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

STATEMENT OF FACTS AND GROUNDS RELIED ON

Sections 5, 8 and 9 of Claim Form

References in this Statement of Facts and Grounds are to the attached bundle, in the form ***[Part/Volume/Tab/Page (if necessary)]****.*

The bundle is in the following format:

- ***Part A, Volumes 1-3: Core Judicial Review Documents***
- ***Part B, Volumes 4-5: Pre-action disclosure provided by the Defendant***
- ***Part C, Volumes 6-9: Witness evidence***
- ***Part D, Volume 10: Expert evidence***

The Court is respectfully invited to read the witness statements and expert reports filed and served with this claim, namely the evidence of:

- ***Sarah Green [C/6/77]***
- ***Harriet Wistrich [C/8/121]***
- ***'XX' [C/8/144]***
- ***Professor Abigail Adams [D/10/167] [D/10/173]***

*Material which EVAW claims is confidential is indicated by **bold and underlined text**. EVAW's proposed directions in respect of such confidential material are addressed in Section VI below.*

I. Introduction

1. This is a claim by the End Violence Against Women Coalition ("**EVAW**"), a UK-wide coalition of more than 80 women's organisations and campaigners working to end violence against women in all its forms. It was set up by its members in 2005 to ensure a unified voice calling for better national and local government responses to violence against women and girls. EVAW's members include support services who work directly with survivors of sexual violence, as well as research and policy experts.

2. EVAW brings this claim against the Defendant, the Director of Public Prosecutions, as the head of the Crown Prosecution Service ("**CPS**"). The target of EVAW's claim is the alarming and distressing change in approach by the CPS to the prosecution of cases of sexual offences, most notably rape.[1] That change of approach has entailed the abolition of the longstanding "**Merits-Based Approach**" to the prosecution of such cases, an approach that was introduced following a judgment of the Divisional Court in 2009,[2] and which formed a cornerstone of guidance to the CPS in this area for almost 10 years; alongside the encouragement to prosecutors to drop "weak" or "challenging" cases to improve CPS statistics through a number of training events for prosecutors, generally referred to as the "Roadshows". That change of approach has led to a precipitous drop in both volumes and rates of prosecutions in cases of rape, which are now lower than for any other year on record. It is, rightly, a matter of

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1 EVAW focuses particularly on 'rape' claims, as it appears to be the crime most directly affected by the change in approach set out below. It has made direct requests of the Defendant as to whether it affects other crimes: in its Letter Before Action, para 117(c), EVAW requested "*an explanation by the Defendant as to the offences to which the New Policy was applied. EVAW assumes, based on the documents set out above, that it applied to both rape and child (sexual abuse). Please provide confirmation of this, and whether or not the New Policy applied to any further offences*" [**A/1/5**]). EVAW understands from the disclosure with which it has been provided that it has at least affected child sexual abuse prosecutions, which are therefore encompassed within this challenge. However, no clear statement as to the extent of the changes has been provided, despite EVAW's clear request. In the circumstances, EVAW reserves its position as to the extent to which other offences may also be affected.

2 In *R (B) v DPP (EHRC intervening)* [2009] 1 EWHC 106 (Admin); [2009] 1 WLR 2072.

significant public concern which has attracted significant public attention,[3] and EVAW brings this claim in the public interest.

3. EVAW first wrote to the Defendant on 10th June 2019, with a letter before action in accordance with the Pre-Action Protocol for Judicial Review (the "**Letter Before Action**") **[A/1/5]**. That letter was unusually detailed, and requested that the Defendant explain if he disagreed with any aspect of EVAW's characterisation of the factual material or legal position set out therein. In the letter, EVAW sought disclosure from the Defendant in line with his duty of candour. The Defendant responded on 24th June 2019 (the "**Defendant's Response**") **[A/1/6]**. He did not engage with much of the detail set out in EVAW's letter, but contended that the "*threatened judicial claim has no prospect of success*".[4] No disclosure was provided with that letter, although it was indicated that further disclosure would be forthcoming. EVAW subsequently received disclosure from the Defendant in four tranches; on 28th June 2019 **[B/4/38-52]**, 17th July 2019 **[B/4/53-60]**, 13th August 2019 **[B/4/61-71]** and, finally, on 22nd August 2019, when a further 947 pages of disclosure were provided **[B/5/72-76]**.

4. The Defendant's change of approach was remarkably opaque. Not only was there no consultation in respect of the decision to remove references to and specific guidance on the Merits-Based Approach from guidance to prosecutors, nor any consideration of the public sector equality duty, it was not even made public that there had been a change at all. Neither was there any public announcement or even acknowledgement regarding the training sessions in which prosecutors were encouraged to take a different approach. The Defendant now appears to accept, as he must, that there has been a change in the guidance given to prosecutors, but contends that this does not amount to a "*change in policy*". The Defendant also now appears to accept that there has been a change in practice, but contends that this is not "*significant*".[5]

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3 Ms Wistrich provides as Exhibit HW/2 to her witness statement a selection of relevant media coverage **[C/8/123-141]**.

4 Para 49 (Conclusion) of the Defendant's Response **[A/1/6]**.

5 Para 34 of the Defendant's Response **[A/1/6]**.

5. As such, as is set out in more detail below, much of the debate between the parties stems from the preliminary dispute as to whether or not there has actually been a change of approach (and, if so, how that change in approach should be characterised as a matter of law). For this reason, EVAW has set out in some detail in the first two sections of this Statement of Facts and Grounds the evidence that clearly supports its position that there has been such a change (and its position on the proper characterisation of that change). In the event that EVAW is correct on this front, it is EVAW's understanding that the Defendant must accept that it has acted unlawfully in respect of many of the legal errors identified.

6. As to those legal errors, EVAW challenges both the process and the substance of the Defendant's change of approach, under the following broad heads of complaint:

   a. **First**, the Defendant's adoption of the prohibited bookmakers' approach to the prosecution of such offences is *per se* unlawful.

   b. **Second**, the Defendant's change to the bookmaker's approach is contrary to rights guaranteed pursuant to the European Convention on Human Rights (the "**Convention**").

   c. **Third**, the removal of the Merits-Based Approach was irrational.

   d. **Fourth**, the removal of the Merits-Based Approach has led to an unacceptable risk that prosecutors have adopted the prohibited bookmakers' approach.

   e. **Fifth**, the Defendant has failed to bring about the change of approach in a lawful manner at all. Indeed, the Defendant appears to accept that there has been no consultation nor any consideration of the public sector equality duty prior to the change of approach. In light of these wholesale failures by the Defendant his decision was also taken without sufficient evidential basis, in breach of the duty of sufficient inquiry, rendering it irrational.

   f. **Sixth**, the Defendant's change of approach is discriminatory and contrary to rights guaranteed pursuant to the Convention and the Equalities Act 2010.

g. **Seventh**, the Defendant has breached the duty of transparency in respect of the change of approach. He has failed to communicate the relevant information both internally and externally, leaving prosecutors and the general public in the dark as to the policy he is applying.

7. This Statement of Facts and Grounds is supported by the following evidence:

a. The witness statement of Sarah Green **[C/6/77]** ("**Green 1**"), director of EVAW, which explains the position of the Claimant (both generally and in respect of the Claimant's application for a cost-capping order), provides an overview of the CPS' approach to prosecutions and the more recent change in approach by the CPS, and describes the impact of that change.

b. The witness statement of Harriet Wistrich **[C/8/121]** ("**Wistrich 1**"), director of the Centre for Women's Justice ("**CWJ**") and the solicitor with conduct of this matter, which exhibits the statement of 'XX' (described below), provides further detail as to the change in approach challenged, and addresses issues raised in pre-action correspondence including delay and cost capping.

c. An anonymous witness statement from 'XX' **[C/8/143]** ("**XX1**") an experienced prosecutor in the CPS who is, essentially, a whistleblower. The statement of XX is formally introduced into evidence as an exhibit to Wistrich 1. It provides a first-hand account of the change in approach at the CPS and the impact of it.

d. An expert report from Professor Abigail Adams of Oxford University **[D/10/167]** ("**Adams 1**"), together with a short supplementary report ("**Adams 2**") **[D/10/173]** which consider, from a statistical perspective, the impact of the change in approach at the CPS on the charging rate for rape.

8. EVAW is conscious that this Statement is lengthy, that the claim is complex, and that it entails a range of evidence and grounds of review. However, this is the position that EVAW has been forced to take in light of the obstructive position of the Defendant thus far (and in particular his failure to accept that there has been any change at all – leaving that to EVAW to evidence). EVAW has, however, sought to ensure the efficient and effective conduct of the proceedings and has provided with

this claim a draft Order, setting out the directions EVAW seeks to ensure that is the case. These directions are addressed in detail in Section VI below.

9. For the Court's note, the remainder of the Statement is structured as follows:

   a. **In section II**, EVAW addresses the approach that has previously been taken by the CPS to the prosecution of such cases (i.e. prior to the recent change of approach that is the subject of this claim).

   b. **In section III**, EVAW addresses the change of approach to the prosecution of sexual offences, including rape, including the appropriate characterisation of that change.

   c. **In section IV**, EVAW sets out its seven grounds of review as summarised above.

   d. **In section V**, EVAW addresses the various arguments raised by the Defendant in pre-action correspondence including matters such as delay and the possibility of alternative remedies.

   e. **In section VI**, EVAW sets out the relief and directions it seeks.

II. Prosecuting rape: an overview

A. The Code for Crown Prosecutors

10. Under s10 of the Prosecution of Offences Act 1985:

> *"The [Director of Public Prosecutions] shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them—*
>
> *(a) in determining, in any case— (i) whether proceedings for an offence should be instituted..."*

11. The Code for Crown Prosecutors (the "**Code**") is issued pursuant to s10, and provides guidance to prosecutors on the general principles to be applied when making decisions about prosecutions (Code, para 1.3). The Code was recently updated in the 8th Edition, on 26th October 2018 **[B/4/41]**, replacing the 7th Edition from January 2013 **[A/1/16]**.

12. Under both the 7th and 8th Editions of the Code, prosecutors "*must only start or continue a prosecution when the case has passed both stages of the Full Code Test*" (Code, para 3.4 of 7th Ed and para 4.1 of 8th Ed). The Full Code Test contains two stages:

    a. The "**Evidential Stage**", under which prosecutors "*must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge*" (Code, para 4.4 of 7th Ed, para 4.6 of 8th Ed).

    b. The "**Public Interest Stage**", under which "*prosecutors must go on to consider whether a prosecution is required in the public interest*" (Code, para 4.7 of 8th Ed, para 4.9 of 8th Ed).

13. The Evidential Stage is set out as follows (para 4.5 of 7th Ed, para 4.7 of 8th Ed):

> "*The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they*[6] *might rely. It means that 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. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.*" (Emphasis added)

14. The prosecutor is directed, in considering the test, to ask themselves a number of questions: whether the evidence can be used in court, whether the evidence is reliable, whether the evidence is credible, and (in the 8th Edition) whether there is any other material that might affect the sufficiency of the evidence.

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6 The 7th Edition of the Code used the language of "he or she" instead of "they", but this paragraph was otherwise identical to the current 8th Edition.

B. The development of the CPS's specific guidance on rape

15. In 2000, several reports were released considering the outcomes for victims of rape after a research study commissioned by the Home Office[7] reported a drop in the conviction rate from 24% in 1985 to 9% in 1997.

16. In 2001-2002, Her Majesty's Inspectorate of Constabulary ("**HMIC**") and Crown Prosecution Service Inspectorate ("**HMCPSI**") conducted a joint inspection of the investigation and prosecution of cases involving allegations of rape [**A/1/19**]. The government in response published a Rape Action Plan in July 2002 [**A/3/37A**], accepting most of the recommendations, including that there should be guidance and training for both the police and prosecutors, and that specialist rape prosecutors should be introduced.

17. Moreover, the CPS has, since 2004, provided specific guidance in respect of its policy for prosecuting rape, following the introduction of the Sexual Offences Act 2003: see Green 1 at para 31 [**C/6/77**]. The 2012 CPS Policy for Prosecuting Offences of Rape [**B/4/42**] explains the way that the CPS deals with cases in which an allegation of rape has been made. It states that the CPS is "*aware that there are myths and stereotypes surrounding the offence of rape*", and that the CPS "*will not allow [such] myths and stereotypes to influence our decisions and we will robustly challenge such attitudes in the courtroom*" (para 5.5).

18. The CPS has also ensured that it has the expertise to prosecute rape: prosecutions are made by specialist prosecutors in the Rape and Serious Sexual Offences ("**RASSO**") units. Independent Sexual Violence Advocates were introduced in 2010.

C. Application of the Full Code Test in rape cases – the Merits-Based approach

19. The Divisional Court in *R (B) v DPP (EHRC intervening)* [2009] 1 EWHC 106 (Admin); [2009] 1 WLR 2072 ("*B*") considered the question of whether in applying the Evidential Stage of the Full Code Test a prosecutor should adopt: (i) a 'bookmaker's' approach; or (ii) should imagine himself to be the fact finder and ask

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7 Jessica Harris and Sharon Grace, 'A question of evidence? Investigating and prosecuting rape in the 1990s', Home Office Research Study 196 [**A/1/18**].

himself whether, on balance, the evidence was sufficient to merit a conviction taking into account what he knew about the defence case. The Court held that the latter was appropriate (at para 49):

"*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.*"

20. The Court then went on to recognise at para 50 that such a distinction was particularly important in respect of certain types of rape prosecutions:

"*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.*"

21. From 2009, following *B*, the Merits-Based Approach was a key aspect of the CPS' approach to rape prosecutions. Alison Levitt QC, the then advisor to the Director of Public Prosecutions, delivered face-to-face training lectures to the CPS in 2009. The speaking notes from that training are provided as Exhibit XX/11 **[C/8/154]**. The following points emerge from those speaking notes:

    a. Ms Levitt QC acknowledged that the Merits-Based Approach has proven controversial in some quarters, but explained that the criticisms made of it are either wrong, or outweighed by its advantages (paras 1-2).

    b. She explained that the CPS policy makes clear that the CPS' aim is to prosecute cases of rape effectively, but that the CPS policy does not supersede the Code (paras 5-7). The test is still that it must be more likely than not that there will be a conviction (para 7). The issue is <u>how</u> the question of whether there is a realistic prospect of conviction should be

approached. She explained that, following the case of *B*, set out above, the question of whether there is a realistic prospect of conviction must be approached by reference to the "*merits-based approach*", as set out in para 50 of *B* (paras 8-10).

c. As she goes on to explain at paras 12-17:

"*In the context of sexual offences, what this means is that even though past experience might tell a prosecutor that juries can be unwilling to convict in cases where, for example, there has been a lengthy delay in reporting the offence or the complainant had been drinking at the time the rape was committed, these sorts of prejudices against complaints should be ignored for the purposes of deciding whether or not there is a realistic prospect of conviction.*

In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters.

Instead of asking necessarily what is the LIKELIHOOD of conviction we should ask ourselves, what are the MERITS of a conviction – taking into account what we know about the defence case.

May sound like a subjective approach, even a morality judgment.

But it is not: the merits-based approach simply reminds prosecutors of how to approach the evidential stage of the Full Code Test in tricky cases.

It does not establish a different standard for sexual offences."

d. She goes on to explain that because it is known that rape myths are untrue, it is correct to ignore them (just as it would be for other offences) (paras 18 - 25).

e. She also acknowledges that if the CPS were to prosecute a lesser number of cases and restrict themselves to "safer" cases then: (i) the attrition rate would be lower, (ii) resources would be saved, (iii) victims would be spared the trauma of a trial, and (iv) defendants who are bound to be acquitted would not be subjected to publicity/distress (para 28). However, she explains that the CPS wants to see the volume of prosecutions go up, accepting that this will cost more and accepting that initially the CPS will lose more cases, because: (i) it is "*morally right*", (ii), "*because it is the intellectually rigorous*

approach to take to the Full Code Test"; and (iii) because "*by clever and sensitive prosecuting we can actually change attitudes*" (paras 31-34).

22. That training was complemented, until very recently, by a number of documents setting out specific legal guidance on the application of the Merits-Based Approach. This could be found as set out in the guidance for certain sexual offences (known as "**Supplementary Guidance**"):

a. The Legal Guidance for Rape and Sexual Offences [**A/1/20**], which referred to the merits-based approach in its Chapter 8 as follows:

"When determining whether to prosecute rape cases, prosecutors should adopt a merits based approach to the evidential stage of the Code for Crown Prosecutors full code test and ask whether, on balance, the evidence is sufficient to merit a conviction taking into account what is known about the defence case. This approach was confirmed by the Divisional Court in R (on the application of B) v Director of Public Prosecutions *in 2009. In June 2009, in a minute to all CCPs, the DPP instructed that they should ensure that the merits based approach was understood and adopted by all those who review rape cases. He emphasised that the alternative, described by the Court as a purely predictive (or book-makers) approach based on past experience in similar cases would be wrong.*

See: http://www.bailii.org/ew/cases/EWHC/Admin/2009/106.html."

b. The Child Sexual Abuse: Guidelines on Prosecuting Cases of Child Sexual Abuse [**B/4/61/469**], which had two paragraphs on the Merits-Based Approach:

"*58. As in all cases you must apply the test prescribed by the Code for Crown Prosecutors, namely that there is sufficient evidence to provide a realistic prospect of conviction and a prosecution is required in the public interest. The 'merits-based approach' reminds prosecutors of how to approach the evidential stage of the Code test in that even though past experience might tell a prosecutor that juries can be unwilling to convict in cases where, for example, there has been a lengthy delay in reporting the offence, or the complainant had been drinking at the time the rape was committed. These sorts of prejudices against complainants should not be regarded as determinative for the purposes of deciding whether or not there is a realistic prospect of conviction.*

59. In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths such as, for example, were an allegation really true it would have been reported at the time. The

prosecutor must further assume that the jury will faithfully apply directions from the judge, such as the fact that they can still convict even where it is one person's word against another's without any supporting evidence."

23. It was consolidated and further elaborated on in a policy document entitled '*Code for Crown Prosecutors Test – Merits Based Approach*' (the "**Primary Guidance**"), which EVAW understands was brought into force in the course of 2015 [**B/4/57**]. That Primary Guidance consisted of 6 pages worth of explanation of the Merits-Based Approach and how it should be applied by prosecutors. In particular, the Primary Guidance:

a. Explained that the decision in *B* has "*been particularly important in making sure that the CPS approach to sexual offence allegations is consistent with the proper application of the Code*" (pp1 and 3).

b. Went on to state at p1 that:

> "*It is in sexual offence cases that there is the greatest risk that myths and stereotypes will influence a jury and in which, therefore, an assessment based on a predictive or bookmaker's approach is most likely to involve a failure properly to apply the Code. Decisions should not be based on perceptions of how myths and stereotypes might lead a particular jury to reach a particular conclusion.*
>
> *The merits based approach is closely linked to the CPS's determination to avoid flawed review decisions.*"

c. Made clear that the Merits-Based Approach is not a different approach to that set out in the Code, which requires prosecutors to consider an "*objective, impartial and reasonable jury or bench of magistrates or judge... properly directed and acting in accordance of the law*". Rather, what it does is explain how that is to be done in sexual assault cases.

d. Set out that the Merits-Based Approach is "*best understood as an explanation of the correct principles for decision-making under the Code*" (p2) and indeed "*[a]pplying the Code test correctly necessarily involves taking the merits based approach*" (p4, emphasis added). Failing to take it means that offenders will escape prosecution, causing injustice to victims and a loss of public confidence in the criminal justice system, and may mean that

prosecutorial decisions will be unreasonable or irrational in judicial review proceedings (p4).

24. At the time that the Primary Guidance on the Merits-Based Approach was introduced the Legal Guidance on Rape and Sexual Offences already provided guidance for prosecutors on 'Societal Myths', which separately addressed myths and stereotypes about sexual offending and its victims. A version of this guidance on myths and stereotypes had already been in force for at least five years by the time that the Primary Guidance on the Merits-Based Approach was introduced, and it remained in force (at Chapter 21) after the Merits-Based Approach guidance was introduced **[A/1/20]**.

