Too Much Information? Regulating Disclosure of Complainants’ Personal Records in Sexual Offence Trials

Abstract

For sexual offence complainants, testifying is an intrusive process where they must discuss sensitive and distressing information about themselves and the incident which has occurred. Traditionally, one of the primary concerns for these complainants was that evidence of their previous sexual experiences would be introduced. The use of such evidence has been curtailed somewhat by rape shield provisions like sections 41-43 of the Youth Justice and Criminal Evidence Act 1999. However, a residual concern for sexual offence complainants is disclosure of personal records such as therapeutic or social work records at trial. Despite increasing applications for access to such material, there is no specific law to regulate such access in England. Applications are dealt with in an ad hoc manner according to the general rules on disclosure in criminal trials. This article considers the current approach to disclosure of sexual offence complainants’ personal records. Principled concerns about the admission of this information in trials are highlighted and proposals for increased regulation of the use of personal records are put forward, using Canadian law as a potential blueprint for reform.

Introduction

Because so many sexual offence trials turn onto the “oath against oath nature” any method of challenging the credibility of the complainant’s testimony is important for the defence. Traditionally, a popular means of doing this was introducing evidence of the complainant’s sexual history to suggest that she was likely to have consented to the impugned sexual encounter, or, historically, that she was unchaste and thus likely to be mendacious also. “Rape shield” legislation as now found in sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 has now made it more difficult for the defence to introduce sexual experience evidence. Another means of challenging complainants’ credibility that has increasingly been relied on is the use of personal records such as social work, counselling and therapeutic, medical or educational records. These files are mined for inconsistencies in the complainant’s account or retractions of the allegation. Perhaps even more problematically, this material can be used to direct jurors’ attention away from the alleged incident and place undue focus on issues such as mental illness or drug use which may prejudice the
complainant in the eyes of the jury. The admission of personal records is undesirable for a complainant, revealing information which will not only invade her privacy but also potentially unfairly prejudice her testimony.

The increasing tendency to seek disclosure of personal records has been highlighted in case-law. In *R. v H(L)*, Sedley J (as he then was) suggested that

“[i]t has become standard practice for defence lawyers in rape and indecency cases to seek to compel the production of any social services, education, psychiatric, medical or similar records concerning the complainant, in the hope that these will furnish material for cross-examination”.

This article considers the use of personal records in sexual offence trials. Principled concerns about the introduction of such records at trial will be explained and the current regulation of their admissibility in criminal trials will be critiqued. In light of these criticisms, drawing on the Canadian Criminal Code, proposals for reform of the rules in this area are suggested.

**Principled Concerns about the Use of Personal Records in Sexual Offence Trials**

Arguments for the use of personal records are based on the “equality of arms” principle under Article 6 of the ECHR which obliges the prosecution to disclose to the defence all material in their possession for or against the defendant. The defence entitlement to disclosure may only be curtailed where this is “strictly necessary” and “any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities”. However, there are many concerns about disclosure of personal records which warrant a measured approach to the introduction of this evidence. The obvious problem with the use of personal records in sexual offence trials is the intrusion into complainants’ privacy and the consequent distress experienced when highly personal information is disclosed to the defence and then potentially introduced at trial. States have a

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1 Complainants and defendants are referred to, respectively, in the feminine and masculine gender. This is done for simplicity and is justified on the basis that, in general, the majority of adult sexual offences are committed by men upon women.


4 Ibid, 177-178. Similar comments were made in *M. v Director of Legal Aid Casework v The Lord Chancellor, The Helen Bamber Foundation* [2014] EWHC 1355 (Admin), discussed below.


positive obligation under Article 8 of the ECHR\(^7\) to protect an individual’s right to privacy. Further, the European Court has held that an individual’s privacy should not be unjustifiably infringed in criminal proceedings.\(^8\) Thus, it is incumbent upon the English legislature to ensure that the law is sufficiently robust to protect complainants’ privacy by limiting disclosure of personal information to where this is strictly necessary.

Another concern for complainants is the potential for information from personal records if introduced in evidence, to prejudice their credibility unfairly. Ellison suggests that “jurors are likely to attach exaggerated significance to psychiatric evidence” and “this is likely to have an irrational, distorting influence on juror decision-making to the prejudice of the…complainant and the fact-finding process”.\(^9\) Whilst observing rape trials, Smith found that in most of the full trials she attended, defence advocates attempted to portray complainants as “delusional” because they were “damaged”.\(^10\) This tactic was supported by “questions about medical conditions, previous traumas or counselling records unrelated to counts on the indictment”.\(^11\) Even where personal records do not reveal evidence of mental health issues, it is likely that they contain other information which could be used by the defence to improperly impugn a complainant’s credibility. For example, social work or medical files may contain references to drug use or incidents with social workers which could be introduced to suggest that a complainant is not a worthy or reliable victim. These strategies unfairly influence jurors’ perceptions of the complainant’s credibility.

