PRIVACY RIGHTS FOR SEXUAL OFFENCE COMPLAINERS

A report for the Victims Taskforce

March 2021

FOREWORD BY CHAIR, SANDY BRINDLEY, CHIEF EXECUTIVE RAPE CRISIS SCOTLAND

Reporting sexual crime and going through the resulting criminal justice processes can be a daunting process. Of particular concern to survivors of sexual crime is the prospect of their sexual history or personal aspects of their lives being brought up in court. There have been some key decisions by the courts in recent years which have highlighted the rights of complainers to privacy and raised important questions about how we assist complainers to assert these rights.

This report brings together key considerations and recommendations from a roundtable held in November 2020 which brought together key agencies and academics to consider the question of whether complainers should have greater rights to legal representation when their privacy rights are at stake. I am grateful to everyone who contributed. There is a growing consensus about the need to take forward action in this area.

I am pleased to present these recommendations to the Victims Taskforce. I believe that they have the potential to give complainers of sexual crime greater agency and protection when engaging with the Scottish criminal justice system.

BACKGROUND

1. The Victims Taskforce was established to improve support, advice and information for victims of crime and their families as they interact with the Scottish criminal justice system. The Taskforce features a work stream on Gender Based Violence, the aim of which is to work with justice partners and victims organisations to promote a system which identifies and addresses gender biases and encourages women's active participation at all levels of the criminal justice system. This work stream is chaired by Rape Crisis Scotland and Scottish Women's Aid, with secretariat support provided by the Scottish Government. Key actions under this work stream relevant to this report included:

   - Looking at issues around privacy, specifically the possibility of having previous sexual history or medical records being interrogated and brought up in court, which can act as a significant deterrent to reporting rape; and
   - Considering the feasibility of introducing legal representation for complainers where an application is made to introduce her or his sexual history or character.

2. The issue of privacy for sexual offences complainers, in particular, the use of sexual history and character evidence in sexual offence trials, is one which continues to attract attention. A number of recent judgements (provided at Annex A) and research reports have raised issues around the approach to how evidence of this nature is used and the rights afforded to complainers to challenge this. Issues such as these, together with the recovery and use of medical and other sensitive records, and electronic devices, give rise to serious privacy concerns for complainers.

3. To further the consideration of work under this workstream, a roundtable discussion was held on 23rd November. The discussion was chaired by Rape Crisis Scotland and attended by a number of legal sector representatives and academics. The note of the meeting is available at Annex B in this report. The purpose of this report is to:

   - provide an overview for the Victims' Taskforce on the issues discussed at the roundtable around privacy;
   - specifically address the issue of protection of privacy rights of complainers where sexual history evidence is raised and interrogated in court; and
   - to inform the future direction of the work on sexual offences complainers under workstream 3 of the Taskforce workplan through a number of recommendations by the workstream chair.

ROUNDTABLE DISCUSSION

4. The Roundtable discussion focussed on the following two key pieces of research which are referenced in this report and were spoken to by the lead researchers at the event :

   - **The Use Of Sexual History And Bad Character Evidence In Scottish Sexual Offences Trials**¨, Professor Sharon Cowan, University of Edinburgh
   - **Right to Independent Legal Representation for Sexual Offences Complainers**, Eamon P. H. Keane, Early Career Fellow at the University of Edinburgh, Solicitor & Tony Convery, Solicitor

5. In addition to presentations from Professor Sharon Cowan and Eamon Keane, Dorothy Bain, QC shared her reflections on recent case law on the matter and Jamie Lipton from the Crown Office and Procurator Fiscal Service (COPFS) provided an update on work taken forward to support the development of guidance for COPFS staff on policies around both sensitive records and applications on sexual history evidence.

6. Key themes from the roundtable discussion included:

   - **Data:** The need for improved data and strengthened evidence base around requests for sensitive records and sexual history and character evidence applications to understand what is actually happening in practice.

   - **Strong messages from the High Court**: The landscape and understanding around protecting complainers' privacy and dignity is changing, this is evidenced through recent judicial decisions at provided on appeal and a number of judicial reviews which have been raised via *nobile officium*.

   - **Contemporary views on how to further complainers rights**: Growing support for introducing independent legal representation for complainers where an application is made to introduce sexual history or character evidence, and this includes members of the legal profession.

   - **Awareness**: Better awareness from solicitors is required to ensure they understand complainers' access rights and recent judgements which have made changes on how complainers are able to voice their views through the criminal justice process.

CURRENT LEGISLATIVE POSITION

7. Before exploring the issues discussed at the roundtable, it is important to set out the current legislative framework which enables sexual history evidence to be brought before the courts. Safeguards in Scots law mean the court must give explicit approval for character and past behaviour evidence to be used in sexual offence cases. However, growing concerns around the operation of the provisions relevant to character and past behaviour evidence and recent consideration by the courts and research have highlighted a number of issues with the way the current legislative framework is operating.

8. Legislative provisions on restrictions on sexual history and character evidence were introduced in Scotland by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 which amended the Criminal Procedure (Scotland) Act 1975.

9. The 1985 Act provisions were re-enacted as sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 and then revised following the Scottish Executive consultation "Redressing the Balance: Cross-examination in rape and sexual offence trials" and response,[1] and further legislation introduced in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The policy memorandum to the Bill leading to this legislation states, under reference to sexual history evidence:

> "The Executive believes that there are a number of deficiencies in [the existing] provisions. They are sufficiently elastic not to strongly discourage the use of this type of evidence. Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak when compared with its prejudicial effect. This may include invasion of the complainer's privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer. The current provisions rely heavily on individual judges to achieve a proper focus on these matters, without providing clear guidance."

10. The resulting provisions form the current legislative position at sections 274 and section 275 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). Section 274 restricts the introduction of sexual history or character evidence in a sexual offences trial, subject to the exceptions that are laid out in section 275.

1 Scottish Executive (November 2000), Redressing the balance: cross-examination in rape and sexual offence trials, Consultation and Scottish Executive (2001) Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials, Report on Responses to Consultation : https://web.archive.org/web/20001216055100/http://www.scotland.gov.uk/consultations/justice/rtb-00.asp

11. Section 274 has four distinct subsections:
    - Section 274(1)(a) prohibits the leading of evidence or questioning that would show, or tend to show, that the complainer is not of 'good character (whether in relation to sexual matters or otherwise)'.
    - Section 274(1)(b) prevents the complainer from being questioned, or evidence being led, about any 'sexual behaviour not forming part of the subject matter of the charge'.
    - Section 274(1)(c) prohibits evidence that the complainer has at any time 'other than shortly before, at the same time as, or shortly after' the alleged offence 'engaged in behaviour, not being sexual behaviour' that might be taken to suggest that the complainer consented or is not a credible or reliable witness.
    - Section 274(1)(d) restricts evidence of 'any condition or predisposition' to which the complainer is subject that might lead to the inference being drawn that the complainer consented or is not a credible or reliable witness.

