

Delays in Trials: the implications for victim-survivors of rape and serious sexual assault

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Claire (not her real name) told police she was raped in the spring of 2017. Three years after the incident, the long-awaited trial was scheduled to go ahead in the early days of lockdown. However, it has now been postponed and replaced with a preliminary hearing scheduled for late 2020, at which a new court date will be set. As a result of the delays, Claire feels she may never get closure, believing now that the case may not be heard until at least 2021, or worse the case could even collapse. Claire's children have been called as witnesses and called to give evidence. The effect on the family is immense: her daughter has been prescribed medication for anxiety and Claire feels unable to talk to her son about what happened as she doesn't know what she can or cannot say before the trial.

Claire worries about the trial daily, and views the criminal justice process as 'worse' than the rape itself. Lack of communication about when the trial will take place and the likely lengthy delays in the case coming to court mean that she cannot move on. She worries about testifying in front of a jury and the prospect of the trial being delayed even further. *"I just feel for the people who have no support who are on their own in lockdown right now and dealing with this with the lack of support and information from the courts Lockdown is hard enough, never mind with putting this in the mix."*

Introduction

Covid-19 has significantly disrupted the operation of the criminal justice system in Scotland and elsewhere, causing considerable strain to the system, as well as uncertainty for those who are caught up in it as victims and alleged offenders. The cessation of jury trials for three months during lockdown has contributed to a significant backlog of cases with lengthy delays before trials can take place. As of 10th June there were 717 High Court cases that have been indicted and are awaiting trial, of which 465 involve serious sexual offences (Grant, 2020). In contrast to other types of crime recorded by the police in Scotland, the numbers of sexual crimes have been steadily increasing since the mid 1970s. Sexual offences are considered 'core' business for Scotland's prosecution service, constituting around 75 percent of overall Crown Office and Procurator Fiscal High Court workload (HM Inspectorate of Prosecution, 2017). In the situation where courts are unable to process cases at their normal capacity and, as more cases continue to come into the system, the backlog of sexual offence cases is continuing to increase. This is a real cause for concern for victim-survivors of sexual violence and their advocates, as well as policy makers, lawyers and academics.

This paper outlines the implications of these delays for those reporting rape and serious sexual offences. It draws on the research literature on the impacts that delays to the operation of the criminal justice system have on those who have experienced rape and sexual assault, and from testimonies from victim-survivors about the effects of delays, gained from their participation in two recent research studies on their 'end to end' experiences of the Scottish criminal justice process: *Evaluation of the National Advocacy Project* (Brooks et al., 2018) and *Justice Journeys* (Brooks-Hay et al., 2019); and from recent victim-survivor correspondence with Rape Crisis Scotland about the impact of the pandemic on their cases.

A distinct crime with distinct impacts

Sexual offences have profound and distinct impacts upon those who experience them and they pose particular challenges for the criminal justice response. While common concerns can be identified in victims' experiences of the criminal justice system irrespective of crime type, for those who have endured rape or sexual assault, concerns are particularly acute. Not least because these are crimes that 'fundamentally challenge a victim's sense of dignity and autonomy' (McMillan, 2014: 5). Rape and sexual assault are acts that remove power, control and dignity from victim-survivors (Myers and LaFree, 1982). Many victim survivors describe feeling frightened and humiliated as a result and these feelings are often intensified by 'rape myths' and stereotypes which cast scrutiny and blame on the actions of those who have been violated.

In the *Justice Journeys* research, a consistent finding from interviews with victim-survivors who shared their experiences of the criminal justice process, is that their sense of loss of control was often replicated within the processing of their case, not least because of the lengthy duration of the process, the requirements for sharing intimate personal details and their inability to influence what happened and when. Hence the impacts of sexual offences on victim-survivors and seeking justice interact and are cumulative across what can be a very protracted process.

It is well-established that there is already a very challenging landscape for victim-survivors of rape and sexual assault and that they are particularly susceptible to 'secondary victimisation' (Adler, 1987; Kelly et al., 2005) arising from the experience of undergoing investigation, prosecution and court room processes. In recognition of this, a raft of international protocols and standards call on states to ensure measures are in place to protect complainers and avoid their re-traumatisation.¹² The Council of Europe Convention on preventing and combating violence against women (the Istanbul Convention) identifies that all measures to provide protection and support to victims should be with the aim of preventing secondary victimisation.³ The UN Declaration on the Elimination of Violence against Women requires States to

¹ UN Committee Against Torture (CAT), General Comment no.3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Implementation of Article 14 by State Parties 13 December 2012, Para 21

² European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 14 November 2012

³ Council of Europe The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence November 2014, Article 18 (3)

ensure that: “...the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”⁴

Impact of delays on victim-survivors

Delays in rape cases are not new; waiting times have been unacceptably lengthy for some time. Long before lockdown and the current disruption to criminal justice processes, the challenges faced by victim-survivors as a result of delays in their case progression, poor communication, the uncertainties about trial dates and last minute changes to court locations were well-established (HM Inspectorate of Prosecution, 2017; Brooks-Hay et al., 2019). In the *Justice Journeys* research, victim-survivors whose cases took between two and three years to reach any kind of outcome described themselves as ‘living in limbo, with ‘no road map’ for how to continue in the criminal justice process or in their life more generally, especially in situations marred with a lack of communication over what is happening and why.

