legal issue 2016

Rape Crisis news

A newsletter from Rape Crisis Scotland

Issue 14 - Spring 2016

Lord Carloway, the Lord President

Contents

Editorial

Our 14th issue of Rape Crisis News has a particular focus on legal matters, and is published at a pivotal moment for survivors' rights. The outcome of a judicial review published on 12th February marked a significant step forward for the right to privacy of complainers in sexual offence cases, while the Evidence and Procedure Review initiated by Lord Carloway and published on 26th February offers some radical and welcome proposals for changes in the way that the justice system engages with children and vulnerable witnesses, including survivors of sexual offences.

We are extremely grateful in particular to the Lord President Lord Carloway (Lord Justice Clerk at the time of his interview with us), the Justice Secretary Michael Matheson, and Jennifer Dalziel from the Scottish Women's Rights Centre for taking the time out of very busy schedules to talk to Rape Crisis Scotland.

The much anticipated Evidence & Procedure Review is published just as we go to press, and can be accessed at: http://tiny.cc/45uj9x

We would also like to extend special thanks to Sarah Scott for allowing us to reproduce her account of her experiences of having her medical records accessed in the course of a rape trial, which highlights very powerfully the damaging impact this invasion of privacy can have on survivors.

If you have any feedback or questions for us about this issue, or are interested in contributing to a future issue, you can get in touch with Rape Crisis Scotland by writing to: info@rapecrisisscotland.org.uk

Interview with Lord Carloway

Rape Crisis Scotland's National Coordinator spoke to Lord Carloway, (then Lord Justice Clerk, now Lord President), about the Evidence and Procedure review which makes some radical proposals to improving how evidence is taken within the Scottish justice system.

I wanted to start by asking you about the background to the Evidence and Procedure review, why you think it was needed?

The reason we carried out the review was because we were concerned about the quality of justice in the sense of whether we were really getting the best evidence in a modern environment. The rules of evidence which we have were devised many years, if not centuries, ago in some cases. They do not always reflect the fact that times have changed. We now have electronic recording devices, which mean that we can often get a person's version of events, and record it, at or about the time of the incident. Obviously it doesn't apply in certain categories of case such as historical cases, etc. But as a generality, we can get much better quality of evidence by getting it canned, so to speak, at the closest point to the incident itself, within reason. So, our concern was that we'd drifted away from having a system in which we had the best evidence that was available, into a situation where we were dealing with people being subjected, essentially, to a quiz or memory test months or years after the event. That is usually done by reference to a written statement which, normally, in modern times they will have signed, but which is a prose narrative of what the police consider the witness or the alleged victim has said. With the best will in the world, that is not the same as an electronic recording of the person, at the time, saying exactly what he or she said in response to particular questions, and which also reflects the state of the person, good or bad, at the time the statement was made. So, the object of our review was to try and improve the quality of the evidence so that we were getting the best evidence of truth that we possibly can.

What are the key proposals in the review?

The key proposal that we're advancing now, because we think it's probably the one which would be most acceptable, is to develop the system in relation to children and vulnerable witnesses. That is to say, to take the principle that I've just mentioned, and to convert it into reality. Instead of having the "quiz" many years after the event, what we would have is a formal system of taking the person's evidence as close as possible to the event. There are problems with that, but presumably it could be done by a specially trained police officer in the case of a vulnerable witness, and by the joint investigative interview in the case of many children. That would essentially form the principal part of the witness' evidence in chief. It would be used as proof of fact. Now, that can be done to some extent at the moment under the existing rules, but it's not being done in a systematic way. We want to encourage that as the way that evidence in chief is taken. In other words that approach should be the presumption that that will be what happens, instead of one involving having to make an application to the court, etc. We then have to introduce a system whereby there is an opportunity on the part of the defence to examine the witness, again as near as possible to the events which have occurred. Now, once more there are opportunities to do that currently by having evidence on commission. But that's not being used

systematically. It's relatively sporadic in its application, and it's only coming in once an indictment is served in the solemn cases. That is often at least nine months or almost a year, after the event has occurred. We want to develop a system whereby that process can be moved forward to a stage before the indictment is served, but after the person has appeared on petition. The person accused would have the opportunity, should they wish to take it, of questioning the witness much nearer the time of the incident. There are problems with that in relation to disclosure and related matters. We have to iron these out, but we're relatively confident that we can iron these out. As with many systems, there has to be a safety valve, because something unexpected can occur. But looking at the generality of cases, most of the information which an accused person requires to cross-examine a witness, for example, ought to be available at a very early stage, notably the defence will have the counter-account, which, if necessary, can be put to the witness. Under the system that we're suggesting they will of course have access to the examination-in-chief materials, which they can listen to, or play. Therefore they're not going to be surprised in the normal case by something new coming up at trial. They will have the evidence-in-chief and they can prepare accordingly. The problem will be what happens if something new turns up? Well, if something new turns up, then there would be an opportunity to ask the court for permission to do further examination, either on behalf of the Crown or the defence, but again, recorded all in advance of trial.

So, in practice, for example, for a rape complainer, what would that mean? Would that mean that she wouldn't have to go to court at all?

That's right. In many cases it may mean that. Let's take an incident which is reported quite quickly. That person would be interviewed, and evidence would be recorded within a day or two of the incident. We need to work out what the optimum time is, in the sense that clearly sometimes people need to have a little time to apply themselves to the situation. But that again is something which can be worked out. It may vary from person to person. But at a very early stage the witnesses are interviewed, it's recorded, it's disclosed, and there is then going to be an opportunity for the defence to examine that witness, to cross-examine if that's required, but that would be something which would be controlled by the court and would take place in advance of trial, be recorded, and the whole thing would be played to the jury. There are lots of questions around that, such as whether that is likely to have the same impact as a live appearance. Our thinking is that, as time goes by, people are much more used to seeing people on-screen in a whole host of ways, by way of mobiles, skyping, and so on, and so forth. Ultimately we don't think there'll be a major difference between what we're suggesting and what is now happening to some extent, which is the interview being played as part of examination-in-chief, and then the cross-examination occurring by live link, or indeed where the examination and the cross-examination are by live link.

I think there is a disconnect sometimes just now anyway between juries' expectations of how rape complainers will present, and how they actually present. Because often what survivors say to us is "I'm not going to give him the satisfaction of seeing me distressed. I'm going to try and hold myself together.

Yes.

Interview with Lord Carloway

And that's the exact opposite of what a jury is expecting so I think there's issues with perception of demeanour just now anyway under the current circumstances.

That may well be.