12. Evidence about sexual history and character can be introduced by application to the court if it is admissible at common law and falls within section 275. Section 275 sets out the following three-stage cumulative test, which must be satisfied before the trial judge can allow questioning or evidence to be led about sexual history or character and the court must also give reasons for its decision on admissibility:

    - The evidence must relate to a specific occurrence or occurrences of behaviour, or to specific facts regarding the character, condition or predisposition of the complainer (s275(1)(a)).
    - The behaviour or facts must be relevant to establishing the accused's guilt (s275(1)(b)).
    - The probative value of the material must be significant and outweigh any risk of prejudice to the proper administration of justice (s275(1)(c)), which includes the appropriate protection of the complainer's dignity or privacy, and ensuring that the facts and circumstances of which a jury are made aware are relevant to an issue which is to be put before them and commensurate to the importance of that issue to the jury's verdict (s275 (2)(b)).

DATA: WHAT DO WE KNOW ABOUT THE USE OF SEXUAL HISTORY AND CHARACTER EVIDENCE?

13. Lack of data and evidence on the use of sexual history and character evidence in Scottish sexual offences trials was a theme consistently raised at the roundtable discussion. Scarcity of research on this issue was highlighted and difficulties were noted in reassuring complainers about the process against a background where little is known about practices where applications of this nature are made.

14. The first comprehensive study of the use of sexual history evidence in Scottish sexual offences cases, undertaken in 1992[2] found that complainers in Scotland were asked about their sexual history in around half of all jury trials for sexual offences, with over half of those relating to history with a third party and in many cases sexual history evidence was introduced without a formal application.

15. In 2007[3] research found an increase in sexual history evidence applications since the requirement for applications to be made in writing following the changes to the legislative framework in 2002, before this applications would have been made orally. Over a 12-month period (2004– 2005), 72% of sexual offences cases and 76% of rape trials in the High Court included a section 275 application. Only 7% of the section 275 applications were refused. In all but a small number of cases, all the evidence allowed in the application was introduced in the trial, usually through cross-examination of the complainer. Several of the interviewed practitioners considered it relatively easy to demonstrate the relevance of sexual history or character evidence. Evidence or questioning concerning the character of the complainer often concerned the complainer's use of alcohol or drugs.

16. Figures on section 275 applications were also released by the Scottish Government in 2016, for a period from 11 January to 11 April 2016, there were 57 section 275 applications (52 in the High Court and five in the Sheriff Courts). Of the 52 High Court applications, 42 were granted in full, five were granted in part, and five refused. Of the five that were rejected, four of them were not challenged by the Crown. Of the 57 total applications, only six were opposed by the Crown while 51 were unopposed by the Crown. However, without more detailed information to understand why so many were granted without opposition from the Crown, the helpfulness of this data is limited.

2 Brown, B., Burman, M. and Jamieson, L. (1992), Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials. The Stationery Office.

3 Burman, M., Jamieson, L., Nicholson, J., and Brookes, O. (2007), 'Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study', Scottish Government Social Research

17. In March 2020, the Equality and Human Rights Commission commissioned a review of the use of sexual history and character evidence, and of other 'private' (for example, medical or counselling) data, in sexual offences trials in Scotland. The resulting review published in August 2020[4] sought to identify the main concerns about the use of sexual history and character evidence, and to have a better understanding of how the use of this evidence affects complainers' access to justice. The review analysed legislation, case law and research on the operation of what are often referred to as 'rape shield' provisions in Scotland – sections 274 and 275 of the 1995 Act.

18. The author of the review, Professor Sharon Cowan, shared her findings at the roundtable. The review found evidence of a potential 'justice gap' in Scotland and identified concerns about how effective the rape shield provisions are in practice. The review found that although the legal framework in Scotland that restricts sexual history evidence and character has been found to be compatible with the European Convention on Human Rights, in practice there appeared to be room for improvement, particularly with respect to protecting the dignity and privacy of the complainer.

19. Professor Cowan's review highlighted that a lack of systematic data collection and research, has meant that scrutiny of how the rape shield provisions operate is limited. A feature of the recent case law (discussed in more detail below) suggests that challenges by prosecutors to the introduction of sexual history and character evidence appear to have been rarely made and therefore, further data on how and when this evidence is introduced, and in particular, the extent to which it is challenged by prosecutors, is required. Professor Cowan also recommends that there is a need to strengthen the protections for people who bring forward allegations of sexual crimes, through legal and procedural reform. These include developing a model of state funded independent legal representation for complainers in hearings about the relevance of sexual history and character evidence, and clear rules on the retention of digital data to ensure complainers' rights to privacy.

20. As highlighted by Professor Cowan at the roundtable discussion, further research[5] examining

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4 S. Cowan, The use of sexual history and bad character evidence in Scottish sexual offence trials, Equality And Human Rights Commission (August 2020) accessible at: https://www.equalityhumanrights.com/sites/default/files/the-use-of-sexual-history-and-bad-character-evidence-in-scottish-sexual-offences-trials-summary.pdf

5 The research is a JAS grant funded project being undertaken by Sharon Cowan and Eamon Keane (University of Edinburgh); and Vanessa Munro (University of Warwick)

the use of complainers' sexual history and character evidence and other 'private data'[6] in sexual offences trials in Scotland is being planned. Building on the Equality and Human Rights Commission review on the use of such evidence in sexual offences trials in Scotland, the project will conduct empirical research, examining existing court processes and practices on use of this data in sexual offences trials, and the impact these processes and practices have on sexual offences complainers' experiences of the criminal justice system.

21. In response to the EHRC report, the Law Officers have referred the matter to the Inspectorate of Prosecutions in Scotland to conduct an inspection. This will likely involve: quantitative and qualitative analysis of adherence to procedural requirements, including time limits and compliance with policy; interviews with COPFS staff and the defence; assessment of the completeness of court minuting of decisions on section 275 applications (see MacDonald v HMA) and the realities of making contact with complainers and discussing applications and their views. Precise Terms of Reference for the inspection are currently being considered and it is likely that the inspection will begin in Spring 2021.

22. **It is recommended that Taskforce members support the need for further data which improves our understanding of how sexual history evidence and other evidence, noting the Justice Analytical Services funded research currently planned.**

6 The research describes "private data" as "any information, the disclosure of which in the context of legal proceedings is likely to engage Article 8 of the European Convention on Human Rights (the right to private life)"

STRONG MESSAGES FROM THE HIGH COURT – RECENT COURTS DECISIONS – USE OF SEXUAL HISTORY EVIDENCE

23. A number of recent cases (further details at Annex A) have highlighted examples of poor practice in respect of the examination of complainers at trial and section 275 applications in particular, which call into question how effective the legislative framework is for ensuring that a complainer's dignity and privacy is protected. The cases highlighted in the EHRC report suggest a range of issues in the interpretation, application and the way in which questioning on issues relevant to sexual history and character evidence of complainers is conducted.

24. The EHRC report highlights five recent cases where the High Court raised significant concerns about the way that sections 274 and 275 were being implemented in practice by courts, Crown and defence. Various concerns around the lack of respect for the dignity or privacy of a complainer in lengthy and problematic cross-examination have been noted by the Lord President in Dreghorn v HM Advocate [2015] HCJAC 69, and by the Lord Justice Clerk in Donegan v HM Advocate [2019] HCJAC 10 and RN v HM Advocate [2020]. In these cases, the failures of the Crown to challenge inadmissible evidence, and the duty of the trial judge to intervene where proper balance regarding fairness to the parties is not struck by defence and Crown, was noted. These issues were raised again in by Lord Turnbull in HM Advocate v JG [2019] HCJ 71, alongside the impact of lengthy delays, and administrative and communication problems, on the complainer's privacy and dignity.