In addition to complainants’ concerns about inadequate protection from disclosure regimes, there are the concerns from record-holders’ that their interests must be recognised. Many organisations likely to be subject to applications (e.g. local authorities or counselling services provided by victims’ organisations) operate on scarce resources. They should not have to expend valuable funds representing themselves to resist disclosure applications –at

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\(^11\) Ibid.
hearings unless this is absolutely necessary. The potential for these records to be disclosed may also impact on how these professionals operate. If the likelihood of disclosure is high, record-keepers may minimise their note-taking or cease taking notes. This can impinge upon their ability to monitor their clients’ care. There are also wider societal interests to be considered. Society has an interest in victims reporting sexual crime and rehabilitating by receiving counselling or access to medical and social services.\textsuperscript{12} If complainants fear that personal records will be disclosed at trial, they may choose between reporting and seeking therapeutic support, deciding to report and not get support or vice versa. Such outcomes are not socially desirable as they minimise the potential for both bringing sex offenders to justice and rehabilitating victims.

A final pragmatic concern about disclosure relates to the usefulness of personal records as evidence. These records represent the recorder’s interpretation of an interchange and are not necessarily an accurate account of what the complainant said or of her behaviour at the time the records were made. The potential for inaccuracy is increased by the fact that, unlike police statements, complainants do not have the opportunity to read the notes to ensure that they are an accurate reflection of their communications.\textsuperscript{13} Thus, the contents should be treated with caution, the weight that can be attached to them within a trial, save in exceptional circumstances, is debatable.

The Current Rules Relating to Disclosure in Sexual Offence Cases

Since personal records are held by local authorities and therapeutic professionals who are not party to the trial and not by the prosecution, the normal procedure for disclosure between the prosecution and defence does not automatically apply. However, although third parties are not obliged to disclose material in criminal trials, it is possible that personal records held by third parties may be disclosed in sexual offence trials. The prosecution must disclose to the defence both the evidence it will rely on at trial and any “unused material” (i.e. relevant material which is not part of the prosecution case). Third party material may be subject to this general duty of disclosure if the police or prosecution have accessed it while investigating


and preparing the case. The Criminal Procedure and Investigations Act 1996\(^{14}\) (CPIA) and accompanying Code of Practice impose an obligation to pursue all reasonable lines of enquiry whether these point towards or away from the suspect.\(^{15}\) The *Attorney General’s Guidelines on Disclosure* require an investigator, disclosure officer or prosecutor to take reasonable steps “to identify, secure and consider material held by any third party where it appears…(a) that such material exists and (b) that it may be relevant to an issue in the case”.\(^{16}\) If the prosecution knows that personal records exist and are potentially relevant and they have not already been disclosed during the investigation, they may seek to access them. The *CPS Guidance* highlights three scenarios which may occur when the police or prosecution seek access to a complainant’s personal records: voluntary disclosure; qualified disclosure or; refusal to disclose. The first two scenarios are regulated by the CPIA and the latter is dealt with via the witness summons procedure.

**Voluntary Disclosure**

When the complainant gives informed consent allowing access to records and service of records as additional or unused material as appropriate, disclosure is straightforward.\(^{17}\) The material becomes part of the prosecution’s unused material and is subject to the relevant rules on disclosure. Where the complainant is a child, the 2013 *Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings*\(^{18}\) will apply. The Protocol seeks “[t]o provide for timely consultation between the CPS and the Local Authority where Local Authority material satisfies the test in [the CPIA] for disclosure to the defence”.\(^{19}\) Although the Protocol is not binding, it represents best practice and should be consulted in all relevant cases.\(^{20}\) Where the

\(^{14}\) As amended by the Criminal Justice Act 2003.


\(^{19}\) Ibid, para 3.7.

\(^{20}\) Judicial Protocol, para 45.
complainant is an adult, some Crown Court centres have developed local protocols which are similarly designed to simplify the disclosure process.  

Whether these protocols encourage voluntary disclosure is unclear. If voluntary disclosure occurs, section 3 of the CPIA provides that the prosecution must disclose unused material to the defence if it “might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused”.  

Thus, personal records which contain recantations of the allegation or other information which may undermine the complainant’s credibility could qualify for disclosure.

**Qualified Disclosure**

Qualified disclosure occurs where disclosure is made to the police and/or prosecution with the caveat that the records will not be disclosed to the defence. If the prosecution feels that the records should form part of the prosecution case or be disclosed to the defence, consent must be obtained. If consent is withheld, the prosecutor must decide whether to apply for non-disclosure on public interest immunity (PII) grounds. The prosecution must apply in writing for a hearing. The defence will be notified and given an opportunity to make representations. The complainant and record-holder are also likely to be permitted to make representations. Court applications for withholding sensitive material should be rare.