We have that kind of situation where the alleged victim, or survivor as you're putting it, is trying to hold it all together and we have many situations in which the witness will crumple before the jury. If we had a situation where the jury are not there, it ought to make life a lot easier for a person to give evidence in a less stressful situation. Again, we go back to the problem that we have with the current system, which presupposes two things, first of all that people's memory improves with time, and secondly that people give better evidence under stress. That's something which is dealt with in the literature, and I think modern thinking is that it's not really a good way of going about things.

What do you see as some of the benefits of what's being proposed?

The main benefit which I've seen, so far as the general justice system is concerned, is that we get a better quality of evidence. Now, that does not necessarily mean that there will be a higher conviction rate; we would have to see what happens over time. But we would have the evidence of the person much nearer the time, so we can proceed on the assumption that they're much more likely to have given an accurate account. We have that, so, we have a better means of establishing truth. That's one strand of it. Going onto a slightly more general area, so far as the witness is concerned, we would consider that it's going to be a lot less unpleasant for the witness with this kind of system because it means that the witness is going to be able to give

the interview at the beginning once and would then be subject to examination from the defence once, subject to the safety valve that I've mentioned. That would be the end of the matter. Basically the witness will not be worrying about this case for months, or in some cases years. He or she would be being examined at a place and time that are much more convenient to the witness, and would not be kept waiting over periods of time until the court system eventually gears itself up to hear his or her evidence. We know that for perfectly understandable reasons, court scheduling is not an exact science, but we also know that that can mean that alleged victims in rape situations may think they're giving evidence on Monday; it might turn out that they don't; it may turn out they don't give evidence at all that week. And for cases which are sexual offences, which are not in the High Court so, not rape - the situation may be even worse, with the degree of churn which occurs in the sheriff courts. We see this as a possible way of reducing the

general churn which occurs, particularly in the lower courts. It's for the government to decide whether they wish to run with it or not, and there's a wider digital programme whereby a similar system could be run for witnesses in general. Now, again, it may not be possible to move with the kind of speed that is entirely desirable on this, because you can't just suddenly change systems. You can't just suddenly devise your own personal utopia and place it into the system and expect it to operate; these things have to be developed gradually. But there are many, many cases in which the vast bulk of police evidence is never challenged, so, why do we bring these witnesses to a court at all? Why don't we just get them to record their evidence and we can play it to the jury? Similarly with expert evidence, we can just simply get expert witnesses to record it and that would become their evidence. If somebody wants to challenge it, by all means, they will be given an opportunity to do that, but they would have to say "I want to challenge that evidence" and then we can decide "Does this require a court appearance on the part of that witness?" "Is this something we can record, can we do this remotely?" So, for the wider digital strategy, which is perhaps a slightly different strand here, we'll be going down that route. And, again, hopefully reducing the inconvenience to witnesses, and reducing the degree of churn, because there's less opportunity for the witness not to be there because they haven't been cited properly or are, for whatever reason, unavailable. And the case goes off. Now, that shouldn't happen in this system. No doubt it'll have its own problems, which we just don't know about yet, but if we actually have the evidence taped and available, the fact that witnesses are not there on the day is neither here nor there.

So, the review's got specific proposals for children and—

And vulnerable witnesses. That's the route we're going down at the moment.

Which would include all sexual offence complainers. Is that right?

Yes.

And then there's a broader strand that you're also looking at that would cover the justice system as a whole?

Yes.

Are you looking at similar provisions being in place for both children and adult vulnerable witnesses?

Well, not entirely, because with most children it's going to depend, no doubt, on the age of the children or the child – but we've got the situation at the moment where the system already has the joint investigative interview and we would envisage that the system in relation to children will be a development of that.

There are certain areas of joint investigative interview, which have to be looked at carefully and improved, things that people are aware of such as forms of questioning, and so forth. We would envisage that for children the joint investigative interview will be the primary vehicle for the examination in chief element, but then we will have to introduce the examination or cross-examination by the defence. With vulnerable non-child witnesses, we have to devise a slightly different system. But we'd envisage again that it would be the first interview by the police officer that would form the basis for the evidence in chief. Again, that requires careful consideration in relation to training so that we don't have a situation where the evidence which is given is susceptible to challenge on the grounds of leading questions, etc. We need to improve

that element of it. And then, again, we have to introduce the method of defence examination or cross-examination. There would be similar processes but they would not be identical.

It sounds like the Court would be involved at a much, much earlier stage than happens just now. Would the judge be present during the cross-examination, would you envision?

Well, that's one of the issues that we have to iron out, as to whether that is something which is required. Again, from the point of view of controlling proceedings, the answer to that probably will be "Yes." Because you're then in an adversarial setting, there has to be a referee. Whether it requires to be the same judge as eventually does the trial, or eventually makes the decision, is another matter. No doubt ideally it should be but I don't think it need necessarily be. At the moment when evidence is taken on commission, for example, it doesn't actually have to be a judge in all cases. But I think the tendency is that it generally speaking is.

You mentioned disclosure earlier. In a number of historic abuse cases there can be huge amounts of, for example, social work records. How that would work with this much shorter timeframe?

There's a big difference with the historic abuse cases, in the sense that the advantage of the system that we're suggesting doesn't exist with these cases. In the sense that, if two or three years have already passed, or ten years, or twenty years have passed, then the quality of the evidence which is going to be recovered at stage A, or from stage B a year down the line, is not going to vary that much. So, this system is primarily designed to deal with the situation where something has been reported more or less immediately by the alleged victim. We can still have the same system for the historic abuse cases but there's no imperative time-wise in quite the same way as with the immediately reported cases. So, with a historic abuse case we can still record things in advance, but we wouldn't have to do so with the same speed. I think it's very much a question of looking at each case as it comes. But what we need to have, what everybody needs to have, is an idea of how these cases are generally going to be progressed rather than a sort of ad-hoc approach to it.

What would you say to the argument that the proposals could infringe on an accused's right to a fair trial?

We're fairly convinced that what we're proposing is human rights compliant. The main area on which the defence representatives have focused is in relation to cross-examination, which is entirely fair. The right under Article 6 [of the European Convention on Human Rights] is not actually to cross-examination in the sense that we know it under Scots Law. It is, under Article 6A, a right to examine or have examined the witnesses on the same basic conditions as the prosecution. That does not mean that the system requires to allow a defence representative free range in questioning of that witness. The ability to ask leading questions, the ability to do so in a relatively, shall we say, confrontational manner, these are aspects of Scots Law. They are not aspects of European Convention law, where of course many of these cases are effectively dealt with without oral procedures at all. So, we're fairly certain that we can build into the system suitable protections so that a fair trial will occur in Scots Law terms, and European Convention terms. Of course, if we don't manage to do that, we'll have to revise

the system.