25. In MacDonald v HMA [2020] HCJAC 21, the Lord President, Lord Carloway, referred to the High Court's guidance and efforts to ensure that courts properly adhere to sections 274 and 275 of the 1995 Act. He emphasised the Crown's duty to oppose applications that seek to bring forward inadmissible evidence, and the duty of the court to challenge inappropriate cross-examination. Lord Carloway emphasised the court's obligation to administer and determine a section 275 application thoroughly and carefully, and state its reasons (which should be clearly recorded) for admitting the evidence. The court made the following observations:

> *"Over recent years, the court has made repeated efforts to ensure that the "rape shield" provisions of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 are properly adhered to by trial courts… It has also given definitive guidance on the duties of a judge to control the tone and content of cross-examination, especially in sexual offences cases… Despite this, and the clear import of these sections, the courts have continued to be criticised for failing to provide complainers in sexual offence prosecutions with adequate protection from irrelevant, and often distressing, questioning. This case is a further illustration of a trial court's failure in this regard."*

"This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable."

26. Of note in the MacDonald judgement is the recognition of the distress caused to the complainer by the process of cross examination, having been subjected to repetitive and at times irrelevant questioning. A number of complainers who participated in research in 2019 also spoke negatively about their experience of engaging with the criminal justice system generally, some indicating that the potential use of evidence relating to their sexual history had caused them particularly acute concern and distress.[7] At the roundtable discussion, one of the researchers involved in this work provided some further insights from the Justice Journeys research, noting that women and men interviewed for that research highlighted that they felt very marginal in the process, especially around sexual history and character evidence. They largely reflected quite negatively on the use of sexual history evidence – either they were unaware that it would be used or were extremely anxious/concerned about what was raised. This issue was also highlighted in the 2019 review into the law and procedure in serious sexual offences in Northern Ireland. Sir John Gillen interviewed complainers involved in sexual offence cases. He concluded that a key contributor to fear on the part of a complainer about the trial process was concern of their sexual past being publicly explored.

27. At the roundtable discussion, Dorothy Bain QC explained the recent consideration of the court in an appeal to the *nobile officium*. In this case, the complainer was made aware of an application concerning collateral issues relating to the complainer's sexual history, some four months after it had been granted in part, when the Crown sought to precognosce her. An application was made to the *nobile officium* arguing that the lack of notice given to victim and consequent lack of a mechanism to respond to the request for evidence relating to her sexual history evidence had breached her Article 8 rights. The application to the *nobile officium* was held to be competent and that the complainer's Article 8 rights were engaged in the process. The judgement sets out that although neither the statutory provisions nor Article 8 carry with them a right for a complainer to be convened as a party, in order to respect a

7 O. Brookes-Hayes, M. Burman & L. Bradley, Justice Journeys Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault, The Scottish Centre for Crime and Justice Research (August 2019)

complainer's Article 8 rights, the complainer must be informed and the court be given information on the complainer's position on the facts and attitude to any section 275 application. The court added further that it was the duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application.

28. Following this decision, COPFS engaged with stakeholders in the process of updating its internal guidance and protocols, requiring COPFS to notify the complainer of the application, seek comments on its accuracy and ascertain whether she/he has any objection to it. Following an application a complainer must be contacted and told about the outcome of the application and a further statement/precognition taken preferably with attendance of an advocacy support worker. In addition, Preliminary Hearing System changes have been made and the forms have been adapted to ensure that the court checks that the complainer knows about the section 275 application and that they have the opportunity to comment on the accuracy of any evidence, and state any objection. The court must demonstrate that it is satisfied that the complainer has had the opportunity to participate in this process.

29. At the roundtable discussion, it was noted that this new process, while a welcome improvement, still fell short from ensuring full protection of privacy rights for complainers. Connected to this was the need to ensure an improved awareness by solicitors to assist their understanding of the rights of complainers' to voice their views through the criminal justice process. Whilst efforts have been made to ensure that complainers are being made aware of their rights and information has, for example been produced to support complainers' understanding of their rights were sensitive records are sought, there is a general feeling that the legal profession would benefit from an improved understanding to ensure an effective response to complainers seeking legal assistance.

30. **It is therefore recommended that Taskforce Members note that recent judicial decisions have highlighted a changing landscape and understanding around the protection complainers' privacy and dignity and that the taskforce should:**

1. **prioritise the consideration of measures to ensure that sexual offences' complainers privacy and dignity is protected; and**
2. **engage with the Law Society to raise awareness amongst the legal profession of the current and developing rights of complainers' to legal representation where attempts are made to introduce aspects of their private lives during criminal proceedings**

CONTEMPORARY VIEWS ON HOW TO FURTHER COMPLAINERS' RIGHTS – INDEPENDENT LEGAL REPRESENTATION

31. Accepting that the case law on the use of sexual history evidence has highlighted some difficulties in the operation and application of the statutory provisions, the roundtable discussion focussed on what more could be done to uphold privacy rights of complainers where matters of a sensitive and intimate nature are sought to be raised in court. Much of the focus of the debate on this matter has centred around whether sexual offence complainers should be afforded independent legal representation (ILR) for this purpose.

32. Provision has been made which allows complainers access to legal aid when challenging an application for recovery of medical or other sensitive documents. The court in the case of 'F v Scottish Ministers [2016] CSOH 27' (known as 'WF'), involved a complainer in criminal proceedings applying for legal aid so as to enable her to be represented at a hearing before a sheriff of the accused's petition for recovery of her medical records. She argued that recovery of such documents would infringe her Convention rights to private and family life. The Scottish Ministers refused to make legal aid available for this purpose, arguing inter alia that she has no right to be heard or represented in front of the sheriff on that application. Lord Glennie made a number of points in his opinion including:

- That the person whose records are being sought (and not just those in sexual offence cases, of which WF was not one) is entitled to have their ECHR rights protected effectively which translates into a right to be notified of an application to recover medical or any other sensitive records and thereafter a right to be heard in opposition.

- Whether the Crown could be relied on to adequately represent the interests of the complainer in *any* hearing on an application (a question Lord Glennie ultimately answered in the negative).

33. It is therefore accepted that Article 8 is engaged by the disclosure of medical records in connection with criminal proceedings to provide an appropriate level of protection of a complainer's dignity and privacy. However, more recently in the case of AR v HMA [2019] HCJ 81, the court took the view that there is at least a possibility that Article 8 is engaged by a request for recovery of property, in this instance, an individual's mobile phone.

34. Whilst the judgement noted that there were obvious differences between medical records on the one hand and messages on a mobile phone on the other, it being less evident that text messages would contain sensitive or personal information, the judge concluded that "these

are differences of degree rather than of principle, and that there is at least a possibility that examination of an individual's phone could amount to a breach of his or her Article 8 rights *inter alia* to respect for private life and correspondence".

