

GOOD PRACTICE GUIDELINES FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE OFFENCES BASED ON THE LACK OF CONSENT OF THE VICTIM



Council of Europe project
“Combating digital and sexual violence
against women in Bosnia and Herzegovina”

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GOOD PRACTICE GUIDELINES FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE OFFENCES BASED ON THE LACK OF CONSENT OF THE VICTIM

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Glossary and acronyms

Complainant	Is a legal term designating a person who has made a complaint of a crime which has not yet been proven in court
GREVIO	Council of Europe Group of Experts on Action against Women and Domestic Violence
Istanbul Convention	Council of Europe Convention on preventing and combatting violence against women and domestic violence
Perpetrator	Is a non-legal term to refer to a person who commits sexual violence
Sexual offences	Covers all criminal offences involving sexual violence, including rape
Suspect	Refers to a person who is believed to have committed a crime, but has not yet been found guilty. If a suspect is charged, they might then be identified as an 'accused' person; and after the accused is convicted, they would be called an offender
Victim	Is the term used in this document to refer to the individual who has experienced sexual violence but is not intended to convey a lack of agency on the part of the person victimised or to imply guilt with respect to an accused person

1. Introduction

The “Good Practice Guidelines for the Investigation and Prosecution of Sexual Violence Offences Based on Lack of Consent” are based on the emerging and good practices in the investigation and prosecution of sexual violence, including rape relying on a consent-based definition, in line with the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) and other international standards. The Guidelines have been developed under the Council of Europe project “Combating digital and sexual violence against women in Bosnia and Herzegovina”. The Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) recent baseline evaluation report on Bosnia and Herzegovina has urged authorities to adopt a consent-based definition of sexual violence, including rape offences to fully incorporate the notion of lack of freely given consent, in accordance with Article 36 of the Istanbul Convention¹:

“GREVIO urges the authorities of Bosnia and Herzegovina to:

- a. amend the sexual offences provided under the national, entity-level and Brčko District criminal codes to fully incorporate the notion of lack of freely given consent as required by Article 36 of the Istanbul Convention and to specify the type of non-consensual sexual acts that are criminalised, in line with Article 36, paragraph 1a, b and c, of the convention;*
- b. adopt the necessary measures to ensure that any offence of sexual violence applies between former or current spouses or partners;*
- c. ensure proportionate and dissuasive sanctions for all sexual acts without the consent of the victim, irrespective of personal characteristics”.*

Moving from force and coercion-based definitions of sexual offences to consent-based definitions often raises challenges to implementation and enforcement.

¹ GREVIO’s baseline evaluation report on Bosnia and Herzegovina (2022), paragraph 223.

It's not uncommon for criminal justice professionals to voice concerns about how such offences will be investigated and prosecuted without requiring physical corroborating evidence in addition to other apparent concerns like shifting the burden of proof from the state to the accused, worries about creating strict liability offences and perceived overreach of the criminal law.

Purpose of the guidelines

This document aims to assist the legal debate on reforms to sexual violence, including rape offences in Bosnia and Herzegovina by setting out guidelines for investigating and prosecuting sexual offences based on lack of consent grounded on good practices. The guidelines are specifically targeted at the evidentiary thresholds of the constituent elements of sexual offences based on lack of consent. There are several other resources available that look at good practices in the overall handling and management of sexual violence cases (such as victim protective measures, fast track case management; establishing specialised units of specially trained professionals, etc.) which will not be covered in this document.² Therefore, these guidelines should not be seen as holistic guidelines on handling sexual offences.

Target of the guidelines

The guidelines are meant for those involved in and who can influence law reform efforts to sexual violence, including rape offences in Bosnia and Herzegovina. This includes lawmakers (i.e., parliamentarians), law reformers (e.g., the law reform commission and representatives from the relevant ministries), law implementers who influence lawmakers (e.g., police, investigators, and prosecutors); as well as civil society organisations who are involved in advocating for law reform in this area.

The need for these guidelines

Sexual violence including rape, are unique crimes. They are overwhelmingly gendered crimes - the majority of victims are women and girls and the majority of offenders are men.³ Archaic views shaped by social expectations about gender roles and sexuality and common myths that 'real rape' involves strangers, physical

² See: <https://www.endvawnow.org/>.

³ For example, see the data referred to in "Best Practice Guide for Law Enforcement Investigations into Sexual Violence-Alberta". Courts, such as the Supreme Court of Canada have recognised sexual assault as a gendered crime: R. v. Osolin, 1994, para. 165.

force and physical injury have historically resulted in narrow definitions of sexual offences based on the use of force or coercion or vulnerabilities.⁴ This has also had negative impacts on the development of the rules of evidence and criminal procedures, such as requiring high thresholds of evidentiary standards of physical resistance and a shifting focus on the victim's behaviour rather than on the accused's actions.

More than any other crime, victims of sexual violence often feel shame, self-blame, and humiliation because of victimisation. These complex emotions and trauma, combined with societal attitudes, myths and stereotypes around sexual violence make it more difficult for victims to disclose the crime to others and continue participating with the criminal justice system. Sexual violence, including rape, are not only pervasive crimes but are the most under-reported crimes and the least likely to end in conviction.⁵ The reporting of sexual offences is also complicated by the private nature of these offences. The victim and the accused are often the only witnesses to the crime and in many cases, there is little other evidence. No other crime involves such a detailed assessment of the perceptions and actions of both the victim and the accused. Consequently, many incidences of sexual violence were placed beyond the law's reach.⁶

The obligation on parties to the Istanbul Convention to formulate sexual offences with the central legal element of lack of consent has led many parties embracing definitions of rape based on the lack of consent given voluntarily as a result of the person's free will.⁷ Parties have taken different approaches in drafting the constituent element of lack of consent.⁸ The 'no-means-no' approach requires for the sexual act to have happened 'against the will of a person', while the 'only-yes-is-yes' approach, or 'affirmative consent' requires voluntary participation to the sexual acts by both parties. GREVIO has consistently drawn attention to the need for sexual offence definitions to fully capture the realities of women experiencing sexual violence and their coping mechanism to deal with such violence, which include reactions such as flight, fight, freeze, flop or befriend.⁹ In this regard, GREVIO has noted that there is a slight difference between sexual acts committed against the will of the victim and all non-consensual sexual acts, as required by the Istanbul Convention.¹⁰

4 4th GREVIO Activity Report (2023), p30.

5 Council of Europe (2022), paragraphs 442 and 446. See also Burman M. et al (2009), p3.

6 4th GREVIO Activity Report (2023), p30.

7 Ibid, p39.

8 Marceline Naudi (2020).

9 Ibid, page 32.

10 Ibid, page 34.

Enacting and implementing a consent-based definition of sexual violence, including rape requires a paradigm shift, one that views sexual activity requiring the voluntary participation of all parties for the sexual act not to be criminalised (the affirmative consent approach) rather than being based on the premise that sexual activity is presumed consensual unless it is withdrawn, explicitly or implicitly, by the victim (the 'no means no' approach). This means that the focus for investigators and prosecutors is on an affirmative expression, whether verbal or non-verbal, of consent rather than focusing on the degree of resistance, whether verbal or non-verbal, as a measure of whether the victim consented to the sexual acts. More specifically, this approach means that passivity, silence, lack of protest or lack of resistance cannot be deemed to be consent and that consent must be ongoing throughout the sexual activity and can be revoked at any time. As these guidelines aim to reflect good practice, the document incorporates the broadest understanding of consent-based definitions to be affirmative consent.

2. A conceptual framework underpinning the guidelines

Criminal laws and procedures should not be interpreted and applied in the abstract. Cases of sexual violence, including rape are often treated differently from other offences, in terms of how these offences are conceptualised, investigated, and prosecuted. Having a better understanding of the reality women face, their right to sexual autonomy, their experiences with trauma, and how rape myths and gender stereotypes can influence how laws are interpreted, all have contributed towards adopting sexual offences based on lack of consent. However, reforming criminal laws to consent-based definitions of sexual violence, including rape is only the first step. If such laws continue to be interpreted through a lens that views non-consensual sex as normal sexual behaviour, is not trauma-informed or is tainted with rape myths and gender stereotypes, many victims of sexual violence will not obtain justice. This section briefly sets out the conceptual framework that these guidelines are based on. Investigators and prosecutors should keep in mind when implementing the guidelines to ensure that their work is: (1) based on the Istanbul Convention; (2) grounded in a trauma-informed approach; and (3) free of rape myths and gender stereotypes.

Based on the Istanbul Convention

The Istanbul Convention requires states to criminalise all forms of non-consensual sexual acts, including rape. The Convention leaves it up to states to formulate how lack of consent will be defined in their laws, leaving it “to the Parties to decide on the specific wording of the legislation and the factors that they consider precluding freely given consent”, nonetheless it is vital that all non-consensual sexual acts are criminalised.¹¹ However, GREVIO’s baseline evaluation reports indicate that in its opinion, the affirmative consent approach is more aligned with the spirit of the convention as a whole and with the overall objective to improve prevention, protection and prosecution.¹² Furthermore, Articles 49 and 50 of the Istanbul Convention set out the obligation of immediate response, prevention and protection for victims of the forms of violence covered by the convention, having regard to a gendered understanding of violence. This includes ensuring that investigations and judicial proceedings are conducted without undue delay, while at the same time

¹¹ Explanatory Report to the Istanbul Convention paragraph 193.

¹² 4th GREVIO Activity Report, p39.

respecting the rights of victims during each stage of these processes (Article 49, paragraph 1); ensuring that all investigations and prosecutions are carried out in an effective manner, and that they conform to the fundamental principles of human rights and reflect a gendered understanding of violence (Article 49 paragraph 2); and ensuring that law enforcement agencies react promptly and appropriately in these cases by offering victims immediate protection and engaging in the prevention of violence, such as by making use of preventative operational measures and in the efficient collection of evidence (Article 50).

What does this mean for investigators and prosecutors?

- The central legal element for sexual offences is the lack of consent given voluntarily because of the person's free will. Voluntary consent by each participant in a sexual encounter must be a pivotal and conclusive factor, thus putting the protection of deliberate sexual choice at the centre.
- Underlying the call for criminalising non-consensual sexual activity are individuals' rights to sexual self-determination and sexual integrity. In other words, sexual violence is a violation of sexual autonomy, based on the idea that an individual has a right to make autonomous decisions about entering or not entering into sexual relations.
- The approach to investigations and prosecutions of sexual offences requires a paradigm shift. The shift from force-based to consent-based definitions entails a shift in how society and in particular the justice system look at the process of consenting to sexual acts.
- In handling these cases, investigators and prosecutors should view 'normal sexual behaviour' as activities that should be entered into willingly by both parties rather than view 'normal sexual behaviour' based on traditional cultural paradigms and narratives of 'seduction' and 'enticement' and reliance on myths that see women as sexually passive and men as sexually aggressive.
- Investigations and prosecutions are to be based on a context-sensitive assessment of the evidence to establish, on a case-by-case basis, whether or not the victim has freely consented to the sexual act. Context-based investigations to assess consent must be victim-centred and with a gendered understanding. This means that investigators and prosecutors should be aware of local gender and social norms when handling sexual offence cases.
- Evidence-collection for consent-based definition offences should be broadened from the traditional evidence collection used for force-based

definition offences. Investigations no longer hinge on proving that the acts were a result of violence, threatening behaviour, or a particularly vulnerable situation. This switches the focus in evidentiary gathering. The central question is whether participation in the sexual act has been voluntary or not. Investigators are looking for evidence as to consent and the suspect's reasonable belief in consent.

- Where there is little or no evidence of force, cases should not be automatically dismissed. All facts must be taken into consideration when assessing if the sexual activity was non-consensual.
- Protective measures should be available for victims at all stages of the investigation and judicial process.

Grounded on a trauma-informed approach

Moving from a forced-based to a consent-based understanding of sexual offences more fully captures how persons experience the trauma of sexual violence and the brain's reaction to threat and trauma. In its evaluation reports, GREVIO has consistently highlighted research on the neurobiology of sexual trauma that shows that 'freezing' (so-called tonic mobility) is a common reaction by victims.¹³ Moreover, recent good practices in handling sexual offences involve adopting a trauma-informed approach, that is, one based on a neurobiological understanding of how the brain processes trauma.¹⁴ An increase in the knowledge about victims' reactions to traumatic events, like sexual violence, has led to a deeper understanding of the neurobiological impacts on the brain's defence circuitry and on memory encoding and recall. A trauma-informed approach is essential when investigating and prosecuting sexual offences based on lack of consent.¹⁵

What is a trauma-informed approach?