The judgment in *R. v H* established a very strict test for non-disclosure on PII grounds. Noting the “golden rule of full disclosure”, Lord Bingham stated that derogation from this principle required the court to consider the type of material which the prosecution seeks to withhold and whether it is capable of weakening the prosecution case or strengthening the defence

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21 CPS Guidance.  
22 If material comes into the possession of the prosecution after the initial requirement of disclosure is satisfied this too must be disclosed if it satisfied these criteria and it has not been previously been disclosed: CPIA, s 7A(2).  
24 CPS Guidance.  
25 Ibid. See also: Attorney General’s Guidelines, para 58.  
26 The CPS Guidance states that an alternative choice for the prosecution where permission to use the records is refused is to discontinue the case. The prosecution may also claim PII where the defence has made an application for disclosure of unused prosecution material under section 8 of the CPIA.  
27 Rule 15.3 of the Criminal Procedure Rules outlines the procedure for PII applications.  
28 Section 16 of the CPIA.  
30 *R. v H and others* [2004] 2 AC 134.
If the material satisfies these requirements, a judge must decide whether there is a “real risk of serious prejudice to an important public interest” if full disclosure is ordered. Even if such risk exists, a judge must determine how limited disclosure might be made so as to minimise interference with this public interest whilst still adequately protecting defendants’ rights. If limited disclosure is ordered, the restrictions imposed must “represent the minimum derogation necessary to protect the public interest in question”.

Lord Bingham stated that “[t]here will be very few cases indeed in which some measure of disclosure to the defence will not be possible”. The judge must consider carefully both the relevance of the records and whether the public interest in protecting complainants’ Article 8 rights and the confidentiality of relationships between record-holders and clients is sufficiently strong to justify non-disclosure or modified disclosure. Given the strength of defendants’ Article 6 rights, withholding records on PII grounds seems unlikely if a sufficient degree of relevance is shown. It is probable that at least a redacted version will be disclosed.

Assessing the CPIA Regime

In 2013, the Crown Prosecution Service Inspectorate (HMCPSI) published a review of CPS compliance with rules and guidance on disclosure of complainants’ medical records and counselling notes in rape and sexual offence cases. The review focussed on a sample of 58 cases where the unused material included complainants’ records and/or counselling notes. Prosecutors did not consider the complainant’s records to ascertain if any or all of them were disclosable under the CPIA in 4 out of 50 relevant cases. In 37 cases, records should have been disclosed. This was not properly undertaken in 5 cases. There was also evidence of unwarranted disclosure. Of the 32 cases where records and notes were disclosed, there were 7 that did not fully comply with the prosecution’s duty of disclosure. In 5 cases, only some of

31 Ibid, para 36.
32 Ibid.
33 Ibid, para 37.
36 Ibid, para 2.4.
37 Ibid, para 2.10.
38 Ibid, para 2.13.
the material was disclosable but the prosecutor had disclosed all of the document(s) and did not redact the material sufficiently or at all. In 2 cases, medical records were disclosed in breach of the CPIA. Although the over-disclosure did not have an adverse impact on the cases, it was an apparent breach of the complainant’s right to privacy. It is also a breach of the CPIA regime. The CPS Guidance recommends that “only material satisfying the disclosure test (capable of undermining the prosecution case or assisting the case for the accused) should be disclosed to the defence” and that “[u]nder no circumstances should there be blanket disclosure”. The review also reveals the absence of a uniform procedure for obtaining complainants’ consent to disclosure or for recording the level of consent given (e.g. whether it was only for disclosure to the prosecution or included disclosure to the defence).

Although a relatively small sample was involved, this review raises some concerns. There is evidence of inconsistency in the application of the rules, with the CPIA procedure not being accurately applied in some instances. The potential for both inappropriate non-disclosure and over-disclosure is also apparent. The latter is a significant problem from a complainant’s perspective, raising the possibility of unwarranted breaches of privacy rights. Furthermore, non-disclosure of potentially relevant information is worrying as defendants’ rights may be infringed. The lack of a standardised consent procedure is also problematic. Complainants might consent to disclosing their records without fully comprehending the repercussions. Moreover, the failure accurately to record the level of consent given could result in qualified consent to disclosure solely to the prosecution being read as full consent and inappropriate disclosure being made. Consequently, although the review is largely positive, it is questionable whether the current CPIA regime can consistently achieve fair results. There are no available data on PII applications but it is clear that defendants’ rights are highly likely to prevail here and justify disclosure in a high proportion of cases. Whilst it is important to protect defendants’ rights, especially in light of Article 6 protections, the current system is ill-equipped to give adequate weight to complainants’ privacy concerns or indeed wider principled objections to the use of such records in sexual offence trials in

40 Ibid, para 2.15.
41 Ibid, para 2.16.
42 CPS Guidance.
43 Of the 32 cases where material was disclosed, it was clear that consent had been obtained in 7. It was not clear whether consent had been obtained or not in the remaining 25: HMCPSI, Disclosure of medical records and counselling notes, (2013), para 3.8.
decision-making about disclosure. There is space for greater accommodation of these factors, whilst still affording appropriate protection to defendants’ rights.