25. Since the introduction of the Merits-Based Approach following the case of *B*, and in the ways described above, the Defendant has repeatedly and consistently reiterated his commitment to it:

    a. In 2010 the Defendant noted that the CPS was "*committed to reinforcing the 'merits-based' approach to rape prosecutions by dealing effectively with myths and stereotypes and improving the quality of communication with victims*" (2010 Government Response to the Stern Review, p20) **[A/1/21]**.

    b. The 2011-2012 VAWG Report included a case study which commended a CPS prosecutor for successfully prosecuting a challenging case "*robustly with the reviewing lawyer applying the merits-based approach*" (**[A/2/30]**; and see also Green 1 at para 32 **[C/6/77]**).

    c. In 2012-2013, the CPS continued to make clear that it had "*worked to challenge the myths and stereotypes about rape victims, selecting and training specialist rape prosecutors to adopt a merits-based approach to cases*" (2012-2013 VAWG Report, Foreword, p2 **[A/2/31]**).[8]

    d. Following Joint Action Plans from the CPS and the Police in 2014 and 2015, training continued to emphasise the importance of the merits-based approach.

[8] See further p5, indicating the extent of the training conducted.

For example, in a training given to the South Eastern Circuit on 30 May 2015 [**A/3/37B**]:

i. The importance of the merits-based approach in the context of the Joint Action Plan was emphasised. The training confirmed that:

"*prosecutors should adopt a merits based approach to the evidential stage of the Code for Crown Prosecutors full code test and ask whether, on balance, the evidence is sufficient to merit a conviction taking into account what is known about the defence case. This approach was confirmed by the Divisional Court in [B]*" (p2).

ii. It further went on to state that:

"*In practice the test is of ready application to cases where even though past experience might tell a prosecutor that juries can be unwilling to convict such as, for example, where there has been a lengthy delay in reporting the offence or the complainant had been drinking at the time the rape was committed, these sorts of prejudices against complainants should be ignored for the purposes of deciding whether or not there is a realistic prospect of conviction. In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters.*" (p4)

iii. It notes that by so doing, "*the CPS are prosecuting more cases that juries find difficult to convict*" (p5). However, it makes clear that the response to this is for case-building to proceed carefully to challenge those myths and stereotypes.

e. The Merits-Based Approach was also referred to extensively in the RASSO Refresher Training delivered to prosecutors in 2016 (and discussed further below) (see the Tutor Brief, p16 [**B/4/54/320**]):

"*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 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 matter ....."

f. Similarly, reference was made to the Court's judgment in *B* in the Tutor Notes for the 2016 RASSO Refresher Training (p64) [**B/4/54/336**], as was the following lesson to be drawn from that judgment:

"*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.*"

g. Similar sections were found in the Child Sexual Abuse for Specialists e-L courses (p162) [**B/4/58**]:

"***2, D Merits based vs bookmakers approach.***

In Courtney's case, and many other cases, these kinds of myths and stereotypes, could lead to the victim being put under the microscope. This could result in you, as a prosecutor, ignoring the credibility of the allegations.

Listen to each description to remind yourself of the different approaches to assessing the credibility of the allegations.

The merits-based approach reminds you how to approach the evidential stage of the Code.

You should assess the credibility of the allegation, for example, did the suspect deliberately target a vulnerable child? You should also dismiss any myths and stereotypes, and not put the victim under the microscope.

Past experience might tell you, that juries can be unwilling to convict in cases where, for example, there has been a lengthy delay, in reporting the offence, or the complainant had been drinking, at the time the offence was committed. This bookmakers approach can lead, to decisions being taken on incorrect grounds.

Instead, you should proceed on the basis of, a notional jury which is wholly unaffected by, any myths and stereotypes, when considering the credibility of the allegations."

D. The result of the CPS' approach to prosecutions described above

26. The effect of the development of the above Merits-Based Approach in this way is explained in Green 1, paras 36-41 [**C/6/77**]. In short, EVAW – and EVAW's members – saw a gradual, but steady, increase in positive outcomes for rape victims following on from the various initiatives set out above. As Ms Green puts it (at para 36 of Green 1): "*it was not perfect but real progress was being made*".

27. Moreover, the experience of CWJ, EVAW and its members is that the CPS's commitment to prosecuting cases, including difficult cases, has a knock-on effect on the whole system. If cases are prosecuted effectively, victims are more willing to come forward, police are more willing to report and to charge, and the system works more effectively overall. This is discussed in Wistrich 1, paras 33-43 [**C/8/121**] (and see also Green 1 at paras 38 and 39 [**C/6/77**]).

28. Indeed, even as recently as 2017, the CPS was publicly recognising, and appeared to applaud, an increase in both the number of prosecutions brought and successful prosecutions in the 10 years since the introduction of the first Violence against Women and Girls strategy. Specifically, in 2017, the CPS published the tenth edition of its Violence against Women and Girls Report [**A/3/35**], which noted that there had been a 48.8% rise in prosecutions for such crimes since 2007-2008, and a corresponding 62.7% rise in convictions (p3). In rape cases, convictions rose from 2,021 to 2,991 (a 48% rise), and completed prosecutions rose to the greatest number ever recorded to 5,190 in 2016-2019 (p9). In sexual assault cases, there was an increase of both prosecutions and convictions to the highest volumes ever recorded, with the highest conviction rate ever (p11).

29. As explained at para 4 of Green 1 [**C/6/77**], the Merits-Based Approach was a fundamental part of that improvement:

"The CPS' formal introduction of practice guidance on the merits-based approach was received publicly – and I believe also within the CPS – as a strategy for overcoming some of the particular difficulties which arise in the context of

prosecuting rape allegations, and its implementation perceptibly boosted both outcomes and confidence in the criminal justice system between 2009 and 2016. Indeed, the CPS itself has repeatedly referred to the adoption of regular training on the merits-based approach as a much-needed improvement in its service and a demonstration of its commitment to improving outcomes. It is notable that the CPS' Violence against Women and Girls Reports ("VAWG Reports") for the years 2010-11, 2011-12 and 2012-13 ... all drew attention to the adoption of the merits-based approach and correlated this with improvements in outcomes."

30. As Ms Green also emphasises, the Merits-Based Approach is not merely a 'buzzword' or way of thinking (see paras 6 and 37 of Green 1):

"It is a pragmatic, best-practice approach which reflects developments in legislation and case-law over a number of years. Guidance and training on the merits-based approach was introduced after extensive consultation with frontline rape and sexual offences specialists, to enforce and reinforce the lessons learned from the significant difficulties that have historically plagued the policing and prosecution of rape and serious sexual offence cases. Such guidance was introduced from 2010 onwards partly in recognition that the criminal justice system was failing too often to bring sexual offenders to justice, particularly in cases where victims were vulnerable, mentally disordered and suffering other forms of abuse, where too often police officers or prosecutors placed undue weight on factors seen as harmful to their credibility and so failed to build cases and charge even where there was mounting evidence against offenders.

...

"*RASSO [Rape and Serious Sexual Offences] prosecutors have said to us that they experienced a step change following the introduction of guidance including the merits-based approach to applying the code test. Guidance ensuring police and prosecutors look at whether consent had been sought as well as given, in line with the law, led to more and better questioning and investigation of defendants. This new approach meant prosecutors were more proactive, especially with cases which had typically been hard to prosecute: i.e. the majority of rape complaints in a domestic violence context or where there is an existing acquaintance between the parties.*"

31. The Primary and Supplementary Guidance referred to at paras 22-23 above, together with the training delivered to prosecutors and described above) provided specific guidance not found in the Code, as Ms Green sets out at para 7:

"While the Code for Crown Prosecutors – which is a generic code for prosecutors working in all areas of crime – has developed over time, there remains in my view a need for supplementary guidance which assists prosecutors in applying the Full Code Test when approaching rape and other challenging sexual offence cases in accordance with the 'merits-based approach': by enabling them to understand how to build strong cases even where there will undoubtedly be particular scrutiny on a

complainant's account; how to assess the weight to be afforded to prima facie 'undermining' or 'challenging' factors that tend to be specific to rape and sexual offence cases; and how to make the most of weaknesses in the case for the defence."

32. That guidance and the CPS' previous emphasis on the Merits-Based Approach has had a real-world impact, allowing cases that would otherwise not be brought to reach trial, as Ms Green further explains at para 38:

"*I do not think it is coincidental that it was in 2012 – following the first reported nationwide trainings for RASSO prosecutors on the application of the merits-based approach in rape and sexual abuse cases, and concerted efforts to consult the women's sector around improvements to its rape prosecution policy – that some of the worst known grooming and child sexual exploitation gangs were finally, and successfully, prosecuted. These were cases which had always been very hard to bring to trial, with often very little physical and forensic evidence and victims who had been 'groomed' or who had earlier been considered 'challenging' as potential witnesses. When questioned around sexual consent by the defence, for example, the girls in child sexual exploitation cases would be likely to answer that they had regarded the defendant as their boyfriend, and they had agreed to go here and there in his car, and even to undertake criminal activity at his request. Before the change in approach, prosecutors would have tended to assume these young girls would make poor witnesses and not be believed by a jury. It was the co-ordinated strategic approach, with agencies working together to build a case around the law on seeking as well as giving consent and recognition of vulnerability, which made these convictions possible. This is where the merits-based approach guidance significantly assists as, in my view, it ensures that prosecutors do not place excessive or definitive weight in deciding whether to charge on factors which may make a complainant easy to stereotype, or a case appear 'challenging'. This may include factors such as the complainant being young, vulnerable, inarticulate, promiscuous or working-class. Emphasis is instead put on case-building to establish whether there is evidence which undermines the accused's account. Rather than rule out charging difficult cases or abandoning those that they predict the jury would reject. – which would effectively mean decriminalising some rape cases – the CPS' more recent approach (that is, up until 2016/17) has been to learn from past failures.*"

33. Unsurprisingly, as the focus of the Merits-Based Approach was developed specifically to ensure that myths and stereotypes did not affect decision making, it was a key protection for vulnerable individuals. It was cited by the CPS as a means of ensuring equal access to justice for individuals with mental health disorders for instance (see the Mind Report (produced in conjunction with the CPS, the General Council of the Bar and the Law Society), cited at para 33 of Green 1).

E. Position prior to change in approach

34. There were a number of reviews in 2015-2016 regarding the CPS' approach to prosecuting rape cases.

35. **First**, in April 2015, Dame Elish Angiolini DBE QC published the Report of the Independent Review into the Investigation and Prosecution of Rape in London (the "**Independent Review**") **[A/1/23]**, which she was asked to carry out by the Defendant's predecessor in the role of the DPP. As Dame Elish explains in the introduction, she was asked to conduct the review "*in order to identify how victim confidence, reporting and attrition of rape can be improved*", and she was asked in particular to consider the effectiveness of the CPS (see p.8).

36. Key findings reached in the Independent Review, for present purposes, include the following:

    a. The Review recognised that the entire criminal justice system is interlinked: "*[t]he effectiveness of each of the police and the prosecution ... is very much dependent on the effectiveness of the other*" (p6).

    b. The Review considered a review of recent national studies examining how rape is investigated and prosecuted, and found "*consistent approval of the policies*", but the identification "*of an inability to implement those same policies comprehensively and successfully*". Dame Elish agreed with those findings (p10). In particular, the Independent Review explains that the "*policy of applying a 'merits-based' approach was introduced in 2009*" (see e.g. p 35) and commended "*the excellent standard of the information available*" at the time to practitioners (p.36). However, the Independent Review went on to caution that a "*gap between policy and practice persists*" (see para 131 on p.37): "*This review was especially concerned that policies involving a 'merits-based' approach to decision making, early consultation between prosecutors and investigating officers and challenges to the myths and stereotypes were not routine*". The Independent Review suggested that the guidance needed to be made more easily available to prosecutors and reinforcing with training: "*To do otherwise risks the continuing disparity*

between well intentioned policy and guidance from the police and Crown Prosecution Service hierarchy and its adoption by those who investigate and prosecute on the frontline" (p37). In other words, the clear concern raised by the Independent Review was not with the substance of the Merits-Based Approach but rather that that approach was not being properly applied by individual prosecutors.

c. Finally, the Independent Review also specifically emphasised the importance of the Merits-Based Approach rather than a bookmaker's approach at p116, cautioning against the abandonment of a merits-based approach to improve statistics at para 563:

> "*As part of its Violence against Women and Girls assurance regime, the CPS monitors a broad range of measures and publishes details of its performance in an annual crime report. However of all the measures, the conviction rate is the most prominent and the most scrutinised. The Crown Prosecution Service acknowledges, however, that a risk averse approach to prosecuting (such as charging only cases regarded as 'safe bets') is one way to increase the conviction rate. This approach is actively discouraged by the use of the 'merits-based' approach which directs prosecutors to avoid a book maker's approach to risk.*"

37. **Second**, and also in 2015, the CPS Appeals and Review Unit ("**ARU**"), which is responsible for considering decisions not to prosecute when these are flagged by the Victims' Right to Review procedure ("**VRR**"), conducted area reviews of decisions made by RASSO units not to prosecute ("**2015 ARU Reviews**").

38. As explained in the "common points" document arising out of the 2015 ARU Reviews (provided as Exhibit XX/14 [**C/9/157**]), the ARU identified that a clear common theme was a failure to consider the overall credibility of a complainant's version of events and to attach far too much credence to the account of a suspect. It further explained that "*[t]here often appear to be a readiness to make a decision not to prosecute based on minor discrepancies in a complainant's account and, this, coupled with a failure to case-build sometimes gives the impression of prosecutors more focussed on finding reasons <u>not</u> to prosecute than a positive willingness to build a strong case*". It continued that there "*are also a significant number of cases across*

the service where CPS polices, particularly our child abuse and rape policies have not been considered".

39. **Third**, in February 2016, the HMCPSI produced a '*Thematic Review of the CPS Rape and Serious Sexual Offences Units*' **[B/4/44]**. That Review (the "**HMCPSI Review**") drew the following conclusions:

    a. "*The policy and legal guidance for RASSO casework is sound and when correctly applied should deliver quality casework*" (para 1.3).

    b. There are some "*positive trends in the data; the volume of prosecutions completed reached its highest level during 2014-15 with an increase in the number of convictions, although the overall conviction rate fell slightly*" (para 1.5).

    c. Amongst the recommendations that were made, one recommendation was for "*[a]ll RASSO lawyers to undergo refresher training, including the role of the merits-based approach in the context of the Code for Crown Prosecutors*" (para 2.17).

    d. It looked in particular at the decision-making at charge, and at the application of the merits-based approach at that stage (para 4.16-4.26). Within that section, the authors noted at para 4.19 that:

    "*There is evidence from a limited number of [geographic] Areas that some lawyers apply the merits-based approach far too vigorously and cases are charged that do not have a realistic prospect of conviction. Inspectors were also made aware of times when the merits-based approach has been viewed as separate to the Code for Crown Prosecutors rather than an integral part of it; this can result in poor decision-making, an increase in unsuccessful outcomes and ultimately a poor service to victims. In one CPS Area refresher training is planned to address this. All Areas need to ensure that the guidance on the merits-based approach is understood and applied properly across the specialist teams.*"

    e. It went on to state, however, that:

    "*In another Area inspectors were told about an internal investigation of the low conviction rate which revealed that some charging decisions were not always in accordance with the Code. Action was taken with all the specialist lawyers to clarify the position, with discussions about applying the Code and*

the merits-based approach, as well as a refresher on the legal guidance. The successful outcome rate rose in the subsequent quarter".

40. As such, in 2016, there appeared to be a consensus that: (i) the policies and guidance being applied by the CPS were appropriate; and (ii) there was a need to ensure that those policies and guidance were being applied uniformly. As such, these reports were followed by refresher training on the Merits-Based Approach delivered in 2016 ("**RASSO Refresher Training**") (see XX 1, paras 36-40 [**C/8/144**]). As is apparent from the slides prepared for that training (see Exhibit XX/16 at [**C/9/159**]):

    a. The aim of the course was to ensure continuing awareness of and compliance with CPS rape and child sexual abuse policy (p3).

    b. It referred to previous reports, including each of the reports set out above (p6). It noted that an issue in the HMCPSI Review was the inconsistent application of policies and protocols, including the failure to apply the Code and merits-based approach correctly (p8). It also referred to the issues identified in the ARU 2015 Review (p22).

    c. It clearly referred to the application of the Code (pp17-18), and to the value of the Merits-Based Approach in applying the code (p19-20), reiterating the points made for example in Ms Levitt's 2009 training. It clearly identified, through the slides, the appropriate issues to be considered by the CPS.

III. The CPS' change in approach

A. The change in approach

41. Sometime after the RASSO Refresher Training referred to above (which was, as XX says "*consistent with all of the studies and previous training*" delivered to prosecutors: XX 1, para 40 [**C/8/144**]), the CPS undertook a *volte-face* away from the longstanding, well-evidenced, and well-understood Merits-Based Approach.[9] It did so over a period starting from late 2016, in the following ways:

[9] EVAW has done its best in this section to compile a timeline from the material provided by the Defendant, which the Defendant contends is such that EVAW "*has sufficient information to compile a timeline itself, at*

a. **First**, it removed specific, detailed, and well-established guidance to prosecutors that explained the Merits-Based Approach.

b. **Second**, it undertook a series of training workshops, referred to as the "**Roadshows**", in which RASSO and VRR units were retrained away from the Merits-Based Approach.

42. From the disclosure provided by the Defendant, a change in approach to CPS decision-making appears to have been first mooted at a Senior Leadership Group meeting on 16 September 2016.

43. It was preceded by a paper from the Director of Legal Services, Gregor McGill, on 8 September 2016 [**B/4/49**], which set out that the conviction rate for trials of such cases had fallen steadily in recent years (although this is internally inconsistent, as it also notes that "*the overall conviction rate for these types of cases has remained relatively constant over the last three years (at around 57%)*", para 5), and asked the Senior Leadership Group to consider and discuss the following actions (para 2):

"*Is the current approach to decision making in these cases right? Have prosecutors misapplied the merits based approach in deciding whether the Full Code Test is met?*

Is there a need for a further round of Area based talks (by the DLA and DLS) to re-iterate the proper approach to decision making in these cases? This would build on the original round of talks carried out by Alison Levitt QC."

44. At the subsequent meeting on 16 September 2016, it appears from the minutes that the Director of Legal Services "*sought views on how decision making in RASSO cases could be improved with a view to increasing the conviction rate for these cases*" (para 12 of minutes [**B/4/47**]). One of (a number) of "*suggestions*" made was as follows:

"*A change in approach was not necessarily required but instead correct application of the [Code] was imperative. Whilst the merits based approach was useful, the Full Code Test would still need to be met. There appeared to be some misunderstanding around this and the assessment of the strength of cases*".

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this stage" (letter of 10 July 2019, para 4 [**A/1/10**]). Insofar as EVAW's understanding of the factual picture is not consistent with the Defendant's understanding, EVAW invites the Defendant to make that clear as soon as possible.

45. After agreeing that "*only marginal change was required in the policy adopted in this area*", it was agreed that "*Gregor McGill and Neil Moore would come out to Areas to do some refresher training on decision making with RASSO teams*" (para 12).

46. Following that meeting, there were a series of Roadshows rolled-out across RASSO units in 2016-2017. These training sessions were conducted by the Director of Legal Services, Gregor McGill, and the then Legal Advisor to the Defendant, Neil Moore. The thrust of the message delivered at those training sessions (in Mr McGill's own words) was that "*we stop talking about the merits based approach and start talking about compliance with the Full Code test*" (email of 10 May 2017 [**B/4/56/415**]).

47. Specifically, EVAW understands that Roadshow training sessions took place on 14 November 2016 (East Midlands); 5 December 2016 (West Midlands); 5 December 2016 (West Midlands); 7 February 2017 (Wales); South West (8 February 2017); 8 March 2017 (London North), 10 March 2017 (London South), 7 May 2017 (Yorkshire & Humberside), 25 May 2017 (North East), 25 May 2017 (Merseyside and Cheshire), 25 May 2017 (East of England), 23 June 2017 (Thames Chiltern), 5 July (Wessex), 19 July 2017 (North East), 21 July 2017 (South East). Training was also provided to the ARU on 30 August and 8 September 2017.