Lottie: ...I didn't know how to live for 18 months. I didn't know, you know, do I just forget about it, but then it has to be all dragged back up again, or do I just live my life on pause?

Beth: ...It was three years of re-traumatisation [...] I felt stuck for so many years because everything kept going wrong [...] they promised that they would keep me informed every step of the way, I remember the words [...] and they didn't. Once you'd reported it, that was it. And that was for years.

The impact of living life on pause, dealing with the burden of hope, feeling out of control and at the mercy of the process, taken together had profound impacts on all aspects of their lives and contributed to their lack of confidence in the criminal justice process. Interviewees in the *Justice Journeys* study described the delays experienced while awaiting trial as ‘being continuously let down’. They also discussed the impact that the lengthy criminal justice process, coupled with waiting for news of court dates had on their ability to function at school, college, work, or as a parent. Others noted how their ability to move on from what happened and plan for the future was negatively impacted.

Helen: ...It totally destroyed everything. [...] we were engaged to be married. [...] when I first met the police officer [...] I said, you know, you can't really [...] tell me how long this takes, but is there an estimation, just even something rough? And she said, between one and two years, and I thought, if it's one, it's fine, I get married at the end of it. But as that year passed, it was like, this isn't happening.

Olive: ...We were left pretty much in limbo for a long time. [...] we got to December the 1st last year was when I went off sick, and I was off sick until May; by that point I was a nervous wreck, I was hyper-vigilant, I wasn't sleeping, and I could see his face morning, noon and night; I felt suicidal, I felt life wasn't really worth living, I felt dirty. So I had all those emotions, I went off sick, and I never went back till the May; and I thought surely by the time I've got back to work...it'll be done. But it wasn't, it wasn't.

⁴ UN General Assembly, Declaration on the Elimination of Violence against Women 20 December 1993, A/RES/48/104

In the current situation, where victim-survivors may now face delays of up to four years before their case is heard in court, these anxieties will inevitably be exacerbated and the stress of waiting likely to increase to breaking point. As one victim-survivor stated in recent correspondence with Rape Crisis Scotland said:

The potential extra delay, and uncertainty of how and when the trial will take place, is really hard after a very long wait already... I feel like if the trial is moved again, I will not be able to go through more time waiting, and might have to pull out, I really need to be able to get on with my life, I am in my thirties, and waiting to give evidence, and the uncertainty of when the trial will be, prevents you from making plans like holidays, changing jobs, moving house, etc. I am not at all concerned about catching the virus or anything about that - it is a far greater risk to my mental health that the trial might be delayed even further.

A range of adverse consequences will likely be precipitated by inordinate delays, impacting on the personal, domestic and professional lives of victim-survivors which prevent them resuming working or studying, and which will likely include difficulties in maintaining close relationships (let alone establishing new ones); developing mental and physical health problems, including anxiety, night terrors, confusion, suicidal thoughts, depression, and trauma (Campbell and Raja, 1999). Because delay has a particular effect on those who suffer from physical, sensory and learning disabilities or pre-existing mental ill health (Gillen, 2019: 290-291), the implications for those with these conditions are considerable.

In cases where defendants remain within the family or community, safety concerns will likely be paramount. This is a significant concern given that sexual offences frequently occur within families or intimate relationships (Gillen, 2019). Participants in the *Justice Journeys* study described the accused assaulting family members or continuing to harass and intimidate them despite the imposition of bail conditions. Significantly, lengthy delays may potentially jeopardise community safety; ensuring the long-term safety of victim-survivors, their families and potentially other witnesses in each case over the course of long delays will require close consideration.

There is little doubt that the impact on survivors' personal circumstances and mental health will be immense. Perhaps most importantly, long delays threaten survivors' wellbeing by preventing them from moving into a therapeutic recovery phase (Gillen, 2019; Herman, 2003) thereby postponing their psychological recovery indefinitely while also requiring them to retain the detail of distressing events in preparation for going to court and give evidence.

Pippa: ... you mentally prepare yourself, right, you are literally in a zone to...like, you've put yourself in that place where you're vulnerable, your thoughts are back where they were then, you smell things that were there. It's the weirdest thing ever, it's like you placing yourself back there, because you are preparing to go in and tell these people exactly...I get goose bumps, sorry.