**Refusal to Disclose: The Witness Summons Procedure**

Since the CPIA only applies where the prosecution has access to personal records, an alternative procedure must be followed where complainant refuses to grant any access to her records. Where a complainant does not consent to release of records, the prosecution must seek access if they believe that it is reasonable to do so.\(^4^4\) The witness summons procedure may be used to require the third party to attend court and give evidence or produce the relevant documents. The defence may also use this procedure if they believe that a third party holds potentially relevant records that have not already been sought by the prosecution.\(^4^5\) A witness summons will be granted where it is proved that (a) a person is likely to be able to give or produce material evidence and (b) it is in the interests of justice to issue a summons to secure that person’s attendance.\(^4^6\)

Where counselling or therapeutic records are sought, a written application is required.\(^4^7\) The application must be served on the record-holder and the person to whom the record relates will probably be notified.\(^4^8\) A summons cannot be issued unless everyone served with the application has had at least fourteen days to make representations and the court is satisfied that it has been able to take adequate account of the duties and rights of the record-holder and of any person to whom the proposed evidence relates.\(^4^9\) The summons may be resisted on the basis that (a) the records are not likely to be material evidence or (b) the duties or rights of the record-holder or of another interested party outweigh the reasons for issuing a summons. The Court may require the record-holder to make the records available.

\(^{4^5}\) *Judicial Protocol*, para 48.
\(^{4^6}\) Section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965, as amended by Part 5 of the Criminal Justice Act 2003. Where the proceedings occur in the Magistrate’s Court, the equivalent provision is section 97 of the Magistrate’s Courts Act 1980, as amended.
\(^{4^7}\) Rule 17.5 of the Criminal Procedure Rules.
\(^{4^8}\) Rule 17.5(3)
\(^{4^9}\) Rule 17.5(4).
for inspection\(^{50}\) and might invite him/her or a person to whom the records relate to help the court to assess the objection.\(^{51}\)

Whoever seeks production of documents must prove that they are “likely to be material”, likelihood for this purpose involving a real possibility, although not necessarily a probability.\(^{52}\) This procedure must not be used as a disguised attempt to obtain discovery\(^{53}\) or as a “fishing expedition”.\(^{54}\) For example, it would be impermissible to call for the entirety of the files held by the local authority where it is known that a complainant has been involved with social services.\(^{55}\) The applicant must demonstrate that the documents are requested because of a properly formed instinct that something in them is relevant to determining the defendant’s guilt. Ultimately, deciding whether the records sought are material within the meaning of the legislation is a matter for judicial discretion. If the records are found to be “material”, PII claims must be assessed with reference to the \(R. \, v \, H\) test.\(^{56}\) Given the large degree of discretion allowed to judges, it is difficult to predict whether disclosure will be granted. However, owing to the strict approach to determining PII claims in \(R. \, v \, H\), it appears that if the records are seen to be relevant, there will be some level of disclosure, at least in redacted form.

Research published by Temkin and Krahé provides some insights into the use of the witness summons procedure. They conducted interviews with 17 judges and 7 barristers in 2003.\(^{57}\) Although the sample is small and the research is dated, without more recent or detailed data, the primary findings are noteworthy. Temkin and Krahé concluded that applications for third party disclosure of personal records were common and the interviews suggested that the rules

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\(^{50}\) Rule 17.6(2).

\(^{51}\) Rule 17.6(3).

\(^{52}\) \(R. \, v \, Reading \, Justices \, ex \, parte \, Berkshire \, County \, Council\) [1996] 2 FCR 535, 542-543.

\(^{53}\) Ibid.

\(^{54}\) See: \(R \, v \, H(L)\) [1997] 1 Cr App R 176, 177-178; Judicial Protocol, para 44.