48. Unlike the very detailed slide packs prepared for the Refresher Training (and indeed the comprehensive materials for other training disclosed by the Defendant), the Defendant has not disclosed any detailed training materials for those Roadshows (save for two case studies, [**C/9/161**] and [**C/9/162**]). This is, as described in XX 1 at para 42, contrary to standard CPS practice.

49. The content of the Roadshows is described in detail by XX at paras 41-48 of XX 1. As set out there:

    a. The key message of the training was that prosecutors were currently charging too many rape cases.

    b. The need for increased conviction rates was emphasised: prosecutors were encouraged to achieve a higher conviction rate at the level of 61-62%. Moreover, it was emphasised that the CPS should be "*winning more cases than we were losing*".

c. In particular, it was emphasised that weak cases should be taken out of the system, and it was indicated that CPS prosecutors would be supported in making more decisions to take no further action ("**NFA**"). This, it was said, would achieve the increased conviction rate sought.

d. In accordance with this aim, it was indicated that the Merits-Based Approach terminology should no longer be used, and that prosecutors should not make reference to such terminology in decisions.

e. No reference was made to any of the detailed guidance or reviews set out above.

f. This was said to be a "*touch on the tiller*"; the same words used as in the 8 September 2016 briefing.

50. After the roll-out of the Roadshows had begun, the message delivered by those Roadshows continued to be emphasised by the Director of Legal Services, Mr McGill. In the minutes from a RASSO Unit Heads Meeting on 10 July 2017 **[B/3/63]**, the following was stated:

"*5.7. The Director of Legal Services has emphasised the importance of the 'conviction after contest' rate as a performance measure in rape and has indicated that we should be winning more rape trials than we are losing (the overall rape conviction after contest rate for rape in 2016-17 was 46.3%. The flag data reveals the significant discrepancy in the conviction after contest rate by rape category ... The conviction after contest rate in 2016-17 for 'rape only' cases was 36.7 (9.6% below the average for rape).*

...

11.2 "Merits Based approach". [Redacted] indicated that whilst there is nothing wrong with the principles of the Merits Based Approach – i.e. to consider all the merits in the case, not just those pertaining to the victim, unfortunately some prosecutors have been applying this as a lower standard of test for sexual offence cases than for other matters. This is plainly wrong and inconsistent with the Code. As such to avoid any possible confusion, prosecutors are to make no reference to the 'merits based approach' in any review they now conduct. It is also important that counsel do not refer to this either in any advices they do, as if we agree with or send out that advice to the police, the CPS could be seen as adopting the merits based approach. Counsel can of course (and should) refer to the Code and the offender centric approach. The 'roadshow' was discussed and all RUHs informed that references to the 'merits based approach' have been removed from training and guidance materials.

ACTION 11 RUHs were asked to raise this with their teams and the local Bar" (emphasis original)

51. There also began at around this time (although the precise timeline is unclear to EVAW) a process by which the detailed legal guidance around the Merits-Based Approach was deleted from internal and external CPS guidance.

a. The detailed Primary Guidance described at para 23 above was removed from the CPS intranet on 3 November 2017 (Defendant's letter of 13 August 2019, para 1 [**A/1/12**]; see also emails of 3 November 2017 disclosed by the Defendant [**B/4/64**]). It is not clear when it was removed from the external website but it appears that this is likely to have been on the same date.

b. The relevant Supplementary Guidance in respect of both Rape and Sexual Abuse and Child Sexual Abuse described at para 22 above was only removed considerably later: "*circa 22 November 2018*" from the Rape and Sexual Abuse Guidance (Defendant's letter of 13 August 2019, para 1 [**A/1/12**]).[10] However, some of those references were then re-produced on the internal CPS website when it was migrated to a new platform (Defendant's letter of 13 August 2019, para 2). As such, in the Defendant's letter of 28 June 2019, some of this Guidance was stated to be "*available on the internal CPS intranet as at 10 June 2019*" [**B/4/38**]. The letter of 13 August 2019 stated that "*this was a mistake, which has since been rectified by the paragraph in question being removed*". As such, while the Primary Guidance was removed in November 2017, this more limited guidance was only removed in the internal guidance for prosecutors between 10 June 2019 and 13 August 2019.

c. Similarly, references to the Merits-Based Approach have been systematically removed from the training materials provided to prosecutors over the last two years. This process began following an email on 10 May 2017 from Gregor

[10] The Defendant's response to "Request 1" of his letter of 13 August 2019 [**A/1/12**] indicates that these were both internal and external guidance notes, and they have been treated as such in this Statement, although this appears to be somewhat contradicted by the terms of the email chain of 22 November 2018 disclosed with that letter [**B/4/64**].

McGill setting out the need to ensure that training courses reflected the content of the RASSO roadshows, the thrust of which "*is that we stop talking about the merits based approach and start talking about compliance with the Full Code test*" **[B/4/56/415]**. On 11 May 2017 Robert Allen, Rape Policy Advisor confirmed by email that the RASSO induction and refresher courses were in the process of being checked and edited to remove references to the MBA **[B/4/56]**. Despite the clear intention to remove all references in these materials, as with the removal of the guidance, "mistakes" (to adopt the Defendant's characterisation) have been made and references remained.[11] It is nonetheless XX's understanding that "*all explicit reference to the MBA along with the vast majority of the associated explanatory content*" has been removed from the Induction Course materials for prosecutors (XX 1 at para 49).

B. The impact of the change of approach

52. Since 2017, there has been a very substantial and persistent decline in charging rates for rape offences. As Adams 1 **[D/10/167]** explains (at para 15), in respect of data from 2017/2018:

"*a. Reporting of rape is at its highest level since records began in 2002;*

b. The number of rape cases charged was lower in 2017/18 than in any year since 2009/10, the earliest period that information is available for;

c. The charging rate looks set to be lower in 2018/19 than in any year since 2009/10, the earliest period that information is available for".[12]

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[11] And as explored below, even today there are instances where – mistakenly – reference has remained to the Merits-Based Approach (see paras 6 and 7 of the Defendant's letter of 13 August 2019 **[A/1/12]**).

[12] Professor Adams explains the terminology relevant to her analysis at paras 8-11 of her first report. As set out there, she focusses principally on so-called "rape-flagged" cases, which are cases where a "rape flag" has been applied by police to a case that it is referring to the CPS for a charge of rape. The category of "rape flagged cases" encompasses various sub-categories (e.g. "rape and child abuse flagged cases"; "rape and domestic abuse flagged cases" etc). A "rape-only" flagged case is where no other flag has been applied by the police. Professor Adams explains at para 10 of Adams 1 how her reports are generally concerned with data on the outcomes of any case referred by the police to the CPS for a charge of rape (i.e. all rape-flagged cases). As she goes on to say, this category of cases is also often referred to by the CPS as "pre-charge decisions".

53. Professor Adams explains that in 2017/18 both: (i) the absolute volume of rape cases charged; and (ii) the proportion of rape cases which were referred to the CPS charged (i.e. the charging rate), fell very substantially. As set out at paras 16-17 of Adams 1:

"*The number of rape cases charged in 2017/18 was lower than in any other year since 2009/10. On average, 3,446 rape cases were charged per year between 2009/10 and 2016/17. In 2017/18, however only 2,822 cases were charged; a fall of 23% compared to the 2016/17 volume.*

The volume of cases charged was not lower simply because fewer cases were referred for pre-charging decisions. ... [T]he percentage of those cases referred to the CPS which were charged (the charging rate) fell to 47% ... from 57% in 2015/16 (and compared to 62% in 2013/14, the highest rate over the period of data available".

54. As for 2018/19, Professor Adams explained in her first report that statistics for the full 2018/19 year were not yet available although she noted that what data had then been published revealed "*that the charging rate is likely to fall even further in 2018/19*" (Adams 1 at para 18). Shortly after Professor Adams finalised her first report, the CPS published its 2018/19 Violence Against Women and Girls Report [**A/3/37**]. That 2018/19 report was considered by Professor Adams in her supplementary report, Adams 2 [**D/10/173**]. Adams 2 explains that, in 2018/19, both the number of rape cases charged was the lowest on record and the charging rate was the lowest on record (see para 4). Thus (as set out at paras 5-6 of Adams 2):

"*In 2018-19, 1, 758 cases were charged compared to 3,446 on average for the years 2009/10-2016/17.*

The volume of cases charged was not lower simply because the CPS made fewer pre-charge decisions. ... The percentage of rape-flagged cases charged amongst all cases that the CPS made a pre-charge decision on fell to 34% in 2018/19 from 57% in 2015/16 (and compared to 62% in 2013/14, the highest rate over the period of data available."

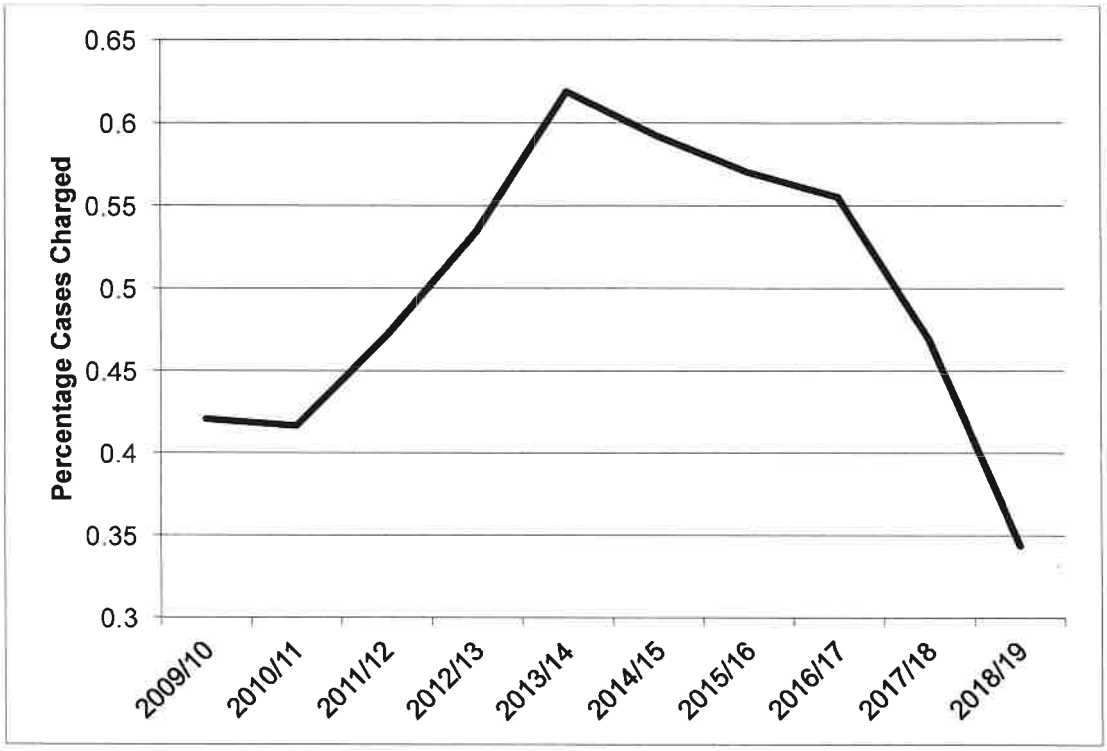
55. Adams 2 also makes the further point that the rate of decline in both the number and rate of rape cases charged has increased in the most recent year (at para 8):

"*[T]he rate of decline has also increased in the most recent year; the number of rape-flagged cases charged fell by 38% in 2018/19, compared to a fall of 23% in 2017/18; the overall charging rate fell by 27% in 2018/19, compared to a fall of 15% in 2017/18 ...*".

56. The figure below – extracted from para 8 of Adams 2 (where it appears as Figure 2(a)) – shows the changes in the charging rate since 2009/10, and illustrates the extremely steep decline which has been observed since 2015/16.

Figure 2(a) from Adams 2:

Charging Rate for all Pre-Charge Decisions Completed by CPS



57. Importantly, Professor Adams' analysis of the declining charging rate is based on the CPS' own statistics on the annual volume of reported and charged cases. Those statistics are drawn from various sources including the CPS' annual reports on Violence Against Women and Girls as well as data released by the CPS in response to an FOI requests from Ann Coffey MP **[D/10/175]** and Ms Rachel Krys **[D/10/178]** and the recently published "End-to-End review of the CJS response to rape" from the Prime Minister's Implementation Unit ("**PMIU Report**") **[A/1/25]**.

The PMIU report was shared with EVAW and other women's organisations by the CPS on a confidential basis. As far as EVAW is aware, it has not been made publicly available. Paras 58-67 below which reference the PMIU Report should therefore be treated as confidential.

58. [redacted]

59. [redacted]

[13] [redacted]

60. [redacted]

61. [redacted]

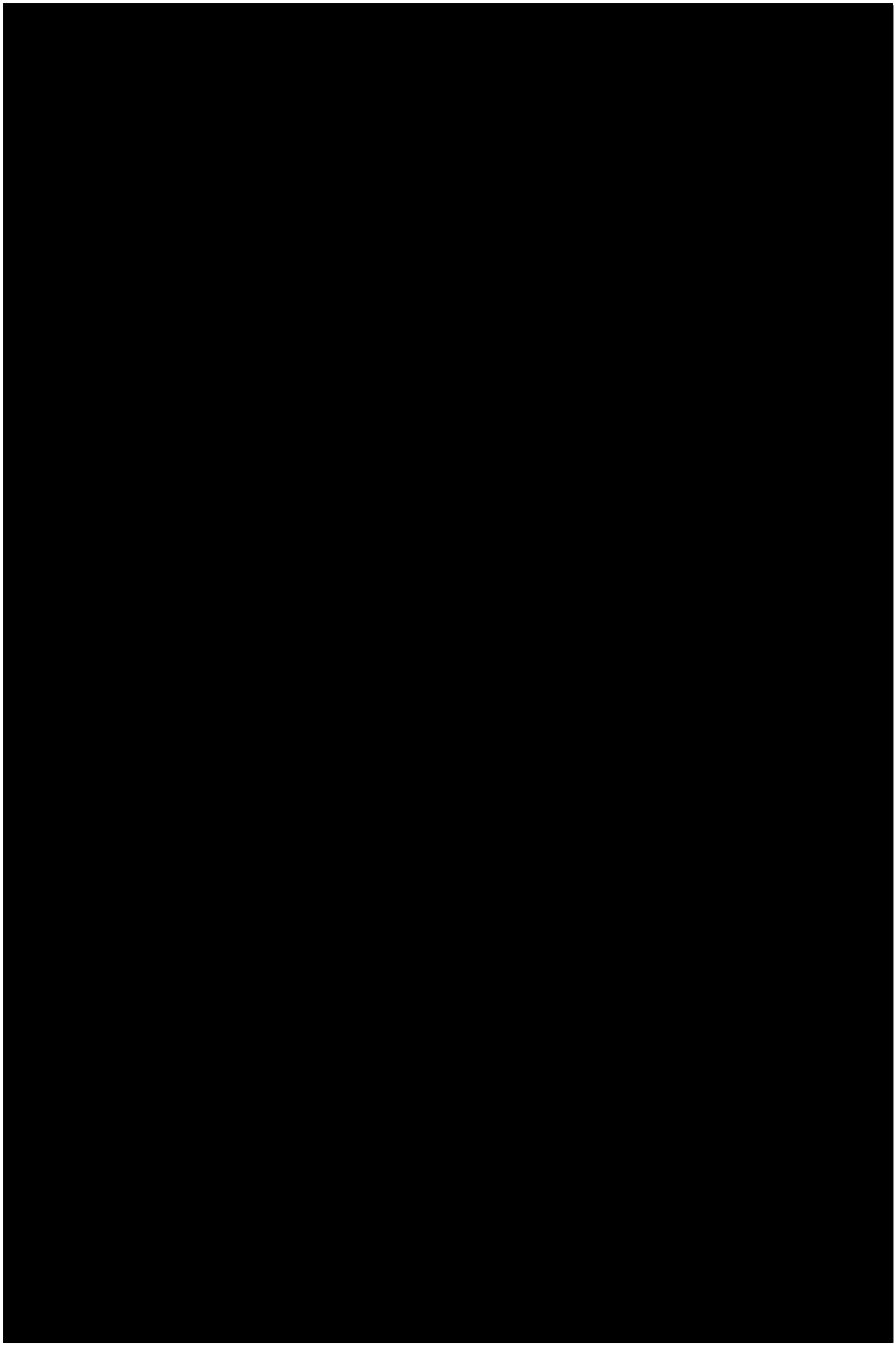
14 [redacted]

62.

63.

64.

65.



66. [redacted]

67. [redacted]

68. Finally, it bears repeating that the change in outcomes described above is not simply a matter of statistics: it means that rapists will go unpunished, and victims will again be

let down by the system in which they have placed trust: see paras 80-83 of Green 1 **[C/6/77]**. This is of deep concern to all those who work within the justice system. As explained by Ms Green:

> *"Those of us in the women's sector have already been able to observe the impact of this change over time, which seems to us to include a widespread loss of confidence in the police and CPS, as well as a massive and exponential drop in the charging rate (with the overall conviction rate, notably, remaining the same)..."* (Green 1, para 5)

> *"I believe that the Crown Prosecution Service's removal of the merits-based approach ... risks permanently affecting trust and confidence in the justice system when it comes to violence against women and girls, as well as allowing vast numbers of sex offenders to go unpunished. In light of the very significant drop in the charging rate, and a number of case studies that have come to my attention, I believe that this has already been the impact of the change in practice."* (para 24)

69. This is not an abstract issue – it will plainly affect numerous individual cases. Ms Wistrich has provided with her witness evidence a series of case studies, comprising individual decisions that may have been affected by the change in approach taken by the CPS: see paras 10-29 of Wistrich 1 as well as Exhibit HW/1 **[C/6/122]**. This is plainly only a fraction of the number of cases dealt with by the CPS, but may assist the Court in understanding how such a change of approach is capable of affecting individual cases.

C. Characterisation of change in approach

70. EVAW in its Letter Before Action contended that the above described change in approach was either (i) a change in policy; or (ii) a change in practice, and it set out its position in detail in respect of both.

71. In his response, the Defendant simply refused to engage in much of that detail. Indeed, the Defendant's position is quite remarkable: he contends that despite the numerous developments set out above, there has in fact been no change to his approach at all: *"There has been no change of policy and the practice remains to apply the Code test. Accordingly, both proposed grounds are misconceived"* (Defendant's Response, para 20). In light of this position, EVAW is therefore

required to consider in more detail the appropriate characterisation of the change that has occurred.

(i) Change of approach

72. It is, EVAW contends, undeniable that there has been a change in approach to the prosecution of rape cases by the CPS since late 2016/early 2017. It would be extraordinary indeed if the removal of specific, tailored, legal guidance, coupled with the encouragement of prosecutors through the roll-out of targeted training to take a different course to that taken for much of the previous decade, could be said to be legally insignificant. Indeed, the fact that there has been a change of approach is something which the Defendant (and other members of the CPS) appear to have recognised at various points in time: see paras 50-56 of XX1, which describes the reaction to the Roadshows and removal of the Merits-Based Approach guidance within the CPS, as well e.g. paras 12-13 of the 8 September 2016 paper [**B/4/49**]; para 12 of the minutes of the meeting on 16 September 2016 [**B/4/47**]; the email received from the Head of the South and East Wales RASSO Unit on 10 June 2019 [**B/4/65/485**]; and the Defendant's Response, para 20 [**A/1/6**].

73. The real question is therefore how this change of approach is to be characterised. As explained above, in EVAW's Letter Before Action it argued that there had been a change of policy and, alternatively, a change in practice. The Defendant appears to refute both of these characterisations, contending that there is no "*underlying change in policy*" or "*significant change in practice*" (Defendant's Response, para 20). EVAW sets out below its submissions as to why this is misguided.

(ii) Change in policy

74. EVAW's principal contention is that the change of approach described above amounts to a change of policy (see EVAW's Letter Before Action, paras 35-45 [**A/1/5**]).