A trauma-informed approach understands and responds to the impact of trauma. It emphasises the physical and psychological safety of the victim and creates opportunities for victims to gain a sense of control. It appreciates that many behaviours and responses expressed by victims are directly related to traumatic experiences. What might appear to be an inconsistency in the way a victim reacts

¹³ See GREVIO's baseline evaluation reports on Spain, paragraph 221; Bosnia and Herzegovina, paragraph 220; Estonia, paragraph 172; Norway, paragraph 185; Romania, paragraph 280; and Slovenia, paragraph 259 including its footnotes that refer to Moller A. et al (2017).

¹⁴ For example, see England and Wales Legal Guidance (2021).

¹⁵ The following notes rely on information from Department of Justice Canada. "The Impact of Trauma on Adult Sexual Assault Victims".

or how they recount the incident can actually be a typical, predictable, and normal way of responding to and coping with a traumatic event.

What is trauma?

A traumatic event is one in which a person experiences something that is frightening, and overwhelming, and that entails a sense of loss of control and in some circumstances, it feels like a threat to one's ability to survive. Individuals experience trauma in their own way, based on many factors including past experiences in their lives. As a result, any definition of trauma is very subjective. Traumatic events are not necessarily violent. However, they will involve a feeling of violation of a person's sense of self, security, and survival.

The brain's reaction to threat/trauma

Our nervous system (the 5 senses in our brain) is continually monitoring our surroundings for varying levels of threat and danger at both conscious and unconscious levels. This is the function of the limbic system. Consider the following progression:

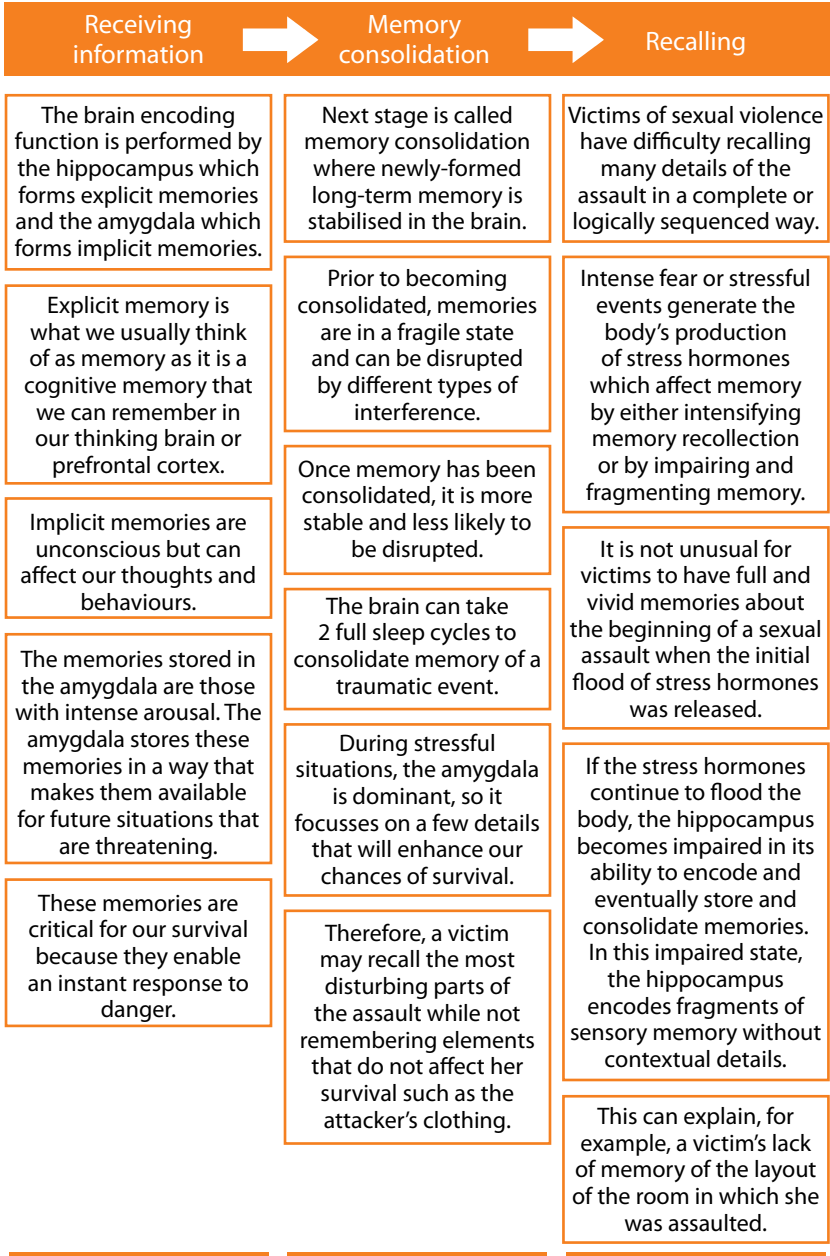
- If we sense that our very survival is threatened, the brain takes over.
- First it immediately releases a cascade of chemicals.
- When the threat is imminent, a normal person switches to subcortical dominance. In this mode, the automatic responses are to fight, to flee or to freeze or flop. We react automatically. Some of our reactions are at the conscious level and some are unconscious and out of our control.
- The important point to remember is that the defence survival circuitry function of the brain dominates at this stage. The defence circuitry includes the amygdala, in the part of the brain that predicts danger. The amygdala can be informed and reacting even before the conscious brain cortex knows what is happening.
- The amygdala sends an instant message to other parts of the brain (the hypothalamus) which relays the message eventually to the adrenal glands. The adrenal gland then releases two powerful stress chemicals (hormones): adrenaline and cortisol.
- Adrenaline's role is to support the 'fight' and 'flight' response by forcing the heart to beat faster, the blood vessels to constrict so that blood moves quickly

to the body and brain. Cortisol suppresses the body from doing anything which isn't necessary at that moment (e.g., higher cognitive/intellectual processing).

- Once the body is filled with these chemicals, it focuses only on the immediate threat. This is key to an understanding of victims as, at this point in an event, a victim's brain, body, attention, thinking, behaviour, and memory processes are altered in dramatic ways.
- Within a second of the triggering event, the amygdala signals the body to inhibit any bodily movement.
- The brain then looks for incoming attacks and seeks out possibilities for escape. This is automatic and beyond conscious control.
- The key understanding is that a person cannot make a calculated or rational intellectual assessment about what to do (freeze or flop, fight or take flight) at this point.
- The brain's capacity for intellectual rational thinking is now minimised or impaired. Normal thinking is so impaired that the victim often cannot even think of a way to escape.
- After the immediate freeze reaction, a victim usually makes a split-second decision to select a response from a range of responses that they have learned during their lives: flight, fight, freeze, flop or befriend.

The effective of trauma on memory and recall

Investigators and prosecutors know that in sexual violence cases, it is critically important to elicit the most accurate and complete information from the complainant as she is usually the primary witness. However, recent scientific research on memory has confirmed that human memory is fallible. Even in ideal non-traumatic circumstances, we do not faithfully record information in our brains that is later available to us. In the case of traumatic events such as rape and sexual assault, the brain encodes, records and recalls information differently than during routine non-stressful activities.



Importance for investigators and prosecutors in understanding the impact of trauma

1. Understanding the impact of trauma highlights shortcomings in interpreting sexual offences to require the victim to take steps to avoid unwanted sexual activity. Sexual activity that is presumed consensual unless it is withdrawn, explicitly or implicitly, by the victim (the 'no means no' approach) fails to account for the many victims who freeze from fear or anxiety and appear 'passive' rather than fight back, resist or articulate a 'no'.

2. It is important when interviewing a complainant:

- A victim interviewed shortly after an assault, or while still very stressed or traumatised, will not be able to retrieve everything that's been encoded into their brain. Two full sleep cycles may be necessary for the episodic memory circuitry to consolidate information that was encoded at the time of a trauma. A good practice for the investigator is to conduct only a brief interview when a complainant first reports sexual violence. This should be followed by a fuller interview several days later when the complainant has had time to sleep and consolidate their memories of the traumatic experience.
- Memories of traumatic events like rapes can be fragmentary. It can be difficult for victims to recall many details of a rape in a complete or linear way. The primary emphasis of the police interview should be on the sensory, emotional memories that the complainant has encoded and remembered rather than expecting them to give a narrative with a chronology.
- To ask rape victims to account and explain their behaviours can result in undermining their credibility because they may try to offer explanations for their behaviour that when challenged by defence, can expose feelings of shame and vulnerability, exacerbated in a victim blaming social context. Or they may make what appear to be inconsistent statements about what they think they were doing. These kinds of evidentiary difficulties can be avoided by trauma-informed police interviewing and prosecutions.
- Remember that often victims cannot explain many of the responses they experienced, nor do they understand their own coping and reflexes. They often find these reactions extremely frightening and confusing, and they often blame themselves for these responses.

3. It is important when assessing the credibility and reliability of the complainant:
 - Where, for example, there are inconsistencies in the recorded accounts of complainants (e.g. between the initial account provided to the first response officer and the subsequent in-depth interview), investigators and prosecutors lacking an understanding of the neurological impact of trauma and how it can account for differences in the way an incident is recalled, disclosed or developed by a complainant, may reach erroneous or unfair conclusions about the reliability and credibility of the complainant's evidence.
 - Investigators and prosecutors need to understand that lack of recall of these kinds of peripheral details does not impugn the veracity of the victim's account; instead, it is consistent with the way in which traumatic memories are encoded.

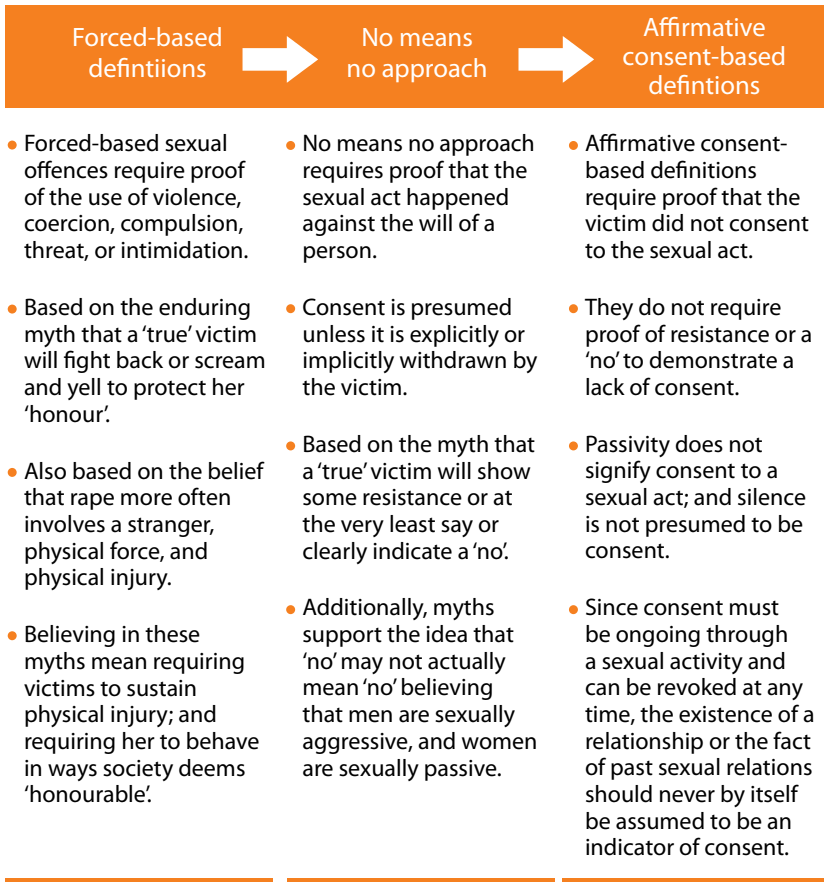
Free of rape myths and gender stereotypes

In addition to understanding trauma, it is important to address myths and misconceptions about sexual violence, including rape, that continue to endure. Myths and misconceptions are based on gender stereotypes, attitudes and biases that lead to violence against women, especially sexual violence. Such myths serve to deny, downplay, or justify sexually aggressive behaviour. They can also unconsciously influence the assessment of investigators and prosecutors of a victim's credibility or reliability. Therefore, it is extremely important for investigators and prosecutors to integrate a gendered perspective in all their work to avoid stereotypical thinking. This not only contributes to more effective investigations and prosecutions but also reduces secondary victimisation commonly experienced by the victims.