\(^{56}\) In \textit{Reading \, Justices}, Brown LJ emphasised that the question of whether the evidence is material must be answered before any question of PII can arise: [1996] 2 FCR 535, 542.

in this area are not applied coherently.\textsuperscript{58} The findings also indicated that fishing expeditions were commonplace and were not necessarily looked upon disfavourably by judges. For example, one barrister who mostly defended stated that fishing expeditions were made by defence counsel on a regular basis and that frequently there was no problem in succeeding with such applications.\textsuperscript{59} The interviews with judges suggested that judges did not take a uniform approach to speculative requests for disclosure, with some suggesting that speculative requests would not necessarily be dismissed.\textsuperscript{60} Finally, the research showed that although local authorities have a positive duty to claim PII\textsuperscript{61}, some did not do so.\textsuperscript{62} Although there were authorities who required the section 2 procedure to be followed and appointed counsel to go through the documents and claim PII where appropriate\textsuperscript{63}, the costs involved deterred other authorities from this approach.\textsuperscript{64} The research was conducted prior to the amendment which permitted complainants to make representations at disclosure hearings.\textsuperscript{65} Thus, there is no evidence on the rate at which complainants make representations or the effect which this has on application outcomes.

As this research is dated, it would be imprudent to draw conclusions on the use of the witness summons procedure from it, especially in light of subsequent developments such as the introduction of the Judicial Protocol in 2013 which provides strict guidance on the appropriate use of witness summonses. However, given the highly discretionary nature of the current rules, it cannot be assumed that subsequent initiatives have entirely eradicated the potential for inappropriate disclosure. The recent judgment in \textit{M v Director of Legal Aid Casework v The Lord Chancellor, The Helen Bamber Foundation}\textsuperscript{66} indicates that despite reforms, the potential for misapplication of the witness summons procedure identified in Temkin and Krahé’s research prevails. M alleged that she was raped by her former husband. The CPS sought a witness summons to access notes from counselling sessions M obtained from the Helen Bamber organisation, part of which referred to the rape allegations. M objected on confidentiality grounds. Although the judgment deals with judicial review of the decision not to grant M legal aid for representation at the witness summons application,
Coulson J’s comments highlight some shortcomings regarding the use of witness summonses in these cases.

In part due to the complications regarding the legal aid applications, there were three disclosure hearings in this case. The first was adjourned to allow more time to resolve the application for civil aid. At the subsequent hearing HHJ Parker QC ruled that four pages of counselling notes should be disclosed to the CPS but that the witness summons should not be executed for a few days and in the interim, the complainant could apply for non-disclosure on PII grounds. Coulson J noted that this was unusual and departed from guidance which states that the recipient of a summons is entitled to resist disclosure on PII grounds without having to issue her own application. Nevertheless, the complainant made an application for PII within the time limit. There was a third hearing where it was held that the notes were not material and even if they were, disclosure would be a disproportionate interference with the claimant’s Article 8 rights. Referring to the hearings in this case, Coulson J commented negatively on the current trends in disclosure of personal records:

“It is becoming increasingly common for the CPS to issue witness summonses of this kind, seeking medical and other such records concerning a complainant in an assault or sex case. In my experience, these applications are often made somewhat lazily, in the belief that, if there are some records which may have some relevance, the CPS is fulfilling its obligations to the defendant, and to the administration of justice, by issuing the witness summons and then putting the burden of resolving the issues raised onto others (namely the defendant, the complainant and the judge). In my view, considerably greater analysis is required before any such summons is issued. As a general rule it is not good enough, as this witness summons seeks to do, merely to require the documents on the general basis that they might undermine the prosecution or help the defence.”

This case highlights some concerns about inappropriate application of the witness summons procedure. The uncertainty regarding the application process is likely to distress complainants who have to withstand a number of hearings and delays before knowing whether records will be disclosed. This misapplication of the rules also evidences a tendency for slippage in the

67 Ibid, para 9.
70 Ibid, para 10.
71 Ibid, para 12.
application of the rules generally which could lead to inconsistent and unpredictable outcomes. The CPS practice of erring on the side of obtaining disclosure creates a high risk of unwarranted disclosure or at the very least another trauma for complainants if applications are unnecessarily made (even if not granted as in M.). Coupled with the findings from Temkin and Krahé’s research, the suitability of the witness summons procedure for adequately protecting complainants’ privacy is doubtful.

Both the CPIA regime and the witness summons procedure could be improved to provide greater certainty and protection for sexual offence complainants’ privacy. Both procedures are unpredictable and this uncertainty is magnified by the fact that two separate regimes apply. It is unclear which is used most often or when disclosure of personal records is legally justified. Consequently, it is difficult to predict when records will be disclosed to the defence. This is problematic for complainants who have no guarantees regarding the privacy of their personal records once they report a sexual offence. This uncertainty also creates problems for the defence who cannot be sure whether access to potentially exculpating evidence will be granted. Moreover, neither regime expressly provides for consideration of complainants’ interests or wider principled concerns about the use of such records in sexual offence trials when making decisions on disclosure. It is thus worth considering whether there is potential for the introduction of a unified regime which would more tightly and predictably control disclosure of personal records.