Research has also highlighted the extent to which the children of those who have experienced serious violence are themselves affected by this experience (Callaghan et al. 2015) There are particular implications for children, in light of their age and the proportion of their lives spent with a parent involved in criminal proceedings, and who may be called to give evidence in court. Whilst participants in the *Justice Journeys* study tried hard to protect their children, especially younger children, from knowledge about their cases, they nonetheless felt that their children came to know, and their abilities to effectively parent whilst navigating lengthy delays in the criminal justice process were compromised. These

concerns were especially acute where the sexual offence had taken place within the context of domestic abuse and child contact proceedings via the civil justice system ensued.

Whilst the implications of delay and uncertainties about the timing of any trial will inevitably have devastating consequences for victim-survivors, the impact on their families and friends should not be overlooked. The *Justice Journeys* research participants highlighted the impact of delays on family members who had taken time off work to attend the trial, either as a support person in court or as a witness in the case. Consequently, preparing to go to court was highlighted as stressful and emotionally draining for both victim-survivors and their friends or family

Implications for the administration of justice and provision of support for victim-survivors

Delays and inefficiencies in the criminal justice system raise significant issues around complainers' access to justice, as well as defendants' rights and the proper administration of justice. Article 6 of the European Convention on Human Rights (ECHR) — the right to a fair trial — provides the right to a fair hearing within a reasonable time: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Lengthy delays have clear implications for the administration of justice. There is ample evidence that long delays have an impact on trust and confidence in the operation of the current criminal justice system. The Gillen Review Report into the law and procedures in serious sexual offences in Northern Ireland (2019) devoted much attention to the consequences of delays in particular, the damage wrought to public confidence in the criminal justice system.

Under-reporting is a recognised concern by the Scottish Government. Fears about what the court procedure would involve after a long protracted process is highly likely to contribute to the already problematic high attrition rate in sexual offences, with many victim-survivors choosing to withdraw from the criminal justice system. For many victim-survivors, the knowledge that a case is unlikely to come to an end for years will likely act as a real disincentive to report in the first place, effectively undoing all of the work undertaken by the Government and Police Scotland to encourage victims to come forward.

For those who do report, and whose cases proceed to trial, there is a risk that further delays will impact upon the quality of their evidence. Witness testimony is likely to be more detailed and accurate closer in time to an alleged incident. Both the victim-survivor's and the accused's ability to recall the details of an alleged offence at trial can be severely affected by delay (Gillen, 2019). For Olive, a participant in *Justice Journeys*, the time from reporting to trial date was almost two years and her concerns pointed to the difficulty of then being able to recall details at court: *'the whole process is far too long ... how are you meant to go in court and remember every bit of detail [almost two years] later?'*. In turn this may influence perceptions of credibility as a witness, which is particularly important in such cases where there are rarely any other witnesses.

The process of giving evidence at trial is recognised as traumatic for victim-survivors of rape and serious sexual assault. Disclosing intimate sexual details to a room full of strangers is understood to be distressing and there is concern that this distress could be exacerbated by changes to courtroom conditions made in response to delays created by the pandemic.

Implications for support services

Additional support will be crucial for victim-survivors encountering delays to their case. Findings from the *Evaluation of the National Advocacy Project* (Brooks-Hay et al., 2018) indicate the undisputed value of advocacy support through the duration of the criminal justice process, from reporting, to trial and beyond. Not only did advocacy support improve victims' experience of the criminal justice process and assist sustained engagement in this process, in some cases it also facilitated making a report of rape to the police in the first instance. This is in keeping with research from other jurisdictions confirming that rape survivors' experiences with medical and legal systems are significantly improved if additional support is provided by victim advocates (see Campbell, 2006; Rich, 2014; Robinson and Hudson, 2011). Delays will certainly have an impact on the provision of advocacy and other support services – including both the amount and intensity of service provision over a prolonged period and the duration that each victim-survivor will require advocacy support.

Conclusion

Sexual offences have profound and distinctive impacts and they present particular challenges for the criminal justice system. Hence, they merit distinctive responses. Reporting a crime and engaging with the ensuing criminal justice process can be a positive experience leading to a sense that 'justice' has been served, though it can also be an experience characterised by anxiety, uncertainty and disappointment in both the process and the outcome. This is significantly exacerbated by the prospect of lengthy delays in the case coming to any sort of conclusion. Identifying a means for streamlining the handling of sexual offences to minimise delays is essential, but it must also avoid further harm to the victim and give weight to those of the victim's interests that are fundamental to their self-governance and well-being.

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This briefing paper, and further information and reports on the *Justice Journeys* project, can be downloaded from: www.sccjr.ac.uk. If you have any further queries about this research, please contact Michele Burman (michele.burman@glasgow.ac.uk) or Oona Brooks-Hay (oona.brooks@glasgow.ac.uk)

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