Affirmative consent-based definitions of sexual offences address the deeply embedded myths about sexual violence, including rape. A woman does not need to fight back or resist to prove that she did not consent to unwanted sex. Moreover, consent cannot be implied just because a woman had consensual sex in the past. Affirmative consent-based definitions specifically reject the notion that a 'true' victim will fight back or scream and yell, or at the very least say or clearly indicate a 'no' and if she didn't, she must have consented to the sex. This mistaken idea simply fails to understand typical responses to sexual threat, coercion, intrusion, and fear. Victims who had a freeze response during an unwanted sexual act may also experience much higher levels of self-blame. These apparently passive responses of some victims may be perplexing to those who don't understand the neurobiology of trauma or gender socialisation. While this is a normal reaction to threats people

such as investigators and prosecutors who are used to a sense of personal power and agency, can find it difficult to imagine such circumstances. If these old stereotypes, myths, and misconceptions are allowed to persist, even when sexual offences require affirmative consent which aims to focus more on the perpetrator and the incident, research shows that very much focus is still placed on the victim and their reaction to the rape and whether it was adequate for a 'real' victim.¹⁶

Shifting to affirmative consent-based definition of sexual offences tackles head on the common myths.



¹⁶ Vandervort, L. (2013).

Facts regarding sexual violence, including rape

- Sexual violence, including rape is most committed by persons known to the victim. For example, one study found 67% of women identified the perpetrator as a non-stranger¹⁷; while another study found that 8 out of 10 victims knew the people who raped them.¹⁸
- Rape often does not involve physical force. Perpetrators of sexual violence may use manipulative techniques to intimidate and coerce their victims.
- In many cases, there will be no visible sign of injury. According to one study examining the prevalence of injuries from rape, only 5% of forcible rape victims had serious physical injuries and only 33% had minor injuries.¹⁹

Facts about victims

- There is no typical person that is raped; people of all ages, race, sexualities, religion, backgrounds, and appearance can be raped.
- Reactions to rape vary greatly. Responses may include extreme distress, quiet control, shock, and denial. The reality is that many victims freeze through fear or shock or decide that resistance would be futile or dangerous.
- A victim coming forward to report rape and support a prosecution is incredibly brave. Most rapes are never reported to the police. The International Violence against Women Survey undertaken in 2008 found that in the countries studies, 4 to 13% of women reported sexual violence to the police.²⁰ Another study estimated that rates of reporting ranged from 5 to 25%, meaning 75% or more of rape cases do not even enter the criminal justice system.²¹ There are many reasons why people do not report or delay reporting, including trauma, feelings of shame, confusion, or fear of the consequences.

Facts about perpetrators

- There is no typical perpetrator. They can come from all backgrounds. They are not necessarily single and can be in long term relationships at the same time.

17 This study was reviewed in Mallios, C. and Meisner, T (2010).

18 This study was reviewed in UNODC (2014).

19 Rennison, C. (2002).

20 Johnson, H. et al (2008).

21 Kelly, L. et al (2005), p293.

- Only a perpetrator is responsible for the sexual violence, including rape and the law should be applied to all perpetrators irrespective of their age, background, or future prospects.

Impact of these myths – which are often seen as ‘common sense’ approaches to rape cases

- Myths produce a narrow understanding of what constitutes ‘real’ rape, of who can be a perpetrator, and what a ‘real’ rape victim looks like. If the facts do not fit this scenario the cases are often dismissed.
- Myths cause the focus to be exclusively on the victim (her behaviour, her characteristics, what she was wearing etc.) rather than on the perpetrator and the act itself.
- Myths perpetuate the false belief that the woman should make it clear that she does not want to have sex, and if she does not say anything, she is expected to be available.
- Myths typically excuse rape or minimise its seriousness or deny that the woman suffered harm or question whether a rape even occurred at all.
- Myths serve to deny, downplay, or justify sexually aggressive behaviour that men commit against women.
- They can also be used to discredit the victim.

Be mindful

- There is no typical rape, typical perpetrator, or victim. Sexual violence, including rape, can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related. It can take place in an intimate relationship such as marriage or dating, and in post-separation situations.
- There is no typical response to rape. People can react in different ways to sexual violence, including and rape. These reactions may not be what you would expect or what you think you would do in the same situation. Be aware of personal bias or opinions and common misconceptions and myths around sexual violence. Victims themselves may hold misperceptions related to rape and their own abuse.

3. Legal elements of sexual offences based on lack of consent

Article 36 of the Istanbul Convention

The Istanbul Convention calls on parties to criminalise all forms of non-consensual acts of a sexual nature, including rape. Paragraph 1 of Article 36 covers all forms of sexual acts which are performed on another person without their freely given consent, and which are carried out intentionally. The Istanbul Convention further provides that consent is understood by assessing the context in terms of whether it was voluntary and where the person has the capacity and free will to make that decision.

Article 36 – Sexual violence, including rape

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
 - a) engaging in non-consensual vaginal, anal, or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - b) engaging in other non-consensual acts of a sexual nature with a person;
 - c) causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

The legal elements: material and mental elements

For a person to be found guilty of a criminal offence, they must have committed an illegal act (the material element) and have the required 'state of mind' or intention (the mental element). The prosecutor must prove the legal elements of the offence beyond a reasonable doubt.

The material element: Non-consensual acts of a sexual nature

The material element has two components:

- (1) The act was of a sexual nature; and
- (2) The absence of consent.

The material element is the touching of a person who does not consent in circumstances of a sexual nature. The validity of consent in the material element depends on the complainant's subjective mind toward the touching at the time it took place. The complainant's testimony is the only source of direct evidence of their state of mind. The accused may claim that the complainant's words and conduct at the time of the offence provided a basis to infer that she did want the sexual touching to take place or, at least, a basis for reasonable doubt about their credibility; but where the investigators and prosecutors find evidence that the complainant did not subjectively consent, this establishes the material element needed for the case to move forward.

Considerations for investigators and prosecutors regarding the element of consent for purpose of proof in the material element

- Remember that context-based investigations to assess consent must be victim-centred and with a gendered understanding. This means that investigators and prosecutors should be aware of local gender and social norms when treating cases of sexual violence.
- The focus of the investigation and prosecution is on finding evidence that the complainant did not consent to the sexual acts. The sexual act at the centre of the investigation and prosecution no longer needs to be the result of violence, threatening behaviour, or a particularly vulnerable situation.
- For the purpose of the material element, 'consent' means that the complainant not only communicated agreement by their words or conduct but also did so voluntarily; that is, subjectively, in their own mind, they actually did want the sexual activity to take place.
- The complainant's state of mind is crucial in relation to voluntariness.
- The evidence of the complainant's words or conduct that are objectively observable to show involuntariness conclusively establishes the absence of consent for the purpose of proof of the material element.
- The absence of any evidence of words or conduct that communicate affirmative consent or voluntary agreement to the activity, like in cases

where a complainant is silent or passive, conclusively establishes the absence of consent for the purpose of proof of the material element.

- The material element does not require that the complainant demonstrate or communicate to the accused a lack of consent. Submission is not consent.
- There are also circumstances – such as submission by reason of force, fear, threat, or fraud – where consent is deemed to be absent, despite a complainant’s ‘apparent’ consent or participation. For example, apparent consent may be vitiated when obtained fraudulently, such as in a case where a perpetrator deceived a victim pretending to be a representative for a breast cancer survey demonstrating how to carry out self-examinations.²² Apparent consent can also be vitiated in an abuse of power situation, where the perpetrator is in a dominant position such as teacher or guardian.
- The complainant’s reason for ‘apparent’ consenting by complying or participating does not need to be either reasonable or communicated to the accused for consent to be vitiated for the purpose of proof of the material element.
- What is required is some evidence of lack of consent and the nature of that evidence depends on the circumstances of the case.
- Such evidence may include that the complainant was incapable of consenting or knowing what was happening due to the influence of alcohol or drugs.

Considerations for investigators and prosecutors regarding the element of an act of a sexual nature for purpose of proof in the material element

- The non-consensual act is to be of a sexual nature. This can be determined by looking at the act to see if it violated or threatened to violate the sexual integrity of the complainant.
- Another way of putting this is whether the sexual nature of the violation would be evident to a reasonable observer who was aware of all the circumstances. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act and all other surrounding circumstances will be relevant.

²² Tabassum case cited in Živa Šuta et al PhD (updated).

- The intent of the accused may be a factor in considering whether the violation was sexual, but it is not a requirement that the violation be for sexual gratification. For example, an accused who was 'just joking' by grabbing another's genitals can still be convicted of sexual offences based on lack of consent.

Mental element: Accused acted with criminal intent, either knowing the complainant's participation was not voluntary or indifferent to whether or not it was not voluntary

The mental element has two components:

- (1) The intent to engage in a sexual act; and
- (2) Knowledge of a lack of consent or recklessness or wilful blindness towards a lack of consent.

Considerations for investigators and prosecutors:

- The focus of the investigation and prosecution is on whether the accused acted with criminal intent, either because the accused was certain that the complainant did not consent or else was reckless in finding out whether the complainant consents to the act.
- The crucial element of the mental element is the lack of consent – the accused's intention of sexually touching the complainant having the knowledge that they did not consent or the awareness that there is a possibility that they do not consent.
- The lack of consent is the critical element not the resistance, physical or verbal, of the complainant.

Therefore, the issue of consent is part of both the material element (the act) and the mental element (the intent) of non-consent based sexual offences.

What is consent?

The Istanbul Convention provides that consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances. The exact formulation of the legislation in criminal codes and the factors that they consider precluding freely given consent is left up to states.

This can range from defining consent as “if they agree by choice, and has the freedom and capacity to make that choice” (England and Wales) to articulating the legal element as “who is not participating voluntarily” (Sweden); “who has not given consent” (Belgium); “consent to be assessed in the context of the surrounding circumstances” and that attention should be given to the “state of that person at the time, taking into account that person’s emotional and psychological state, among other considerations” (Malta); “lack of freely given consent” (Slovenia); “without explicit consent” (Denmark); consent to a sexual act must be assessed “in the light of the circumstances of the case” and that “it cannot be inferred from a lack of resistance by the victim” (Luxemburg).

Definition of consent

Consent is defined as a person’s willingness to engage in a specific sexual act. Consent needs to be given voluntarily (i.e., someone agrees by choice) AND because of a person’s free will (i.e., has the freedom and capacity to make that choice). Both must be present. This means, for instance, consent is absent when a complainant does not give any indication of consent, regardless of whether they are competent or incompetent to consent. It also means consent is absent when a complainant may have given an indication of consent but is not conscious and/or mentally incapacitated (an individual who is able to understand and evaluate the situation and consequences of giving consent).

What does consent look like?

- Consent requires a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act. Therefore, consent cannot be given in advance to sexual activity that occurs when the complainant is unconscious.
- Consent must be present throughout the sexual activity and can be revoked at any time. Consent is an ongoing state of mind, and a consenting partner must be capable of asking their sexual partner to cease sexual activity at any time.
- Consent must be obtained not only to the touching of a sexual organ, but to its sexual nature and with a particular partner (e.g., consenting to a medical exam of the cervix by a doctor is not consent to sexual touching by that doctor).

- Consent must be communicated by words or actions of the complainant. It can be expressed, or inferred from behaviour, depending on the context and circumstances. There is no requirement that it is done verbally, directly or in any way. There is also no duty to say 'no' on the complainant. Participating in a sexual act or showing physiological reactions does not automatically mean the complainant consents willingly.

What does consent not look like?

- Silence, passivity, lack of protest, lack of resistance or ambiguous conduct cannot be deemed to mean consent or a sign of voluntary participation. The complainant is under no obligation to indicate by resisting or indicating no (verbally or physically) that they are not consenting. The investigation, therefore, should not focus on the presence or absence of a 'no', but instead focus on the behaviour of the complainant, as a whole, to establish whether there had been consent.
- An accused would be responsible for the crime not only in cases where the complainant objected to the sexual conduct but also in cases when the complainant did not express their consent, and due to any reason, remained passive.
- If a complainant consents because of fear of the application of force to themselves or someone else or has been coerced because of the accused having a position of authority over them, the consent is not valid.
- If the complainant has been misled about the nature of the sexual activity, that fraud can also make the consent invalid. (e.g., non-disclosure of HIV status; the accused surreptitiously poking holes in condoms to make the victim pregnant).
- Sometimes consent is given, or appears to be given, i.e., 'apparent' consent, but it is not true consent in the particular context in which the offending has occurred, for example where it is important to make a distinction between consent and mere submission, acquiescence, or compliance. Consent and submission are different. Remember that a victim's perception of threat influences their behaviour. Fearful of being killed or seriously injured, they may cooperate with the perpetrator to save their life. They may also fear sexually transmitted diseases and seeking to minimise that risk, they may try to befriend the perpetrator and ask them to use a condom.