Devising a solution to the problems in this area: Lessons from Canada

Section 278 of the Canadian Criminal Code provides a statutory scheme for the regulation of disclosure of personal records in sexual offence trials which may provide a suitable blueprint for reform. In section 278, a “record” is defined as “any form of record that contains personal information for which there is a reasonable expectation of privacy”. This includes, but is not limited to, “medical, psychiatric, therapeutic, counselling, education, employment, child

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73 S. 278.1.
welfare, adoption and social services records, personal journals and diaries”. The rules apply to records held by both the prosecution and third parties. However, where the prosecution holds the record, the complainant may waive the application of the scheme.

Disclosure under section 278 is a two-stage process. The first stage (production stage) begins with an application to the trial judge. This written application must include:

(a) particulars identifying the record that the accused seeks to have produced and the name of the record-holder; and

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or the competence of a witness to testify.

To prevent speculative applications, section 278.3(4) lists grounds for seeking records which, on their own, are insufficient to establish that the record is “likely relevant”. These include assertions that the record:

(a) exists;

(b) relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) relates to the incident that is the subject-matter of the proceedings;

(d) may disclose a prior inconsistent statement of the complainant or witness;

(e) may relate to the credibility of the complainant or witness;

(f) may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) may reveal allegations of sexual abuse of the complainant by a person other than the accused;

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74 Ibid.
75 S. 278.2(2). When the prosecutor holds the records, defendants must be informed but the contents of the records must not be disclosed: s. 278.2(3).
76 S. 278.2(2).
77 S. 278.3(1).
78 S. 278.3(3).
(h) relates to the sexual activity of the complainant with any person, including the accused;

(i) relates to the presence or absence of a recent complaint;

(j) relates to the complainant’s sexual reputation; or

(k) was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

The defendant must serve the application on the prosecutor, the record-holder, the complainant or witness and any other person to whom, to the knowledge of the defendant, the record relates, at least seven days before the hearing which determines the outcome of the application. This hearing is held in camera and determines whether to order the record-holder to produce it to the court for review by the judge. The record-holder, the complainant and any other person to whom the record relates may appear and make submissions at the hearing. The judge may order production of the record where s/he is satisfied that:

(a) the application was made in accordance with the correct procedures;

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

There is also a list of factors which the judge must consider when making a decision on production. Section 278.5(2) provides that the judge

“shall consider the salutary and deleterious effects of the determination on the accused’s right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates”.

Specifically, the judge must examine:

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79 The judge may permit a shorter period of time if this is appropriate in the interests of justice: s. 278.3(5).
80 S. 278.3(5). The judge may also order service on other persons to whom the record may relate: s. 278.3(6).
81 S. 278.4(1).
82 They are not, however, compellable as witnesses at the hearing: s. 278.4(2).
83 S. 278.5(1).
(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society’s interest in encouraging the reporting of sexual offences;

(g) society’s interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

If the judge orders that the record, or part thereof, should be produced, this initiates the second stage of the application process (i.e. disclosure stage). The judge must review the material in the absence of the parties and determine whether disclosure should be made to the defendant.\(^{84}\) The judge may hold another hearing in camera.\(^{85}\) Where the judge is satisfied that the record or part thereof is likely relevant and its production is necessary in the interests of justice, s/he may make a disclosure order.\(^{86}\) When deciding whether to order disclosure, the judge must again be guided by section 278.5.\(^{87}\) Where the judge orders the disclosure or partial disclosure, s/he may impose conditions, such as that: the record be edited as per the judge’s directions; copying of the record is restricted or prohibited; contents of the record may not be disclosed to others without court approval or; the record be viewed only at the court offices.\(^{88}\) Such conditions encourage proportionality and help to ensure that any disclosure goes no further than is necessary in the interests of justice.\(^{89}\)

\(^{84}\) S. 278.6(1).

\(^{85}\) S. 278.6(2).

\(^{86}\) As is seen below, such disclosure may be subject to conditions: s. 278.8(1).

\(^{87}\) The judge must “consider the salutary and deleterious effects of the determination on the accused’s right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account”: s. 278.7(2).

\(^{88}\) S. 278.7(3).