It sounds like quite a big culture change that you're talking about, in terms of how we're used to thinking about justice being done in Scotland.

Yes, it is. I think that's absolutely right. It's a culture change in the sense that we have to get a grip on the advantages that technology has, and use the technology. The simple example of this, again, and I'm stating the obvious but sometimes it's worth stating the obvious, is this: we have frequent situations in which after a witness has given their examination in chief, the line in cross-examination is "look at your statements; do you agree that what you said in your statement is much more likely to be the truth because it was said nearer the time?" And the witness nearly always agrees and the defence are proceeding on the basis that that is in fact the case. I think there are certain flaws in that argument, to do with the recording of the statement with pen and paper. But assuming that the general proposition is right, then why aren't we using that statement as the evidence? Using it as the primary evidence, instead of going through this rigmarole of having to bring the witness along, quiz the witness on what he or she can remember, and then surprise them by producing some statement that the witness hasn't seen, possibly ever, and often not for months or years. So, we try to eliminate what ought to be recognised as significant faults in the ascertainment of truth. If you were trying to devise a system which ascertained truth in the most accurate manner, we would not be doing what goes on in our courts today.

It certainly does seem at the moment there is quite a lot can be made of what is seen as gaps in memory that would be completely natural after the length of time that's passed.

Well, yes, there are lots of psychological studies on memory. It's certainly true that traumatic events stick much longer in the mind than more pleasant things, there's that, but people will remember different things at different times even. But we don't have our cases decided by psychologists, we just have the ordinary citizen, the juror, deciding whether he believes that person, having never seen the person before. It's a difficult exercise, and we ought to make matters as easy as possible for jurors by showing them precisely what the witness has said at or about the time of the incident. If we do that, again, we'll improve the quality of justice. It's not intended to result necessarily in an increase in convictions, that's something which will have to be ascertained over time by statistical assessment. But it ought at least to mean that we have a clear record of, almost, the incident itself, by virtue of the proximity of the reporting. Domestic violence cases are a classic example of that. If you have the police going to the scene and recording the scene, to describe it as an aftermath is often not accurate, the police are entering the scene of the crime and they are recording elements of it as it goes on. Now, again, instead of having this memory test, it's there, and you can just play it to the jury. That's what we should be relying on. The reality is that the body-worn lapel camera, going to the scene of a domestic fracas, or indeed a report of a rape, is very valuable; and the domestic fracas may include a rape. You've got the camera there and you can see not only how the alleged victim is reacting, you can also see how the alleged offender is behaving, which tends to be slightly different from the way that he is seen later in the courtroom.

It sounds like what you hope the proposal would achieve is better evidence and also a better experience

for the complainer.

Yes.

Related to that, I wanted to ask about a recent appeal judgment that you commented on, and I wouldn't ask you to be specific about that case but some of the comments you were making were around the role of the judge intervening to protect complainers. And our sense is that perhaps we've got quite a non-interventional culture in courts in Scotland, and I wondered if you wanted to say a little bit more about what you consider the role of the judge should be in those.

I think there are two aspects to this. One's to do with jury directions, but the other is to do with interventions. I've been practising in the criminal courts for a very long time now and the civil courts too, and it's interesting to see how things have developed over that time. The role of the cross-examiner, or the role of the defence representative, has undoubtedly changed in practical terms over the last twenty, thirty years, in the sense that twenty, thirty years ago, we had quite limited and focused cross-examination. The culture was that you would not embark on cross-examination unless you had clearly in mind an objective in relation to a specific point or points. Your cross-examination would be planned, your cross-examination would be focused, and your cross-examination would be relatively short. It would be neither repetitive nor intended to be insulting to the witness. The advocate, especially at the High Court level, would be acting in a responsible fashion; almost but not exactly as an intermediary, but more as an officer of the court who would put the defence in an appropriate fashion. He would not simply be a cypher for the accused person or engage in an exercise of upsetting the witness as much as possible. Over time, and especially since disclosure has resulted in mass of documents being released, we've developed a situation in which I think defence representatives feel that they have to go into every nook and cranny, for fear of criticism. I think there are reasons for the way things develop. We have this huge volume of previous statements being released as a matter of routine. We also have what we call the Anderson appeals - defective representation appeals in which one firm of solicitors effectively accuses another firm of solicitors of professional negligence. People are very conscious of these two things, but it's resulted in a situation whereby we have cross-examination, which in many cases, by no means all, is unfocused and repetitive. It consists of getting the witness to repeat what that witness has already said in the witness box. And it has no objective, or no apparent objective, other than perhaps that the cross-examiner thinks there's a possibility that the witness might say something different. Now, this is essentially a waste of resource. It's not a good way of defending clients. We have to get back to a situation in which cross-examination does what it is intended to do, which is either to test the evidence of the witness on particular points, or to bring out further evidence which has not been brought out by the prosecution. The judge has a role in this, and the judge has an increasing role now because of the way things have developed. It has always been the case, as we said in the particular case to which you refer - I think we picked up the principles from a couple of cases in the 19th century –that it is the duty of the court to stop abuses of the privilege of cross-examination, that the dignity of the witness has to be protected, and repetitive questions, insulting questions, have to be eliminated. At the same time, of course, the judge has to make sure that, in terms of the Scottish rules, as well

as the European Convention, the accused person has got a reasonable opportunity of examining the witness, so that whatever version of events the accused says happened can be appropriately put to the witness. One of the problems that we have at the moment is this ethical duty on the advocate to put the client's story to the witness, for fear that not doing so will result in criticism, and that's a rule that we have to revise. In many cases it's really quite pointless going through a formal process of doing that, it achieves not very much. But, yes, the judge has to be interventionist. I hasten to add that this does not just apply to cross-examination, it applies to examination in chief too, which is often lengthy and repetitive, and in some cases, not so much insulting as patronising. The judge has got a duty to say to the prosecution at some point, "Are we actually going to get anywhere near the incident here instead of asking the witness what she's had for her supper before she went to the pub?" It gets quite frustrating as a judge, knowing the way that things have been done in the past, and knowing the way things are done properly by other counsel or solicitor advocates. One problem with intervening is that the judge is sitting there not knowing what the evidence is going to be. As a judge you don't really have advance notice of that. That is something which we may have to deal with in due course as well. And you're sitting there and you're an hour and a half into the evidence of a rape complainer for example, and you haven't actually started, she hasn't actually met the accused at this point and you're saying "Well, what's happening here?" It's just a waste of everybody's time.

