

JOINT OPINION OF SENIOR AND JUNIOR COUNSEL

for

RAPE CRISIS SCOTLAND

in relation to

THE PROSECUTION OF SERIOUS SEXUAL CRIME IN SCOTLAND

AT THE TIME OF COVID-19

Introduction

1. Rape Crisis Scotland (“RCS”) is the national office for the rape crisis movement in Scotland. Through campaigns, briefings and publications RCS raises awareness of the impact of sexual violence, challenges attitudes and presses for legal change. RCS provides crisis support for anyone in Scotland affected by sexual violence at any time in their lives. RCS assists adult victims of sexual violence through the criminal justice system, from the initial reporting of a crime through to investigation and trial, by providing practical, moral and emotional support. Through this work, RCS is uniquely placed to provide insight into the impact that the outbreak of COVID-19 has had, and is likely to have, on victims of rape and serious sexual crime, particularly on those whose cases have yet to come to trial.
2. On 17 March 2020, in response to COVID-19, the Scottish Courts and Tribunals Service (“SCTS”) confirmed that no new solemn trials would be commenced. As cases of rape and serious sexual assault proceed by way of solemn procedure, there have been no trials for these types of offences since that date. This has had a devastating impact. RCS advises that those victims who are awaiting their trial have reported the development or exacerbation of existing mental health problems and have described suffering profound distress and anxiety. RCS considers that the overwhelming response from those seeking support is that the current situation is unbearable.

Summary of Opinion

3. We have been asked to provide an Opinion for RCS on the Scottish Government's response to the current situation in relation to the prosecution of serious sexual crime. Specifically, we have been asked to advise on whether: (i) the Government has fulfilled its legal duties under the European Convention on Human Rights ("ECHR"), Directive 2012/29/EU (the "**Victims Directive**") and the Equality Act 2010 and (ii) whether there is a legitimate basis to advance the argument that serious sexual crime prosecuted under solemn procedure requires to be treated differently to other crime.

4. In summary, we have concluded that:

(1) The Government has a positive obligation under Articles 3 and 8 ECHR to protect people from violence and interferences with their physical and moral integrity. The Government's failure adequately to address the delay in the prosecution of serious sexual crime resulting from COVID-19 **may amount to a failure to fulfil its positive obligations under Articles 3, 8 and 13.**

(2) The vast majority of gender-based violence is directed against women. Violence against women is a form of discrimination. The delay in the prosecution of serious sexual crime resulting from COVID-19 will have a disproportionate impact on victims of serious sexual crime. The Government's failure adequately to address the delay **may amount to indirect discrimination under Article 14 ECHR.**

(3) In terms of Article 18 of the Victims Directive the Government has an obligation to protect victims of crime from secondary and repeat victimisation. The delay in the prosecution of serious sexual crime resulting from COVID-19 increases the likelihood of secondary and repeat victimisation. The Government's failure adequately to address the delay **may amount to a breach of the Victims Directive.**

(4) In terms of section 149 of the 2010 Act the Government is subject to the public sector equality duty. The Government was initially in favour of judge-only trials. As introduced, the Coronavirus (Scotland) Bill contained provision for judge-only trials. In removing that provision and subsequently reversing its policy on judge-only trials without having due regard to the need to eliminate discrimination (i.e. the disproportionate impact of the delay on victims of serious sexual crime) and advance equality of the sexes, the Government **may have breached the public sector equality duty.** The decision to remove judge-only trials as an option **would be amenable to judicial review.** As the duty under the 2010 Act is a continuing one, the Government remains under an obligation to review and reconsider the likely impact of delay on victims of gender-based violence.

(5) Sexual crime is different from other forms of crime. **There is an objective basis for treating it differently from other types of crime, particularly during the current pandemic.** We understand that RCS favours the

introduction – even if it is only temporary – of trials before a judge sitting alone (or before a panel of judges) in cases of serious sexual crime.