75. There are two distinct bases on which the Claimant contends that the Defendant has changed his policy.

a. The **first** is that whatever the Full Code Test states, the Defendant's change in approach amounts in substance to an adoption of the bookmakers' approach that is inconsistent with the Full Code Test and it is this policy rather than the Full-Code test that governs decision making by prosecutors.

b. The **second** and alternative argument is that even if the Defendant has not gone so far as to positively adopt the bookmakers' approach, the removal of the detailed guidance on the Merits-Based Approach amounts to a change in policy even if the Full Code Test remains. As described below, this affects both the substance and the procedure of the test applied by prosecutors.

76. Importantly, both bases of challenge entail a change in policy despite the fact that the Full Code Test remains in place.

77. As to the first basis – change of policy by the adoption of a bookmakers' approach - EVAW's position is that there has been, substantively, a policy change to require the adoption of a bookmaker's approach in spite of the fact that the Full Code Test remains. This is based on the following:

a. The justification actually provided at the time for the Roadshows was not that it represented a proper application of the Full Code Test. It was – quite clearly from the disclosure provided – all about increasing conviction rates. In the paper of 8 September 2016 [**B/4/49**], the Director of Legal Services, Mr McGill, did not suggest that there was confusion in the CPS about the application of the Full Code Test. Nor does he make any reference to the HMCPSI Review (which, as explained at para 106 below was referred to in the Defendant's Response as justifying the change in approach). What the paper principally refers to is the need to drive up conviction rates:

"5. All responsible organisations strive for continuous improvement. Although the overall conviction rate for these types of cases has remained relatively constant over the last three years (at around 57%), consideration has to be given as to how we drive this figure up. From the figures produced, one answer would appear to be to focus on the trial cases where there has been a straight denial from the defendant. In those cases, the question has to be clearly asked by the reviewing lawyer: is there sufficient evidence to provide a realistic prospect of a conviction? The figures provided for the last

few years indicate that reviewing lawyers are often answering this question wrongly (in very simple terms).

6. Additionally, analysis of the figures by the PMU demonstrate that even minor gains in these difficult cases can have a significant impact on the overall rape conviction rate. If the trial conviction rate could be improved from 45% to 52% the overall conviction rate would increase from 57% to 61% (based on the same 2016/17 projected caseload figures). It is submitted that 52% is an achievable figure because the service achieved it in 2011/12 and 2012/13.

7. It is important to stress that the actual numbers required to deliver this improvement are not great. It will require only 197 more successful cases to secure the overall conviction rate of 61%. Likewise, the same result can be achieved if 350 weak cases were not to be charged. In reality, the improved conviction rate will be secured through more successful outcomes and fewer unsuccessful outcomes."

b. This reasoning expressly refers to lawyers predicting the outcome that will be achieved in rape cases and incorporating that prediction in their decisions. That is the bookmaker's approach.

c. At the Senior Leadership group meeting on 16 September 2016, the Director of Legal Services "*sought views on how decision making in RASSO cases could be improved with a view to increasing the conviction rate for these cases*" (para 12 of the minutes, emphasis added [**B/4/47**]).

d. This was again highlighted in the meeting with RASSO Unit Heads in July 2017, where "*[t]he Director of Legal Services ... emphasised the importance of the 'conviction after contest' rate as a performance measure in rape and has indicated that we should be winning more rape trials than we are losing*" (para 5.7 **[B/4/63]**).

e. It was further emphasised in the Roadshows themselves. As explained at para 43 of XX 1:

"The key message of the training was that prosecutors were currently charging too many rape cases and McGill emphasised the significance of performance data to support this argument. He stated that in 2011-12, 45.3% of rape cases had gone to trial, whereas by 2015-16, this figure had risen to 58.3%. He then stated that the fact that an increased number of rape prosecutions were going to trial proved that the CPS was prosecuting a greater number of weak cases. He stated that in 2011-12 52.4% of rape cases

resulted in a conviction after jury trial but that the figure had fallen to 45% in 2015-16. The fall in the conviction after jury trial rate was significant, he said, because if we were prosecuting the right cases "we would be winning more cases than we are losing"."

f. By focusing on the desired outcomes of the relevant cases (i.e. what is the likelihood a conviction will result?), rather than their merits in an objective sense (i.e. in the words of Alison Levitt QC, what are the merits of a conviction, taking into account what is known about the defence case?) this marked the adoption of the unlawful bookmakers' approach at the expense of the Merits-Based Approach. It was doing exactly what Alison Levitt QC trained prosecutors not to do: to focus on the likelihood of success and not the merits of the case. It was therefore not, as contended by the Defendant, "*normal and refresher training provided to RASSO prosecutors*" (Defendant's Response, para 20). It was specific training brought in to ensure an increase in conviction rates – and thus a move away from the Merits-Based Approach which is (as the Defendant accepts) necessary for a proper application of the Full Code Test.

g. Moreover, this is the view of prosecutors on the ground, as confirmed by para 59 of XX 1, commenting on the Defendant's denial of a change in approach in his Response to EVAW's Letter Before Action:

"*It is my experience that these statements are untrue. The RASSO Roadshows ... clearly endorsed the bookmaker's approach to the prosecution of RASSO cases and prohibited prosecutors from referencing the MBA in their review decisions. This training was reinforced by the removal of bespoke MBA guidance from prosecutor legal guidance and by substantial changes to existing legal training materials. The inevitable result of these changes was for prosecutors to raise the evidential bar for charge in rape cases such that those more challenging case types which based on previous experience are less likely to find favour with a jury became less likely to be charged. Prosecutor colleagues have confirmed that they no longer believe that the MBA needs to be considered when making charging decisions and have adjusted their approach accordingly. I have referenced documentation in this statement which evidences the same.*"

78. In any event, EVAW contends – and this is the alternative second way in which it puts its challenge - that even if the change of approach has not gone so far as to

amount to the substantive adoption of the bookmakers' approach, the removal of the specific Merits-Based Approach guidance is itself a change of policy. This flows inexorably in a situation where specific legal guidance catering to a specific risk is removed. There was a policy, and now there is not. That is a change in policy.

79. There are two ways in which this change is apparent: one is that there has been a change in the substantive test to be applied by prosecutors and the other that there has been a change in the procedural methodology to be applied.

80. The change is substantive as, by removing the specific Merits-Based Approach guidance in relation to rape prosecutions, the Defendant is dis-applying that approach in rape cases. Disapplication of the Merits-Based Approach appears to be how the Defendant himself has previously characterised the CPS' change in approach. EVAW notes, for example, the following public statement made by the Defendant in March 2018 (in a response to a Freedom of Information Act 2000 request, which appears to have been sent on 27 March 2018) [**A/1/24**]:

"*The [CPS] does not follow a 'merits-based' or a 'bookmakers' approach to the prosecution of rape cases. We apply the Full Code Test contained in the Code for Crown Prosecutors*".

81. Senior RASSO leads have expressed similar views. As set out in email from the Head of the South and East Wales RASSO Unit on 10 June 2019 [**B/4/65/485**]:

"The article states that "The CPS said there had been no change in approach" and accuses us of secretly changing policy when clearly there was a change in approach when we were told that the merits based approach was no longer to be applied." (emphasis added)

This constitutes a substantive change in policy: the CPS certainly used to apply a Merits-Based Approach (as has been amply demonstrated above) and is no longer doing so.

82. The policy change is also of a procedural nature as the removal of specific guidance on how to apply the Merits-Based-Approach especially in relation to rape offences is just that, without at the same time bringing about the application of a different approach. Either way, there is a change in the policy being applied by prosecutors.

83. Despite the fact that the Defendant accepts that there have been significant changes to the guidance to prosecutors, and does not appear to take issue with EVAW's description of the Roadshows, the Defendant maintains that there has been no change in policy whatsoever. The following strands of argument appear from the Defendant's Response:

a. **First**, the Defendant contends (essentially as a matter of law) that if there is no change to the Full Code Test, then change to the Guidance supplementing the Code cannot amount to a change of policy (see e.g. Defendant's Response, paras 20, 30 **[A/1/6]**). This is misguided.

i. As the Supreme Court made clear in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45; [2010] 1 AC 345, a lack of a clear policy by the Defendant applying to specific offences may itself amount to a legal error (despite the general guidance contained in the Code). The finding of the Court was that specific guidance applying to the offence in question was necessary to provide the clarity required by the Convention. A lack of such guidance was a breach of Article 8. That finding must, it is submitted, be premised on the assumption that that specific guidance has legal standing: it was required to cure the breach of Article 8.

ii. Indeed, any other position would be illogical. It would mean that the Defendant could promulgate policy directly contrary to, subverting, or misapplying the Code, and require its prosecutors to follow that policy, but insulate it from any challenge (as the Code itself would be unchanged).

iii. It is also contrary to the position taken by the Director of Legal Services in evidence given in other proceedings, as discussed in more detail in subparagraph (d)(v) below (see the witness statement at **[A/3/37C]**).

b. **Second**, the Defendant contends as a matter of fact there has not been a move to the bookmakers' approach (e.g. Defendant's Response, para 20): the

Defendant accepts that any such approach would not be lawful (Response, para 30). EVAW has set out at para 77 above why this argument should not be accepted.

c. **Third**, the Defendant argues that any change in policy was only minor: there was only a "*gentle*" touch on the tiller; only "*limited*" changes to the legal guidance (Defendant's Response, paras 20, 26 and 31). EVAW does not accept that that was the case, given the impact of the change, but in any event it is irrelevant: a change of policy, even if minor, is still a change in policy.

d. **Fourth**, the Defendants argues that the removal of specific legal guidance does not itself amount to a change in policy (whether substantive or procedural), because the 2010 version of the Code was intended to incorporate the Merits-Based Approach.[15] As such, the Defendant contends that there is in fact no change – because the specific legal guidance is covered by the general position in the Code. The changes therefore "*do not have any impact on the proper application of the Code test*" (Defendant's Response, para 26). Again, this is misconceived:

    i. It confuses the impact of the change in policy (whether or not there has been an impact on the proper application of the Code test) with the fact of the change in policy. The two are logically separate.

    ii. It treats the guidance as pointless when it plainly was not. The guidance on the Merits-Based Approach was not some kind of 'hang-over' from the period after *B* and prior to the amendments to the Code introduced in 2010. The specific guidance was promulgated well after the 2010 amendments (indeed, as set out above, the Primary Guidance appears to have been published in 2015), precisely because the terms of the Code were not considered to be sufficient by themselves to ensure the clear direction of the

[15] The Code prior to *B* made clear that: (i) the test was objective; and (ii), it required the jury/judge to be "*properly directed in accordance with the law*". The only material change in 2010 was the addition of the qualification that the jury had to be "*objective, impartial and reasonable*".

Divisional Court to adopt the Merits-Based Approach was followed by prosecutors most particularly in relation to rape cases.

iii. Moreover, there was a clear purpose which the adoption of this specific guidance pursued, which is to explain how to ensure that myths and stereotypes do not affect prosecutorial decision-making in this area. As the Primary Guidance indicated, the Merits-Based Approach ensured that decisions were not based on "*perceptions of how myths and stereotypes might lead a particular jury to reach a particular conclusion*". This is particularly important in rape cases because myths and stereotypes are especially prevalent. An understanding of how properly to apply the Merits-Based Approach assumes special significance if prosecutors are to make effective prosecutorial decisions, without reference to myths and stereotypes. So, while EVAW welcomes the confirmation in the Defendant's Response and in the disclosure that the CPS still provides training on myths and stereotyping – it does not excuse the fact that the methodology for ensuring that myths and stereotypes do not infect decision-making has now been removed. EVAW further notes, in this regard, that both the 7th and 8th Editions of the Code contained separate and additional sections on myths and stereotypes – as set out at para 24 above.

iv. That the guidance and training on the Merits-Based Approach performed a very specific function is confirmed by the perspective of those who actually work in this area. As set out at para 65 of XX 1:

> "*The reality, which was recognised by the organisation for many years prior to the delivery of the Roadshows and the subsequent edits to training materials and guidance, was that RASSO prosecutors require detailed input on the subject of appropriately applying the MBA to RASSO charging decisions because it is these cases which are most regularly associated with myths and stereotypes and where there is a particular danger that the low*

conviction rate can impact upon the prosecutor's approach to the concept of a realistic prospect of conviction."

v. Finally, the significance of the guidance in putting meat on the bones of the Full Code Test has previously been recognised by the CPS. Mr McGill himself, in his capacity as Director of Legal Services at the CPS, provided in July 2018, a signed witness statement to the Independent Inquiry into Child Sexual Abuse **[A/3/37C]**, in which he explained the role played by: (i) the Code; and (ii) CPS guidance. In particular, he set out how the 7th Edition of the Code (i.e. the 2013 edition) had been deliberately and substantially shortened from the previous version so that it would be more streamlined (see paras 56 and 57 of the witness statement). The Code was, he said, an "*overarching statement of principles*" (para 57). Mr McGill then proceeded to explain to the Inquiry how, as a result of the "*streamlined*" nature of the Code, more detailed information fell to be provided in guidance: "*where information, such as that relating to victim's rights, could be found elsewhere in the publically available guidance and policies a decision was taken not to include it in the Code*" (para 57). He added that "*since its inception, the CPS has produced Guidance relevant to the prosecution of sexual offences*" which he expressly noted included guidance on the Merits-Based Approach (para 61 and the reference to the Child Sexual Abuse Supplementary Guidance on p.15).[16]

(iii) Change in practice

84. Further and in the alternative, EVAW contends that even if the change in approach does not formally amount to a change in policy, the actions of the Defendant have clearly brought about a significant – and deeply concerning – change in practice: (i) in favour of the bookmakers' approach; (ii) alternatively, a more 'risk-averse'

[16] No mention was made of the fact that the CPS had, by this time, clearly begun the process of deleting other references to the Merits-Based Approach from (at least) the Primary Guidance and other training materials.

approach to prosecution in which fewer 'difficult' cases are brought. That change in practice is evidenced by the precipitous fall in the number and rate of cases charged, set out above. Even if the Defendant only intended a minor "*touch on the tiller*", the result has been a substantial change in direction. EVAW clearly set out its position in this regard at para 52 of its Letter Before Action.

85. The Defendant has hardly engaged with this contention, however. His sole statement on the point is at para 35 of his Response:

> "*Just as there has been no change in policy there has been no significant change in practice. The Defendant relies on the content of paragraphs 29-34 above [in respect of the change of policy] as its defence also to this second ground. Indeed the only change in practice is limited to ensuring that weak cases (as defined at paragraph 26 above) are not prosecuted. The practice remains a proper application of the Code test*" (emphasis added).

86. An assertion that there has been "*no significant change in practice*" is simply not good enough. Indeed, what this paragraph tends to suggest is that there was a change in practice (taking "weaker" cases out of the system), but that the Defendant considers that change in practice to be justified. That is a separate (and secondary) question.

87. It appears to EVAW, however, that the Defendant's position is more nuanced than is set out in his Response. While he did not engage with the point there, elsewhere he has admitted that there has indeed been a significant and concerning drop in prosecution rates and volumes (such that it is not understood that this is in contention between the parties). However, his contention appears to be that none of that can be attributed to the change in practice outlined above.

88. In a letter to EVAW on 18 February 2019 [**A/1/4**], a press release dated 20 May 2019 [**B/4/68**] and in internal circulars/briefings for RASSO prosecutors sent on 15 July 2019 [**C/9/166**] and 29 July 2019 [**B/4/67**], the CPS variously attributes the drop in prosecution rates to the following: (i) a fall in referrals from the police; (ii) an increase in cases where the CPS has given early investigative advice to the police; and (iii) the "*growth in digital data*", leading to investigations taking longer.

89. EVAW specifically asked the Defendant in its Letter Before Action to set out his position on this issue and, in particular, if his position was that the change of approach outlined above has had no impact whatsoever and that all of the drop in volumes are attributed to other causal factors, to provide a detailed explanation of any other reasons he contended would explain the falls in question, including by reference to the dates of the other "*improvements*" referenced. EVAW specifically noted that it "*would expect such an explanation to be provided in response to this letter*" (para 71). It is regrettable that, despite this appearing to be the Defendant's position from these internal and external documents, he did not respond to this request by EVAW in any meaningful way.

90. EVAW reserves its position to argue further as to any other causal factors to which the Defendant seeks to attribute the drop in prosecution rates. However, from the information available to it, EVAW submits that there is indeed clear evidence that the change in approach is a significant factor in the fall in prosecution rates/volumes:

a. The evidence of XX clearly explains the significant impact that the Roadshows and changes to the guidance have had on prosecutors (see, in particular, paras 50-56). As XX sets out at para 52, for example, as a result of the Roadshows:

> "*Many colleagues have positively embraced the 'bookmaker's approach' to charge, commenting that, as a result f the Roadshow training, they believe they no longer have to consider the MBA at all and feel empowered to stop the prosecution of more 'difficult' cases which, based on their previous experience, have little prospect of resulting in a successful outcome at trial such as so called 'student rape cases' involving alcohol or cases with little or no corroborative evidence available to support the complaint made. When I have had these discussions, colleagues have suggested that the new approach introduced by the Roadshow training will ultimately benefit victims because, by following the MBA, we have been unnecessarily subjecting victims to the trauma of trials in challenging cases where on account of jury prejudice we can anticipate a jury acquittal from the outset.*"

b. As already noted (see para 77.g above) XX has also commented expressly in XX 1 on the Defendant's contention that there has been no change in policy or practice. As XX explains, these statements are not consistent with XX's experience (XX 1 at para 59).

c. The statistical analysis which Professor Adams has carried out further confirms that the alternative explanation for the drop in charging rates given by the Defendant does not stand up to scrutiny. Both Adams 1 and Adams 2 consider whether the collapse in the charging rate of rape offences which can be observed from the data can be adequately explained by the other factors pointed to by the Defendant in the various internal and external statements referred to above. Her firm conclusion is that they cannot. Rather, Professor Adams concludes that the only explanation consistent with the trends she has observed in the data is that which EVAW has alighted upon: namely, the change in approach in relation to the Merits-Based Approach. As Professor Adams says at paras 7(c) and (e) of Adams 1 [**D/10/167**]:

"*None of the factors highly by the Director of Legal Services at the CPS in their briefing note to RASSO teams and staff can fully account for the fall in the rape charging rate: a fall in police referrals, a rise in cases where files are returned to the police, and an increase in the length of time for cases to progress through the system, are insufficient to explain the most recent decline in the rape charging rate. ...*

It also appears that the magnitude of recent declines cannot be attributed to changes in disclosure practice alone. Taking the rate of failure in the CPS January 2018 disclosure review as a benchmark for the impact of greater scrutiny of unused material on charging practice implies a much smaller decline in the charging rates than that observed in the available data for 2018/19."

d. Professor Adams' ultimate conclusion is therefore that (Adams 1 at para 47, emphasis added):

"*While the evidence is not sufficient for me to come to firm statistical conclusions either way about the causal impact of these changes in the application of the MBA approach on the charging rate for rape cases, I importantly have not identified any other causal factor in the documents and information provided to me that could explain such a drop. As I have already said, the reasons provided by the CPS itself do not appear to me to explain the decline in the charging rate, based on the analysis I have conducted.*"

e. For the avoidance of doubt, Professor Adams reaches the same conclusion in relation to the most recent data disclosed by way of the 2018/19 VAWG Report. As she says at para 16 of Adams 2 [**D/10/173**]: "*In conclusion,*

therefore, none of the explanations given by the CPS are able to account fully for the most recent declines in the charging rate".

f. **This paragraph is confidential:** [redacted]

g. Finally, this is further confirmed by the experience of those who work in the criminal justice system as a whole, as described at para 80 of Green 1 **[C/6/77]**:

> *"There is an obvious risk that the current CPS approach, whereby all references to and explanation of the merits-based approach has been removed from its internal and external guidance and training to prosecutors has even advocated a "touch on the tiller" in the opposite direction, is creating a negative feedback loop: prosecutors are making judgements about whether to charge RASSO cases based on what they think a jury would make of the credibility of the victim (the 'bookmakers' approach'). This means they are less likely to charge more challenging cases, which means the police are reacting by not building these more challenging cases, leading to more cases NFA'd (designated 'No Further Action') at an earlier stage. Media reporting and unclear, defensive responses from CPS are likely to add to the negative signals to survivors who are considering whether to report."*