- A victim's passivity does not manifest consent but rather the inability to consent. This particularly applies to the 'frozen fright' response, a common response to sexual trauma.
- Verbal resistance such as crying, begging, screaming, or simply saying "no" is not required to prove lack of consent.

Assessing consent

The assessment of consent and whether it has been given voluntarily and an expression of the person's free will, is based on the circumstances of the specific situation. Assessment of such is done by considering the circumstances the person is in and their emotional and psychological state. Hence, the importance of the element of consent pivots around the notion of a person's sexual liberty and autonomy.

What is reasonable belief in consent?

Consent is given when the average person in the same circumstances could reasonably believe that the complainant has consented to the sexual conduct. To raise the defence of honest but mistaken belief in consent, the accused must show that they believed the complainant affirmatively communicated, by words or actions, consent to engage in the specific sexual activity. An accused who claims this defence is essentially denying the mental element for the offence.

A subjective test with an objective element

Deciding whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused has taken to ascertain whether the complainant consents. The accused's defence that they believed the complainant was consenting must be objectively reasonable, while still taking an accused's personal circumstances into account.

The best way of dealing with this issue is to ask two questions:

- Did the suspect genuinely believe the complainant consented? This relates to their personal capacity to evaluate consent (the subjective element of the test).
- If so, did the suspect reasonably believe it? It will be for the fact finder (judge or jury) to decide if their belief was reasonable (the objective element).

Remember - there is no requirement to communicate lack of consent.

Some considerations

- A reasonable belief in consent can be demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the complainant had affirmatively and freely given authorisation to the act.
- The onus will be on the accused to demonstrate such consent if the complainant alleges no such consent was given. Therefore, it will be the accused's story of the events of the incident that is under examination by the court, rather than that of the complainant.
- A reasonable belief in consent does not include the defence of a genuine though unreasonably mistaken belief as to the consent of the complainant. So, for example, where the accused had the belief that 'no' means 'yes' or that silence is consent, or that failure to resist, or resist successfully, is consent, then the defence of belief in consent should not be accepted as valid.
- This in effect means for investigators and prosecutors reviewing a complaint that the accused has the responsibility to ensure that the complainant consents to the sexual activity at the time in question.
- If the accused's belief arose from a self-induced intoxication, recklessness, or wilful blindness; or the accused did not take reasonable steps in the circumstances known to them at the time, to make certain that the complainant was consenting, such a defence should not be accepted as valid by the authorities.
- It is important to note that a claim by the accused that he did not mean to have non-consensual sex is not the determinative issue. What is the determinative issue is whether he had non-consensual sex and possessed the required mental element.

Implications for the investigation and prosecution

- It will be important for the police to ask the suspect in the interview what step or steps they took to satisfy themselves that the complainant consented to show their state of mind at the time.

- This defence requires some plausible evidence that gives it an 'air of reality'. The evidence may consist of a combination of the victim's evidence, the accused's evidence, and evidence of the circumstances surrounding the commission of the offence.

Burden of proof

The state (the investigator and prosecutor) has the burden to prove the constituent elements beyond a reasonable doubt. The prosecutor must prove that the complainant did not consent, as compared to having to prove the complainant said or gestured 'no' or having evidence to show that the complainant resisted; and that the accused had intent to engage in the sexual act and the knowledge of a lack of consent or recklessness or wilful blindness towards a lack of consent. This does not prevent the accused from claiming an affirmative defence that the complainant indicated consent; however, it does hold that an accused cannot take a complainant's passivity or silence as indicative of a willingness to engage in sexual acts.

Clarifications regarding concerns about shifting the burden of proof

- Affirmative consent is about the substantive criminal law and the presence of an element of the crime – namely unconsented sexual contact. It has nothing to do with the procedures necessary in a courtroom or lessening the burden of proof for the prosecution.
- Because affirmative consent is a substantive, not a procedural, concept it affects the elements of a crime. The prosecutor must prove that the accused did not have the consent of the complainant. This can be done by having the complainant testify that they did not give consent to the accused for the sexual acts. The burden remains the same: the prosecutor must prove every element beyond a reasonable doubt.
- What is different is the legal significance of passivity. It no longer signifies consent. Rather, passivity reflects the now common belief that a lack of behaviours suggesting a desire to engage in sexual activities does not constitute consent.
- The prosecution must still introduce evidence that there was no consent beyond a reasonable doubt and that the definition of consent did not relieve the state of its burden of showing there is not consent. This is not a burden shift. It is an articulation that an absence of conduct or words

conveying consent to sexual contact cannot be presumed to indicate consent because it manifests a lack of resistance.

- The affirmative consent approach demands that the accused request and obtain consent. If the accused fails to obtain consent, then the prosecutor has evidence there was no consent.

Intoxication and consent

A challenging situation is often intoxication and consent. The issue of capacity to consent is particularly relevant when a complainant is intoxicated by alcohol or affected by drugs. A complainant cannot consent if they are incapacitated through alcohol or drugs.

The focus usually centres on whether the complainant retains the capacity to consent. Some considerations:

- An unconscious person cannot give consent.
- An individual does not need to be unconscious to lose their capacity to give consent. The level of intoxication may indicate incapacity to give consent even without the individual concerned falling unconscious.

Implications for the investigation and prosecution:

- It is important for investigators and prosecutors to consider the complainant's state of mind at the time of the sexual activity.
- Evidence of a lack of recollection of events cannot of itself be determinative of issues of consent and capacity.

Deception and consent

In cases where a material deception has been perpetrated on the complainant by the suspect, 'apparent' consent can be vitiated. However, this usually requires deceptions that are closely connected to the nature or purpose of sexual act. This means deceptions related to the physical performance of the sexual act, rather than the broad circumstances surrounding it.

Deceptions related to the physical performance of the sexual act

- A lie about wearing a condom can be seen to be sufficiently closely connected because it physically changes the nature of penetration, whereas a lie about fertility is not a deception that vitiates consent because it is not related to the performance of the sexual act.

Consent vitiated where conditions for engaging in sexual activity were breached

- The imposition of conditions embodies personal sexual autonomy.
- So, for example, cases where the complainant imposed a specific condition on the giving of their consent to the sexual acts, such as the accused wearing a condom throughout the act of intercourse or that the accused would not ejaculate inside the vagina during the act of intercourse. In cases where the complainant imposed a condition of wearing a condom on the giving of their consent, there is a deception by the suspect from the moment they made the decision not to comply with the condition.

4. Evidentiary issues in sexual offences based on lack of consent

Evidentiary focus of the investigation and prosecution

An investigation should follow all reasonable lines of enquiry. Of course, there continues to exist reports to the police that involve situations where force, coercion or helplessness vitiates consent in sexual violence cases. However, these Guidelines aim to cover scenarios where consent is the issue. This includes such scenarios as factual denial (i.e., where a complainant alleges non-consensual sex activity, and the defence is that the complainant has fabricated the allegations); and the defence of consensual sexual activity (i.e., where a complainant alleges non-consensual sexual activity, and the defence argues they had reasonable belief that it was consensual). This switches the focus in evidentiary gathering. The central question is whether participation in the sexual act has been voluntary or not. Investigators are looking for evidence as to consent and the suspect's reasonable belief in consent.

These investigations can be challenging due to the private nature of sexual activity. They are often viewed as 'he said, she said' type of cases where it is one word against the other. In addition, the impact of trauma on memory and recall of the complainant, delay in reporting, and the lack of or limited corroborative evidence contribute to the challenges in investigations. On a positive note, an evaluation of the sexual offences laws in Sweden found that the concern about evidentiary challenges in affirmative consent cases such as the absence of violence or the inebriation of the injured party which might make it harder to obtain evidence for this type of offence in the form of documented physical injuries or measurements of alcohol consumed have turned out not to be a concern in successful prosecutions.²³

Important to remember

- Requiring corroborating evidence independent of the complainant's testimony in sexual offence cases is not required as a matter of law.
- Many sexual offence cases will feature limited or no corroborative evidence. While it is important to try and identify supporting evidence in all cases, investigators and prosecutors should not introduce a requirement for

²³ Stina Holmberg and Lars Lewenhagen (2020).

corroboration in their review or identify the 'one versus one' feature as a negative in their assessment of the evidence. One person's word can be sufficient to provide a realistic prospect of conviction.

- Corroborating evidence beyond the testimonies of the parties involved should nonetheless be sought out. There may be evidence that support the complainant's account, including witnesses as well as partial admissions of the suspect. There may be evidence that goes to the suspect's account being implausible or being undermined.
- In factual denial cases, there may be forensic evidence of sexual activity with the suspect which undermines their statement.
- When assessing the evidence of the complainant, in terms of the complaint, their manner and demeanour and consistency, do so using a trauma-informed lens and ensuring to disregard factors that are irrelevant or based on myths or gender stereotypes.

What not to focus on / to avoid

- Do not gather evidence relating to the sexual history and conduct of the complainant which has no probative value.
- Do not focus on information that is not relevant, such as detailed description of what the complainant was wearing or makeup unless there is specific relevance to the case.
- Do not focus on lack of injuries or evidence of resistance, or a helpless state of the complainant to dismiss a case.

Guiding principles in the evidentiary approach in sexual offences based on lack of consent

Best practices in investigations are guided by the following principles:

- Appropriate assessment of the credibility of the overall allegation.
- Use an offender-centric approach to case building.
- Support complainants to give their best evidence, paying attention to any vulnerabilities.

i. Appropriate assessment of the credibility of the overall allegation

- Investigations and case building should focus on the credibility of the overall allegation and should not focus solely on the credibility of the complainant.
- This should be with the intention to address head-on any issues related to vulnerabilities to support, rather than undermine, the case.
- When looking at the credibility of the overall allegation do so with a trauma-informed lens free of myths and stereotyping.

ii. Use an offender-centric approach

- Focus on the actions of and tactics used by suspects. This involves looking closely at the actions of the suspect before, during and after the alleged assault. The approach may include considering whether the suspect targeted the complainant or exerted control or coercion. It may also include assessing how and why a suspect interacted with an intoxicated complainant. It may also include an analysis of the suspect's digital communications, analysis of their behaviour from CCTV or direct witness evidence.
- In cases where the suspect states they reasonably believed that the complainant consented, investigators must properly assess whether any belief in consent was reasonable. This must include consideration of the role and behaviour of the suspect to ensure a balanced consideration of the accounts provided.

iii. Support complainants to give their best evidence, paying attention to any vulnerabilities

- There are dangers in misunderstanding vulnerabilities of complainants of sexual violence which can result in (1) insufficient consideration of the circumstances of the offence including the credibility of the overall allegation and the suspect; and (2) a lack of support for complainants to give their best evidence and therefore undermine their accounts.
- This principle requires investigators to not make quick judgments of the complainant as being able to give credible or reliable evidence, but to ensure that all practicable steps to gather all evidence and to support the witness to provide credible or reliable evidence have been taken.

- Complainants are more likely to cooperate with the proceedings and give their best evidence if they understand: what to expect; what is expected from them; the process and its implications.
- Important to note that if vulnerabilities are considered in a different way, these very vulnerabilities might support rather than detract from an allegation. For example, an inconsistent account owing to the consumption of drugs might be seen to militate against somebody's credibility. However, somebody's drug use might be the very reason they were vulnerable to being victimised and targeted by an offender.

Sources / categories of evidence

Every investigation of sexual violence, irrespective of how the sexual offences are formulated, requires early and meaningful collection of evidence. This means that evidence needs to be collected immediately after receiving a report, be given priority, and be completed without delay. The possible sources of evidence in the investigation of sexual offences based in lack of consent can range from interviewing the complainant, questioning the suspect, securing the crime scene, forensic examination of the complainant, where there is the consent of the complainant, securing evidence such as clothing, bed sheets and mobile phones and identifying witnesses. It is important to undertake robust and comprehensive evidence to secure as many different types of independent evidence as possible at the earliest stages of the investigation.

Potential sources of evidence are listed below.

i. The complainant

- The complainant's story itself is usually the most important evidence in these cases. The police questioning should shift from determining if the suspect used violence or the threat of violence, to determining whether the complainant had consented to the act.
- The complainant's statement is a key part of the evidence and often allows other evidence to be identified, such as the crime scene and possible witnesses.
- There may also be forensic evidence on their bodies, which is perishable. If seeking to conduct a forensic examination, this must be done with

the complainant's consent. If the complainant does not consent, the investigations should not be discontinued.

- Caution – do not proceed down wrong pathways, such as irrelevant sexual history of the complainant, or broad search of complainant's smart phone, as this will implicate disclosure obligations to defence.