35. The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 (SSI 2017 No 291), followed WF which allows complainers access to legal aid when challenging an application for recovery of medical or other sensitive documents. At the roundtable discussion a point was raised that there was a lack of clarity around whether these regulations extended to cases where mobile phone records are sought, which as discussed above, the courts accept may engage Article 8 and therefore the complainer should have a right to be heard. As part of further work to address privacy issues for complainers, consideration needs to be given to whether new legal aid regulations are required to cover circumstances where mobile phone records are sought.

36. In the context of section 275 applications the current position in Scotland is that a complainer has no statutory right to oppose or present their response to the court. Nonetheless, recent developments have highlighted a growing consensus towards the development of a system of targeted ILR for these purposes. Indeed, most recently in her August 2020 review, discussed above, Professor Sharon Cowan suggests that there was a need for consideration of further legal and procedural reform specifically exploring the benefits costs, and possible models for state funded ILR for complainers in section 275 hearings.

37. The issue has been further considered by Keane & Convery[8] who concluded that ILR for section 275 applications should be made available. The core proposal contained in that report is that a complainer should have a right to be heard, and to be legally represented for that purpose, whenever an application is made under section 275 of the Criminal Procedure (Scotland) Act 1995 to lead evidence of character or sexual history. The conclusion is reached in light of the especially private and intrusive nature of the questioning which follows a successful section 275 application, and in recognition of the research which indicates the high risk of "re-victimisation" of complainers in sexual offence cases throughout the criminal justice process. The proposal is guided by the relevant case law on Article 8 of the European Convention on Human Rights, which the authors believe may provide a legal basis for independent legal representation. In the report, the authors suggested that extending ILR to applications on sexual history evidence is analogous with the practice that already occurs when applications are made to obtain the sensitive records of complainers in criminal

8 Keane. E.H.P, and Convery.T, Proposal for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of Their Sexual History or Character, 2020, accessible at https://www.law.ed.ac.uk/sites/default/files/2020-09/ILR%20Report%20Final%20Version%20June%20_0%20-%20Acc.pdf

prosecutions, and would not therefore, amount to a radical rewriting of criminal procedure in Scotland.

38. Keane spoke to the report at the roundtable discussion and much of the discussion which followed focussed on the role of COPFS who are operationally designed to prosecute in the public interest, and whether this may result in a conflict when upholding the rights of the complainer. This tension between the interests of a complainer and that of the Crown was also noted by Professor Fiona Raitt[9] in her 2010 report, adding that "The Crown's role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. Her interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge. This falls a long way short of what a complainant in other countries is entitled to from a legal representative. It also falls a long way short of what complainers say they need in order to give their best evidence with confidence and without fear or humiliation."

39. Keane and Convery note that the lack of Crown opposition was feature of many of the recent judgments where a refusal of an application made under s.275 resulted in an appeal. In these cases the Crown did not oppose some or indeed all of the application in the first instance but nonetheless decided to challenge it on appeal. In the report, the authors therefore concluded that "We respectfully suggest that the Crown cannot and should not be expected to perform this function. Indeed, expecting the Crown to undertake this role can place prosecutors (who act in the public interest) in a difficult position and cause distress to complainers, where the Crown fails to oppose an application to which a complainer objects."

40. Whether or not an application is opposed, it is a matter for the court to apply the test and carry out the balancing exercise required by the legislation. Lord Glennie's judgement in the WF case (which concerned requests for sensitive records) posed the question "if the complainer is not given the opportunity to be heard, how is the court to carry out the balancing exercise required of it?" Keane and Convery consider that the same question must be asked in the context of section 275 applications. How can the court, in absence of hearing direct from a complainer, carry out the balancing exercise required under s. 275, and fully appreciate particular sensitivities arising from any proposed line of evidence from the perspective of the complainer? This knowledge is vital to assist the court in their assessment on the extent to which an issue is collateral, and the extent to which allowing the evidence to be led would impact on the complainer's dignity and privacy.

9 Independent Legal Representation for Complainers in Sexual Offence Trials (Rape Crisis Scotland)

41. The current practice as described by COPFS at the roundtable event is that there is now a duty incumbent on COPFS to notify the complainer of the content of a section 275 application; to invite the complainer to comment on the accuracy of matters contained therein; and to invite them to set out any objections to the application. This information is then presented to the court by the Crown to inform the consideration of the court in carrying out the balancing exercise required under the legislation.

42. In response, views were offered at the roundtable indicating that whilst this new process goes some way to protecting privacy rights a tension still remains between the Crown's function of prosecuting in the public interest and any duty they have to represent the rights of the complainer. The point was also made by Rape Crisis Scotland that it is an issue consistently raised by survivors that use of their sexual history is the most fearful part of the trial process. As such it is difficult to see how someone could navigate this process without detailed advice and that the difference it would make for complainers to have independent representation should not be underestimated.

43. Keane and Convery in their report therefore recommend that a system of limited independent legal representation be introduced for the purposes of applications to lead the sexual history evidence of a complainer. The Republic of Ireland was highlighted as a jurisdiction which since 2001 has operated a model of ILR with appropriate legal aid funding, for complainers in rape and certain specified offence connection with an application to question them about other sexual experiences. In Ireland it is understood that complainants felt that independent legal representation offered reassurance and support for them at an especially stressful stage of the prosecution. It is also highlighted that legal practitioners explained that on occasion complainers gave instructions not to oppose the applications to lead sexual character or history evidence once the law and the purpose of the application had been explained to them. The provision of publically funded ILR up to but not including trial has been recommended for Northern Ireland in Sir John Gillen's Review into the law and procedures in serious sexual offences in Northern Ireland (May 2019) (the Gillen Report).

44. **A building of consensus has been noted towards the introduction of independent legal representation for the purpose of ensuring that a complainer's privacy rights are upheld where applications to lead sexual history or other evidence of a sensitive or intimate nature are made and it is recommended that:**

1. **The Taskforce give thorough consideration to the introduction of ILR for these purposes; and**
2. **Give consideration to the development of legal aid regulations to cover circumstances where mobile phone records are sought**

LADY DORRIAN'S REVIEW GROUP ON THE MANAGEMENT OF SEXUAL OFFENCES CASES

45. Although not discussed at the roundtable it is important to note the wider consideration on the management of sexual offences cases by Lady Dorrian's Review Group. The Review was commissioned by The Lord President, Lord Carloway, to develop proposals for an improved system to deal with serious sexual offence cases. The aim of this independent judicially led review was:

46. "To improve the experience of complainers within the Scottish Court system without compromising the rights of the accused; to evaluate the impact that the rise in sexual offence cases is having on courts; and to consider whether the criminal trial process as it relates to sexual offence cases should be modified or fundamentally changed. The review will then generate proposals for modernising the courts' approach. The review will examine potential changes to the court and judicial structures, procedure and practice as well as determining recommendations for changes to the law".

47. To support the review a cross justice Review Group with representation from members of the judiciary and representatives of the Scottish Courts and Tribunals Service, Police Scotland, Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, the Scottish Children's Reporter's Administration, the Scottish Government and the Scottish Legal Aid Board, as well as third sector organisations including Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland, was established. There is likely to be some cross over between the recommendations of Lady Dorrian's review group and the recommendations made in this report, it is therefore important to ensure that ongoing consideration is made in tandem.

