. But for a crown prosecutor effectively to adopt a corroboration requirement in such cases, which Parliament has abolished, would be wrong. On the alternative "merits based" approach, the question whether the evidential test was satisfied would not depend on statistical guesswork.

It is this which has come to be known as the "merits-based approach". In the context of sexual offences, what this means is that even though experience might tell a prosecutor that juries have, in the past, been unwilling to convict in cases where, for example, there has been a lengthy delay in reporting the offence, such a prejudice should be ignored for the purposes of deciding whether or not there is a realistic prospect of conviction.

Annex - Tutor resource material

In other words, when assessing whether a jury is more likely than not to convict, the prosecutor should proceed on the basis of a notional jury, which is intelligent, unaffected by any myths or stereotypes, and which will apply legal directions in a rational, informed and unprejudiced manner.

Learning from VRR – casework examples - outlines

ARU Observations about the application of the Code in VRR cases

1. **Myths and Stereotypes** : Prosecutors know that we need to avoid assessing credibility on the basis of preconceived ideas about how a victim might respond during the rape or her ability to give a **coherent** account when interviewed. But the ARU continue to see evidence of Lawyers own myths and stereotypes in the review decisions they read.

ARU examples from review decisions which imply our decisions are still influenced by Myths:

Reference to clothing V wearing in ABE – e.g., comment that a teenager wearing a t-shirt with 'dork' written on it is inappropriate but then saying they have not taken this into consideration.

Putting, "I have adopted the merits based approach, ignoring myths and stereotypes."

Does not mean that any myths/stereotypes mentioned throughout the review are negated.

Undue pessimism about prospects of cases and cases NFA'd on grounds which were issues which ought properly be left to the jury.

2. **Over-reliance on police views / counsel's views and others**

Views of the police on the credibility or reliability of a victim – these might be important but we need to remain independent and objective. The police officer may not have had the benefit of training on this issue or experience in investigating rapes.

Also other views and opinions, for example comments made in related Family Court proceedings are often cited as reasons not to prosecute. See case of Dridi for a good example of this and the ARU lawyer's response.

In the case of Dridi a family judge heard the complainant's evidence in family proceeding about repeated rapes by the suspect. Criminal proceedings were pending and the judge

Annex - Tutor resource material

made observations to the effect that he found her account of the rapes lacking in credibility as she did not leave him, resist or seek help immediately following the various incidents. He made the point that the defence should bring his views to the attention of the CPS reviewing lawyer in the criminal case which they duly did. He was convicted and has now pleaded guilty to a second offence of rape involving a second former partner.

3. Inconsistencies in the account

Guard against over-reliance on small inconsistencies to conclude the victim lacks credibility or is unreliable or that the evidence is fundamentally flawed. And remember to consider these in light of the issues in the case and the case theory. Context is all important.

ARU case : Sexual assault on a 7 to 8 year old child over a period of months in 2008/9 by the suspect who was a family friend.

Unbeknown to the victim or her mother he had been convicted of similar assaults against his two nieces 10 years' previously and sentenced to 6 years' imprisonment.

The victim initially told a teacher but when her complaint was investigated, she said she had lied. She later explained that her mother had told her to say that she had lied as her mother had disbelieved her allegation.

The Area declined to prosecute on the basis that her account in her ABE in 2015 contained some discrepancies compared with her account to her teacher 4 years' before. The ARU decided that the overall credibility of her allegation was strong. The suspect had made a no comment interview and the circumstances of the suspects' previous offences were so similar that there was little to undermine the substances of her allegations. Charges reinstated.

ARU DV case

T was a DV case which included a catalogue of assaults by kicking and punching, attempted rape and penetrative sexual assault over a 12 month period.

The complainant initially reported it to the police but at that stage she gave a limited account, didn't sign her statement and would not support a prosecution. Two years later, the relationship had ended and she made a further, fully detailed statement to the police, including an explanation for her earlier reluctance to proceed.

Annex - Tutor resource material

The Area declined to charge on the basis that her new statement differed from her initial statement and she had continued the relationship for a period following the abuse. The complainant requested a review and the Area automatically referred it to the ARU. The ARU Specialist Prosecutor concluded that the new account was a much expanded version of the previous statement, and not a different version of events. Her explanation for her previous reluctance was credible and her account generally was corroborated by police photos of her injuries. 8 counts of sexual offences and ABH charges were authorised following conviction after trial he was sentenced to a total of 12 years imprisonment.

4. Word against word – lack of corroboration. We are advised to seek against requiring corroboration. It is not an essential element of a case.

ARU case R v J (Common Assault)

The suspect was accused of assaulting his two children age 9 and 6 years while they were on access visits. The children had told their mother on being dropped off at their child-minder's from whom the suspect was due to collect them later. They also made similar disclosures to the child-minder's teenage daughter.

The Area declined to prosecute on the basis that while the 9 year old gave a credible and impressive account it was one person's word against another. The mother requested VRR. The ARU lawyer decided that while the original analysis was good, setting out all relevant material and identifying the factors in the decision, in his opinion, it fell into the error of paying insufficient regard to the merits-based approach and gave undue prominence to considerations of background matters that was not merited on analysis.

2 charges of common assault were laid. Guilty plea. Sentenced to 12 month community order, 30 days Rehab Activity Requirement, 250 hours unpaid work,

5. Case Building – Links to Key cases

1. See R v Ciccarelli [2011]EWCA Crim 2665 (see tutor resource) – Approach taken by court re evidence of reasonable belief in consent of defendant where victim and defendant were strangers and victim asleep at time of assault.