The second strand is the judge's obligation in relation to the directions to the jury. Some judges consider that they should not give the jury any directions on the way that the jury should approach the evidence. They take the view that that is not their function, but that is not the case. It was Lord Justice General Emslie back in the 1970s who issued a practice note saying that it is the duty of the judge to give the jury such direction, such help and assistance, in relation to the assessment of evidence, as he thinks appropriate, having regard to his judicial knowledge and experience. That is used, for example, in situations where we have identification evidence, in which the judge is expected to tell the jury certain things that the jury won't necessarily know about the dangers of identification evidence, why these dangers exist, and so on. So, he is giving the jury guidance on the approach to that type of evidence. Similarly, in relation to complainers in rape cases and witnesses generally, there are certain areas in which the judge should be able to assist the jury in approaching the particular type of evidence concerned. So that when we're talking about a complainer who has made three, four or five statements, and there are contradictions in them, the judge should be able to say to the jury "You have to assess all these things and it's for you, of course, to decide what to do with this. But bear in mind that experience dictates that people do say different things at different times for a whole host of reasons. They contradict themselves, they may be lying at certain points, or they may have forgotten things", and to be able to give that kind of direction to a jury. Now, we see an aspect of that in the recent Bill [Abusive Behaviour and Sexual Harm (Scotland) Bill].

We have a situation in which Parliament may make provisions that judges must direct the jury in relation to certain behaviour. This is something which some of the judges are concerned about because it's seen as an interference with the judge's duty to direct the jury appropriately. But, as always, if the

judges are seen as not directing the jury appropriately on these areas, Parliament has the opportunity of saying "You must give this direction".

Do you have any views that you would want to express about the proposals?

The former Lord Justice General and I did write a paper which indicated the area of concern, saying you have to bear in mind that you are entering a field which is not normally the role of Parliament, it's normally that of the judges. Our view was that with jury directions, we now have quite a sophisticated system run by the Judicial Institute, as to what should go into jury directions. It would be relatively straightforward to run a system whereby, possibly with outside consultation, there could be some kind of consensus as to what should be said in certain types of case. But being prescriptive about these things can result in problems. But I'm not expressing a view for or against the policy. That's a matter for government and I can't express a view on that.

Going back to the question of intervention or if there's questioning that could be perceived as harassment, what do you think the Crown's role is in relation to that?

The Crown act in the public interest. If there is questioning, which the Advocate Depute or the procurator fiscal depute considers transgresses the line of propriety then my own view is that they should be objecting to that question, on the basis that it is harassing the witness. If you do have a situation where a witness is harassed, you're likely to get distorted evidence. So the Crown have a role there. Obviously it's a matter for the Lord Advocate to issue guidance to the Advocates Depute, etc. on exactly what they should be doing. I know that some Advocates Depute are reticent in objecting for fear of perhaps getting on the wrong side of the jury. They sometimes think that juries prefer just to let evidence flow so that they can make up their own mind on the subject, but my own view would be that they do have a role in objecting to cases that cross the line of legal propriety.

We have an adversarial system and judges are reluctant to react unless they have got a decision to make. If somebody objects, they must make the decision, and they will make the decision. If they don't have an objection, they haven't got a decision that they have to make, and therefore they perceive themselves as being unnecessarily interventionist, and they can get themselves into trouble certainly if they are too interventionist in a given case.

Do you think we do enough to protect complainers' privacy in sexual offence trials? Thinking about two key areas, one would be sexual history and character, but also increasingly what we're seeing is complainers' medical records being used. It's often social work records for historic cases but for adult rape, recent cases, it's often mental health. So, if you've reported a burglary nobody's going to look at your medical records, but if you report a rape it is quite routine that your medical records will be checked to see if you've got a mental health history.

Well, again, I suspect if you trawl the internet I probably said one or two things about this as well. Why is it that in relation to rape cases that you can dig up the person's personal history, education, social work, psychological records, but not where – burglary is probably not a good analogy – but an assault is, with two people attacking each other in the pub? Why should you, in the former, but not the latter, start exploring that

person's character? I think the problem is that we have gone so far down the line here and the Crown, as I understand it, do not object in many cases to the recovery of these records. So, having gone down that line, and if the Crown are not objecting, the judge can intervene but he may be reluctant to do so because of the lack of objection. So, either the alleged victim would have to object to her medical records being recovered, in which case we could start having rulings on that basis, or it will require further parliamentary intervention. I suspect the latter.

There's no eligibility for Legal Aid for a complainer to object.

I can see the difficulty there. In many of these cases the recovery of these records takes a long time. Very often none of the material is ever used because either there's nothing in the material or because actually the material which is recovered is not capable of being used because of section 274. So, why exactly we're going down that route is a matter of some concern. I suspect the easy solution to this is a legislative one whereby Parliament can decide what is, or is not, appropriate by way of recovery of someone's past records. If the defence want to challenge the legislation on human rights grounds, we can get a legal ruling on the matter. But I think we've got ourselves into a situation where the practice is basically to release a lot of these documents to the defence, and that's problematic.

My final question is what happens next?

What we have to do with all of these things is say to the government "There you are, this is what we think. We think these are the faults in the system. We think these are solutions that you should consider. What do you want to do about it?"

S T O P P R E S S
The Evidence & Procedure Review was published on 26th February and is available at: http://tiny.cc/45uj9x

Judicial Review: a vital step

Landmark decision in the protection of complainer's human rights within the Scottish criminal justice system

In a recent legal judgement*, Lord Glennie struck down the decision of Scottish Ministers to refuse legal aid to a complainer to enable her to oppose the recovery of her personal records by her alleged abuser, in the context of a criminal prosecution against him.

Scottish Ministers refused the application for legal aid on the basis that they did not consider that the complainer had any right to appear at any hearing where a decision was made about whether the defence could have access to her records.

The complainer in this case was served with legal papers saying her alleged abuser wanted access to all her medical and psychiatric records, but was informed that - unlike in England and Wales - there is no provision in Scotland for legal aid to be granted to enable her to oppose this. She then applied to Scottish Ministers, who have the discretion to grant legal aid, but they refused to make legal aid available. This decision has now been overturned at judicial review.

The important points to be taken from Lord Glennie's decision are:

1. A complainer has a right to be told when the person she has accused of assault makes application for her records.

2. In that event, she now has a right to be heard on that application

3. That will entitle complainers to apply for legal aid now to be represented at any hearing on the opposed application.

Rape Crisis Scotland considers this to be a very significant step in improving the protection of complainers' Article 8 right to privacy within the Scottish justice system.