Tips on conducting a victim-centred, trauma-informed interview of complainants are in the next section.

ii. The suspect

- Question the suspect as soon as possible.
- The focus is on consent, rather than simply the issue of saying no, or force, coercion, or helplessness. This switches the conversation and the attitude of the questioning during the investigation and prosecution. So, for example, instead of asking the suspect about these 'criteria', such as violence or the complainant's helpless state, and how they forced themselves on the complainant, you ask "what led you to believe that they wanted this"?

Tips on shifting the focus of the suspect's interrogation are in the next section.

iii. Recorded evidence

- Evidence from an emergency call can be important. Check if there is one.

iv. Observations from witnesses

- Check if there are any witnesses, either to the act in question, or preceding it.
- There can also be testimony of a person in whom the complainant had confided - people who had not personally witnessed the event, but who had been told about it by the complainant.
- Consider witnesses such as:
 - Emergency personnel – who took the emergency call or attended at the scene or at the hospital.
 - Any other person who observed or heard the incident.
 - Any other persons who may have been present before or after the actual incident occurred.
 - Consider speaking to friends, neighbours, peers.

v. Forensic /medical evidence

After the initial contact with the complainant, the police consider the need for a forensic exam and identify the crime scene and collect material for forensic examination. A forensic examination of the complainant is an option for the victim and not a duty. Investigations should not be closed if the complainant refuses to undergo a forensic examination. Furthermore, a best practice is where there are facilities allowing for forensic evidence to be stored for later use even in the absence of a criminal complaint.

Forensic medical examination of the complainant

- If it is determined a forensic exam is needed or would benefit the complainant/investigation, and the complainant consents to the examination, it should be conducted within 72 – 120 hours of the incident and by a specialised forensic expert, with the informed consent of the complainant. Best practice is where the complainant can choose a female forensic expert to carry out the forensic examination when possible.
- Informed consent is the ability to understand the explanation of the examination and the ramifications of accepting or declining the exam. Information to the victim should include: the nature of the examination; alternatives to the examination; the risks, benefits, and uncertainties about each of the alternatives; an assessment of the understanding of the victim; accepting or declining the examination or its components; the victim can withdraw consent at any point during the examination process.
- The purpose of these exams is to obtain information about what sexual acts were committed and to collect biological evidence. They are also meant to obtain information about physical injuries to document the use of physical force in such cases. However, remember that many victims sustain no genital injuries, or by the time of reporting, any injuries have healed. Remember that lack of injuries is not fatal to the case proceeding to the prosecution.
- Forensic evidence may provide crucial assistance with determining the key issues in the case. DNA deposited during the commission of an offence may for example link the suspect to the crime and reveal the nature of the activity that has taken place.
- Forensic Medical Examiners can also give evidence in a way to address potential myths with the fact finder with regards to issues such as the

absence of injury. So, for example they can explain to the fact finder that the absence of genital injury to the complainant does not mean that sexual intercourse did not occur, nor does it assist in determining whether it was consensual.

A clear understanding of the accounts provided by both complainant and suspect is key to ensuring the value of the forensic examination. A complainant might be able to provide important information relating to the following matters:

- Activities involved
- Time frames
- Previous intercourse/sexual activity
- Washing/showering/bathing
- Defaecation
- Consumption of food/drink
- Clothing – changed, washed
- Sanitary wear – when used/changed.

Toxicology

- In cases where it is alleged that the complainant was incapable of giving consent because of alcohol consumption or drug induced intoxication, toxicology evidence may provide strong support for a lack of capacity to consent.
- Back calculations in relation to alcohol consumption feature in many rape cases. Early evidence kits should be provided as standard to all first responders, and it is good practice to take urine or blood samples for the purpose of toxicology reports.

Drug facilitated sexual assaults

- In addition to alcohol there are various drugs used during the commission of sex offences either by force, covertly or self-administered.
- These may be prescription drugs, illegally obtained pharmaceutical drugs or street drugs, which are administered on their own or mixed with alcohol, or other substances.
- Forensic examination should include toxicological testing including drug-facilitated sexual assault urine test.

- Victims who are impaired with drugs and alcohol may be able to consent if they can respond appropriately to questions and physically cooperate throughout the examination.
- The capacity to consent is not related to the legal limitations for driving. Determination of capacity can begin with: Can the victim follow instructions? Can the victim walk, is their gait steady? Can the victim carry on a conversation?
- If the victim is not able to give informed consent (e.g. unconscious or capacity is impaired); police need to check the laws and hospital policies in determining what options might be available (e.g., deferring the exam to see if the victim regains capacity for informed consent; seeking a court order; proceeding with the forensic exam and holding the evidence until the victim has capacity to provide informed consent).

What can forensic evidence help with in sexual offence based on lack of consent investigations?

- Forensic evidence can also help with evaluating the evidence – such as versions of events from both the complainant and the suspect. It might be that the foundation of incident is not disputed but may need to be looking for discrepancies between each version of events. This may require interpretation of levels, location, and distribution of body fluids / DNA in relation to the two versions of events.
- Be aware that complainants might not have provided full details of the incident due to trauma, feelings of shame, cultural or family concerns. Investigators and prosecutors should be prepared for this possibility and if samples can be requested to prove or disprove an issue every effort should be made to obtain them.

vi. Digital evidence

- Reasonable lines of enquiry may involve searching digital communication data. This will often involve obtaining and analysing communication data originating from devices belonging to the suspect, the complainant, and on occasion, third parties.
- Digital evidence could include apologetic text messages by the suspect, social media posts, etc.

- Smartphones contain all kinds of data including highly sensitive material such as medical details, bank details and private photographs.
- The decision to obtain and review material on a digital device should not be taken lightly. Caution not to proceed down wrong pathways, such as irrelevant past sexual history texts, as this will implicate disclosure obligations to defence.
- There could be examples of cases where there is no requirement for police to take the device of a complainant and no requirement for any examination to be undertaken. For example, sexual offences committed opportunistically against strangers, or historic allegations where there is no prospect that the complainant's phone will contain any material relevant to the period in which the conduct is said to have occurred and / or the complainant through age or other circumstances did not have access to a phone at the time.

Consider four principles when reviewing a reasonable line of enquiry

- i. Digital material should only be reviewed in pursuit of a reasonable line of enquiry and material should only be disclosed if it meets the relevancy test. There is no presumption that a complainant or witness's mobile telephone or other devices should be inspected, retained, or downloaded, any more than there is a presumption that investigators will attempt to look through all material held in hard copy. There must be a properly identifiable foundation for the interrogation, not mere conjecture, or speculation.
- ii. A review should be proportionate and should not involve a review of wholly irrelevant material. If there is a reasonable line of enquiry, the investigators should consider whether the digital material can be reviewed without taking possession of the device. If a more extensive enquiry is necessary, the contents of the device should be downloaded with the minimum inconvenience to the complainant and, if possible, returned without any unnecessary delay. When reviewing the digital material, the investigator should also consider whether it is sufficient to view limited categories of data, such as an identified string of messages/emails or a limited period.
- iii. The complainant should be kept informed. The complainant should be told that the prosecution will keep them informed as to any decisions that are made as to disclosure, including how long the investigators will keep the device; what it is planned to be 'extracted' from it by copying; and what thereafter is to be 'examined', potentially leading to disclosure.

- iv. The prosecutor and investigator should consider the consequences of refusal. If a witness does not provide the investigator access to their mobile telephone or other device, the investigator should consider the circumstances and furnish the witness with an explanation as to the procedure that will be followed if the device is made available. If they continue to refuse, consideration should also be given to whether it is appropriate to apply for a witness summons for the mobile telephone or other device to be produced.

vii. Third party records

- Access to information held by third parties, such as counselling records or on digital devices – must be justified as a reasonable line of enquiry, justified by the circumstances of the individual case. It should not be undertaken routinely in every case.
- Remember, victims do not waive their right to privacy by making a complaint against the accused.
- Third party material investigators may encounter in sexual offence investigations include:
 - Social services departments
 - Forensic physicians
 - Counsellors / therapists
 - Schools
 - Hospitals
 - Family Courts
 - Owners of CCTV
 - Surveillance video footage
- When considering whether to make a request to a third party: look at establishing a reasonable line of inquiry; establishing relevance and balancing rights.
- It is not reasonable if the investigator pursues fanciful or inherently speculative searches.
- Access to therapy notes can only be requested in an individual case when it is a reasonable line of inquiry that may reveal material relevant to the investigation or the likely issues at trial. They must be properly identifiable foundation for the inquiry, not mere conjecture, or speculation.

- Need to think about the material, what the perceived relevance of the material is, having regard to the identifiable facts and issues in the individual case.

viii. Expert evidence

- With the complainant's consent, consider the possibility of adducing information from psychologists and other professionals to explain behaviour related to the impact of offending.
- Experts can also provide admissible evidence about the complainant, any diagnoses, and possible causes.
- However, evidence relevant to general human behaviour, such as to explain the delay in reporting and to explain why the complainant had continued to associate with the defendant following the allegations is not generally admissible.
- There will be occasions when it is necessary for investigators and prosecutors to consider whether to call evidence of psychological injury. They must carefully consider the position and they must understand the limitations of the evidence that can potentially be called. If a counsellor gives evidence, they will have to be one that has treated the complainant and it must be relevant.
- The most appropriate person to approach will depend on the complainant's circumstances and their informed consent but should be someone closely involved in their care who has specific expertise on gender-based violence issues to avoid misconceptions about the offence.

ix. Recent complaint evidence

- An immediate complaint of sexual violence is not an essential element of the prosecution case. This recognises many victims do not report immediately for several reasons, which may be linked to trauma, vulnerability, embarrassment, cultural or family pressures.
- On the other hand, if available, recent complaint evidence may strengthen the prosecution case. Investigators should look for evidence of all complaints of crime made by complainants to witnesses, including friends, relatives, police officers, doctors, and nurses, irrespective of the time lapse between the incident and the account given by the complainant.

x. Similar fact evidence

- Check to see if there have been other allegations against the suspect, which have resulted in no further action or a decision to charge.
- This information may show a pattern of behaviour, which when viewed as a series of offences casts a different light on the criminality of the suspect. For example, when the suspect uses a specific defence or explanation for his conduct, which has given rise to the allegation, such as sexomnia.
- All police files should be requested and reviewed simultaneously to identify similarities and to consider whether the new allegation now provides additional evidence, which may support revisiting the earlier cases and decisions not to proceed.

5. Key steps in the investigation and prosecution

Receiving initial reports and interviewing the complainant: using a victim-centred, trauma-informed approach

The complainant is, in most cases, the primary or even exclusive source of evidence, and therefore their testimony is of crucial importance. Yet it is precisely in how this testimony is heard, received, and understood, including misunderstood, that many of the difficulties in how these cases are processed by the criminal justice system arise. Investigators and prosecutors need to be aware of still commonly held rape myths, failures to understand common trauma reactions, and mistaken assumptions about small and apparent inconsistencies in recall about upsetting and traumatic events. All this often leads to the mistaken belief that the complainant testimony lacks credibility or reliability.

It is important for police officers to recognise that disclosure is a process, not a one-time event. It is also important for police to recognise that disclosing sexual violence incidents, which victims often experience as humiliating and disempowering, is particularly difficult. This is especially true in a society where rape myths still exist, such as that some women are 'less worthy of belief' or that women are prone to 'lie' about experiences of sexual violence. These kinds of harmful beliefs and rape myths create a context of suspicion and doubt, making it particularly difficult for victims to report experiences of sexual assault. The fear of not being believed creates a profound barrier to disclosure for victims. As such, it is essential that police receive disclosures respectfully and patiently, in a way that empowers the victim. Taking a victim-centred approach means treating a complainant with care and respect and recognising the difficulties and needs facing those who have experienced this unique crime and the social stigma surrounding it. Research shows that the attitude conveyed by police is the single most important factor in determining the success of the complainant interview, and therefore the entire investigation.²⁴

Overall considerations for any police interacting with a complainant in sexual offence investigations.

²⁴ Archambault, J. et al (2007).