91. More specifically, in relation to the various factors pointed to by the Defendant as explaining the drop in prosecution rates (as summarised at para 88 above):

a. As to point (i) (a drop in referrals from the police) there are a number of problems with this hypothesis as justifying the changes observed:

i. First, as Adams 1 explains at para 25: "*while referrals from the police did fall between 2015/16 and 2017/18, the number of cases charged by the CPS from this group has fallen further still. This has resulted in a fall in the charging rate of cases referred from the police to the CPS*". This point is elaborated upon in Adams 2 (para 12, emphasis in original): "*[A] fall in police referrals cannot explain the drop in the charging rate. While the number of pre-*

charge decisions did continue to fall in 2018/19 ... and the number of police referrals fell ... the number of cases charged has fallen further still resulting in a fall in the charging rate". This analysis leads Professor Adams to conclude that this argument from the Defendant in relation to falling police referrals is "*without merit*" (Adams 1 at para 25 and Adams 2 at para 12).

ii. Moreover, Professor Adams makes the further point that a fall in police referrals to the CPS may itself be a response to changes in CPS practice following the removal of the MBA guidance (Adams 1, para 26). This is supported by the evidence of those who work directly in the system. As explained in paras 33-43 of Wistrich 1 **[C/8/121]**, the change in approach that has taken place within the CPS has had repercussions at the level of police decision-making as well. As Ms Wistrich explains at para 42 of her statement: it appears 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*".

iii. EVAW further notes in this regard a letter sent in June 2019 by Detective Chief Constable Sarah Crew, the National Police Lead on Adult Rape and Serious Sexual, to all Chief Constables and Force Rape and Serious Sexual Offence Leads **[A/3/37D]**. In that letter, DCC Crew explained that she had recently met with the Defendant to discuss matters relevant to the "*worsening outcomes for complainants, including the observed rise in police recording against falls in the volume of police referrals to the Crown Prosecution Service, charges and convictions for adult rape and serious sexual offences*". The letter then goes on to say that the matters discussed with the DPP, included "*approach to charging in*

rape and serious sexual assault cases – a move to a more risk averse approach" (emphasis added). Again, this suggests that police are conscious of the changes made by the CPS to its charging practice, and that those changes are having an impact on police behaviours. In the premises, these cannot be assumed to be separate isolated factors.

b. As to point (ii) (an increase in cases where early investigative advice is given) similar responses apply:

    i. First, as a matter of statistical analysis, this explanation is not borne out. As Professor Adams explains, one would expect that a rise in the number of cases where early investigative advice is given such that the file is returned to the police without a charging decision having been taken by the CPS, would result in a greater proportion of cases being classed as "administratively finalised" (see footnote 14 above and Adams 1, paras 11(c) and 27). As Professor Adams goes on to explain, there is some support for the suggestion that this may account for some of the fall in the rape charging rate in 2017-18 as the proportion of administratively finalised decisions in that period doubled (Adams 1, para 28). However, Professor Adams is clear that this cannot explain the further fall in the charging rate in the period 2018-19. Rather, as she explains at Adams 1, para 29 and Adams 2, para 13, the fall in that period "*has been driven by a rise in the proportion of "No Further Action" outcomes being assigned amongst non-AF'd [administratively finalised] cases*". As set out at Adams 1, para 11(b), a "no further action" decision is a decision taken by the CPS not to prosecute for evidential or public interest reasons. The conclusion which Professor Adams is therefore driven to is that "*the proportion of cases passing the Full Code Test has fallen in recent years. In 2013/14, the proportion of cases passing the Full Code Test was between 62% and 66% for all rape-flagged cases and between 55%*

and 59% for rape-only cases. However, over April-September 2018, these figures had fallen to between 37% and 49% for all rape-flagged cases and between 30 and 41% for rape-only cases" (Adams 1, para 32).

ii. Second, as Professor Adams also notes, the rise in case files being returned to the police following early investigative advice is not inconsistent with a change in CPS practice following the removal of the MBA guidance and training: Adams 1, para 30. Again, this is borne out by the factual evidence before the Court. As Wistrich 1 explains, the experience of ISVAs is that prosecutors in the CPS are "*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*" (para 36(b), emphasis original). So once again this factor cannot be isolated from the change in approach.

c. As to point (iii) (the issue of disclosure and an increase in the length of time it takes for cases to progress through the system), there are a number of points to make:

i. First, as Professor Adams explains, the evidence as to whether there has been an increase in the overall time taken between a case being referred by the police and a charging decision is mixed – certainly for those cases which are ultimately charged (Adams 1, paras 34 and 35). In any event, if cases taken more time to progress through the system, one would expect that to also increase the rate of cases being classified as administratively finalised. However, as already explained above, that is not the case for 2018/19 (see Adams 1, paras 33 and 36 and Adams 2, para 14).

ii. As for the possibility that additional scrutiny as a result of changes in disclosure could be causing the fall in the charging rate,

Professor Adams' view is that "*the available evidence suggests that the potential magnitude of this channel is likely to be small*" (Adams 1, para 41). In particular, she notes that a disclosure review of all live RASSO cases undertaken in 2018 resulted in just 1.3% of those cases being stopped (Adams 1, paras 37 and 41).

iii. In addition, EVAW would note that as the issue of disclosure arose later than the change in approach challenged in this case, it does not explain the falls in 2017.

iv. Finally, as explained at para 70 of XX 1, the fact that changes in the approach to disclosure may be contributing to the fall in volume does not disguise the fact that the change in approach is a key driver of that fall:

> "*This development has increased the amount of time it typically takes for an investigation and charging decision to be completed in a rape case and this will be contributing to falling volumes but in my view it is unlikely that this development alone provides a full explanation for the falls observed. As I have explained above, I believe the fact that the CPS has raised the evidential bar for charge in rape cases as a result of the Roadshows and abandonment of reference to the MBA and associated guidance is, as explained above, a key explanatory factor behind the falling volume and proportion of rape cases charged.*"

92. For all the above reasons, EVAW therefore invites the Court to reject the contention that there has been no change of practice in the CPS.

IV. Grounds of review

93. EVAW has set out above its contentions as to the appropriate characterisation of the change in approach. The relevant grounds of review relied on by EVAW apply as follows to those different possible characterisations:

a. Grounds 1 and 2 apply insofar as the Court considers that there has been a change of policy in favour of a bookmakers' approach.

b. Grounds 3 and 5 apply insofar as the Court considers that there has been any change of policy (whether in favour of a bookmakers' approach or in removing the Merits-Based Approach guidance).

c. Ground 4 applies insofar as the court considers that there has been a change of policy in removing the Merits-Based Approach guidance or a change of practice by virtue of that change.

d. Grounds 6 and 7 apply howsoever the change in approach is characterised (and indeed, ground 7 applies even to the extent that there has been no change in approach).

A. Ground 1: Unlawful application of the bookmakers' test

94. In the event that the Court finds that there has been a change in policy in favour of the bookmaker's approach, EVAW contends that this is unlawful.

95. The Defendant accepts that "*it is beyond doubt that the 'bookmakers test' does not represent a proper application of the first stage of the Code test*" (Defendant's Response, para 30). He is right to do so. The Divisional Court in *B* made it very clear that the appropriate approach to the prosecution of rape cases was the Merits-Based Approach. It made it equally clear that the bookmaker's approach was not lawful. This is because, as the subsequent detailed materials produced by the CPS made clear, as a matter of rationality, the Merits-Based Approach merely explicates what is necessarily required to apply the evidential test which (by way of reminder) is that there must be "*sufficient evidence to provide a realistic prospect of conviction ...on each charge*". Thus, those materials variously state:

a. The Merits-Based Approach "*reminds prosecutors of how to approach the evidential stage of the Full Code test in tricky cases*".

b. It is the "*intellectually rigorous approach to take to the Full Code Test*".

c. It ensures that the CPS avoids "*flawed review decisions*".

d. It was "*best understood as an explanation of the correct principles for decision-making under the Code*".

e. Applying the Full Code Test correctly "*necessarily involves taking the merits based approach*".

f. The Merits-Based Approach "*is not a different test but merely reinforces the approach we must take in applying the Code test*".

96. In the premises, if EVAW is successful in demonstrating that the Defendant's change of approach has effected a change of policy in favour of the bookmakers' approach, that change is contrary to the Divisional Court's decision in *B* and unlawful. Its effect is to require decision makers to apply in practice a test which is – in the CPS' own clear words – incompatible with the Evidential Stage of the Full Code Test. In other words, it requires them to act incompatibly with their own published policy.

B. Ground 2: Adoption of bookmaker's approach is in breach of Articles 3 and 8 of the Convention

97. Further, the adoption of the bookmaker's approach is also unlawful as it is contrary to the Defendant's duty under s. 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights. This is because it is a policy whose adoption is incompatible with the implied positive obligation under Articles 3 and 8 of the Convention to conduct an effective investigation into a credible allegation of rape: see *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2018] 2 WLR 895 ("*DSD*").

98. The obligation to investigate effectively is indissoluble from an obligation to prosecute such cases where appropriate. As the European Court of Human Rights stated in *MC v Bulgaria* App No. 39272/98 (a case relied on heavily by the Supreme Court in *DSD*):

> "*...the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution*" (para 153, emphasis added: cited in *DSD* at para 18).

99. Moreover, as the Divisional Court found in *B*, a failure to take a proper approach to prosecuting serious crimes against the person is likely to entail a breach of Article 3 of the Convention (see paras 64-71).

100. The CPS, as the public authority responsible for prosecutions, is subject to this investigative/prosecutorial obligation with respect to its prosecutorial functions. Insofar as it adopts policies governing the exercise of its prosecutorial powers which require prosecutors to act incompatibly with the Convention, such systemic failings will breach Article 3.

101. The investigative/prosecutorial obligation imposed under Article 3 is a duty of means not ends. The mark of the effective discharge of that duty is not, therefore, that the application of the state's machinery results in a conviction. Rather it is that the state's machinery operates in practice to bring to trial those who, as a result of an effective investigation and effective prosecution, should be required to answer for their alleged mistreatment. The evidential test set out in the Full Code Test does just that. It requires prosecutors to charge (subject to the public interest test) in all cases 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.

102. The adoption of the bookmaker's approach, by contrast, means that in cases of serious sexual offending, where myths and stereotypes continue to abound, alleged offenders will not be prosecuted not by reason of a lack of evidence but because of the improper application of those myths and stereotypes. The result is that objectively meritorious cases will not be prosecuted. This is the antithesis of an effective investigation.

103. In *MC v Bulgaria* the Strasbourg Court found the Article 3 investigative obligation to have been breached where there was evidence of a practice by the Bulgarian authorities of only charging rape offences where violence had been used. In reaching this conclusion the Court recognised that "*in respect of the means to ensure adequate protection against rape, states undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account*" (para 154). It nonetheless concluded at para 164 that any such practice: "*risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Arts 3 and 8 of the Convention must be seen as requiring*

the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".

104. The adoption of the bookmaker's approach is bound to mean that certain types of rape go not only unpunished but also uncharged. A policy which adopts such an approach is, therefore, contrary to both Articles 3 and 8 of the Convention.

C. Ground 3: Change of policy by removing the specific guidance on the Merits-Based-Approach is irrational

105. In the alternative, if the change of approach does not amount to the substitution of the bookmaker's approach for the Merits-Based Approach, but does comprise a policy change insofar as the Defendant has removed the specific guidance on the Merits-Based Approach, that policy change is also unlawful because it was irrational.

106. In the Defendant's Response, the only justification provided for the change in approach is reliance on the HMCPSI Review (see paras 24-26). In EVAW's view, it is highly questionable whether this was, in fact, the reason for the change in approach given that there is no contemporaneous reference to the HMCPSI Review in any of the relevant documents: see para 77 above. Nor is there any reference, in substance, to the issues raised in the HMCPSI Review in the contemporaneous documents surrounding the decision to change approach in 2016. Rather, as explained at para 77 above, those documents indicate a concern in relation to the conviction rate, not the approach of prosecutors. This is also supported by XX's evidence which is clear that "*no reference was made by either speaker [at the Roadshows] to the 2016 HMCPSI thematic review findings or to previous training and guidance issued by the CPS in response to it*" (XX 1 at para 45).

107. But in any event, even if the Defendant did have in mind the HMCPSI Review at the time he was making the decision to change approach, the HMCPSI Review did not advocate removal of the specific guidance on the Merits-Based Approach. On the contrary its recommendations are wholly inconsistent with such a course of action. It expressly found that "*The policy and legal guidance for RASSO casework is sound and when correctly applied should deliver quality casework*" (para 1.3 **[B/4/44]**). What it advocated (along with the 2015 ARU Reviews discussed at paras 37 and 38

above) was training on the existing guidance, including the Merits-Based Approach. The HMCPSI Review therefore provides no rational justification for the removal of the existing guidance.

108. Furthermore, the training recommended in the HMCPSI Review had already been carried out, by way of the RASSO Refresher Trainings. This is apparent from the slides prepared with that training [**B/4/54**]. Specifically:

a. The HMCPSI Review (along with the other reviews referenced above) was set out in the introduction to those slides as one of the reviews "*highlighting areas for improvement*", which the training was intended to address.

b. Slide 8 notes the finding of the HMCPSI Review that there was a lack of consistent application of the CPS' policies and protocols, including a failure to apply the Code and Merits-Based Approach correctly (see also p9 of the accompanying Tutor Brief [**B/4/54/313**]).

c. The Tutor Brief also indicates that the themes covered in the refresher training include the consistent application of the protocol and policies, the Code and the Merits-Based Approach (p8 [**B/4/54/312**]).

109. That RASSO Refresher Training had been conducted in 2016, i.e. the same year that the decision to undertake the change of approach challenged by way of this judicial review was made. No disclosure has been provided which would indicate that research had been undertaken within the CPS to suggest that that Refresher training had been insufficient (indeed, it is difficult to see how this could have been done in the time). Again, therefore, the HMCPSI Review provides no rational justification for the removal of the existing guidance and the Defendant's (*ex post*) reliance on the HMCPSI Review in these proceedings is itself irrational as the Review simply cannot justify the change which was made.

110. This suggests to EVAW that there must have been another rationale for the change in approach.

111. EVAW is only aware of one such possible rationale, which is the justification in fact put forward by the Defendant in the RASSO Roadshows and in the material prepared

in respect of the decision taken in 2016: i.e. the need to increase the conviction rates for rape. While it is possible that such an aim might be legitimate in certain circumstances, it is denied that it was so in this case (most particularly, where low conviction rates have always been attributed by the CPS itself to rape myths and stereotypes: see XX's Witness Statement, paras 22-23). Moreover, even if the aim was legitimate it is incapable of rationally justifying the course of action which the CPS actually took. The decision to remove guidance which was introduced with the specific aim of ensuring the proper application of the Merits-Based Approach, in an area where there is a serious risk of myths and stereotypes being improperly applied, inexorably entailed the serious and obvious risk that any increase in conviction rates obtained would be the result of unlawful decision making: namely a failure to apply the Full Code Test, including through the application of the bookmaker's approach. For the reasons elaborated in next ground of challenge the Claimant contends that the removal of the Merits-Based Approach guidance has indeed resulted in a change of practice whereby prosecutors are applying that unlawful approach.

112. As such, the Defendant's purported justifications provided no rational basis for the change in approach which was in fact taken.

113. Further, for the reasons developed below, by reasons of the procedural failings in his decision making, the Defendant failed to make sufficient inquiry before taking his decision to change his approach in breach of the *Tameside* duty.

D. Ground 4: Change of practice - systemic illegality arising from removal of specific guidance on the Merits-Based-Approach

114. As adverted to above, the removal of the specific guidance on the Merits-Based Approach (whether constituting a formal change of policy or otherwise) creates an unacceptable risk of illegality. In particular, it creates a serious risk that prosecutors will fail to apply the Merits-Based-Approach and the Full Code Test properly but will instead apply the unlawful, bookmaker's approach.

115. While the Merits-Based Approach elaborates upon the Evidential Test and in many cases may be an unnecessary explication, it assumes very great importance in cases of rape and serious sexual assault, where there is a risk that an assessment of the

evidence will be tainted by harmful false stereotypes. This is precisely because, when applied, it ensures that those stereotypes do not impermissibly feed into the application of the evidential test. It is in just such cases that a profound difference in outcome arises depending upon whether the Merits-Based Approach or the bookmaker's approach is applied. That is no doubt why cases of rape were specifically highlighted by the Divisional Court in *B*, and why the CPS previously took particular care to guide prosecutors on the application of the Full Code Test in cases of serious sexual offending against women by providing detailed and specific guidance, including in the six page Primary Guidance document (the 'Code for Crown Prosecutors Test – Merits Based Approach' [**B/4/57**]) and the Supplementary Guidance (comprising Chapter 8 of the CPS's policy on rape [**A/1/20**] and its guidelines on prosecuting cases of child sexual abuse [**B/4/61/469**]).

116. It is submitted that there must, at the very least, be a very great risk that as a result of the removal of that Guidance, prosecutors are not currently applying the Merits-Based Approach at all but instead are applying the bookmaker's approach (or, insofar as they are purporting to apply the Merits-Based Approach they are not in fact doing so correctly).

117. In EVAW's submission, that risk flows necessarily from the Divisional Court's decision in *B*: the Court in *B* expressly recognised (at para 49) that there were two ways in which the Full Code Test could be interpreted and declared (at para 50) one of those interpretations to be right and one of them to be wrong and unlawful. Thus, unless the Defendant takes positive steps to tell its prosecutors which of the two interpretations of the Full Code Test identified in *B* is the right one (i.e. the Merits-Based Approach), there must be a risk that at least some of those prosecutors will adopt the wrong, and unlawful, interpretation.

118. Of course, the risk is all the greater because the removal took place following the instructions prosecutors were given on the RASSO roadshows, which included an effective instruction to prosecutors to take "*weak cases out of the system*" (XX 1 at para 47).

119. In fact, the Claimant goes further. The evidence before the Court suggests that not only is the improper application of the bookmakers approach a risk which has arisen as a result of the Defendant's change in approach, but that this is an outcome which has eventuated insofar as a substantial proportion of prosecutors are in fact failing to apply the Merits-Based Approach correctly in practice because they either understand the proper test to be the bookmaker's approach or if not, they nonetheless lack the necessary assistance in properly applying that test, which was formerly provided in the Primary and Supplementary Guidance. The evidence overwhelmingly points to this conclusion for the reasons set out above in relation to why there has been a change in practice (see paras 84-92); and reflects the views of prosecutors themselves. As XX says: "*many colleagues have positively embraced the 'bookmaker's approach' to charge*" following the Roadshows and removal of the Primary and Supplementary Guidance (XX1 at para 52; see also the views of the Head of South and East Wales RASSO Unit at para 81 above). Furthermore, for reasons already explained, that understanding is in turn likely to have been imparted to the police and to be influencing decision making by them: see Wistrich 1 at paras 33-43.

120. Insofar as individual prosecutors are failing properly to apply the Merits-Based Approach they are clearly acting unlawfully for the reasons set out in Grounds 1 and 2 above. But this legal error will not necessarily be apparent on the face of a decision not to charge and so not remediable by way of an individual judicial review challenge to that decision. The underlying cause of such unlawful conduct is instead systemic and must be remedied at an organisational level by rectifying the policy failings that are giving rise to the misunderstanding and resulting illegal decision making: see e.g. *R (Tabbakh) v Secretary of State for Justice* [2014] EWCA Civ 135 at para 54; *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341 at para 27, and *R (Howard League) v Secretary of State for Justice* [2017] 4 WLR 92.

E. Ground 5: Material flaws in the procedure

121. This Ground of challenge applies insofar as the Court considers that there has been a change of policy (however that change of policy is articulated).