48. It is recommended that the actions relevant to sexual offences under WorkStream 3 under the Victims' Taskforce Workplan are refocussed to progress a range of actions which will improve the experience of sexual offences complainers in the criminal justice system. This will include consideration of relevant aspects of The Lord Justice Clerks' Review on the Management of Sexual Offences Cases when this is made available[9].

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10 The report from the review was published in March 2021 and is available at: **https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6**

CONCLUSION

49. The aim of this report has been to provide an overview for the Victims' Taskforce on the issues discussed at the roundtable around privacy, specifically the possibility of having previous sexual history or medical records being interrogated and brought up in court. It is intended that this report informs the future direction of work to develop a packages of measures which would ensure that the privacy rights of sexual offences complainers can be upheld in a system which improves the experience of victims through a trauma informed practice.

50. Victims' Taskforce members are therefore invited to note the terms of the report and provide comments on the following recommendations that the Victims' Taskforce should:

Recommendation 1

- Refocus the actions relevant to sexual offences under WorkStream 3 under the Victims' Taskforce Workplan to progress a range of actions which will improve the experience of sexual offences complainers in the criminal justice system. This will include the recommendations contained in this report and consideration of relevant aspects of The Lord Justice Clerks' Review on the Management of Sexual Offences Cases when this is made available.

Recommendation 2

- Support the need for further data which improves our understanding of how sexual history evidence and other evidence is being used, noting the JAS funded research currently planned.

Recommendation 3

- Prioritise the consideration of measures to ensure that sexual offences' complainers privacy and dignity is protected. This includes:
  - Engaging with the Law Society to raise awareness amongst the legal profession of the current and developing rights of complainers' to legal representation where attempts are made to introduce aspects of their private lives during criminal proceedings;
  - Giving consideration to the development of legal aid regulations to cover circumstances where mobile phone records are sought; and
  - Giving thorough consideration to the introduction of ILR for complainers where applications to introduce sexual history or character evidence is raised.

Sandy Brindley, Chief Executive, Rape Crisis Scotland

Workstream Chair, Victims Taskforce | March 2021

ANNEX A

RELEVANT CASE LAW

F v Scottish Ministers [2016] CSOH 27, the case involved a complainer in criminal proceedings applying for legal aid so as to enable her to be represented at a hearing before a sheriff of the accused's petition for recovery of her medical records. She argued that recovery of such documents would infringe her Convention rights to private and family life. The Scottish Ministers refused to make legal aid available for this purpose, arguing inter alia that she has no right to be heard or represented in front of the sheriff on that application.

The decision of Scottish Ministers to refuse the initial determination request was the subject of judicial review. The judicial review hearing concluded on 22 January 2016 and the decision was published on 12 February 2016. Lord Glennie made a number of points in his opinion including:

- That he considers that the person whose records are being sought is entitled to have their ECHR rights protected effectively which translates into a right to be notified of an application to recover medical or any other sensitive records and thereafter a right to be heard in opposition.

- That the decision of Ministers, as it was based on the premise that no such rights exist, was based on an error of law. He therefore quashed the decision not to award legal aid.

- Whether the Crown could be relied on to adequately represent the interests of the complainer in *any* hearing on an application (a question Lord Glennie ultimately answered in the negative).

AR v HMA [2019] HCJ 81, the petitioner, was charged on indictment with 26 offences, including charges of rape against four complainers, sought an order for commission and diligence to recover a mobile phone belonging to one of the complainers.

The petitioner averred that he believed that the phone would contain records of text messages and other communications between himself and the complainer, and possibly between the complainer and other parties, which would support his defence in relation to the charges concerning this complainer. The court was satisfied that there was at least a real possibility that there will be items which would be of material assistance to the proper preparation or presentation of the accused's defence and accordingly that a relevant case had been made for the granting of commission and diligence.

The court took the view that there is at least a possibility that examination of an individual's phone could amount to a breach of his or her Article 8 rights *inter alia* to respect for private life and correspondence and in the circumstances, concluded that the interests of justice do not require the order to be granted without affording the complainer an opportunity at a hearing to contest it on the basis of her Article 8 rights, if she wished to do so.

LL v HM Advocate [2018] HCJAC 35, the accused was charged with rape and sexual assault. The preliminary hearing judge refused the section 275 application on the basis that a complainer consenting to sexual intercourse on an occasion in October 2015 was irrelevant as to whether there was consent, or reasonable belief as to consent, to intercourse in July 2016. It was further noted that the probative value of the evidence was weak, and an inappropriate intrusion against complainer's dignity and privacy. The Crown did not challenge the application at the preliminary hearing. The accused appealed, saying that the complainer and accused were friends who had previously had consensual sexual intercourse. On appeal the court upheld the refusal, stating that 'particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, prima facie, unrelated events'. Although the previous sexual interaction was a specific occurrence, evidence relating to it still had to pass the relevance test, which in their view it did not. They also agreed that admitting it would be an inappropriate intrusion into the complainer's privacy and dignity. The court stated that "We simply do not see why the fact that there was free agreement and reasonable belief as to that agreement on one occasion, makes it more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later".

Dreghorn v HM Advocate [2015] HCJAC 69, the accused was charged with 43 counts of sexual assault and assault against three different complainers. The Lord President, Lord Carloway, was critical of the manner and length of cross-examination at trial, and the lack of respect for the dignity or privacy of one of the complainers in particular. He noted the duty of the trial judge to intervene where a proper balance regarding fairness to the parties is not struck by defence and Crown. At first instance, neither the Crown nor the trial judge had challenged a very lengthy and problematic cross-examination. Lord Carloway said "both the manner and length of examination and cross-examination give cause for concern in relation to the treatment of a vulnerable, or indeed any, witness testifying in the criminal courts. The examination lasted for many hours and must have been what can only be described as a substantial ordeal for the complainer. From the outset of cross-examination, she was subjected not just to in depth questioning testing the veracity of her testimony, but to direct insults of her general character as, for example, being a 'wicked, deceitful, malicious, vindictive liar'".

The cross-examination itself then lasted for hours. It was conducted in a manner apparently calculated to break the will of the witness, which at times it undoubtedly did. The court noted that due regard must be had to the right or privilege under domestic law to test a witness's evidence by properly directed and focused cross examination but that does not extend to insulting or intimidating a witness and it requires to be balanced against the right of a witness to be afforded some respect for her dignity and privacy. The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and the length of time for which a complainer can be expected to withstand sustained attack.

Donegan v HM Advocate [2019] HCJAC 10, the accused was charged with the rape of two different women, the High Court commented on the lengthy questioning of one of the complainers over three days, which was described as unjustified and insulting. It was noted that there was no objection from the Crown or intervention by the judge. Lady Dorrian stated "Moreover, rather than being tempered by the bench, the experience for the witness was merely prolonged further by the inquisitorial nature of the trial judge's own questioning, which in some instances took the form of cross-examination in itself". In conclusion, Lady Dorrian repeats the final words of the Lord President in Dreghorn, about the duty of the court to intervene: "It appears that these observations bear repeating. We therefore wish to remind all involved of their respective roles in keeping examination of a witness within proper and reasonable bounds".