RCS has had serious concerns about the use of complainers' medical records in sexual offence trials. Frequently these records are being sought to look for mental health issues. Many complainers experience attempts to access their private records as a significant violation of their privacy which adds considerably to the stress and upset of their interaction with the criminal justice system. The prospect of having their personal or private lives subjected to scrutiny acts as a direct deterrent to complainers reporting what has happened to them to the police. Where they do report it, it can add considerably to the trauma and sense of violation they experience.

RCS believes that the Scottish Government must put in place clear rules governing access to medical or other sensitive records. A complainer must be told when an application is made for her records, and informed that she has a right to oppose this, to seek legal advice and be represented at any hearing where this is decided on. This process should apply irrespective of whether it is the Crown or the Defence who wish to access her records. Legal aid should automatically be made available to complainers in these circumstances, on a non means tested basis.

*The full text of lord Glennie's decision can be seen at **http://tiny.cc/i5le9x**

Medical Records: A Survivor's Story

My name is Sarah. I live in the north-east of Scotland. I am a mother. I am a rape survivor.

In May 2011 Adrian Ruddock, was convicted at the High Court in Aberdeen and sentenced to 8 years imprisonment - with an extended sentence of three years - for attacking me.

This is about my journey through the justice system as a survivor of rape - in particular, the way my medical records were obtained and used as evidence to prejudice the jury against me.

In the days that followed my rape, I struggled to cope mentally and emotionally. I didn't want to deal with it - I couldn't. The pain, the trauma, it consumed me. This culminated in me attempting to end my life. I slashed my wrists and took around 60 pills that were prescribed for the injuries Ruddock had inflicted upon me. My life was spared. I was admitted to A&E and given life-saving treatment. It was here, in my fragile mental state - still dazed, confused, traumatised, still bleeding from the tears when he ripped me open - that I was given a piece of paper to sign by police officers. It was a consent form for my medical records to be used as evidence. I wasn't given any legal advice, I wasn't even offered a choice. It was handed to me and I was to sign it. That was it. I was never told what this information would be used for. I was certainly never told that my rapist's QC - Ronald Renucci - would broadcast personal information from my childhood in court.

I tried to prepare myself in the months that followed for giving evidence. I made detailed notes - I filled notebooks with everything that could be asked of me in court. I was determined to be prepared for everything and anything. But I placated myself with the belief that

legislation would prevent my rapist's QC from attacking my character. I was wrong. Very wrong. Giving evidence can only be described as re-victimisation and secondary violation. In other words: being raped all over again.

I knew I would have to tell the court in chilling detail precisely how this man violated me, I knew the defence were going to paint me as some scorned temptress, I knew it was going to be difficult. I epitomise the old cliche of 'asking for it': I am the perfect imperfect rape victim. I was drunk. I was wearing a short skirt. I knew the man who attacked me. I willingly, albeit under false pretenses, went back to his home. I knew Renucci was going to have a field day. But nothing prepared me - or rather, no one prepared me - for the fact that my previous mental health records were going to be scrutinised in front of a courtroom full of strangers.
While cross examining, or as I prefer - bullying me, Renucci asked something that shocked me. It shocked me more

than his accusations that I wanted to be raped and torn open by his client. He asked me if I had ever self-harmed in the past. I was confused. I was angry. I didn't understand. When I was a young teenager - around 13-years old - I was bullied at high school. I was depressed. I resorted to self-harm to deal with my pain. I had only confided this detail to a school psychologist, maybe my doctor. I hadn't even told my own mother. But here, at the trial of my rapist - some seven or more years later - this incredibly personal information was broadcast to all - journalists, the jury, the judge, and worst of all, the man who only five months prior had repeatedly raped me. I am sure he could see the colour drain from my face, I am sure everyone could. My heart felt like it had a thousand anchors pulling it to the ground. I wasn't prepared for this. All those hours of taking notes and I didn't see this coming. I was completely blindsided.

I looked around, desperate for someone to save me, to help me, to see that this was not right. But it was in vain. I proclaimed something along the lines of, "do I have to answer that!?". The judge, Lord Bracadale, told me that I did. He told me that only the prosecution were allowed to object to a line of questioning. They didn't. So there, alone, I had to tell the world that when I was a little, bullied girl I cut myself to deal with the pain. Normally in life when someone is verbally attacking you and your identity and character you can walk away. You can ignore them. You can leave the room. I couldn't do this. I had to answer my bully's questions. I had to tell this complete stranger, who was over twice my age, all this personal information. It was around this time I shouted at Renucci - asking him how he could do this to people, how he could ask me these things, how he could sleep at night. Bracadale called for an early lunch.

I was so traumatised that I didn't want to go back into the courtroom. I told staff that I was running away. I was told I had no choice - a warrant for my arrest would be issued otherwise. It sounds cliched, but I truly did feel like I was on trial - I was on trial for being raped. The next day, the newspapers had the latest scoop on the story. On page four of the Press and Journal it was there in black and white:

"She admitted, under cross-examination by defence advocate Ronnie Renucci, that she had previously received treatment for depression and anxiety and had self-harmed before."
The world now knew, not just those in the court room, that I had self harmed as a child. Remember, I hadn't even told my mother. I had a lot of difficult conversations to have at a time when my sole concern should have been my own wellbeing. At this point, my mental health had deteriorated to a point where I was hospitalised as an inpatient at a psychiatric unit. I had been diagnosed with post traumatic stress disorder. But here I was, sitting at the payphone in the hallway of my hospital ward, trying to explain to my mother that I did trust her and that I was sorry I didn't confide in her when I was younger.

At the time of writing this, it has been 910 days since I gave evidence. I have had a lot of time in the past two and a half years to go over what happened to me. I've had a lot of time to think about everything, to put things in perspective, to get answers. But there is one particular question that looms over my head and disturbs me.

Why were my mental health records brought up in court that day?
I have a few ideas. None positive. I have deduced that Renucci decided to play on the public's prejudices regarding mental health, in the hope that someone in the jury falsely believed that because

someone had suffered from depression, they were likely to lie about being raped seven years later. He wanted to tarnish me, to question my credibility. Don't get me wrong, I'm smart enough to know that it's a defence QC's job to question a survivor's credibility and I understand that is their job, but I have yet to see any research of any kind that links depression, anxiety and self-harm to lying about rape. But Renucci knew that the public still has prejudices against people with mental health issues. He knew they still believed myths. He knew there is still, sadly, a massive stigma against those who suffer from ill mental health. So he played that card, he clutched that straw - heck, it was one of the only ones he had.