\(^{89}\) The section specifically provides that the “judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates”: s. 278.7(3).
Assessing the Suitability of the Canadian Scheme for Adoption in England

Although section 278 is not dissimilar to the English rules, there are a number of key differences which make it a superior approach. Both frameworks are based upon formal application processes but section 278 provides a unified approach with one central application point. This is more straightforward than the English system where there are three alternative routes to disclosure, each with slightly differing procedures. A streamlined process reduces the potential for uncertainty or misapplication of procedures. Further, applying the same rules to all records, whoever controls them, is sensible as similar concerns about unwarranted use of these records apply whether the material is in the hands of the prosecution or a third party. Allowing the complainant to waive the application of the scheme where the prosecution holds the record allows for avoidance of the formal process where the complainant consents. This is similar to the English law where the complainant can consent to disclosure of records. However, the section 278 consent process is much simpler as there are no concerns about qualified consent and attendant PII implications. The problems outlined in the HMCPSI research about failure to accurately record the level of consent given are also obviated. Under section 278, the complainant either consents to release of the records or the full disclosure regime applies.

Like the English rules, section 278 is discretionary. However, judicial discretion is structured by detailed guidelines which encourage more consistent and predictable results. Certainly, maintaining discretion, even in a structured way, allows a margin for erroneous or conservative application of the rules. Indeed, judicial interpretation of section 278 has not been entirely progressive. In R. v Mills, it was held that when making decisions at the production and disclosure stages, a judge is not required to engage in a conclusive and in-depth analysis of all of the factors listed in section 278.5(2) but is only required to “take them into account”. Gotell argues that “the Mills majority transforms [the section 278.5(2) criteria] into a ‘checklist’ of various factors which ‘may come into play during a judge’s deliberation’” rather than “a list of considerations to frame the analysis of likely

91 Ibid, at 675 and 753, respectively.
There are indications that the judicial interpretation of section 278 has undermined its effectiveness. Research by Gotell\(^94\) found that judicial analysis of whether production or disclosure was “necessary in the interests of justice” was “for the most part, succinct and economical to the extreme” and that judges render decisions “without ever showing their actual reasoning”.\(^95\) She also saw that decisions “emphasize the pre-eminence of fair trial rights” and do not accord proper consideration or weight to complainants’ rights and societal interests.\(^96\)

However, whilst Gotell’s research has highlighted some shortcomings, there is also evidence of progressive interpretations of section 278. For example, in \(R. v\ Batte\(^97\) it was held that to justify production, “the accused must be able to point to something in the record…that suggests that the records contain information that is not already available to the defence”.\(^98\) Although Gotell’s research suggests that the judgment is not universally followed\(^99\), it shows judicial support for the intention behind section 278 and careful application of the scheme. Judicial commitment to protection of personal records is also apparent in judges’ refusal to allow access to records where the legislative requirements are not met.\(^100\) Gotell’s research demonstrates that the courts are filtering out unmeritorious applications. Of the 16 cases examined in her study, the scheme was held to apply in 14. Of these cases, 7 applications were dismissed, 7 resulted in the production of at least some records to the court and 5 led to disclosure of records or edited portions of records to the defendant.\(^101\) This is, admittedly, a small sample. It would be unsafe to draw definitive conclusions from it. However, the results indicate the types of decisions that are being made and provide cause for optimism about the benefits of section 278. While there have been

\(^{93}\) Ibid.

\(^{94}\) L. Gotell, “Tracking decisions on Access to Sexual Assault Complainants’ Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the Criminal Code” (2008) 20 Canadian Journal of Women and the Law 111. Although the study focuses on just sixteen decisions in the period late 2000 to early 2006) it provides insight into the operation of section 278. The sample represents the only reported decisions in this area in this period. Also, the findings are supported by an earlier study of thirty-seven cases carried out by the same author: Gotell, “The Ideal Victim, The Hysterical Complainant, and the Disclosure of Confidential Records” (2002) 40 Osgoode Hall L.J. 251. Due to space constraints, the more recent study is focussed on here as an instructive indication of how the regime is operating.


\(^{96}\) Ibid, at 144.


\(^{100}\) For examples of such cases, see: Ibid, at 132-137.

\(^{101}\) Ibid, at 127-128.
some slippages in interpretation, this is inevitable where discretion is maintained and there are some measures (discussed below) which could minimise the potential for regressive application of the section 278 guidelines. Generally, the regime has yielded positive results and the introduction of a scheme like this offers the prospect of fairer results for complainants.

It might be argued that adoption of a tailored regime like section 278 is unnecessary. Modification of the existing disclosure provisions to provide guidelines for the exercise of judicial discretion could be sufficient. However, there is a strong justification for special procedural rules in sexual offence cases. As noted in a recent study on the investigation and prosecution of rape:

“Rape is a unique crime in that it is the state of mind of each of the suspect and the complainant that transforms what in other circumstances would be a normal, lawful human interaction, into an indictable crime. …[I]t is therefore vital for there to be recognition of the inherent unique challenges and complexity of investigating and prosecuting these crimes when compared to other serious crime against a person…”