HM Advocate v G (J) [2019] HCJ 71, the trial judge in the High Court of Justiciary blocked a legal bid by a man accused of raping his former partner in respect of leading evidence to the effect that the complainer had been involved in sado-masochistic sexual conduct with another man before, during and after their relationship ended. In his opinion, Lord Turnbull said evidence of this nature which the accused was trying to elicit would be "entirely irrelevant".

Lord Turnbull's analysis of the application suggests that the court's interpretation of the law was quite different to the Crown's assessment of whether to oppose the application. Submissions made by both the Crown and Defence on the applications focussed only on relevance of the evidence and did not address whether its perceived probative value was outweighed by the appropriate protection of the complainer's dignity and privacy. Given the nature of the questioning, Lord Turnbull highlighted that it might be expected that this matter was one which would have been "brought into very sharp focus" in any discussion on the application.

RN v HM Advocate [2020] HCJAC 3, the accused was charged with sexual assaults against one of his sons, and his partner. He made a section 275 application on the basis of an alleged previous false allegation. This was refused by the sheriff at first instance and the accused appealed.

The opinion of the court was delivered by Lady Dorrian, who dismissed the evidence as 'collateral' in that it had no direct or indirect connection to the facts at issue, criticising the procurator fiscal depute and the sheriff – the former because they did not challenge parts of the application which were in fact inadmissible, and the sheriff for not recognising this. Lady Dorrian cited Lord Carloway in CJM (No2) v HM Advocate [2013] HCJAC 22, para 44 as stating: It is not unreasonable to comment that some courts, and prosecutors, appear to have found it difficult to balance the clear intent to restrict evidence in the wider interests of justice for all, and in particular complainers, with what they consider to be fair, looking primarily to the interests of the accused.

MacDonald v HMA [2020] HCJAC 21, the accused was convicted of sexual assault by penetration and sexual assault. The accused appealed on the ground that in referring to the complainer as a 'victim', the sheriff's charge to the jury had constituted a miscarriage of justice. In refusing the appeal, the Lord President, Lord Carloway, commented extensively on the trial process, focusing particularly on the administration of the section 275 application, the cross examination, and the duties of the defence agent and the presiding trial judge. Drawing particular attention to a section 275 application Lord Carloway stated that there was no record of the section 275 application having been judicially considered or determined, but that the parties at trial proceeded as if it had been. In his decision, Lord Carloway referred to the High Court's 'definitive guidance' and 'repeated efforts' to ensure that courts adhered properly to sections 274 and 275 of the 1995 Act. Further, he emphasised the Crown's duty to oppose applications that seek to adduce inadmissible evidence, and the court's duty to carefully consider the application, and give reasons, that are minuted, for admitting the evidence. He concluded that the trial had been 'conducted in a manner which flew in the face of basic rules of evidence and procedure' and that '[w]ere this to be repeated, the situation in sexual offences trials would be unsustainable'.

RR v HMA [2021] HCJAC 21, the complainer was advised 4 months after a section 275 application that this was lodged and accepted in court. Therefore she was to be asked in cross examination about how she had sent undated text messages to the accused stating she liked hard sex, and on a previous date had indicated to him in person that she wanted to be spanked. Both allegations she said were factually wrong and she denied both things happened. There was no mechanism to appeal the decision as the Crown did not oppose. She was legally aided to be heard in a *nobile officium* case. Claimed that her rights under Article 8 engaged and that the Victims Directive and Victims and Witnesses Act 2014 should allow her to be heard. She claimed that WF, JC and AR cases, provided an analogous case whereby complainers had the right to be heard not just on sensitive documents but sensitive information such as sexual history. The court said that she had a right to be informed about the section 275 application but not a right to be heard. Therefore the decision was quashed.

However, the court did not say the complainer had a right to be heard. The court found that in absence of statutory intervention, the complainer cannot be heard and is therefore a witness to the case, and not a party to proceedings. Preliminary Hearing System changes have been made and the forms have been adapted to ensure that the court checks that the complainer knows about the section 275 application and that they have the opportunity to comment on the accuracy of any evidence, and state any objection. The court must demonstrate that it is satisfied that the complainer has had the opportunity to participate in this process.

ANNEX B

VICTIMS TASKFORCE – PRIVACY RIGHTS FOR SEXUAL OFFENCES COMPLAINERS

10:00 – 12:00 | Monday, 23rd November 2020 | On Microsoft Teams

MINUTES OF MEETING

Attendees

NAME	ORGANISATION
Sandy Brindley (Chair)	Rape Crisis Scotland
Katie Anderson	Rape Crisis Scotland
Sharon Cowan	University of Edinburgh
Vanessa Munro	University of Warwick
Oona Brooks-Hay	University of Glasgow
Eamon Keane	University of Edinburgh
Dorothy Bain QC	Faculty of Advocates
Nicola Gilchrist	Faculty of Advocates
Kathleen Harper	Head of NSCU, Crown Office and Procurator Fiscal Service
Moira Price	Head of Victims and Witnesses Policy, Crown Office and Procurator Fiscal Service
Jamie Lipton	Crown Office and Procurator Fiscal Service
Alison Atkins	Crown Office and Procurator Fiscal Service
Stuart Munro	Law Society of Scotland
Lynn Welsh	Equality and Human Rights Commission
Laura Paton	HM Chief Inspector of Prosecution in Scotland
Danielle McLaughlin	Law Clerk to the Lord Justice Clerk, Scottish Courts and Tribunals Service
Neill Mitchell	Scottish Children's Reporter Administration
Dr Stephen Pathirana	Director of Justice, Scottish Government
Willie Cowan	Deputy Director, Criminal Justice Division, Scottish Government
Saira Kapasi	Violence Against Women and Girls Justice Unit, Scottish Government

Attendees continued

NAME	ORGANISATION
Ria Phillips	Violence Against Women and Girls Justice Unit, Scottish Government
Harry Wood	Violence Against Women and Girls Justice Unit, Scottish Government
Patrick Down	Criminal Law, Practice and Licensing Unit, Scottish Government
Debbie Headrick	Justice Analytical Services, Scottish Government

EVENT STARTS – WELCOME AND INTRODUCTIONS FROM THE CHAIR

1. SB thanked all for attending and set out the background and context against which the roundtable discussion is taking place. The discussion stems from the Victims Taskforce which features a work stream on Gender Based Violence, the aim of which is to work with justice partners and victims organisations to promote a system which identifies and addresses gender biases and encourages women's active participation at all levels of the criminal justice system. This work stream is chaired by Rape Crisis Scotland and Scottish Women's Aid. Key actions under this workstream include consideration of issues around privacy for sexual offences complainers and the feasibility of introducing legal representation for complainers where an application is made to introduce her or his sexual history or character.

2. SB then asked for introductions for all attendees. A list of those in attendance is provided at the top of this minute

THE USE OF SEXUAL HISTORY AND BAD CHARACTER EVIDENCE IN SCOTTISH SEXUAL OFFENCES TRIALS

3. SB invited SC to provide an overview of the research taken forward around use of sexual history and bad character evidence in Scottish sexual offences trials taken forward.