122. EVAW set out the procedural flaws in its Letter Before Action. In his Response, the Defendant appeared to accept that there has been no compliance with the various legal standards in question: in the letter from the Government Legal Department on 17 July 2019 **[A/1/11]** the Defendant confirmed that "*to the best of its knowledge, there is no material to disclose regarding (i) consultation; (ii) the public sector equality duty; and (iii) the Convention.*"

123. In other words, the Defendant's case on this ground of challenge is wholly premised on there having been no change in approach. His entire rebuttal to these points is set out in para 33 of his Response:

> "*As there is no new policy there has been no consultation, no call for evidence or public announcement. Similarly there is no breach of the public sector equality duty set out in section 149(1) of the Equality Act 2010 nor any breach of any duty to conduct sufficient inquiry*".

124. As such, EVAW understands that insofar as there has been in fact a change of approach, the Defendant has no grounds to state that it complied with the relevant legal standards. Insofar as EVAW can establish that the change of approach amounted to a change of policy (which for the reasons set out above, it is submitted it can), EVAW submits that this ground of challenge must therefore succeed. However, for the avoidance of doubt, EVAW sets out its position on the material failures in question below.

(i) Breach of duty to consult

125. The Defendant failed properly to consult, and/or acted contrary to the legitimate expectations of victims of rape and/or advocacy groups, and/or irrationally or unfairly in introducing the change of approach without consultation.

126. It is clear from the CPS website that, ordinarily, the Defendant consults publicly on changes to its approach and guidance **[A/3/37E]**. It states that:

> "*We want to hear your views about our prosecution policy. You can help us to be better informed, fairer and more representative by participating in our consultations.*"

127. As is apparent from the voluminous consultation documents set out on that public website, changes to guidance are preceded by a public announcement, a rationale, and an open consultation, on which there is a clear opportunity to comment. That is to be expected: the approach taken by the CPS is one that has a significant effect on the lives of many individuals.

128. Moreover, as set out in detail in Green 1, paras 42-66, this has consistently been the case in respect of polices around rape and sexual assault in particular. Ms Green explains how the CPS has historically "*regularly and extensively consulted publicly before materially changing its guidance, policy or practice around rape and serious sexual offences prosecutions, often specifically encouraging responses from the voluntary sector, including women's organisations and survivor groups*" (Green 1 at para 42). As she further explains, the CPS has organised and attended "External Consultation Group" meetings to consult on criminal justice system policy and practice specifically in relation to offences such as rape (para 43-46), as well as facilitating other cross-sector engagement, over many years (see paras 47-66).

129. Most notably, for over ten years, developments in CPS guidance and policies on rape and other related offences have been subject to extensive consultation. For example:

    a. In 2008, prior to the development of the CPS' policies on prosecuting cases of rape, the CPS undertook an extensive consultation process which then informed the revised public policies: Green 1, paras 51 and 52. As stated by the Defendant at that stage: "*[t]he feedback from the consultation has been invaluable*": Green 1, para 53.

    b. In 2011, the Defendant issued a public consultation on new proposed guidance for prosecutors around the proper approach to 'false retractions' by rape complainants: Green 1, para 54.

    c. In 2012, the CPS held a further consultation with women's groups inviting feedback on a proposed updated policy on prosecuting rape: Green 1, para 33.

    d. In 2013, the CPS issued a public consultation on new guidelines for prosecutors on prosecuting child sexual abuse cases, including a series of roundtables: Green 1, para 57.

e. In 2014, the Defendant and the national policing lead for adult sexual offences announced a new national rape action plan, developed with the assistance of a 'rape scrutiny panel' attended by police, prosecutors, academics and victims' groups: Green 1, para 58.

f. Also in 2014, the CPS consulted on an entire package of revised CPS and police guidance and training covering a range of areas addressing violence against women and girls, including guidance on charging allegedly 'false' rape or domestic violence complainants; guidance for police on when to 'crime' or 'no crime' offences; considerations relating to drug-assisted rape; a checklist for police/CPS in dealing with individuals with intellectual disabilities; considerations for interview planning in relation to sexual offences; considerations relating to bail and remand; a new risk assessment checklist for use by the police in VAWG cases; guidelines in handling young complainants; and the new national policing curriculum: Green 1, para 62.

g. In 2016 there was a public consultation on social media offences, including specifically whether social media offences relating to violence against women and girls should be considered: Green 1, para 63.

h. In 2016-2017, the CPS consulted with interested groups in the women's sector regarding CPS policies on stalking and harassment: Green 1, para 65.

i. In 2018, the CPS started a consultation on new draft guidance relating to the use of pre-trial therapy notes in criminal proceedings: Green 1, para 66.

130. It is well-established that a legitimate expectation that a decision-maker will consult before taking a decision can arise out of a past practice of consultation, and that if such a legitimate expectation exists, it is unfair/ inconsistent with the principle of good administration to depart from it (see e.g. *CCSU v Minister for Civil Service* [1985] AC 374, p401).

131. In this case, EVAW submits that there is clearly a sufficiently consistent policy of extensive consultation (see *R (BAPIO Action Ltd) v Home Secretary* [2007] EWCA Civ 1139, para 39) with key stakeholders including victim's organisations and

advocacy groups, to give rise to a legitimate expectation that EVAW would have been consulted on the change of policy set out above. It was not. That was unlawful.

(ii) Breach of s149 of the Equalities Act 2010

132. The Defendant further failed to have due regard to the matters set out under s149(1) of the Equality Act 2010, pursuant to the public sector equality duty ("**PSED**").

133. The Defendant is under a duty to have due regard to the matters in s149 of the Equalities Act 2010. It is an essential preliminary to public decision-making (see *R (Hurley) v Secretary of State of Business Innovation and Skills* [2012] HRLR 374, para 70).

134. It is clearly the case that women are disproportionately the victims of rape, and that women who have other protected characteristics (such as black and ethnic minority women) and women with disabilities, including mental disabilities, are affected particularly acutely by myths and stereotypes around rape: see further Green 1, paras 3, 38, 39, 71).

135. The whole purpose of the Merits-Based Approach was to explain how to stop decisions being taken by crown prosecutors without regard to those harmful myths and stereotypes (it having been long been accepted that those myths and stereotypes should not be taken into account). The specific Primary and Supplementary Guidance was designed to ensure that myths and stereotypes did not affect the decision to prosecute.

136. In relation to either of the alternative policy changes which it is contended the Defendant has brought about, therefore, his duty is *a fortiori*: it was of paramount importance to have regard to the matters specified in s149 of the Equalities Act before the change of approach, because it was removing protection that was designed to ensure non-discrimination.

137. Instead, the Defendant either replaced the Merits-Based-Approach with the bookmaker's approach, or removed all reference to the Merits-Based Approach, and instructed CPS prosecutors not to have regard to it, without gathering appropriate evidence and consulting with relevant parties.

138. The Defendant therefore failed to have due regard to the need to eliminate discrimination, advance equality of opportunity (including *inter alia* by minimising disadvantages suffered by persons with such protected characteristics and encouraging them to participate in public life), and foster good relations for persons with those protected characteristics. Put shortly, he did not comply with the PSED.

(iii) Breach of *Tameside* duty

139. These failures are not only of themselves unlawful, but they led to a substantive error of law in developing the change of approach: the Defendant failed to make sufficient inquiry in accordance with the *Tameside* duty and/or to take into account relevant information, namely the information he would have gathered had he consulted and complied with his PSED (*Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014).

F. Ground 6: Discrimination

140. Furthermore, the change in approach, however characterised, is indirectly discriminatory, in breach of ss19 and 29 of the Equalities Act, as well as Articles 3 and 8 in conjunction with Article 14 of the Convention. EVAW also relies, in this regard, on Article 5 of the Convention on the Elimination of Discrimination Against Women ("**CEDAW**").

(i) Applicable rights

141. Under s29 of the Equality Act 2010, a service provider concerned with the provision of a service to the public must not discriminate against the person requiring the service (see ss29(2) and 29(6) in particular). The Defendant (and the officers of the CPS) are a service provider concerned with the provision of a service to the public.

142. The Defendant is therefore under a duty not to discriminate, including a duty not to indirectly discriminate. Under s19 of that Act:

> "*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -- (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

143. Moreover, as the rights of victims of rape are engaged pursuant to Articles 3 and 8 (for the reasons set out under Ground 2 above), the prohibition against discrimination contained in Article 14 of the Convention applies.

144. When interpreting the scope of the foregoing obligations, regard should be had to relevant provisions of CEDAW. The relevance of specialised international treaties such as CEDAW when considering the scope and application of both Convention rights and domestic statutory rights has been consistently recognised by the Supreme Court: *R (SG and Others) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 1449 at paras 83 (per Lord Reed), 142 (per Lord Hughes) and 213 and 218 (per Lady Hale) and *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 at para 122 (per Lord Dyson JSC). As Lady Hale put it in *SG* "*our international obligations under ... CEDAW have the potential to illuminate our approach to both discrimination and justification*" (at para 218).

145. Relevant for present purposes is Article 5 of CEDAW which obliges signatory states to:

"*[T]ake all appropriate measures: (a) the modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*".

146. In EVAW's submission, Article 5 underscores the need for the Court to be alert to the possibility of discrimination arising from practices which reinforce or are liable to reinforce myths and stereotypes about women and girls.

(ii) Breach of the relevant duties

147. The change of approach set out above (whether properly characterised as a change in policy or practice) is clearly a provision, criterion or practice ("**PCP**") for the purposes of s19 of the Equality Act. It is also an act of a public authority to which Article 14 of the Convention applies.

148. In EVAW's submissions, the change of approach / PCP is plainly discriminatory for the following reasons.

a. As set out above, women are disproportionately the victims of rape, and women with other protected characteristics (such as black and ethnic minority women) and women with disabilities, including mental disabilities, are affected particularly acutely by myths and stereotypes around rape: see further Green 1, paras 3, 38, 39, 71.

b. As explained above in respect of Articles 3 and 8 of the Convention, the Merits-Based Approach served to ensure that – despite the risks of myths and stereotypes affecting prosecutorial decision making – prosecutors acted in a manner which ensured that the merits of the individual cases were what drove prosecutorial decision-making and the improper application of those myths and stereotypes is avoided. It therefore prevented the CPS from discriminatory decision-making, whereby only 'easy' rape cases would be charged.

c. By removing the Guidance on the Merits-Based Approach and advocating in favour of an outcome driven, bookmakers' approach, the CPS is now doing the opposite. It is, in EVAW's submission, inevitable that such a change in approach will have a detrimental effect on those with protected characteristics. EVAW relies on the drop in both charging volumes and rates, as set out above, as evidence that it has indeed had such an effect. That discrimination arises because, contrary to the UK's obligations under Article 5 of CEDAW, the Defendant has not acted so as to eliminate discrimination based on stereotypes about women but to reinforce them.

149. In EVAW's submission, there is no justification for such an adverse impact. Certainly, none is provided by the HMCPSI Review (the only justification thus far advanced by the Defendant) for the reasons set out in paras 106-109 above, most notably that the Review did not in fact advocate any move away from the Merits-Based Approach.

150. In the premises, EVAW submits that the change in approach violates Articles 3 and 8 in conjunction with Article 14 (see *mutatis mutandis* the judgment of the Strasbourg Court in *Talpis v Italy*, App No. 41237/14, paras 141-149), ss29 and 19 of the Equalities Act 2010 and Article 5 of CEDAW.

G. Ground 7: Breach of the duty of transparency

151. This final ground of challenge applies however the change of approach is characterised – and indeed, this ground of challenge applies even if the Defendant can show there has been no change of approach at all.

(i) Duty of transparency

152. It is a fundamental tenet of public law that policies relating to the exercise of statutory powers must be transparent and clear. As set out by Green J (as he then was) in *R (Justice for Health Limited) v Secretary of State for Health* [2016] EWHC 2338 (Admin), at para 141:

> *"The principle of transparency has evolved out of Strasbourg jurisprudence but it is now well established as a common law principle. It is said to amount to a component of the "rule of law" and the principle of "legal certainty". In Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 363 at [68] Lord Justice Laws stated that it was a "requirement of good administration" (to which the courts would give effect) that "public bodies ought to deal straightforwardly and consistently with the public". The principle serves a number of important purposes. A law or policy should be sufficiently clear to enable those affected by it to regulate their conduct i.e. to avoid being misled. Such a law or policy should also be sufficiently clear so as to obviate the risk that a public authority can act in an arbitrary way which interferes with fundamental rights of an individual. Clear notice of a policy or decision is also required so that the individual knows the criteria that are being applied and is able to both make meaningful representations to the decision maker before the decision is taken and subsequently to challenge an adverse decision (for instance by showing that the reasons include irrelevant matters). Where the principle applies it might require the publication of the policy that a decision maker is exercising; it might require that the policy be spelled out in greater detail so that the limits of a discretion*

may be demarcated; it might require the decision-maker to be more specific as to when he/she will or will not act."

153. In *R (Hutchinson and others) v Secretary of State for Health* [2018] EWHC 1698 (Admin), Green J reiterated those principles, finding that they were applicable to all public law decisions (and not simply those entailing fundamental rights: paras 123-126). As he explained at para 127:

"The extent of the duty will depend upon what the publication or promulgation is intended to achieve. For instance, a consultation document must contain sufficient detail to enable addressees to be able to respond. A statement of policy must (at the least) enable those either subject to the policy or affected by it to be aware of its salient terms and components so that they know how to adjust their conduct. The public body promulgating the document has a discretion but there are nonetheless benchmarks of adequacy against which the clarity and transparency of that publication can be measured. The extent of the duty is also affected by the identity and nature of addressees. A highly sophisticated and knowledgeable target audience might need less explanation than a lay audience and might also be unaffected by (otherwise culpable) omissions: See Moseley (ibid) as applied in Hutchinson 3G and others v Office of Communication [2017] EWHC 3376 (Admin) at paragraphs [220]-[229]; and see also B v Secretary of State for Works and Pensions [2005] EWCA Civ 929 at paragraph [43] per Sedley LJ."

154. The Defendant is not immune from this duty (in line with Green J's findings that it applies to all public decision making). Moreover, the Supreme Court has emphasised the importance of clarity in the Defendant's guidance in *Purdy*. Notably, in finding that the Defendant was obliged to publish offence-specific guidelines in respect of assisted suicide, the Supreme Court in *Purdy* made a number of relevant findings:

a. The Court was at pains to emphasise the importance of prosecutors being given clear guidance:

"Crown prosecutors to whom the decision-taking function is delegated need to be given the clearest possible instructions as to the factors which they must have regard to when they are performing it. The police, who exercise an important discretion as to whether or not to bring a case to the attention of the Crown prosecutors, need guidance also if they are to avoid the criticism that their decision-taking is arbitrary." (Lord Hope at para 46)

"The exercise will be important, not only in guiding the small number of Crown prosecutors who decide the small number of cases which are actually referred to them by the police, but also in guiding the police and thus the general public about the factors to be taken into account in deciding whether

a prosecution will or will not be in the public interest." (Lady Hale at para 64).

b. The Court was also clear that the Code itself will not be sufficient to satisfy those requirements (indeed, this was the thrust of the *ratio* in *Purdy*). As emphasised by Lord Brown, having considered the Code:

"The requirement, however, that it shall apply across the entire spectrum of criminal conduct, to offence of every kind and description, means that the principles it states are at a very high level of generality. Assuming that the evidential test is satisfied, paragraph 5.7 of the Code states that "[a] prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour" (or, and I simplify, a caution is the more appropriate disposal, unlikely though that must be in a case of assisted suicide). When considering, however, the factors stated to weigh respectively for and against prosecution in the context of the assisted suicide of a mentally competent adult who knows his or her own mind, the Code provides in my opinion singularly little assistance." (para 78)

"*The sole point I am presently concerned to make is that it appears to me to underline the essential unhelpfulness of the Code itself as any sort of guide to those attempting to ascertain the critical factors likely to determine how the Director will exercise his prosecutorial discretion in this class of case.*" (para 81)

"*I have concluded that, with the best will in the world, it is simply impossible to find in the Code itself enough to satisfy the article 8(2) requirements of accessibility and foreseeability in assessing how prosecutorial discretion is likely to be exercised in section 2(1) cases. ... What to my mind is needed is a custom-built policy statement indicating the various factors for and against prosecution....*" (paras 85-86)

c. Indeed, in requiring the Defendant to be clearer about his policy in the area of assisted suicide, Lord Brown specifically referred to the importance of the guidance around rape. He noted that "*it is open to the Director to go beyond the Code in setting out his policy with regard to the prosecution of various categories of offence...[h]e has indeed done this by issuing statements of the Crown Prosecution Service's "Policy for Prosecuting Cases" respectively "of Rape" [and others]*" (para 84). He emphasised that for such cases "*one can readily understand why those particular categories of offending should have been singled out as needing a fuller and more specifically offence-*

targeted set of stated policy considerations for the benefit of victims" (and see further the judgment of Lord Neuberger at para 104).

155. In EVAW's submission, there has been a gross failure in the Defendant's duty of transparency in this case, for the reasons set out below.

(ii) Failure in this case – internal confusion

156. The Defendant has failed to take a clear position internally.

157. First, the adoption of the bookmaker's approach was communicated orally in the RASSO Roadshows but not with any measure of clarity or transparency in the internal guidance documents relating to the Code and its application.

158. Further, as explained above, it has come to EVAW's attention through the disclosure provided by the Defendant that the changes intended to be implemented to these materials were fact implemented in a haphazard and piecemeal fashion. This has meant that contradictory guidance has been and continues to be available to prosecutors. Due to the approach taken to removing reference to the Merits-Based Approach, at any one time such guidance was available on some platforms, and via some trainings, but not others: see e.g. the incorrect statements in July 2017 that references had been removed from training and guidance materials (minutes of RASSO Unit Heads, para 11.2 [**B/4/63**]), and the eventual removal of those references in late 2017 (for Primary Guidance), late 2018 (for some, but not all, Supplementary and external Guidance), mid 2019 (for the remaining Guidance and training materials; as explained in the letter of 13 August 2019 [**A/1/12**]).

159. Even now, the Merits-Based Approach is referred to in Chapter 1 of the CPS' Guidance on Rape and Sexual Offences [**B/4/43/100**], referring prosecutors to a non-existent section in Chapter 8 (emphasis added):

> "*The Code for Crown Prosecutors sets out the purpose and work of the CPS. It explains how prosecutors make decisions whether to prosecute. When deciding whether to prosecute a rape allegation, the two stage Full Code Test must be satisfied in exactly the same way as for allegations not involving rape. In terms of the evidence, there must be a realistic prospect of conviction. However see Chapter 8 - Case Building - for the Merits-Based Approach to prosecuting rape.*"

160. Indeed, such was the lack of clear implementation that it took reference by counsel in an interview to the supposedly prohibited Merits-Based Approach for the external guidance to be updated.

161. It is patently apparent from the disclosure that this has caused significant confusion within the CPS. While the Defendant has not undertaken a search for communications regarding confusion and/or disagreement brought about by his change of approach (see para 13 of the Defendant's Letter of 13 August 2019 [**A/1/12**]), it has disclosed "*correspondence that senior management at CPS is aware of*" in relation to this request. Even at that high level it is apparent that there is confusion and a lack of clarity in the approach to be taken. An email from the Head of the South and East Wales RASSO Unit, received on the 10 June 2019 **[B/4/65/486]** for example provides as follows:

"*Morning Rob,*

The lawyers in my team have been sharing and discussing the article on BBC news this morning and before I speak to them I wanted to check whether Headquarters is preparing a national response to be shared with staff and if so when it will be ready for release

[BBC news link]

The article states that "The CPS said there had been no change in approach" and accuses us of secretly changing policy when clearly there was a change in approach when we were told that the merits based approach was no longer to be applied.

Hope all is good with you,

[signed]."

162. As noted in a subsequent, follow-up email within the CPS, this suggests "*there was some misunderstanding about whether the merits based approach applied*" (see email of 17 June 2019 **[B/4/65/485]**.