**While these tips should apply to the treatment of any victim of sexual violence, given the crucial importance of the victim's testimony in cases of sexual offence based on lack of consent, these tips are included as an important aspect of these guidelines.*

- Have emotional competency and empathy. Empathy, the capacity to understand the experience of another, is of particular importance when interacting with complainants in consent-based definition sexual offence cases. Connecting with the complainant depends on empathy and compassion for the complainant. Remember that the ability to listen with empathy does not make one biased. It is possible to be both neutral and impartial, and to be compassionate and empathic.
- Moreover, being able to interview complainants in ways that empower and calm them allows them to be able to provide more accurate, coherent, consistent, and persuasive narratives. Remain objective and nonjudgmental. Do not express surprise, disbelief, or other emotional reactions.
- When victims feel that someone is listening to them, can tolerate what they have to say, understands what they have to say and can imagine their story to be true, they will feel more comfortable disclosing their experience and feel more comfortable providing information about it.
- Sexual violence victims may bond with the first responding officer or may be resistant if the officer is the same gender as the offender. Explaining the roles of individuals with whom the complainant may interact may ease the transition between them.
- Emphasise the context, confirming that they understand that it is a difficult situation for the complainant, that the police officer has met many others in the same situation and that they can ask to take a break whenever needed.

Initial contact by first responder with the complainant

The initial response and treatment from the police can have decisive impact on the willingness and ability of survivors to go through the legal process as well as to their recovery and healing. It sets the tone. The nature of the police response to the initial complaint will directly impact three critical components: (1) The victim's ability to work towards healing and recovery; (2) The overall investigation; and (3) Any court proceedings that result from the investigation. It is important for victims to feel that the police recognise the severity of the case when they file their report,

and that victims are met with a sense of inclusiveness and respect. By ensuring a good start in the contact between the complainant and the police, it is possible to ensure that the victim feels heard and recognised, and thus to prevent the victim from losing their courage and withdrawing their report or wishing not to participate in the investigation of the case.

Initial police interview should be brief and set a positive tone

Be mindful:

- The best practice for a trauma-informed approach to the initial contact is for the complainant to have a brief, respectful, and empathic first contact with a police officer, who should take only a limited amount of information for the initial report. Questions should be limited to those that will establish only the basic facts of the incident that occurred. It is important for police to determine what is needed immediately, and what can wait.
- By being empathetic, patient, and respectful, the police officer can contribute to the immediate and long-term recovery of the victim and lay the foundation for cooperation and respect on which the successful interview, investigation, and prosecution is built.
- Be conscious that persons subjected to such forms of violent actions may have difficulties reporting the incident, either because the perpetrator is a current or former partner or a family member of the victim, or because the victim is experiencing feelings of shame because of having been subjected to the incident in question.
- The initial statement is used to assess safety and health needs, ascertain jurisdiction, identify, and preserve sources of evidence and determine next steps.
- Asked about the relationship with the suspect, as this may be relevant not only in the collection of evidence but also to assessing protection needs of the victim.

Checklist for the first police officers who take the report

- Address any safety or medical concerns.
- Collect just enough information to establish the elements of the crime.

- Identify potential witnesses and suspect(s).
- Identify and secure evidence.
- At a slightly later date, the officer can fill in more details during a more in-depth interview.
- Help the complainant connect with a victim advocate or other support services.
- Provide the complainant with information about next steps and about how the process will unfold, to make it as predictable as possible.

Some do's and don'ts

DO	DON'T
Describe the incident as “the crime”, “the offence” or “the sexual assault”	Describe the incident as the “alleged assault” or the “reported assault” as this conveys attitudes of doubt and suspicion
Include specific observations: “the victim was tearful and trembling”	Don't just note “the victim was upset”
Use active language: “the suspect put their forearm across the victim’s chest to hold the victim down”	Don't use passive language “The victim was held down”

Note on the third option practice

- Victims who report the sexual violence may be reluctant and not prepared to participate in the investigative or court process.
- Victims should also be provided with information related to their ability to report the incident in the future, if and when they feel ready. The Third Option provides victims of sexual assault with a reporting choice that allows collected forensic evidence to be stored for a period of up to one year, allowing a victim time to make the reporting decision that is best for them without pressure.

Detailed follow-up statement

A detailed follow-up statement should be delayed for at least two sleep cycles after the traumatic incident. This is important as it is consistent with how memory works after a traumatic event. Memory transfer to the cortex during sleep allows the episodic memory to retrieve information that was stored at the time of a sexual assault. Victims thus ideally require two full nights of sleep to allow their memories to consolidate and transfer the information about the incident before they can relate detailed narratives about 'what happened'. Unless there are exceptional circumstances that require an accused to be immediately arrested, the best practice for conducting sexual assault investigations should be delayed follow-up interviewing. Additionally, multiple repeated interviews with the complainant should be avoided as much as possible, as this can be re-traumatising for the victim.

Setting the stage for the interview

- The interview should be video recorded and conducted in a victim-friendly room if possible.
- Only the complainant and the interviewer should be present in the room. If the complainant is unable to participate without having a support person in the room, consideration should be given to having a victim services support person present.

Tips for a trauma-informed interview of the complainant

- Acknowledging the difficult conversation is critical. For example, an investigator could say, "You have been through something very difficult. Things may be jumbled up a bit right now, just do the best you can. You may remember more as time passes or as we go along. Just do the best you can".
- It is important to allow for an uninterrupted narrative, articulated by the complainant, so that they can tell you what happened in their own words.
- The interview questions should be open-ended to focus on eliciting raw information, such as the complainant's sensory experiences of sights, smells, and sounds.
- Police should also practice active listening and avoid victim-blaming language/questions and assumptions, such as "Why did you...?".

- Opening questions should be probing and open-ended. These can include:
 - What are you able to tell me about your experience?
 - Where would you like to begin?
 - What was the most difficult part of this experience for you?
 - What can't you forget?
- Other open-ended questions and probes can include:
 - "Tell me more about ..." "What was your thought process during this experience?"
 - "What are you able to remember (with your six senses)?"
 - "Do you recall hearing anything? What do you recall hearing?"
 - "Do you recall smelling anything? What do you recall smelling?"
 - "What were your reactions to this experience?"
 - "What do you remember feeling physically?"
 - "What do you remember feeling emotionally?"
- An open-ended approach that elicits sensory details and allows a complainant to describe the assault in their own words is recommended.
- Unblocked memories can lead to identifying more memories. Asking about these details is a way of delicately gathering evidence and making it possible to collect further information that may corroborate the complainant's account.
- Victims will often recall many micro details about the sexual violence experience. Listen for them. Such details can support the victim's account, so look for ways to corroborate them to support the evidentiary record.

Do not use standard interrogation practices on sexual violence complainants

- Traditional interrogation practices developed to interrogate suspects should not be applied to complainants.
- These standard interrogation practices emphasise establishing a timeline and key facts as soon as possible when it is believed that memory is "freshest" and most complete.
- Such interviews start with police scepticism, with a view to establishing whether or not the complainant is telling the truth. As such it reflects a position of doubt rather than neutrality.

- Standard interrogation practices actually interfere with interviews and can close down the flow of information necessary to investigate the sexual violence.
- If victims feel unsafe when questioned they may not be able to use their prefrontal cortex to understand the questions and retrieve certain memories.
- If victims feel traumatised by the questioning, it may trigger the retrieval of fragmentary sensations and emotions that are nearly as intense as those they experienced during the assault itself.
- Also, poor memory retrieval is associated with high levels of stress and high arousal, which in turn is associated with the prefrontal cortex being threatened.
- Not only do such techniques cause secondary victimisation but also has a negative impact on the quality of evidence.

OLD WAY	NEW WAY
Interview immediately	Allow 1-2 sleep cycles before conducting interviews
Remained dispassionate and be sceptical	Use a victim-centred approach
Went in chronological order of events	Ask victim to tell them about their experience, as they remember it
Asked 'who, what, where, when and why'	Ask about the five senses experienced during the assault
One dimensional: only wanted to know the facts	Avoid 'why' questions
Used rapid-fire questioning	Three dimensional: thoughts, feelings, sensory information
	Go at a slow pace and be patient

DO	DON'T
Begin with open-ended questions and allow for free narrative to follow	Don't ask sexual assault victims to repeat their narrative from different points in the sequence, for example, asking a victim to start the story from the end and tell it backwards.
What do you remember about the place where this happened?	Don't ask victims questions designed to confuse or test their narrative (to assess its validity).
What are you able to tell me about (5 senses: smelled, heard)?	Do not use victim-blaming language/questions and assumptions, such as "Why did you...?".
What was happening when you first thought something was wrong?	Do not seek information from a victim that is irrelevant to the charges being alleged. In particular, past sexual experience, psychiatric history or counselling in most cases is not relevant to a sexual violence allegation.
What were you feeling when this was happening?	If you ask, "Are those the clothes you were wearing when this occurred?" they might hear, "They think it's my fault because of how I was dressed."
Let the victim tell their story without interruption and take detailed notes in relation to the verbal statement	If you ask, "Did he physically hurt you or threaten you with a weapon?" they might hear, "It must not be real rape. He didn't hurt or threaten you." e from different points pe. He didn't hurt or threaten you."
Clarify but do not confront or interrogate	
Do not suggest feelings or responses	
Avoid asking questions of quantity	
Address inconsistencies respectfully	

Questioning the suspect as soon as possible

The interview with the suspect is a vital piece of evidence in any investigation, but particularly in sexual violence investigations. The account provided by the suspect in interview will help to identify the issue in the case and will assist in establishing what reasonable lines of enquiry should be pursued. Investigators and prosecutors should assess the credibility and reliability of the suspects account by considering all the evidence available.

Remember that fact finders are entitled to reject the suspect's account based on the complainant's evidence alone.

Tips for interrogating the suspect

- By focusing on consent, rather than simply the issue of saying no, or force, coercion, or helplessness, this switches the focus of questioning.
- Instead of asking the suspect about these 'criteria', such as violence or the complainant's helpless state, and how they forced themselves on the complainant, you ask "what led you to believe that they wanted this?"
- You could ask 'how could the complainant have said yes if there was no talking?'
- Did the suspect have a reasonable basis for thinking the complainant was not freely consenting?

Keep in mind

- A perpetrator might use drugs and alcohol to disarm the victim and facilitate the abuse. Check whether the complainant was incapacitated at the time of the abuse.
- A perpetrator might target someone who may lack the capacity to understand abuse, because of mental health conditions or learning difficulties, and might therefore be less likely to report and less likely to be believed. Check whether the complainant has a mental health condition or learning difficulties.
- A perpetrator might think carefully about the location and timing of the offence to minimise the risk of detection and punishment. Check what might be the significance of the location and or timing of the abuse.

- Perpetrators may take steps which, on the face of it might seem normal or reasonable, to distance themselves from an offence or to reframe the offence after committing a crime to undermine or pre-empt any allegation. For example, by contacting the complainant, perhaps being overfriendly or seeking reassurance; reinterpreting events leading up to the offence as spontaneous rather than planned; going out of their way to boast or brag about the offence to friends or family; appearing entirely unconcerned or pretending to sleep despite the obvious distress of the complainant; or making a counter-allegation against the complainant. Check what the suspect's conduct and demeanour were like when arrested.

Police analysis to determine founded or unfounded case

Tips for analysing the facts

Police assess the evidence gathered to decide whether the investigation moves forward, with a report sent to the prosecutor, or is closed. They should consider:

- Assessing the credibility of the overall allegation, using an offender-centric approach, rather than solely focusing on the complainant.
- Remembering that several issues can impact on the precision or the detail of the complainant's account which should not impact the credibility assessment. This includes the impact of recalling a traumatic situation and possible side effects of medication, drugs, and alcohol on memory.

Coding the incident

Police need to ensure accurate coding of an incident. This is usually by categorising the report as founded or unfounded.

1. Founded

- Cleared by charge or charges recommended.
- Not cleared. Police believe an offence took place but the investigation is not yet solved, there is insufficient or conflicting evidence to substantiate laying a charge or recommending a charge to the prosecutor or where the suspect cannot be or has not yet been identified by police, either because the complainant or other witnesses do not want to identify a suspect or they do not want to actively participate in the investigation. This category

also includes situations where there is no credible evidence to confirm that the reported incident did not take place.

- Cleared otherwise. A suspect has been identified and there was sufficient evidence to lay a charge, but for specific reasons the individual was not charged and processed by other means. This includes situations where a suspect has been identified but the complainant requests that no further action is taken.

2. Unfounded

- An incident is unfounded if it has been determined through police investigation that the offence reported did not occur, nor was it attempted.