My rapist was convicted after a majority verdict. I will never know how many of those jurors thought that I was lying. I will never know what their reasons were, but in my mind it's clear: it's at least in part because of those medical records. I may be wrong, but that's truly what I believe. This was, in the prosecution's eye, a very strong case: I ran away from his home half naked in the snow; immediately after I left people heard me say, "help me, I have been raped"; his neighbour heard my screams; there was blood all over his flat; I had bruises covering my entire body; I had painful vaginal tearing; forensic scientists even showed how my tights had been ripped off, and how much force was used. It was 'open and shut'. But someone still didn't believe me.

The government has recognised that the length of woman's a skirt doesn't mitigate a rapist's culpability, they have recognised that a survivor's past sexual history isn't relevant, so why isn't it recognising that a survivor's mental health shouldn't be fodder for the defence? My rapist had a lengthy criminal record - including a custodial sentence for carrying a loaded firearm. The jury was not allowed to hear about that. They weren't allowed to be told that he used an alias because he was a convicted drug dealer. This was because it could prejudice the jury against him. As soon as he was arrested he had access to legal representation that gave him guidance on everything - what to say in interviews and court, what procedures to consent to, even what to wear in court. I was given no legal advice. I wasn't afforded the same - any - privileges he was in court regarding my previous character. I was not just a witness or an exhibit in that court room - regardless of how the court viewed me - I was a victim and I was fighting for my life and I was fighting for the lives of other women he may attack if he was not found guilty.

Deep down I know that if Ruddock had merely physically assaulted me, mugged me or committed some other non-sexual crime, then these questions would not have been asked. That's what kills me: that because his assault involved my vagina, people will find any reason to make me culpable and the court, at present, is allowing that. The court and the government, by allowing medical record evidence to be introduced, are actually endorsing the idea that survivors who are unlucky enough to be blighted by ill mental health are responsible. They are agreeing that women who have suffered from psychiatric issues are liars. You're breaking my heart. Because I love this country and I have great respect for our justice system, but I can't support this. I can't stand by idly while this continues.

My self harm and depression from my childhood had absolutely no bearing on the pain and violation that he inflicted upon me, repeatedly, in the early hours of the 16th of December, 2010.
So why was it brought up? Why didn't the judge or the prosecution intervene? Why

did no one help me or say 'stop'? It keeps me awake at night knowing that women will choose not to report their rape for the fear that their private medical records will be broadcast to the world. It kills me to know that other women are being re-victimised in court in this way; that rapists are walking free today because survivors' irrelevant mental health records are being used to falsely paint them as unstable liars. My experience is not unique: since my assault, I have spoken to countless survivors who have experienced the same thing. It's not right. It's not fair. It cannot continue. Something has to change.

Sarah Lauren Scott

Image opposite:
Justice, by Sir Edward Burne-Jones
Photo by Fr Lawrence Lew O.P.
reproduced under Creative Commons

RAPE CRISIS SCOTLAND

Interview with Michael Matheson

Sandy Brindley interviewed Michael Matheson, the Cabinet Secretary for Justice on 12th January 2016.

I wanted to ask you firstly what your views are on the proposals within the Evidence and Procedure Review.

There is a range of really important issues that have been highlighted in the review which make a compelling case for further reform within our justice system. There is some further work that's being undertaken at the present moment and I'll wait to see what the final recommendations are. But there are areas where I'm keen to see further progress particularly around victims and witnesses, and also around areas involving children and vulnerable witnesses. There's a significant level of progress that we can make in actually improving how our justice system deals with some of these individuals when they are moving through our criminal justice system. For example, if we look at the approach that's taken for children who can find themselves, even with protected measures in place, subject to cross-examinations within our courts. There are systems being used in other parts of the world that can prevent children from ever being put through that type of very difficult and challenging set of circumstances. In Australia, England and in Scandinavia they have a different approach, and I'm very keen to look at how we can make progress in these areas, while protecting the integrity of the justice process and the right to an individual having a fair trial but at the same time also affording greater protection to vulnerable individuals. And I don't think it's beyond our ability to look at taking forward some of the issues that come from the review that could help to facilitate that type of more enlightened approach to how we deal with some of the more vulnerable individuals that end

up finding themselves within our court system.

And do you know what the timescales are?

It should be at its final stages so I would expect something in the coming weeks rather than months around what their final recommendations are. There's clearly then going to have to be a lot of work taken forward off the back of that and there's also the pending Scottish Parliament elections. But one of the areas I've clearly got in mind is around victims and witnesses and in particular around children and vulnerable individuals and how we can better protect them from the adversarial nature of our justice system while at the same time also protecting the right to the accused having a fair trial. And experience in other jurisdictions would say that both of those issues can be effectively balanced and I'm very keen to make sure that they look at making progress on these issues.

And do you think the proposals are necessary?

I do. I think it is not acceptable that

children should be subject to cross-examination in particular cases and we should be able to find a mechanism in order to prevent that from happening given the particular trauma that that can cause for them. Especially if it relates to matters around abuse and how it can be extremely challenging for them in the way in which they may find themselves being cross-examined. We need to look at experience in other jurisdictions and look at how we can learn from them and how we can apply that to our justice system in a way that helps to modernise it while at the same time also delivering a fair justice system.

Lord Carloway made some comments in a recent appeal judgement around the role of the judge intervening to protect complainers from unduly harassing or aggressive cross-examination. Can you say more about what you think the role of the judge could or should be in these circumstances to protect complainers?

I think it's clear that the new Lord President has a view that the judiciary have to take a much more active role in looking at when they should be intervening in the course of a trial in order to protect a witness. And I would certainly wish to encourage that. And from the government's perspective, I very open to working with the judiciary and how we can help to effect that as best possible.

And what about the role of the Crown Office in protecting campaigners or witnesses? Is there any comments you'd want to make on that?

From the Crown's point of view, over a number of years now, they have been much more proactive in helping to try and address the needs of witnesses and the accused. As you'll be aware one of the things which we're undertaking is a review of the operation of the Section 274 and 275 (provisions on restrictions on evidence relating to sexual offences) to see how that's being applied, how the Crown Office are making use of that, to wait and see whether there are ways in which we can build on that, improve on it. And I know that the Lord Advocate and the Solicitor General are very keen to make sure that the Crown continue to reform and improve the way in which they're working with witnesses and the accused. We need to make sure that the progress that has been made is built upon.

And what is happening with the review? Has that started?

Yes. One of the first parts of the review is the data collection across the Procurator Fiscal service, and that process has already started.

And does that include looking at medical and sensitive records as well as sexual history and character?

It's both. What we want to do is to find out exactly how often this is occurring for a better understanding of the approach that the Crown's taking when it does occur and what the outcomes from these issues are so that we can then come to an informed decision about whether there are further measures that we then have to take forward.