4. SC explained that she was commissioned by the EHRC to look at the Rape Shield legislation in Scotland (sections s274 and 275 of the Criminal Procedure (Scotland) Act 1995), how it has been used, and compare its operation with that of similar legislation in other jurisdictions. The research stems from a number of high profile cases over recent years which have raised questions about how the dignity and privacy of complainers has been maintained during

the trial process. Against this background, the lack of recent research was highlighted, the most recent research on 274/275 having been undertaken in 2005-6.

5. The research undertaken by EHRC contextualises the consideration of issues arising as a result of the operation of s274/275 against the available statistical data on rape and sexual assault. The data indicates the highest rate of recorded rape and other sexual crimes since records began, even though crime generally has been falling.

6. In undertaking the review, specific consideration was given to how the courts have interpreted sections 274 and 275 in allowing or refusing application to introduce sexual history evidence. With an additional focus on disclosure of medical records and phone records, the review considered the extent to which Article 8 rights were met.

7. Focus was also given to how the dignity and privacy of a complainer is upheld – particularly when concerning cross examination. A literature review, and a review of reported appeal cases was undertaken to examine what happens in practice with these cases. Information was also obtained from a previous FOI application, on the number of section 274/275 applications. However, in sum, the information available is very patchy and lacking in detail.

8. Through this work, the review was able to identify some areas of good practice in Scotland, where rights of complainers were respected and dignity and wellbeing had been considered. The various aspects of work looking at the handling of sexual crimes, including Lady Dorrian's judicially led review of sexual crime, was noted.

9. The review concluded that more rigorous research in this area was required, looking at a case from preliminary hearing stage to trial, and identified the need for proper statistical records to support an analysis of the number and detail of 274/275 applications. The research also reviewed the literature on independent legal representation but it was noted that this would be covered in more detail by another speaker at today's event.

10. Further research on this matter, funded by the Scottish Government Justice Analytical Services is planned, which will allow the research team to sit-in on rape and attempted rape trials, and observe the process around sexual history evidence. Discussions are underway on how this will work in practice given current restrictions with Covid-19.

REFLECTIONS ON RECENT CASE LAW

11. SB invited DB to provide reflections from recent consideration of matters relating to privacy rights of complainers before the courts. DB began by setting out some context around sexual crime.

12. Sexual offences take up about 85% of crimes tried in the High Court – these predominantly involve an adult female complainer or child. Victims have reported feeling powerless in the process of trial as a result of the cross-examination, which delves into their sexual and character history. The view was expressed that Article 8 rights of complainers had not been properly respected or protected through the courts. Article 8 was engaged in cases of 274/275 applications and article 10 of the Victim's directive was relevant as well.

13. DB explained the recent consideration of the court in the RR case. In this case, the complainer was made aware of an application having been granted concerning collateral issues relating to the complainer's sexual history. An application was made to the Nobile Officium arguing that the lack of notice given to victim and consequent lack of a mechanism to respond to the request for evidence relating to her sexual history evidence to be put before the court had breached her article 8 rights. The application to the nobile officium was held to be competent and that the complainer's article 8 rights were engaged in the process. The judgement sets out that in order to respect a complainer's Article 8 rights, the court must be given information on the complainer's position on the facts and her attitude to, any section 275 application.

14. Following this, there was an order from Lord Justice General and Lord Justice Clerk that relevant forms in the proceedings should be adjusted to reflect if the complainer has been made aware of the application – enabling the court to be satisfied that the complainer has effectively participated in the proceedings. Whilst this is noted as an improvement, there was a feeling that this approach falls short of what victims organisations would want to see to ensure that privacy is respected.

COPFS UPDATE

15. SB then invited JL to provide an update from COPFS. JL outlined the role of the Policy division within COPFS – to develop guidance and draft policy for prosecutors.

SECTION 275 APPLICATIONS

16. In June 2020, in light of judgements in *Her Majesty's Advocate v JG* and *Gavin Macdonald v Her Majesty's Advocate*, a reminder was issued to COPFS staff to emphasise the rigour with which the legal tests in both the common law and section 275 require to be applied.

17. In November 2020, in light of the decisions in *CH v Her Majesty's Advocate* and *RR (Petitioner) v Her Majesty's Advocate*, the guidance issued in June was updated to advise COPFS staff of the duty now incumbent on COPFS to notify the complainer of the content of a section 275 application; to invite the complainer to comment on the accuracy of matters contained therein; and to invite them to set out any objections to the application

18. COPFS is providing training to staff regarding the necessary steps in response to a section 275 application. More detailed guidance, which will seek to address the various practical challenges which are likely to arise, is being prepared.

SENSITIVE PERSONAL RECORDS

19. In June 2020, having consulted with a range of stakeholders, COPFS published a refreshed policy on the recovery of sensitive personal records. The refreshed policy seeks to ensure that the rights of witnesses, in terms of *WF v Scottish Ministers,* are respected when records are sought by both the Crown and the defence.

20. In terms of the process, the policy directs COPFS staff to seek the consent of a witness before recovering records and to advise the complainer of their right to refuse to consent. Witnesses are to be given time to consider their position and advised of opportunities to seek advice and support. Information leaflets have been produced that explain the process and detail why sensitive records would be accessed.

21. The policy describes the process for intimation by the Court to the witness of defence applications and also the witness' right to Legal Aid should they wish to object to the defence application.

22. COPFS is providing training to staff regarding the appropriate approach to both Crown and defence recovery of sensitive personal records.

Q&A OPPORTUNITY

23. SB advised that a question was raised in relation to what provision has been made available for legal aid where an application for access to mobile phone records was made. The Lord Tyre judgement indicates that mobile phone records can constitute sensitive records and as such to ensure parity with requests for other forms of sensitive records, legal aid should be available. It was discussed that Scottish Ministers have powers to grant legal aid in circumstances where no provision is made in regulations. It was discussed how ever that this process isn't well known or understood and efforts should be made to ensure proper provision is made for legal aid where mobile phone records are sought.

24. Inspectorate for Prosecutions indicated that they would be undertaking a review of 274/275 and the practice of the Crown in this regard.

25. EK asked COPFS if they see any potential conflict or issue with regard to obtaining the complainer's views when it is the Crown's own 274/5 application. COPFS did not foresee any issues but the important role that advocacy support workers can play to support the discussion with complainers on applications relating to sexual evidence. It was noted that survivors can feel quite overwhelmed by the conversation, support is therefore important.

26. SK noted the discussion in the RR judgement around the Victim's Directive and asked if there was any helpful analysis in the judgement to enhance our understanding of the issues raised. DB indicated that the court concluded that the Directive had not been transposed as envisaged but because this point wasn't argued by the complainer, it wasn't fully explored. A follow up question was asked around whether any further clarity on the point was available from judgements elsewhere in Europe – none were offered.

27. NM advised that very similar rape shield provisions operate within children's hearings proof proceedings before the sheriff and extend to any witness giving evidence where the subject matter of the case involves sexual behaviour engaged in by any person.

RIGHT TO INDEPENDENT LEGAL REPRESENTATION FOR SEXUAL OFFENCES COMPLAINERS

28. SB introduced Eamon Keane to present his findings on the right to independent legal representation for sexual offences complainers. EK briefly set out the legal context to this issue before focussing on best practice in this area.