163. This position has not been made any clearer by the Defendant's attempts to clarify it. What the CPS has said to external stakeholders (and more recently, following EVAW's action, internally), is that there has not been a change (see e.g. the Defendant's Letter of 18 February 2019 **[A/1/4]**; the Defendant's press release of 20 May 2019 **[B/4/68]**; and the Defendant's circular on 29 July 2019 **[B/4/67]**). The point is particularly well illustrated by the 15 July 2019 briefing from the Director of

Legal Services to all teams, which was said to "*provide updates*" and "*set out the key points*" on *inter alia* EVAW's Letter Before Action [**B/4/66**]. The version sent to RASSO teams referred to EVAW's Letter Before Action and stated that this claim was "*entirely without merit*", due to the "*fundamental point*" that "*there has been no change of policy or practice because our decisions on whether or not to prosecute are – and have always been – based on whether the Code test is met*". However, it goes on to state that:

"*You will probably know that we previously developed legal guidance specifically on the 'merits based approach' which stood alongside, but separate to the Code. It was intended to help RASSO teams to apply the correct principles for decision making, and ensure that charging decisions were not influenced by so called "myths and stereotypes". It was not, and was never intended to be, a different test to that of the Code.*

However, an HMCPSI inspection in 2016 recommended that 'all RASSO lawyers undergo refresher training, including the role of the merits based approach in the context of the Code for Crown Prosecutors'. The report also suggested that the merits-based approach was sometimes viewed as separate to the Code, rather than an integral part of it.

To ensure we were providing the most helpful support for RASSO teams, workshops were held by Gregor McGill and Neil Moore – which I know some of you will have attended. The separate guidance on the merits-based approach was subsequently withdrawn.

This was not a change of policy, but making sure that existing policy – to apply the Code test – was clear

I hope you have found this helpful."

164. The CPS therefore indicated, in response to the confusion – that there had been a change to remove the Merits-Based Approach, but that this was not a change in policy. It is difficult to see how this could have made matters less confusing: as is apparent from the response that it immediately prompted, whereupon RASSO Unit Heads expressed concern that the CPS appeared to be misstating the position, as there had "*clearly there was a change in approach*" (see 10 June 2019 email, cited at para 161 above). A similar view is reported by XX, who records that a number of colleagues "*reacted with incredulity*" to the briefing (see XX 1, para 56).

165. The Defendant's distinct lack of clarity is in breach of the principles of legality and good administration.

(iii) Failure in this case – external opacity

166. The Defendant has taken an opaque and obfuscatory approach to the fact that there has been a change in approach externally. The manner in which the CPS has developed and implemented its change of approach has been, from EVAW's perspective, truly extraordinary.

167. The paper of 8 September 2016 preceding the change of approach **[B/4/49]** stated the following:

"12. To avoid any danger that any such a "gentle touch on the tiller" is misinterpreted by stakeholders and interested pressure groups, any communication issued about this would ned to be properly communicated."

168. This statement is telling: it indicates that it was clearly known by the Defendant that the change in approach mooted was one that would be highly controversial amongst relevant stakeholders. There is a clear desire on the part of the Defendant to 'manage' any such communication.

169. But even more remarkably, the Defendant did not even provide such limited communication. The Defendant did not communicate the policy change at all. No public announcement whatsoever regarding the change of approach (still less the basis and rationale for it) was made in 2017, or at any point thereafter until EVAW brought this challenge. Indeed, no steps were taken to even notify affected parties of the change in approach. What the CPS did state publicly was as follows, in a response to a Freedom of Information Act 2000 request, which appears to have been sent on 27 March 2018 [**A/1/24**]:

"*The [CPS] does not follow a 'merits-based' or a 'bookmakers' approach to the prosecution of rape cases. We apply the Full Code Test contained in the Code for Crown Prosecutors*".

170. This appears to directly contradict the Defendant's current position, which is that the CPS does apply the Merits-Based Approach (and indeed that it is required for a proper application of the Full Code Test: see Defendant's Response, para 30).

171. In all, the Defendant's response to the change in approach set out above has been the opposite of transparent. As explained at para 72 of Green 1:

"*We have been consulted about both major and minor policy as well as practice changes on a constant and ongoing basis. However, this major change never came to our attention, was never put to discussion at the ECG VAWG stakeholder group and, as such, we feel as though they have happened covertly.*"

172. This is in breach of the duty of transparency. Victims, defendants, victims' groups and advisers (such as. ISVAs) have not known what test is being applied by the CPS for almost three years. They have been left to second guess the decisions being taken by the Defendant with one hand tied behind their backs.

(iv) BT's case

173. In this regard, EVAW notes that the Defendant has placed weight in his Response on a separate claim, brought by 'BT' in October 2018 (see Defendant's Response, paras 23 and 47 [**A/1/6**]). EVAW does not represent BT, but has been granted permission by BT to refer to the documents in her claim in this action. Copies of those documents appear as Exhibit HW/3 to Wistrich 1 [**C/8/142**]. In that claim, by way of explanation:

a. BT reported that she had been raped to the police, who investigated the matter and referred it to the CPS. The CPS decided to take NFA on the case, and BT was unsuccessful in her VRR review.

b. She brought a claim for judicial review, alleging that there was a 'secret' (i.e. unpublished) policy under which weak cases were urged to be removed from the system. She noted that she had only very limited information about that secret policy, and sought a stay of the claim pending that further information being released by the Defendant.

c. The Defendant's Summary Grounds of Resistance stated that BT's reference to the RASSO Roadshows (which are not now disputed by the Defendant) was "*inaccurate anonymous multiple hearsay*" (para 2). It contended that the urging of staff to take a proportion of rape cases out of the system was false, contending that "*at no stage has the Defendant operated a secret policy in relation to charging decisions for offences of rape ... it ... follows that the assumptions on which this claim is based ... are utterly misconceived*" (para

12). It did not mention the removal of either the Primary or Supplemental Guidance (a matter which EVAW understands was not known to BT or her advisors at the time, as it was still referenced on at least the external CPS website (and in some places on the internal website)). BT's attempts to find further information were rebuffed as a "*fishing expedition*" (para 2).

d. That challenge was not granted permission to proceed, and was not renewed for reasons that are explained in Wistrich 1 at paras 47-55.

174. This is, in EVAW's submission, illustrative of the Defendant's approach to this issue. The Defendant did not respond to the (now accepted) fact of the Roadshows. He did not respond to the (now accepted) point that prosecutors had been urged to take "weak" rape cases out of the system. He did not mention the (now accepted) removal of specific legal guidance, which would have been highly relevant to BT's claim, and which appears to have been only removed on the external website during the period of BT's claim. He did not provide any disclosure about any of those issues. He merely stated that there was no "secret policy", and therefore the claim should be dismissed. While the Defendant's reliance on this case is addressed below, it is, EVAW submits, also relevant to the Defendant's obstructive approach to this issue being aired publicly.

V. Arguments raised by the Defendant

175. In this section, EVAW considers the various further objections which the Defendant has raised in pre-action correspondence, by which he seeks to put the change of approach described above beyond the jurisdiction of the Court. For the reasons set out below, each of these arguments is without merit.

A. Review of the Decisions of the DPP

(i) General objection

176. First, in paras 12-16 of his Response, the Defendant places very significant emphasis on the respect granted to the Defendant by the Administrative Court when making individual decisions to prosecute (or, indeed, not to prosecute), arguing that there are "*only three ways*" in which a successful public law challenge to such decisions can be

made.[17] The Defendant goes so far as to make the assertion that "*it is no function of the Administrative Court to consider the terms of [the Defendant's] Legal Guidance or his Policy, unless it is unlawful*" (para 14).

177. The Defendant is patently incorrect in his assertion that the result of Kennedy LJ's judgment in *R v Director of Public Prosecutions (ex parte C)* [1995] 1 Cr App R 136 ("*ex parte C*") is that there are "*only three ways*" in which his decision-making can be challenged. That is to misread the judgment, which states that "*in the context of the present case*" (emphasis added), the Court could be persuaded to act only if one of those conditions were met (p141). That case was an individual decision not to prosecute.[18] The Defendant is, as a prosecuting authority with an important constitutional role, rightly entitled to a level of respect from the courts in relation to the decisions taken in individual cases (and indeed, EVAW recognised this in its Letter Before Action, at paras 71-72).[19] It would be plainly inimical to the efficient administration of justice if the Courts were to be second-guessing the Defendant on a regular basis in such cases.

178. However, not only is it plainly the case that the Defendant is subject to review in relation to individual decisions (as is plain from *B* itself; and see further Lord

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[17] Citing the judgment of Kennedy LJ in *R v Director of Public Prosecutions* [1995] 1 Cr App R 136, at p141.

[18] As are each of the decisions cited at para 15 of the Defendant's Response: *R v Director of Public Prosecutions (ex parte C)* [1995] 1 Cr App R 136 related to the decision of the Defendant not to prosecute a husband for anally raping his wife; *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin) arose after a case had been started against the claimant in relation to a prosecution for forgery offences in relation to immigration; *Sharma v Browne Antoine* [2006] UKPC 57; [2007] 1 WLR 780 was a challenge by the Chief Justice of Trinidad and Tobago to a decision of the Deputy Director of Public Prosecutions of Trinidad and Tobago to prosecute him for influencing the course of a trial being conducted by the Chief Magistrate; *R (S) v Crown Prosecution Service* [2015] EWHC 2868 (Admin) [2016] 1 WLR 804 related to a decision of the Defendant to prosecute a rape following a victim's right to review process; and *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin) related to the decision of the Defendant not to prosecute an undercover police officer posing as an activist. In respect of each of *Pepushi*, *Sharma v Browne-Antoine* and *S*, the decision in question was a decision to prosecute, which leads to particular reluctance on the part of the Courts to permit judicial review, as the matters can be addressed in the course of the resulting criminal trial (see e.g. *Pepushi*, para 49, which the Defendant inexplicably cites in favour of his position in this case). Each of *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] QB 727 and *R (Corner House Research) v Director of the Serious Fraud Office* related to decisions by the director of the Serious Fraud Office; the former into the decision of the Director not to investigate whether a prosecution should be brought in the context of extradition proceedings, and the latter a decision to discontinue an investigation into bribery in an arms contract between the United Kingdom and Saudi Arabia.

[19] See, further, paras 30-31 of Lord Bingham's judgment in the *Corner House Research* case.

Bingham at para 32 of the *Corner Hose Research* case), the Defendant is clearly not entitled to act in a constitutional void, into which no Court may inquire, in his operation as a public authority. This *a fortiori* in the development of policies and procedures, rather than in individual decisions.

179. The jurisdiction of the courts to consider the legality of the Defendant's broader policies is most plainly illustrated by the Supreme Court's decision in the *Purdy* case discussed at length above.[20] In *Purdy*, the Defendant was required to publish clear, offence-specific guidelines – going beyond the guidance found in the Code itself – to ensure compliance with rights protected by the Convention. As such, it is clear that the Courts may inquire into the sufficiency, and the legality, of the Defendant's Guidance.

180. Indeed, in light of the very serious hurdles faced by individual claimants in challenging individual decisions by the CPS, it is all the more important that the Court inquire, where necessary and appropriate, into the CPS's decision-making at a systemic and/or policy level.

(ii) Specific objection

181. The Defendant makes a more specific argument at his Response para 21, that:

"*... a decision to amend the CPS's Legal Guidance to Crown Prosecutors and which does not affect the Code cannot be amenable to any public law challenge*".

182. This point is also made at paras 13-14 of his Response.

183. Again, this argument is wrong in law. *Purdy* provides conclusive evidence that the Court will inquire into the legality of guidance even if the matter is already covered by the Code (and see further para 83.a above).

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[20] See also, for example, the express reference in *ex parte C* to the decision of Salmon LJ that a general directive issued that no persons should be prosecuted for stealing any goods less than £100 in value would clearly be challengeable: see pp140-141.

B. Suitability for public law proceedings

184. At various stages in the Defendant's Response, it appears to be asserted (pursuant to the heading at para 38) that EVAW's action is not "*suitable for public law proceedings*". In particular, the Defendant contends that: "*your reliance on statistics is misconceived and indeed that public law proceedings are an inappropriate forum to consider the various competing arguments, which are based on a multiplicity of factors that are complex*" (para 32). It appears to be the Defendant's case that: (i) the fact that EVAW indicated its intention to refer to statistical evidence to support its argument renders its claim inappropriate; and (ii) the fact that there is an ongoing Criminal Justice Board led review is such that any matters can be dealt with in that review. Each of these contentions is misguided.

185. As to the expert reports of Professor Adams, those reports cannot be said to render this claim unsuitable for public law proceedings:

a. It is simply not the case that the inclusion of statistical evidence renders an application for permission to judicially review a decision unsuitable for public law proceedings. Such evidence is not only increasingly common in a range of judicial review claims, it can be among the most important evidence available to demonstrate the impact of a particular change of approach or decision by a public body (see, for example, the Supreme Court's decision in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, in which the evidence indicating a sharp, substantial and sustained fall in the volume of case receipts demonstrated a risk that individuals were being denied access to justice: see the judgment of Lord Reed at paras 90 and 97 in particular).

b. That is precisely the type of evidence at issue in this case. Moreover, it is one strand of evidence which, considered together, links the (accepted) change in policy with the (accepted) drop in rape outcomes. It is evidence which EVAW submits is clearly of assistance to the court. The suggestion that it renders the proceedings inimical to judicial review has a distinct air of unreality and again typifies the approach of the Defendant to this issue.

186. Nor does the fact that the Criminal Justice Board review provide any justification for dismissing these proceedings. This is addressed in more detail under sub-heading D below ("Appropriate alternative remedies").

C. Delay

187. At paras 47-48 of his Response, the Defendant reserved "*his position to argue that the proposed claim is time barred*", and indicated that he "*will expect*" EVAW to address the date of decision making and the knowledge of EVAW with a witness statement. This is a remarkable approach, when one considers the Defendant's actions in this case, and the total lack of transparency described above. In any event, for the avoidance of doubt, this matter has been addressed in Wistrich 1, paras 44-64. EVAW's position is summarised below.

(i) No delay

188. The Defendant's change in approach was not an individual, one-off decision. It is a continuing act, which is having an ongoing and very serious impact on victims of rape and other serious sexual offences. In the premises, EVAW is not out of time to challenge it.

189. As summarised by the editors of Auburn, Moffett and Sharland on Judicial Review at para 26.44:

> "*Where there is a free-standing challenge to a policy which is still in force, it is unlikely that the court will conclude that a challenge is out of time simply because the challenge was not brought promptly, or in any event within three months of the date on which the policy was introduced. In such cases, the court is likely to analyse the challenge as being a challenge to a continuing act rather than a challenge to a 'one-off' decision to introduce the policy*".

190. EVAW adopts this summary (see e.g. *R (H) v Brent London Borough Council,* [2002] EWHC 1105 (Admin), para 15).

191. Indeed, had EVAW issued this claim earlier, it would have been likely faced with a prematurity defence: that it was too early to tell whether or not the change in approach had had the very serious and significant impact on prosecution rates that is now apparent (see, *mutatis mutandis*, the Lord Chancellor's argument in the original

UNISON challenge, accepted by the Divisional Court [2014] UHC 218 (Admin); [2014] ICR 498, paras 46 and 89). As the Court said there, it is "*far better... to wait and see whether the claimant's fears prove to be well founded*".

192. Further and in any event, the change in approach was not publicly announced, and has been followed by a period of very significant confusion as to the approach now being applied by the CPS, as set out above (see the principle in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604, para 26: public law decisions do not take effect until the communication of the decision; see further *R v Foreign Secretary, ex parte World Movement Ltd* [1994] 1 WLR 386, *per* Rose LJ at p402H). Where the claimant is "*left in the dark*" he cannot be expected to immediately issue proceedings (see *R (Macrae) v Herefordshire District Council* [2012] EWCA Civ 457, at paras 17-22).

193. In all the circumstances, EVAW respectfully submits that its claim is not out of time: indeed that it would be "*harsh indeed*" to hold otherwise (see *R v Swale Borough Council, ex p RSPB,* 1989 Official Transcripts, p4 of Lexis transcript).

(ii) Application for permission to extend time insofar as the Court considers necessary

194. Insofar as the Court disagrees with the above analysis and considers that this claim is out of time, EVAW seeks the court's discretion to extend the time limit pursuant to CPR r. 3.1(2)(a) and PD 54A para 5.6(3). It relies on the following reasons:

a. The Defendant's opacity in implementing the change of approach, such that EVAW could not be expected to bring a claim at the time of the change or even when first notified of the apparent change in approach: significant information was not revealed about the status of the change of approach until the disclosure provided by the Defendant in August 2019 (see similarly, *ex p World Movement* Ltd, *per* Rose LJ at p402H-403A).

b. The fact that the Defendant's change in approach – even if (contrary to the submissions above) it is not a 'continuing act' – continues to affect the prosecution of cases going forward, and is thus not a finite one-off decision that is inapposite for challenge at this stage.

c. That EVAW has made every effort to resolve the issue without litigation, and has engaged in extensive and meaningful pre-action correspondence with the Defendant, since May 2019 (receiving substantial amounts of disclosure from the Defendant well into August 2019). The Defendant has thus been on notice, and there can be no prejudice or hardship of the examination of his approach at this point.

d. Despite this proactive approach, it has taken EVAW some time to finalise this claim, given: (i) the opacity of the Defendant's approach; (ii) the lack of disclosure provided until recently; and (iii) the need to collect significant and detailed evidence. Very significant work has been required to bring this claim as set out in Wistrich 1 at para 63 (see also paras 69 and 70). In the premises, any delay has not been excessive in the circumstances.

e. Insofar as the strength of the challenge is relevant, EVAW respectfully submits that it has a strong challenge, not least as it is common ground that both there has been a change in the guidance applicable to rape cases, that the bookmaker's approach is unlawful, and that no consultation or consideration of the public sector equality duty has taken place.

f. The general importance – and significant public interest in – the proper and lawful approach being taken to cases of rape prosecution, such that the Court should grant permission for the claim in any event (see *ex p World Movement Ltd, per* Rose LJ at p402H; *R v Home Secretary, ex p Ruddock* [1987] 1 WLR 1482, p1485G; *R (Independent Schools Council) v Charity Commission* [2010] EWHC 2604, paras 26-28). By contrast, there can, as set out above, be no prejudice or hardship to the Defendant of the examination of his approach at this point.

(iii) The relevance of BT's case

195. The Defendant places weight on the case of *R (BT) v DPP* in his Response at para 47, where he reserves his position on delay.

196. As to that reliance:

a. The fact that CWJ has represented each of BT and EVAW is irrelevant as a matter of law. EVAW's claim must be considered on its own merits. For all of the reasons above, EVAW submits that it is in time to bring this claim (or, in the alternative, that it would be just for an extension of time to be granted).

b. However, for the avoidance of doubt, EVAW has adduced evidence from Harriet Wistrich, the director of CWJ, in respect of both BT's claim and EVAW's claim. As is apparent from that evidence, which is set out at paras Wistrich 1, paras 47-56:

    i. BT had a specific, individual decision, the time limit in respect of which was due to expire on 11 October 2018, and it was therefore necessary to issue proceedings in respect of that decision.

    ii. BT relied only on the publicly available documents available to her at that time – which included reports of the change of approach in the *Guardian* newspaper. She relied on what she contended was a "secret policy", as – at that stage – no public documents had been made clear regarding the Defendant's change of approach. She sought disclosure of those documents.

    iii. As already indicated, the Defendant contended that this amounted to "*inaccurate anonymous multiple hearsay*". He provided none of the disclosure requested. He contended that there was no secret policy and resisted BT's application for permission to judicially review her case and for disclosure. He also resisted BT's application for a stay of proceedings to allow her to collect evidence regarding the "secret policy".

    iv. The Defendant's position was accepted by the Court, which refused the application for a stay on the basis of the Defendant's denial that there was any such secret policy. It dismissed the application for judicial review, and BT did not renew her application.

c. EVAW submits that the response of the Defendant to BT's claim only supports the necessity for EVAW to wait and prepare/collect the detailed

evidence and grounds in support of this present claim which it had brought: had it done otherwise, it would have been faced with the same 'stonewall' that BT was faced with. EVAW therefore does not understand the Defendant's reliance on it.