Since these cases amount to “swearing contests”, anything which challenges the credibility of the complainant or defendant is of utmost significance and could be instrumental in jurors’ assessment of the evidence. The impact of personal records is far greater in a sexual offence trial than in any other criminal trial. The significance of personal records is compounded when one remembers that “myth, prejudice and disbelief surround the reporting, investigation and prosecution of sexual assault, producing a ‘culture of scepticism’”. The potential for advocates to focus on stereotypes to undermine complainants’ credibility by suggesting they are prone to mendacity or are not “worthy” victims is particularly acute in sexual offence trials where rape myths provide a compelling backdrop to juror deliberations. Special rules of evidence have always applied in sexual offence cases (e.g. rules on the admission of sexual history evidence). A regime regulating disclosure of personal records thus fits neatly within existing sexual offences legislation. Moreover, creation of a separate regime for disclosure in sexual offence trials would symbolically mark this area out for special attention and


hopefully stimulate a fresh approach to this type of evidence, maximising the potential for progressive application of the new rules.

There is a good case to be made for introducing a regime similar to section 278 into English law. To maximise the potential for progressive application of such a framework and seek to offset some of the potential pitfalls highlighted by Gotell’s research, a number of measures can be taken. To ensure that judges engage in a proper balancing exercise, taking into account all of the listed factors when deciding whether to grant production and disclosure, there should be a requirement for written decisions. This practice is already part of PII applications\(^{104}\) and continuing to require this will ensure that judges do not make hasty or ill-considered decisions as this will be readily apparent from their recorded decision.

It is also important that legal aid is provided to record-holders and complainants.\(^{105}\) Lack of funding for independent legal counsel for complainants and record-holders has proved problematic in Canada. Of the 16 cases in Gotell’s study, complainants and record-holders were, respectively, represented in only 7.\(^ {106}\) For record-holders, the unavailability of legal aid means that they must either use already scarce resources to fund legal representation or do without it, raising the potential that their interests will not be properly represented. For complainants, inadequate funding prevents them from impressing their objections to disclosure effectively upon the court. Extension of those eligible for legal aid is not uncontroversial given recent debates in this area.\(^ {107}\) Nevertheless, giving complainants and record-holders the opportunity to be heard in applications for disclosure is pointless if they cannot afford legal representation to articulate the arguments against disclosure effectively. Appropriate legal aid is vital to ensure that a scheme replicating section 278 is fully workable.

\(^{104}\) Judicial Protocol, para 55.

\(^{105}\) Access to legal aid is regulated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Applicants must satisfy a means test and the merits criteria set out in the Civil Legal Aid (Merits Criteria) Regulations 2013. The difficulties in securing legal aid in relation to an application under the witness summons procedure were highlighted in M. v Director of Legal Aid Casework v The Lord Chancellor, The Helen Bamber Foundation [2014] EWHC 1354 where it was held that the applicant had been unfairly denied legal aid.\(^ {106}\) Ibid, at 125.

There are also a number of extra-legal initiatives which would buttress the introduction of a regime like section 278 and maximise its potential to properly control the disclosure of personal records in sexual offence trials. First, information on the new rules and the underlying ethos of the regime should be incorporated into the existing training provided to “sex-ticketed” judges to ensure that judges apply the guidelines appropriately when exercising their discretion. Further, training should encourage judges to carefully monitor cross-examination about the contents of personal records so that complainants are not subjected to unnecessary invasion of privacy or prejudice. Best practice guidelines for record-holders should also be introduced to make sure that they properly defend disclosure applications. Finally, once introduced, the scheme should be monitored to ascertain whether it is working according to legislative intention.

Conclusion

The CPIA and the witness summons procedure have filled the lacuna in sexual offences law relating to the disclosure of personal records. However, applying general rules to a contentious area has generated complexities and uncertainty. The current approach is no substitute for a bespoke regime which is specifically designed to achieve justice in this difficult area. The current rules are not sufficiently nuanced to ensure that the interests of complainants, the fair trial rights of defendants and wider societal interests in the proper treatment of victims and the punishment of offenders are appropriately accommodated in disclosure decisions. The Canadian rules provide a workable alternative. Certainly, the Canadian scheme is “still a discretionary one (and thereby subject to the vagaries of the particular judge applying it)”. However, it “has an educational validity” and draws “public and judicial attention to the particular issues which are raised by disclosure of confidential records in sexual cases”. The English legislature should give serious consideration to the introduction of a regime like section 278. Given the trauma faced by sexual offence

108 Judges who hear rape cases must be “sex-ticketed”. To remain ticketed, judges must complete the Judicial College’s Serious Sexual Offences Seminar once every three years: P.N.S. Rumney and R.A. Fenton, “Judicial Training and Rape” (2011) 75 JoCL 473, 474.
110 Ibid.
complainants when testifying in trials, any method of easing their passage through the criminal justice system should be explored as a matter of priority.