29. In terms of current process, it should be queried whether this is really best practice? COPFS are operationally designed to prosecute in the public interest, this may result in a conflict when upholding the rights of the complainer. This is not to suggest that COPFS cannot perform this function, but that consideration ought to be given to understand what more can be done to uphold the rights of the complainer.

30. The report recommends that a system of limited independent legal representation be introduced for the purposes of applications to lead the sexual history evidence of a complainer. Complainers should have a right to be heard and right to be represented during the application of 274/275. Ireland was cited as a jurisdiction which since 2001 has operated a model of ILR similar to what is proposed in the report.

31. To ensure these rights are upheld, consideration needs to be given to other procedural matters, including the need to have a clear process of appeal for a complainer and the need to ensure that information to complainers is properly intimated. On intimation, the approach taken in Ireland was highlighted where following an indication that sexual history character evidence is to be led, information is provided by the prosecution to the complainer to speak to the legal aid board.

DISCUSSION

32. SB sought views on whether current practice protects a complainer's privacy rights.

33. KA offered views indicating that privacy rights are protected to an extent, but noted the tension between the Crown's function of prosecuting in the public interest and any duty they have to represent the rights of the complainer noting that is not the purpose of COPFS. Reflecting on concerns consistently raised by survivors that use of their sexual history is the most fearful part of the trial process. It is difficult to see how someone could navigate this process without detailed advice and that the difference it would make for complainers to have independent representation is not to be underestimated.

34. When considering whether complainers can be properly represented without ILR, it is worth considering what properly represented means. Against that background SK asked a question directed towards the Advocate Depute present and COPFS more widely, around how in practice would any 274/5 application be handled.

35. KH provided an explanation of the process followed post RR. The Crown will ask the complainer for the factual position in relation to the application for sexual history or character evidence. It is the duty of the Crown to pass that information to the judge. Often, the position of the Crown will match the position of the complainer. It was also noted that post RR more information is being passed to the judge than before and so the judge is better informed to ultimately take the decision on the application.

36. SB enquired about what the experience of complainers in light of this new process has been. KH highlighted the challenges presented by Covid-19 restrictions, where Crown are not able to meet complainers face-to-face. With this in mind, given it is a very difficult conversation in the first place to have with the complainer, it is made further complicated by the fact we can not engage with them as we have done pre-Covid. It was highlighted that there are cases where discretion will need to be used to address challenges in engaging with complainers.

37. DB expressed an interest in who within COPFS is engaging with the complainer about the application, asking if they are legally qualified to do so.

38. JL indicated that the individual would not necessarily be legally qualified but would be supervised by a senior legal manager who would oversee staff and provide guidance as issues arise. Reference was made again to the full COPFS guidance on sensitive records and s.275 which all staff would be aware of and be trained on.

39. LW asked whether it was human rights compliant that the Crown will be asking the court for the information to be released as well as advising the court of the complainants view?

40. KH indicated that it was a dual function that the crown have, to represent the public interest but also to relay the views of the complainer. It was noted that it was an unusual position bur that she didn't think the two things can't function together and it seems to be working at the moment.

41. SK highlighted the data generated from the 2016 research which indicated that of 57 applications 51 were unopposed – is it anticipated that this will change through new changes coming through?

42. KH indicated that she was aware of the research which was discussed in COPFS when it was first published. The lack of detail around the figures was noted and did not reflect the conversations that took place between parties to narrow the scope of the application before it was decided by the court. It is also worth noting that significant changes have been made since that data was published. If you looked at statistics now, you would likely see that the majority of applications are opposed by COPFS.

43. SB indicated that this highlighted the need for up-to-date data to evidence the change in how applications are dealt with in court.

44. EK advised that they had spoken to members of the DPP (Irish prosecution service) during their research when they were in Ireland and the overwhelming views of these individuals were largely positive.

45. LP highlighted that the issue of data has come up a number of times during the discussion and wondered whether there was any information that COPFS have been gathering which may assist with our consideration?

46. JL highlighted that the case management system used by COPFS doesn't lend itself well to the purposes of collecting data for research purposes, however, COPFS are looking at data analysis on this issue. [10]

47. SB asked whether those in attendance thought ILR would be a helpful introduction?

48. OBH provided some reflections from the Justice Journeys research, the feedback from women and men interviewed for that research highlighted that they felt very marginal in the process, especially around sexual history and character evidence. They largely reflected quite negatively on the use of sexual character history evidence – either they were unaware that it would be used or were extremely anxious/concerned about what was raised.

49. OBH also indicated that it would be helpful to consider whether there is any data which captures analogous convictions of the accused. Michele Burman's research did not find any equivalent provision on details relevant to accused – such as analogous convictions.

10 It is noted that COPFS is not in a position to provide the over-arching systematic data required. SCTS/The Courts are the official keepers of the records and it would therefore be appropriate for those bodies to be involved in any discussions around gathering data.

50. SB highlighted that if the accused is successful in his application to introduce the complainer's sexual history or character, any relevant convictions held by the accused can be released

51. SK sought views on whether the Crown could foresee benefits of individuals being legally represented for these purposes.

52. EK pointed to the benefits noted in Ireland from a procedural perspective and SM suggested that there could be advantages for the Crown were a complainer to be entitled to ILR in a specific set of circumstances.

53. JL highlighted that any changes to the law and policy would be a matter for the Scottish Government, there were still likely to be practical considerations to be considered around timescales and intimation and service of applications.

WIDER PRIVACY ISSUES – SHOULD ILR BE EXTENDED TO EG MOBILE PHONES / SOCIAL MEDIA ETC

54. SB asked the group if there were other areas that raise Article 8 considerations. Mobile phones were raised as an area requiring further investigation. It was noted by SC that we know even less about this than other issues and further issues arise around the collection and storage of data in addition to its disclosure. It was noted that despite the judgement on AR, the position was still not clear.

55. OBH pointed to the fact that even where we have judicial decisions to help guide us, it doesn't means that the spirit of the law is always interpreted in the same way.

56. SC indicated that it would be advisable to look at this issue in more detail, it would benefit from a specific piece of research.

EVENT SUMMARY AND FINAL WORDS

57. SB summarised the discussion, noting the following:

- It was evident that the landscape and understanding around protecting complainers' privacy and dignity is changing, this is evidenced through recent judicial decision on the matter but more is needed.

- Lack of data and evidence was a theme consistently raised. If we don't know what's happening how can we reassure complainers about the process. In particular, there is a need for further evidence around requests for sensitive records and s274/5 applications and a need for clear monitoring and data systems. The further research to be undertaken by Sharon Cowan, Eamon Keane and Vanessa Munro will be extremely helpful in this regard.

- Consideration is required around legal aid regulations for requests for mobile phone data. How do we ensure that solicitors are aware of and complainers are able to access the rights that have been set out by the courts.

- A report of this discussion will be prepared and presented to the Victims Taskforce to in form our consideration of next steps on this matter.

CLOSE

RAPE CRISIS SCOTLAND

For more information about the work of the Victims Taskforce:

www.gov.scot/groups/victims-taskforce

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