D. Appropriate alternative remedy

197. The Defendant essentially contends that there are two alternative remedies available to EVAW.

(i) Case studies

198. The Defendant places very significant emphasis in his Response on the set of case studies which is included with Wistrich 1 (and referred to in EVAW's Letter Before Action) (see e.g. paras 17, 22, 37, 46 and 50 of the Defendant's Response). The Defendant terms the individuals involved in those case studies *"complainants"*, and appears to contend that the existence of these individual case studies precludes the bringing of a claim by EVAW: "*If there were any merit in the individual 19 cases then they should be the subject of a clear alternative remedy, namely asking for a review in accordance with the VRR Scheme, or if dissatisfied with that, an individual public law claim*" (Defendant's Response, para 50).

199. This is unfounded. An adequate alternative remedy – typically a statutory appeal or equivalent – requires an "*equally effective and convenient*" remedy (*R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 270, *per* Lord Widgery CJ, p278), which enables the "*real issue between the parties to be determined*" (*R (Humber Oil Terminal Trustees Ltd) v Marine Management Organisation* [2012] EWHC 3058 (QB), paras 118-121).

200. No such remedy is available in this case:

a. Fundamentally, EVAW is challenging the Defendant's change in approach. An alternative remedy must at the very least be one open to the Claimant: EVAW has no alternative remedy, still less an adequate one.

b. Possible alternative remedies of individuals are irrelevant. Indeed, were this to be otherwise, no organisation could bring a challenge to a systemic policy in the public interest – since there will always be individuals affected by the policy who could themselves have brought a claim. But, of course, organisations can bring such a claim, even without evidence of individuals who have been deterred (as was the case, for example, in *UNISON*, where indeed the defendant Lord Chancellor unsuccessfully contended that a claim brought without such examples made it impossible for the court to find in the claimant's favour: see e.g. para 5 of the Divisional Court's judgment [2014] EWHC 4198 (Admin); [2015] 2 CMLR 110). The fact that EVAW has provided examples of the type of decision-making in question cannot possibly bar EVAW's claim.

c. Indeed, the fallacy of the Defendant's position is apparent from considering its result. The Defendant notes that he would be content to consider "*some or all of the cases in the dossier with the Claimant*" (Defendant's Response, para 37). While EVAW welcomes this indication, EVAW cannot itself consent to, nor otherwise have any input into, the individual cases involved. It is not a representative of those individuals.

d. The Defendant cannot use individual decisions as a shield to prevent the examination of the legality of his change of approach. Even if the Defendant were to take the welcome step of reconsidering the individual cases involved,[21] this would not begin to address the serious public law errors in the Defendant's decision-making at a general level, as identified above (see e.g *R v Huntingdon D.C., ex p Cowan* [1984] 1 WLR 501, at p507-508 *per* Glidewell J, where the Divisional Court held that there was a "*material difference*" between an individual case, which could have been taken to the Magistrates' Court, and a case which affected the conduct of local authorities throughout the country, which was appropriate to proceed to judicial review).

[21] Insofar as the decision to stop the prosecution was taken early enough that it is possible for it to be reconsidered, which unfortunately is not the case for quite a number of the cases: see Wistrich 1, para 14(c)).

201. The Defendant's suggestion that there is an issue as to whether "*these proceedings are being used as a vehicle to seek to obtain costs capping protection instead of seeking to argue the merits of some or all of those 19 cases in individual judicial review claims*" (Defendant's Response, para 46) has no merit. The Defendant is invited to withdraw this assertion.[22]

(ii) Criminal Justice Board review

202. The Defendant also refers to a Criminal Justice Board review, which, as explained above, he contends is a far better forum to consider the issues raised than a judicial review (para 38). This review was announced in the Government's Ending Violence against Women and Girls 2016-2020 Strategy Refresh, published in March 2019 [**A/3/37F**]. The publication notes the drop in the volumes of police referrals, charges, prosecutions and convictions, and explains that the review will seek to "*identify any issues within the criminal justice system that have contributed to the fall in volumes*", and then will seek to develop recommendations to address any problems identified (p37).

203. In examining whether an alternative remedy is adequate, the Court will consider:

> "*... all relevant circumstances which typically will include ... the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising and (perhaps the apparent strength of the applicant's substantive challenge*" (*R v Falmouth PHA, ex p SW Water Ltd* [2001] QB 445, *per* Simon Brown LJ, p473D-E).

204. EVAW naturally welcomes the review, which involves a range of stakeholders. EVAW hopes that it will undertake a holistic and multifaceted analysis of the approach of the criminal justice system to rape cases.

205. However, it is plainly not an adequate alternative remedy:

    a. It is a broad-brush consideration of a range of issues across the criminal justice system. It is not focused on the CPS, nor the guidance applicable to rape cases.

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[22] And EVAW reserves the right to respond further insofar as it is maintained. It is noted that it is a rather counter-intuitive suggestion, not least due to the availability of legal aid in individual cases.

b. It is not going to be conducted by an independent adjudicator. Rather, as the strategy refresh publication makes clear, the review will comprise senior officials and working level practitioners (p.37).

c. As such, the review is not an "*adequate alternative*": it is an entirely different type of process, without the focus or analysis that a judicial review will bring.

d. Indeed, it is not focused on the "*real issues*" in the instant case: there can be no prospect that it will consider the legal duties on the CPS or identify errors of law in the CPS's approach and as such cannot authoritatively resolve a legal issue: see e.g *R (Devon County Council, ex p Baker and another* [1995] 1 All ER 73, at p92. Moreover, the outcome of the review will be "*recommendations*" (strategy refresh document at p.37): it will not require that the errors be rectified. Again, the characteristics of the review are therefore such that it cannot be said to be an "*adequate alternative*" (see e.g. *Humber Oil Terminal* paras 118-120).

e. Insofar as the strength of the challenge is relevant, EVAW again respectfully submits that it has a strong challenge for the reasons set out above.

206. In the circumstances, EVAW submits that the two processes are not adequate alternatives: they are doing different things. EVAW submits that EVAW is and should be entitled to continue to participate in both.[23]

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[23] In addition to the Criminal Justice Board review, EVAW is aware that on 12 September 2019 at the same time as publishing its 2018-19 VAWG Report (which, as already indicated, confirmed the continuing and substantial drop in charging decisions in the year 2018-19) the CPS announced that it has commissioned Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) to carry out a further review of rape charging decisions. In the press release accompanying the publication of the report, this review was said to be part "*of a cross-government review into handling of cases*" (https://www.cps.gov.uk/cps/news/annual-violence-against-women-and-girls-report-published-0). This is consistent with EVAW's understanding that the HMCPSI review referred to by the Defendant on 12 September 2019 is part of the wider Criminal Justice Board review. In light of that (and because this is not a point which the Defendant has raised directly with EVAW to date), the HMCPSI review is not addressed separately in this Statement. In any event, however, the points made above would likely apply with equal force to any such review, even if it is separate from the Criminal Justice Board review on which the Defendant has positively relied in his Response.

(iii) Public interest in proceedings

207. In any event, even if it can somehow be said that EVAW did have an alternative claim capable of producing an equally effective and convenient remedy (which for the reasons set out above, EVAW contends is clearly wrong), EVAW's position is that there are strong reasons for this claim to proceed in the public interest.

208. The approach of the CPS to prosecuting cases of rape has, rightly, been the subject of much recent coverage and debate (in light of the precipitous fall in the charging rate). Indeed, merely the publication of EVAW's Letter Before Action led to extensive press coverage of the issue (see Exhibit HW/2 at **[C/8/123-141]**). As noted in Green 1, para 92, EVAW has already raised £23,000 worth of crowdfunding from the public to support this case.

209. But this is not just a matter that the public is interested in, it is also a matter of public interest. If the CPS is applying a policy that goes against the principles underlying the Code of Conduct, and if thereby victims of rape are being left without a remedy, and perpetrators of rape are being left to walk free, that is a matter that is patently in the public interest to resolve.

210. With that in mind, EVAW now turns to the relief and directions it seeks by way of the claim.

VI. Relief and directions sought

A. Relief sought

211. EVAW seeks the following relief:

a. A declaration that the change in approach by the Defendant is unlawful on the basis of the grounds set out above.

b. Mandatory orders requiring the Defendant to:

i. Re-instate the Merits-Based Approach, including by way of reinsertion into the Guidance and re-training of all CPS RASSO units.

ii. Notify all victims of the fact that any decisions taken following the change of approach were taken pursuant to an unlawful approach.

iii. Reconsider all non-final prosecutorial decisions taken not to proceed with cases of rape and sexual assault taken under the change of approach.

iv. Review all final prosecutorial decisions and publish recommendations from that review.

c. Such further or other relief as appropriate.

d. Costs, in line with the cost capping order set out below.

B. Cost capping order

212. EVAW applies for a costs capping order ("**CCO**") under s88 of the Criminal Justice and Courts Act 2015 (the "**2015 Act**"). Specifically, it seeks an order that:

a. EVAW's liability for the Defendant's costs be limited to £30,000 if the claim fails.

b. The Defendant's liability for EVAW's costs be limited to EVAW's reasonable costs, recoverable at Treasury panel rates.

(i) Relevant principles

213. A CCO may only be made, under s88(6) of the 2015 Act, if: (a) the proceedings are public interest proceedings; (b) in the absence of the order, the applicant would withdraw the application for judicial review; and (c) it would be reasonable for the applicant to do so.

214. Proceedings are public interest proceedings under s88(7) if: (a) an issue that is the subject of the proceedings is of general public importance; (b) the public interest requires the issue to be resolved, and (c) the proceedings are likely to provide an appropriate means of resolving it. Moreover, as set out in s88(8), the matters in relation to which the court may have regard in determining whether proceedings are public interest proceedings include: (a) the number of people likely to be directly

affected; (b) how significant the effect on those people is likely to be; and (c) whether the proceedings involve consideration of a point of law of general public importance.

215. Pursuant to s89(1), the court must have regard to a number of matters when considering whether or not to grant a CCO. These include the financial resources of the parties to the proceedings; the extent to which the applicant (or those persons who have provided the applicant with financial support) will benefit if relief is granted; whether legal representatives are acting free of charge; and whether the applicant is an appropriate person to represent the interests of other persons or the public interest generally.

(ii) Public interest proceedings

216. In EVAW's submission, these proceedings are plainly public interest proceedings under the meaning of the 2015 Act. As is explained by Ms Green in her witness evidence (at paras 84-85):

> "*I hope it is clear from what I have already said that EVAW is bringing this application to further the general public interest. We have no private interest in these proceedings but act to protect the overwhelming public interest in ensuring that rape is effectively investigated and prosecuted. If the claim succeeds then all women who report rapes, and in particular the vast majority whose perpetrator was known to them, are liable to benefit because there will no longer be a risk that, as a matter of practice or policy, the book-maker's approach will be applied in their cases and all prosecutors will be clear that the full code test requires them to apply the merits based approach. The benefits to this large class are huge and obvious. While the major beneficiaries will be rape victims, plainly the public interest at large will be served by restoring a measure of public confidence in the operation of the criminal justice system.*
>
> *The nature of this challenge is not such that it can reasonably be left unresolved without risking very serious harm to the public interest. If the challenge is well founded it is vital that the illegality is declared so that steps can be taken to stop its damaging consequences. The huge amount of positive work that has been undertaken in the last decade by the CPS which has contributed to a notable rise in prosecutions and convictions in 'difficult' cases and an increase in the confidence of women and girls to report, risks being completely undone. EVAW has sought to use all means available to it short of litigating to resolve the issues. The only means now available are through this challenge.*"

217. This is supported by the extraordinary response to the CrowdJustice appeal in this case – which, as noted above, has so far (i.e. prior to issue) raised £23,000: Green 1, para 92.

218. In the circumstances, EVAW submits that the factors in s88(6)(a) for the granting of a CCO are satisfied.

(iii) EVAW would otherwise be unable to proceed

219. As explained at paras 86-87 of Green 1, EVAW is a small NGO with six members of staff. It is a membership organisation, and many of its members are very small voluntary sector organisations. It does not charge for membership, nor does it accept public money (such as to retain its independence). It is therefore reliant on private donors and grants.

220. Accordingly, Ms Green is clear at para 96 of her witness evidence that, in the absence of a CCO, EVAW will be unable to proceed:

> *"In the event that a cost capping order limiting our cost liability to £30,000 is not granted, we will have no option but to discontinue the claim as we are simply unable to risk paying a greater sum in costs without preventing us from undertaking the other vital work to which we are already committed and without putting the future existence of the organisation at serious risk."*

221. This is plainly reasonable: it would put EVAW at serious financial risk to continue the claim, in circumstances where it has no direct interest in the outcome. It could not be expected to pursue the claim in such circumstances.

222. In the circumstances, EVAW submits that the factors in s88(6) (b) and (c) for the granting of a CCO are also clearly met.

(iv) Other relevant factors

223. EVAW submits that there are a number of other relevant factors which support its application for a CCO pursuant to s89(1):

a. As to the financial resources of the parties (s89(1)(a)), EVAW is, as set out above, a small membership organisation with six members of staff, with a total income of just under £400,000 per annum. It has set aside (as explained

below) £30,000 for satisfying the Defendant's costs. This represents a very significant outlay.

b. Neither EVAW itself, nor the individuals who have contributed significant sums through crowdfunding, are themselves benefiting (at least in any direct or financial way) from the bringing of proceedings (see s89(1)(b) and (c)).

c. EVAW's legal representatives acted initially *pro bono* and now act on a conditional fee arrangement that will mean that – even if successful – they will not recover their fees at their usual rates (see s89(1)(d)). Of course, if unsuccessful, they will receive no funds at all: see Wistrich 1 at para 73.

d. EVAW is particularly well placed to address this unlawfulness, pursuant to s89(1)(e), as:

    i. The bars for individual claimants seeking to raise issues of policy and practice within the CPS are extremely high. It is therefore all the more appropriate that the Court examines the matter at the level of the CPS' general approach.

    ii. EVAW is able to draw on the experiences of its members across the justice system, and therefore provide the Court with an overview that would be particularly difficult for an individual claimant to provide, such as the evidence contained in Green 1, Wistrich 1 and XX 1..

e. EVAW has made significant endeavour to ensure that it has a sum set aside to provide for the Defendant's costs in the event that the claim is unsuccessful: EVAW has set aside £15,000 for this litigation, and has also raised £23,000 through CrowdJustice. It has set a moderate amount aside for disbursements, leaving £30,000 for the Defendant's costs. While it recognises that this is unlikely to satisfy all of the Defendant's costs, it represents a significant effort on the part of EVAW to ensure that the Defendant will not be unduly prejudiced by the making of a CCO: see Green 1, paras 88-95.

(v) Level of the relevant caps

224. EVAW submits that a cap of £30,000 on the Defendant's recoverable costs is reasonable: it is a significant sum that has been raised (including by way of crowdfunding) that will go a substantial way to ensuring that the Defendant is not prejudiced by the bringing of these proceedings in the event that the Defendant is successful.

225. Similarly, EVAW contends that a cap on its reasonable costs, to be calculated at Treasury Panel rates, is an appropriate (reduced fee) cap on the CFA. The size and complexity of this judicial review is such that this approach is, it is submitted, appropriate.

226. In this regard, EVAW reiterates the grounds of review set out above, and in particular the Defendant's obstructive and opaque approach to disclosing its position. EVAW, and its legal representatives, have had to undertake very significant work just to understand what has happened within the CPS over the last few years, and more to consider its legality (see Wistrich 1, paras 68-70). This has led to significant wasted time (often *pro bono*) having been spent simply to determine the Defendant's own policies. Moreover, it is estimated that in light of this opacity and the extra work it has generated, the Defendant's costs will be less than the Claimant's (see Wistrich 1, para 74). In these circumstances, an asymmetry of approach is appropriate and justifiable.

(vi) Defendant's Response

227. EVAW invited the Defendant to agree that a CCO was appropriate in this case in its Letter Before Action, para 122 (at which point in time EVAW's legal advisors were acting entirely *pro bono*). The Defendant refused, contending that as there had been no change in approach then the proceedings were "*doomed to fail*" (Response, para 45). For the reasons set out above, EVAW invites the Court to reject that contention. The Defendant also drew the inference that the claim was "*being used as a vehicle to seek to obtain costs capping protection*" (Response, para 46) – as set out at para 201 above, that inference is wholly without merit and the Defendant is invited to withdraw it.

228. In the circumstances, EVAW submits that a COO should be granted in this case in the form set out above upon permission being granted.

C. Further directions

229. EVAW has already dealt, in the above, with the following applications: (i) insofar as the Court considers necessary, an application for the extension of time in this case; and (ii) a costs capping order.

(i) Confidentiality

230. EVAW also seeks a number of orders in relation to confidential material addressed in this Statement and the accompanying evidence, as follows:

a. The material in paras 58-67 and 90.f above comes from the PMIU Report, which is at [**A/1/25**]. As noted above, that report is not yet in the public domain (and EVAW does not have permission to disseminate it publicly). In the circumstances, EVAW seeks the following orders: (i) an order pursuant to r5.4C that a person who is not a party to proceedings may not obtain from the court records a copy of this Statement; (ii) an order pursuant to CPR r32.13(2), that this Statement shall not be open for inspection by parties other than the parties to the claim; and (iii) an order that it is prohibited for use to be made of the paragraphs set out above, or for the PMIU Report, on the basis that it has lost its confidentiality in the course of these proceedings. For completeness, the Court is asked to note that EVAW also intends to file, within seven days of issuing the claim, a version of this Statement, from which the confidential material in question is redacted, so that a non-confidential version of the Statement can be placed on the Court's records and be made available for inspection.

b. As explained at para 13 of Wistrich 1, the complainants in the case studies relied upon by EVAW are referred to by cipher only. That is because victims of rape are entitled to life-long anonymity pursuant to ss1 and 2(aa) of the Sexual Offences (Amendment) Act 1992. As Ms Wistrich sets out at para 13(f), there is – in addition to the case study summary document which

appears as Exhibit HW/1 **[C/8/122]** – a confidential annex which comprises supporting documents relating to each of the case studies (the "**Confidential Annex**"). This annex has not been filed with this Statement because it does contain identifying information about the victims in question. EVAW seeks, in respect of the Confidential Annex, an undertaking from the Defendant that the material therein will be kept confidential. It also seeks: (i) an order granting each of the individuals named in the Confidential Annex anonymity; (ii) an order pursuant to r5.4C that a person who is not a party to proceedings may not obtain from the court records a copy of the Confidential Annex; (iii) an order pursuant to CPR r32.13(2), that the Confidential Annex shall not be open for inspection by parties other than the parties to the claim; and (iv) an order that it is prohibited for use to be made of the Confidential Annex on the basis that it has lost its confidentiality in the course of these proceedings of these proceedings.

(ii) Case management

231. Finally, EVAW has also, in the interest of efficient case management, considered the need for directions in light of the complexity of this matter. It proposes the following case management directions:

a. That EVAW be granted permission to judicially review the Defendant's change in approach (indeed, EVAW invites the Defendant to agree that permission in this case should be granted, not least as the Defendant accepts that the bookmaker's approach is unlawful, accepts that there has been a change to public guidance, and also accepts that there has been no consultation nor consideration of the PSED: see again Defendant's Response, para 30, and the letter of 17 July 2019 **[A/1/11]**).

b. That the claim be heard by a Divisional Court.

c. That, in the event that the Defendant contests this claim, the Defendant be required to serve Detailed Grounds and the evidence on which the Defendant proposes to rely (see para 17 of the Defendant's Response), along with any further disclosure, within 35 days of permission being granted.

d. That EVAW be granted permission to put in a reply to such Detailed Grounds and any reply evidence within 35 days of receiving the Defendant's Response.

e. That a case management conference be listed to address any issues arising following the service of pleadings and evidence, prior to the hearing of the claim. In the event that the parties are agreed that such a hearing is not necessary they shall notify the Court at least one week before the hearing date.

24 September 2019

PHILLIPPA KAUFMANN Q.C.

Matrix Chambers

JENNIFER MacLEOD
EMMA MOCKFORD

Brick Court Chambers