One of the things that Rape Crisis Scotland has called for is access to independent legal representation for complainers where there is a privacy issue around sexual history or medical records. Do you have any views on that?

This is an issue that was considered at the time we were looking at the Criminal Justice Bill as it was put forward by an

amendment, and it would be a new innovation within our criminal justice system in Scotland in bringing in a third party into court proceedings in these ways. As I set out to the Justice Committee and to Parliament in this issue we are looking at how Section 274 and 275 are applying and how they are being used by the Crown Office. Once we've completed that we can then come to a decision on whether we need to take any further measures in this particular field. And I'm keen at this stage as to wait to see what the outcome of that is before we come to any judgement on whether there are further measures that we need to take forward.

There's a further appeal case recently – HM Advocate versus SSM - where the issue of rape within a relationship seemed to not be taken seriously and where comments were made by the trial judge about victim acquiescing in her own rape. I know you won't be able to talk about individual cases, but in general is there anything you think the government can or should do to help change attitudes within the judicial system?

We need to make sure that our justice system collectively is dealing with these cases in as serious a way as they should do. I think there are areas where the judiciary are keen to improve their own training and understanding in these matters as well through the Judicial Studies Institute. It's also about making sure that we have prosecutors who have got the right expertise - we've now got specialist prosecutors for sexual offences cases. Alongside that with Police Scotland we've got national units who from an investigations point of view have a tremendous amount of expertise in this particular field.

I wanted to ask you about forensic examinations. Rape Crisis Scotland has a referral protocol with Police Scotland where all reports of rape and serious sexual offences of persons aged over sixteen are referred to our helpline and as part of that we've got a feedback process that seeks survivors' views. And one of the things we ask is how they found the forensic examination. We've been hearing really negative feedback about people's experience of the forensic examination immediately after a rape or sexual assault. And it's particularly around the lack of female doctors, about how distressing that can be, having such an intimate examination straight after a sexual offence by a male doctor. The right to request a certain gender of examiner is set out in the Victim and Witnesses Act, but that's not been implemented yet. What are the government's plans in this area?

We've already implemented a range of parts of the Victims and Witnesses Act and there're still further areas that we have to implement and this is one of them. It's important that when we implement various parts of the legislation that we ensure that we've got the provisions in place in order to meet the needs of victims of crime in particular and this is an area where I know we've got some work to do to ensure that we have the right provision in place in order to meet that commitment once it's implemented. As a government we're completely committed to implementing all aspects of the legislation. And that work is being taken forward at the present moment. Once we know what further work is necessary in order to make sure that victims get access to the right medical examiner, we'll then look at how we can then implement that provision within the legislation. So there is no lack of commitment on our part to make sure that this provision will come into force.

What I want to do is to make sure that I can be assured that for those women who may ask for a female doctor that we have female doctors available for them.

As you know, the requirement in Scots law for corroboration has a disproportionate effect on crimes primarily experienced by women such as rape and domestic abuse. Only a small proportion of rapes reported to the police ever make it to court. Can you say what the government's plans are in relation to the corroboration requirement?

I've made it very clear that I see the issues of corroboration as being unfinished business. Following the review that was undertaken by Lord Bonomy there's a range of recommendations which we have said we will look at taking forward, which were all around post-abolition of corroboration and the safeguards that need to be put in place. One of the most significant of those was around jury research, to understand some of the issues around juries. In taking forward the recommendations set out by Lord Bonomy I think we can then reasonably put a case that we should now look at abolishing corroboration because that's what the recommendations for Lord Bonomy were intended to assist in achieving.

The jury research leads us into a few different areas, whether it is jury majorities, the size of the jury, the three verdicts. Once we've completed that process we can then revisit this issue and in that sense that's why we view this matter as being an issue of unfinished business.

My final question is about attitudes. You mentioned earlier the bill which is looking to introduce judicial directions in sexual offences which we really strongly welcome. More broadly, jury members are obviously drawn from the Scottish public and we know from research that at least some of them are likely to hold attitudes which blame women for rape in certain circumstances.

Yes.

Does the government have any plans in addition to judicial directions to think more broadly about how to change public attitudes in Scotland to rape?

I very much welcome your support for the legislation and in particular the jury directions, which is an innovation within our court system. I think they're extremely important in helping us to make sure that our justice system can continue to innovate and improve in the way in which it deals with these types of offences. They will be an important contribution to assisting particularly with sexual offences cases and in particular rape cases, while at the same time giving the judiciary sufficient flexibility on the form of the direction which they give. The other part will be the outcomes that we get from the jury research which will assist us much more in understanding the decision making that can go on in juries and some of the issues that we need to consider that may arise from that. And the third area is to continue to make sure that we're making progress in tackling the whole issue of domestic and sexual violence, and that's about taking forward our Equally Safe strategy and making sure that that's been implemented as effectively as possible. And to make sure that we're continuing to provide support to the victims of these crimes. The additional £20 million that we're putting in to support organisations that work in area of domestic and sexual violence and the way in which the additional £1.85 million

that we provided to Rape Crisis Scotland and others to help to extend the range of services that they can provide I think are extremely important. Along with that we need to continue to make sure that we are sending out a very strong message about not tolerating these types of offences, with robust policing and an on-going campaign to inform people about these issues. We also want to make sure that victims have the confidence in reporting these matters and them being thoroughly investigated and prosecuted.

So I think there's a combination of different things we need to do in this area through legislative change, providing financial support and also in making sure that partners are working collectively together in order to make sure that we are pursuing these types of offences as robustly as we can, while providing the right level of support and assistance to individuals who may find themselves being a victim of these types of offences.

Criminal Justice statistics 2014-15

Rapes & Attempted rapes reported: 1,901*

Rapes & Attempted rapes prosecuted: 270**

Convictions for Rape and Attempted rape: 125**

[Sources:
***Recorded Crime in Scotland 2014-15:**

www.gov.scot/Resource/0048/00484776.pdf

****Criminal Proceedings in Scotland 2014-15:**

www.gov.scot/Resource/0049/00494474.pdf]

Scottish Women's Rights Centre

The Scottish Women's Rights Centre is a new and innovative project developed by Rape Crisis Scotland, the Legal Services Agency and the University of Strathclyde Law Clinic.

Launched on 22nd April 2015 by Paul Wheelhouse MSP, the service went live that afternoon offering a free, weekly legal advice line for women who have or are experiencing gender based violence. Since its launch, the SWRC has employed a full time solicitor and developed its services to include two free weekly surgeries* offering legal information, advice and representation. Referrals to the SWRC Solicitor can be made through the legal helpline, via statutory and voluntary agencies and by individual women survivors who contact directly. Often initial contacts are dealt with on the helpline, with follow on appointments by arrangement or at surgeries; ensuring that the Solicitor represents in cases which target unmet legal need, and are feasible within the resources available.