Tips for writing the police report to the prosecutor

- Be careful how you use the active / passive voice which shows the subject positions and areas of action in the decision – For example, if the text expresses that “X was forced to”, this can be used as a linguistic tool used to tone down an individual’s or group’s actions or guilt. The suspect of the action becomes invisible, and the focus is then put on the other, in this case the complainant.
- Avoid language that describes rape as “the incident (that) occurred”. Rather use language to describe what the suspect did to the complainant – For example, avoid “She went to X residence where she met him. In connection with her visit to X, the prosecuted incident occurred”.
- When language is framed in this way, the descriptions contain responsibility-relieving tendencies. Passivation is actualised by focusing entirely on the descriptions from the responsible actors, so that instead the focus is on the recipients of the event, the complainant. Consequently, the responsible actor is rendered invisible by placing all the focus in the description on the recipient. This kind of attitude towards the complainant can reflect some kind of blame on the victim for the occurred ‘incident’ or it is framed in a way that pictures the incident as inevitable - she went to the house, and it just happened.
- Stay away from language construction that would indicate that there is a ‘right’ or ‘wrong’ behaviour from the complainant.
- Use language to indicate that the rape is not portrayed as something that ‘just happens’, without a responsible actor.

- Language can indicate how rape is constructed linguistically, and a consensus is created.
- Consider the relevance of information describing the complainant's behaviour after the rape. Consider the relevance of describing what she is wearing – use only neutral words like underwear rather than panties; and only do so if relevant to describe the assault.

Prosecutor analysis when exercising discretion to prosecute

The test for prosecutors in exercising their discretion to proceed or not with a prosecution for sexual offences prosecutions is the same as for any other offence: The prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction.

The evidential stage

- Usually framed as there must be a realistic prospect of success.
- When assessing a realistic prospect of conviction, a prosecutor must assume that the fact finder (judge/jury) will be objective, impartial, and reasonable, properly directed and acting in accordance with the law.
- Prosecutors must not apply a 'bookmaker's test' where an attempt is made to second guess potential fact finders' prejudice.

Key principles to keep in mind at this stage

- Prosecutors must conduct an objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely.
- Looking for whether an objective, impartial and reasonable fact finder hearing the case, properly understanding the law, is more likely than not to convict the accused of the charge alleged.
- This might involve scrutiny of accounts given of the event, forensic examination and careful consideration of digital material and CCTV coverage. It also includes consideration of the reliability and credibility of witnesses, and advising on actions that can be taken to address weaknesses in the case.

- Prosecutors should have a gendered understanding of these offences and must not allow rape myths and/or gender stereotypes to influence their evaluation of evidence nor must they apply a 'bookmaker's test' where an attempt is made to second-guess potential prejudices of the fact finders.
- Prosecutors must not introduce a requirement for corroboration in the review process - one person's word can be enough (and often is) but the quality of the evidence must be assessed in an objective manner.
- Assess credibility, reliability and how to approach inconsistency in complainant's statements.

Note on appropriate assessment of the credibility, reliability and how to approach inconsistency

Regarding the complainant's statements:

- Prosecutors should consider whether there is any evidence that suggests the complainant's account is not credible or plausible.
- Fact finders are bound to consider internal and external consistency, particularly where there is no other direct evidence. It follows that prosecutors should consider the likely impact of any inconsistencies. Evidence of inconsistency does not necessarily mean that an account is unreliable or lacking credibility.
- It is important to distinguish between actual inconsistency and potential inconsistency.
- Potential inconsistency encompasses two main possibilities (neither of which should be elevated to the status of actual inconsistency), described, for these purposes, in these terms:
 - Apparent inconsistency, where the point depends on the reliability of the report against which an account is being compared and
 - Presumed inconsistency, where, for example, a fact finder may be invited to conclude that an action is inconsistent with a state of mind being described.
- With apparent inconsistency it is important to consider the possibility that other reports may not be accurate, independent, or reliable - not every apparent inconsistency is real.

- In any event the mere fact that a complaint emerges in an inconsistent way does not mean it is untrue. There are several reasons why a complaint may emerge in an inconsistent way and those are matters on which a fact finder may be directed including the impact of trauma on memory.
- With presumed inconsistency it is critical that prosecutors do not apply myths and gender stereotypes: fact finders would be warned not to do so.
- It would, though, be wrong to ignore levels of inconsistency which, even with the benefit of a warning about myths and stereotypes, are nonetheless likely to prove a significant cause of concern to any fact finder.

Regarding the suspect's statements:

- When reviewing a case prosecutors should consider the potential significance of a no comment interview or an initial failure by the suspect in interview to admit key facts such as sexual activity prior to the return of forensic evidence. Where these circumstances apply, this is likely to strengthen the prosecution case and an adverse inference may be drawn by the court.
- There will be occasions where the suspect is telling the truth about some things but lying about others. As with inconsistent witnesses, the prosecution can rely on the parts of the suspect's interview which help the prosecution case (e.g., the fact of sexual activity), and reject the parts the prosecution say are untrue (e.g., a suspect's reasonable belief in consent).

Selecting charges

- When choosing which offences to charge, prosecutors should choose the most appropriate offence to fit the circumstances of the case, taking account of the courts' sentencing powers.
- Counts on the indictment must:
 - Reflect the seriousness and extent of the offending supported by the evidence.
 - Give the court adequate powers to sentence and impose appropriate post-conviction orders.
- Enable the case to be presented in a clear and simple way.

Annex 1. More on trauma

[From The Impact of Trauma on Adult Sexual Assault Victims, Department of Justice Canada]

Traumatic impacts of sexual violence experiences

There is no uniform or predictable victim response to sexual violence, but understanding trauma can help understand some common ways that victims may react to sexual violence.

Some common ways victims may react can include:

- Freeze
- Not report or delay reporting
- Not remember aspects of the event
- Have blanks in memory
- Struggle with decision making
- Not say no clearly to unwanted sexual contact
- Exhibit no physical evidence of injury from a sexual assault
- Be unable to identify the perpetrator to police
- Exhibit no apparent emotional expression following a sexual assault
- Provide what might appear to be inconsistent statements at different points of time
- Blame themselves for the assault
- Have a relationship with the perpetrator after the assault
- Deny or minimise the assault
- Recant the experience

In the aftermath of trauma:

- Victims may make statements that appear to be incomplete or inconsistent.
- They may also seek to hide or minimise behaviours they used to survive, such as appeasement, or flattery, out of fear that they will not be believed or that they will be blamed for their assault.

- But what might appear to an ‘inconsistency’ in the way a victim reacts, or tells her story, may actually be a typical, predictable, and normal way of responding to life-threatening events and coping with traumatic experiences.
- Many responses that seem inexplicable to those who are unfamiliar with normal trauma responses can be appreciated by understanding the brain’s way of coping with and processing overwhelming psychological events.

How trauma affects memory and recall

- People often assume and expect that we will be able to recollect major events in our lives with clear and unwavering accuracy and that this determines the ‘truth’ of what happened.
- One of the most critical contributors to achieving just outcomes in sexual assault cases is eliciting the most complete and accurate information from the primary source of evidence – the complainant.
- Important to remember that traumatic events such as sexual assaults are encoded differently than more routine, everyday experiences in life. Human memory and recall do not function like a tape recorder, faithfully recording events later to be recalled on command. Our memories are fallible and have gaps and inconsistencies. As a result, we recall and narrate traumatic events differently than routine events.

Memory and recall

- Memory is essentially the capacity for storing and retrieving information. Three processes are involved in memory: encoding, storage and recall.
- First we receive the information (e.g., from what we see, hear and understand). Then we convert the information so it can be stored in various parts of the brain.

The hippocampus and the amygdala: encoding and consolidating memory

- The hippocampus is responsible for putting experience into chronological order and into perspective; it is necessary for forming new explicit memories. We think of this as a cognitive memory, a memory we can remember in our thinking brain, or prefrontal cortex.

- The amygdala, part of the limbic system, catalogues past sensory experiences (threats, anger) as implicit memories, memories that are unconscious but can affect thoughts and behaviours. There is a critical survival feature of implicit memory, enabling an instant response to danger.
- Memory consolidation signifies the stabilisation process of a newly formed long-term memory. Initially unconsolidated memory is in a fragile state and can be disrupted by several types of interferences, including behaviour, pharmacological and electrical. Over time, the memory becomes resilient to these forms of interferences through the process known as consolidation.
- This has significant implications for the timing of police interviews. A victim interviewed shortly after an assault, or while still very stressed or traumatised, will not be able to retrieve everything that's been encoded into her brain. Two full sleep cycles may be necessary for the episodic memory circuitry to consolidate information that was encoded at the time of a trauma such as sexual assault.
- Best practice for a sexual assault investigator to conduct only a brief interview when a victim first reports a sexual assault. This should be followed by a fuller interview several days later when the victim has had time to sleep and consolidate her memories of the traumatic experience.

How threat and highly stressful events affect memory

- Stress and fear heighten activation of the amygdala. This reinforces and intensifies traumatic memories while at the same time impairing hippocampal function, which is involved in episodic or explicit memory.
- Implicit memory refers to behaviour knowledge of an experience without conscious recall. It is not a memory we can reflect on or think about. These memories are impossible to verbalise. They are often fragmented in time, and for the most part consist of primary sensory information (images, smells, sounds) that are link to physiological fear systems.

Trauma and memory

- Memories of traumatic events like sexual assaults can be fragmentary. It can be difficult for victims to recall many details of a sexual assault in a complete or linear way.

Intensified traumatic memories: flashbulb memories and the hippocampus in overdrive

- The effect of fear, threat or states of intense stress on memory can result in intensified memory recollection, or it can result in fragmented or impaired memories. Both are the result of the stress hormones released when the defence circuitry is activated.
- Some elements of traumatic memories are more acutely remembered. The adrenal glands release adrenaline, which has been shown to help encode memories to the hippocampus more intensely.
- A burst of adrenaline is thought to enhance memory storage of the events closer to the onset of a traumatic or highly stressful event. This strengthens memory pathways and creates what are referred to as “flashbulb memories”.
- It is not unusual for victims to have some full and vivid memories about the beginning of a sexual assault when the defence circuitry was first triggered, and the initial burst of stress hormones were released. As well, central details or aspects of the experience that were of most significance may be intensely remembered.
- Experiences with emotional significance are more likely to be consolidated into episodic memory and made available for intentional, conscious recollection than those with little or no emotional significance. The brain encodes what it pays attention to. During a threatening event, the brain focuses on what is central to survival, so it does not focus on insignificant and peripheral details, so it does not encode them.

From intensified to fragmented memories

- When high levels of the stress hormone cortisol are secreted, along with adrenaline, the hippocampus super-encodes these intense early moments of the event. Following this, if the threat or fear continues, the hippocampus continues to be flooded with stress hormones and it is temporarily impaired and there may be minimal encoding. That is how the hippocampus goes from flashbulb mode to fragmentary mode.
- When the hippocampus is in this fragmented mode, it encodes (converts) fragments of sensory memory without contextual details. As a result, a sexual assault victim might not recall the layout of the room where the rape happened. The hippocampus might not encode time-sequencing information because its functioning is altered during a traumatic event.

- The amygdala is critically involved in calculating the emotional significance of events. Fear focuses one's attention on a few details at the expense of a lot of others.
- As a result, a victim may not remember some details of the assault, for example, what colour of clothing the offender was wearing. Conversely, the central details of an assault, or the parts of the experience that were most disturbing are often well encoded and consolidated.
- During states of fear, the hippocampal and amygdala networks can become disassociated, resulting in a disconnection between the emotional memories of the amygdala and explicit hippocampal processing. As a result, few peripheral details, little or no context or time sequence information, and no words or narrative surrounding the memory may be recalled.

How attention and memory affect recall of traumatic events like sexual assault

- Much of what is remembered of a traumatic or threatening event functions as if existing in separate islands of memory.
- Information encoding and storage are impaired for aspects of the experiences that are not considered essential for survival or are of little emotional importance. This includes the sequence of events as well as peripheral details. This often results in a disorganised and incomplete narrative memory.
- This is immensely important for how victims of trauma are interviewed. The primary emphasis of the sexual assault police interview should therefore be on the sensory, emotional memories that the victim has encoded and remembered rather than expecting the victim to give a narrative with a chronology.

Enhanced traumatic memory coexists with incomplete memory

- Some elements of traumatic memories are more acutely remembered than others. These are called enhanced memories. They are etched more deeply in our memories precisely because they are traumatic and overwhelming to us.
- Victims often focus on some specific sensory details from the assault. For example, they often remember specific smells (the smell of body odour), but very few details of other aspects of what happened, for example, how

long the assault lasted or the specific order in which some things happened.

- These are normal limitations of memory. They are caused by the stress and fear of the traumatic events and how the brain's defence circuitry affects attention and memory consolidation.
- While they may have these fragments of memory that seem like "burned into" memory, yet they may have no memory of other peripheral details that were irrelevant to their survival at the time of the experience.
- It is common for victims to have some gaps in their memory, but more often they can recall central details of what they experienced in the assault but unable to recall some of the peripheral details, such as how they got home later.
- Need to understand that lack of recall of these kinds of peripheral details does not impugn the veracity of the victim's account; instead, it is consistent with the way in which traumatic memories are encoded.
- These kinds of normal inconsistencies have been seized upon by defence lawyers, amplified to intersect with dominant and pernicious rape myths in our society, and used to undermine victims' credibility in sexual assault trials.

Annex 2. Rape myths and stereotypes

[From England Crown Prosecutor's Legal Guidelines, Sexual Offences, May 21, 2021]

Rape myths and stereotypes may arise in rape cases in relation to the complainant, the offender, consent issues and/or circumstances of the alleged offending.

Rape

Rape remains one of the complex criminal offences dealt with by the criminal justice system, yet the crime of rape is commonly misunderstood. In reality:

- in many cases, there will be no visible sign of injury;
- rape is commonly perpetrated by someone known to the victim;
- the body's response to the trauma of rape can impair a victim's ability to give a clear and coherent account of the event;
- some victims may return to the suspect after the event and/or contact them with friendly messages to reduce the risk of being raped again by the perpetrator, or because they want to block out the abuse to return to a sense of normality.

Common myths:

- Rape is commonly perpetrated by a stranger, outside, at night, in secluded places.
- Rape involves physical force and results in physical injury.
- Women mean 'yes' when they say 'no'.
- If a woman says 'yes' once, there is no reason to believe her 'no' the next time.
- Consent is continuous in intimate relationships and does not need to be explicitly given.

It is important to note the common misconception:

- Rape is always violence or involves physical force – False.
- Rape most commonly occurs between strangers in dark alleys – False.
- Sex workers cannot be raped – False.
- You cannot be raped by your husband or intimate partner – False.
- The victim had previously consented to sex with the accused several times so they must have consented – False.
- Sexual abuse at the hands of a perpetrator which took place when the victim was a child has no bearing on the issue of consent if the same parties engage in sexual activity as adults - False.

Perpetrators of sexual violence, including rape

In investigating the suspect, it must be established what steps, if any, the suspect took to obtain the complainant's consent and the prosecution must prove that the suspect did not have a reasonable belief that the complainant was consenting. This can be difficult, but the prosecutor needs to ask, "how did the accused know the complainant consented and continued to consent?" There are many myths related to perpetrators. In reality:

- Only a perpetrator is responsible for rape and the law applies equally to all – irrespective of age, background, or their prospects,
- There is no typical perpetrator – they can come from all backgrounds, all walks of life and can be in long term relationships.
- Perpetrators may use a range of techniques to target, intimidate and coerce their victim.
- Sexual violence can be perpetrated on people of a different sex, same sex or on people who do not identify with a particular sex regardless of their relationship history.

Common myths:

- Rape is only a crime of passion.
- Men's sexuality is uncontrollable and the responsibility for controlling male sexuality is placed on the woman.
- Only perverts and maniacs can perpetrate sexual violence and rape.
- Young men do not deserve to be convicted as they have their whole life ahead of them.

Prosecutors need to carefully consider the context of the allegation including whether there was any premeditation and planning. They need to consider whether the suspect targeted or exploited the victim at a time when they were vulnerable. Remember that some perpetrators may seek to reframe events, even to themselves, to claim they were spontaneous and consensual. Prosecutors need to challenge any assumptions which attempt to remove the responsibility of rape from the perpetrator.

- Rape is only a crime of passion – False.
- When it comes to sex, men have a point of no return – False.
- Young men do not deserve to be convicted as they have their whole lives ahead of them / have good character references – False.

Victims of sexual violence and rape

Someone consents to sexual activity only if they agree by choice to that act and have the freedom and capacity to make that choice. Consent to sexual activity may be given to one sort of sexual activity but not another, e.g., vaginal but not anal sex or penetration with conditions such as wearing a condom. Issues to consider which might be relevant to someone's freedom to consent:

- Domestic abuse: did a partner or family member use coercion, control, force, or power to remove a complainant's freedom to consent?
- Position of power: is the suspect in a position of power where they could abuse the complainant's trust especially because of their position or status (e.g., family member, teacher, religious leader, employer, gang member, career or doctor)?

- Dependency: is the complainant dependent on the suspect, e.g., financially or for care?
- Age: is the complainant significantly younger than the suspect, and is this age gap relevant?

Issues to consider which might be relevant to someone's capacity to consent:

- Was the complainant under the influence of drinks or drugs?
- Does the complainant suffer from a medical condition which might limit their ability to consent or communicate consent?
- Does the complainant have mental health problems or learning disabilities which might limit their ability to consent or communicate consent?
- Was the complainant asleep or unconscious?

It is important to note the realities:

General:

- Rape can have a devastating impact on a victim, their family and the wider community.
- A victim coming forward to report rape and support a prosecution is incredibly brave.
- There is no typical person that can be a victim of sexual violence and rape; people of all ages, races, sexualities, religion, background and appearance can be victims.
- There is no typical response to rape. People react in a variety of ways.
- Each occasion is specific, and consent needs to be given for each occasion, and can always be given under certain conditions or withdrawn entirely including during an act which was initial consensual.
- Consent is active and there is no requirement to articulate the absence of consent.

Victim behaviour:

- Meeting people via dating apps and social media and sending sexual

images is increasingly common. Consent cannot be implied from just the method of meeting or messages.

- Consent cannot be implied from what might be interpreted as flirtatious behaviour or from the way a person is dressed or simply by the act of going back to someone's house.
- Consent cannot automatically be implied simply because the victim shows signs of sexual arousal or stimulation.

Intoxication:

- Just because a person is drunk or has taken drugs does not mean that they must be looking for, or willing to have, sex.
- If someone is unable to give consent because they are drunk, drugged or unconscious, it is rape.
- Just because someone is intoxicated at the time of the incident doesn't mean their recollection of events is unreliable. Studies have shown intoxication to impact upon the level of detail that can be recalled by the witness rather than on the accuracy of memory. It is therefore essential in making case decision, investigators and prosecutors do not assume that a witness who was intoxicated at the time of the sexual assault is less reliable than a witness who was sober.

Victim sexual history:

- Sex is not confined to people who are married / co-habiting / in long-term relationships, etc.
- People have a right to have consensual sex with however many people they want and whenever they like. This does not negate their right or ability to consent.
- Consent cannot be implied by the number of people someone has slept with prior to, or after, an incident.
- Consent for sexing the future cannot be implied just because people have had consensual sex in the past. Each occasion is specific, and consent needs to be given for each occasion.

Victims' response to rape:

- There is no typical response to rape – the traumatic nature of the offence means that victims can behave in a huge range of ways some of which might seem counter-intuitive.
- A victim's perception of threat influences their behaviour. They can legitimately be afraid of being killed or seriously injured so co-operate with the rapist to save their life. They may also fear for the safety of others including their family members. Consent and submission are different.
- When under threat, the brain will implement instinctual survival responses that the victim will not necessarily have control over. The response may not appear logical to others, or even the victim, but in the moment the brain might choose to react based on basic instincts: not just fight or flight, but flop, freeze or befriend.
- Many people experience a form of shock during or after a rape that leaves them emotionally numb or flat – and apparently calm.
- A person with a disability can become more symptomatic after trauma or during recall of trauma.
- People can respond to any stimulation and display signs similar to sexual arousal – even those which are non-consensual / traumatic / painful. This can lead to huge amounts of shame, self-blame, and guilt on the part of the victim.
- Focus on the definition of consent; ensuring that this is dealt with proactively and sensitivity together with a rounded assessment of the case.

Delayed reporting:

- Many victims of rape do not report the attack to the police. The trauma of rape can cause feelings of shame and guilt which might inhibit a victim from making a complaint. The process of reporting rape itself can be traumatic, as well as prosecution process, and can deter victims from reporting the rape.
- Some victims may tell a friend, GP or other individual. Many others will not tell anyone perhaps owing to feelings of shame, guilt, and fear of the perpetrator and/or fear of being disbelieved.

- A delayed allegation is not equivalent to a false allegation.
- The time taken to make an allegation is no indicative of the level of upset.

Inconsistent account:

- Inconsistencies in accounts can happen where a person is telling the truth or not.
- Avoid an either/or argument that allows a complainant's evidence to be wholly dismissed because of a peripheral inconsistency. Don't pit it as either you believe the accused OR you believe the complainant for this reason.
- Rape can be very traumatic, and memory can be affected in several ways. Understanding the effects of fear and the psychological mechanisms that may occur during a sexual assault is vital when considering recall and memory. Some, understandably, may try to avoid thinking about being raped or try to avoid recalling it all – this can impact upon recall.

Previous allegations of rape:

- Victims can face very difficult decisions when deciding to report rape and supporting a prosecution. Some may decide not to report or withdraw support for an investigation or prosecution for several reasons including intimidation by the accused.
- A decision to stop a case on evidential grounds does not mean that an allegation is false. It means that the case does not meet the evidential test required to put an allegation before the court.
- When the court returns a not guilty verdict it means that they were not satisfied 'beyond reasonable doubt' that the offence was committed.

Victim's previous convictions:

- Previous convictions or untruths do not automatically impact on the credibility of allegation – it is important to consider relevance and applicability. Only issues of relevance should be considered when dealing with specific allegations.
- Where relevant, consider context of any previous convictions. For example, are they a result of previous victimisation (e.g., child sexual abuse) or do they indicate a form of vulnerability.

Common myths:

- 'Real' victims will fight their attacker, or physical and/or verbal resist unwanted sex.
- 'Real' victims express clear and explicit non-consent to unwanted sexual contact.
- Women who use drugs or alcohol are responsible for the sexual violence perpetrated against them.
- Women are 'asking for it' when they wear provocative clothes.
- Women who 'tease' men deserve to be raped.
- Women who are 'promiscuous' or of so-called 'unchaste' character are untrustworthy and more likely to have consented to the sexual acts in question.
- Women who go to the home of a man on the first date imply they are willing to have sex.
- 'Real' victims can recount every detail of an assault in a chronological manner.
- 'Real' victims report to the police as soon as they can and those that don't are lying.
- 'Real' victims will always be visibly distressed when describing what happened.
- 'Real' victims demonstrate perfect or near perfect recall, including a consistent and linear narrative of 'what happened'.
- Recantation by a victim, inaccuracies or inconsistencies in victim's statements or the lack of corroborating evidence equates to a false report.
- 'Real' victims discontinue contact with the person who has been inappropriate sexually or who has assaulted them.

It is important to note the common misconception:

- The victim provoked rape and automatically implied consent by their dress / flirtatious behaviour – False.
- If you send sexual images or messages prior to meeting someone, then having sex is inevitable – False.
- If you voluntarily attend someone's house after a date or night out, you obviously want sex and consented to it by going there – False.
- If you meet men online or through hook-up apps you are consenting to sex and should be ready to offer sex – False.
- If you drink alcohol or use drugs, then you have made yourself vulnerable to being raped and you bear the responsibility – False.
- If you have lots of sex, including with different people, then you are promiscuous / 'deserve what you get' / are not harmed by rape – False.
- If someone has been raped then they would never seek, or want, sex soon afterwards – False.
- You can tell if someone has 'really' been raped by how they act afterwards – False.
- A real rape victim is always visibly distressed when describing what happened to them – False.
- A real rape victim would never freeze when attacked, they would fight back – False.
- A real victim of rape would never be able to carry on with their normal life – go to work, take children to school, etc – False.
- If the victim didn't scream, fight, or get injured then it wasn't rape – False.
- If the victim didn't complain to the police immediately it can't have been rape – False.
- If you don't say 'no', it wasn't rape – False.

- Only young / attractive people get raped – False.
- Strong / independent / powerful / older people don't get raped – False.
- The victim's race / religion / background is responsible for rape – False.
- A real victim would always be able to provide a clear and coherent account of being raped – False.
- Inconsistencies in accounts provided by a victim always mean they lack credibility as a witness – False.
- Where a victim has consumed alcohol or drugs prior to an incident they will always be an unreliable witness as their evidence won't be accurate – False.
- False allegations are common, and women always cry rape when they regret having sex or want to seek revenge – False.
- Other complaints of rape which have not resulted in successful prosecution outcomes always mean the victim lacks all credibility as a witness – False.
- Previous withdrawals of complaints or previous reluctance to cooperate with a prosecution, always means the victim lacks credibility as a witness – False.
- Where the victim has previous convictions, they always lack credibility as a witness – False.
- The victim has previous convictions or has told untruths about other matters and therefore can never be relied upon to tell the truth about rape – False.
- Where the victim has a learning disability or mental health condition, they always lack credibility as a witness – False.
- If someone displayed signs of sexual arousal during abuse, the only conclusions are that they wanted and / or enjoyed it - False.

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