The SWRC has three overarching objectives: to ensure that women are fully aware of their rights and are supported to exercise these rights; that they are properly supported to maximise their own safety and the safety of their children (if any), and; that they are able to make informed choices as to their involvement with the criminal or civil justice system. In addition to the provision of advice and information, the SWRC also has a wider training and policy remit and, as part of this is producing guides and FAQs relating to the legal rights of women. The SWRC solicitor is available to provide free advice to other professionals working in the field to increase their skills and awareness when working with women who have been affected by gender based violence. It is also planned to develop a network of pro-bono solicitors to offer drop in services in rape crisis centres across Scotland.

The SWRC offers free training, in order to raise awareness and provide a practitioner and legal insight into policy and practice on barriers to justice as well

Scottish Women's Rights Centre

as good practice for the delivery of legal advice to women who have experienced gender based violence.

The SWRC is funded by Foundation Scotland until 2017 and by the Scottish Legal Aid Board until Sept 2016.

***Free legal surgeries - How to get in touch**

The **Glasgow surgery** is based in Glasgow Rape Crisis Centre working in partnership with the Support to Report project: The Glasgow surgery runs on Mondays 10am – 1pm. Tel: 0141 552 3201 for an appointment.

The **Lanarkshire surgery** is based in the Lanarkshire Rape Crisis Centre working in partnership with the North & South Lanarkshire Violence Against Women Partnerships. The Lanarkshire surgery runs on Thursdays 10am – 1pm. Tel: 01698 527 006 for an appointment.

Katy Mathieson, Coordinator, Scottish Women's Rights Centre

Interview with Jennifer Dalziel

Jennifer Dalziel is a solicitor employed by the Legal Services Agency for the Scottish Women's Rights Centre. In an interview with Rape Crisis Scotland, she spoke about her new role and what the Centre's work involves

Could you give a bit of background about yourself and your work?

I've actually taken a bit of a change in the direction of my career in this role. The first part of my career I trained at DLA Piper, which is a commercial law firm and was qualified there for about 7 years. But I've always had an interest in working with more vulnerable clients, and while I was at DLA, I did some pro-bono work with the University of Strathclyde Law Clinic. Also, when I was at university, I did quite a lot of work with organisations that focus more on women's rights from an educational perspective – they did a lot of work with helping women set up their own businesses. So I came into this role because I had a general interest in it. It looked like a really interesting development. The work that I am doing now is still a lot of litigation, so the skills that I gained by being a commercial litigator have been really helpful because I know the court process very well.

Why do you think the Scottish Women's Rights Centre's been established? Would you describe it as a unique or important development, and if so, why do you think that is?

I think it's an important development for a few different reasons. One of them is the context that it sits in - a collaboration between the Legal Services Agency, Rape Crisis Scotland and the University of Strathclyde Law Clinic. That partnership with Rape Crisis is really helpful because it allows us to provide legal advice in a very gender sensitive fashion. It allows me to make sure that I am providing advice in the right kind of way, as well as picking up on the right kinds of issues. So I think that is quite

Interview with Jennifer Dalziel

unique and is important.

Also, the fact that it's fully funded, at the moment, so that I am not constrained - a lot of solicitors who are working under Legal Aid have a level of constraint on the amount of time they can spend on something. For a vulnerable client, that can be difficult. Also, solicitors who are working in a civil perspective can't get Legal Aid payments in order to provide advice about the criminal justice system because complainers aren't entitled to their own solicitor in that process. There's no independent legal representation, and while I can't represent somebody within a criminal process, I can provide information and advice about the process and about why certain things are happening.

What kind of preparation did you get here in terms of helping this particular client group, and undertaking this kind of work?

When I started, there was a lot of shadowing and I went with Kirsty, who heads up the department that I sit in within LSA, to appointments, went on the helpline with her. I spoke, as well, with Katy Mathieson (SWRC Coordinator), about her experiences so I could build up that knowledge before I actually started taking meetings myself. Also, we have the advisory group which is really helpful.

Your work for the Scottish Women's Rights Centre involves quite a range of different activities. Could you say a bit more about each of these & describe a bit about what's involved?

It's quite a varied working week, which is good. The two surgeries, in Glasgow, and in Hamilton are by appointment.

There's quite a wide variety of issues. A lot of it is information and advice – questions about the criminal justice system.

Those are the surgeries, and there is support provided as well, by Rape Crisis. To have that support available immediately after the appointment is very, very good and I've had a number of occasions where it's really been needed. Not with everybody - a lot of women are now, maybe, out of the situation of domestic abuse or sexual or other abuse, but sometimes that immediate support with somebody who's trained to support properly on the emotional level, it's great.

Has there been a good uptake on the surgeries?

It varies a lot from week to week. At the moment we still don't have mainstream

publicity. We have a website that is about to go live, shortly, and I think, once that's out there it'll raise the awareness. Referrals have been coming through agencies – so it's through the police, through Citizen's Advice, through ASSIST, Women's Aid, maybe through social work, to a degree, and through people phoning LSA for advice, or Rape Crisis. The helpline calls tend to be quite long and involved, so where it's 7 or 8 calls, that does take up the full helpline hours, and often there'll be some follow-up work to be done on protective orders, child contact, benefit, debt, access or with an immigration status.

Is most of the information given over the phone or face-to-face, verbally?

I would say almost always, with surgery appointments, I will follow up with an email and with bullet points of what we talked about and what I'm going to do. If, for example, somebody's coming to me about contact and residence and whether or not she should go ahead with the court action, I will provide a note on what the process is and the pros and cons. I do find as well, for certain clients, it's helpful for them to have a support worker present with them, who can then take in that information but doesn't have the same emotional investment, so they're able then to be there, hear what I'm saying, and usefully talk to them about it later on.

Did you have any preconceptions about what your input might involve? To what extent has your experience matched those?

I don't think I really knew what to expect. I've actually found it - 'easier' is maybe not the right word, but more comfortable than I thought I would. A lot of the time, it is just going through their story, helping them to separate it out into different legal issues, answering what I can, and when I don't know, I tell them. Women aren't phoning and expecting immediate answers. I think they're happy to know that you're checking to give them the right answer.

What about representation in court?

I've got two cases where I've appeared in court and I have another three or four that are almost at that point. What I've dealt with so far has been contact, residence, protective orders and I think that will be the majority because from a civil perspective, that's where the representation is required.

There must be something, both about working for an organisation at its early stages like this, and also being there at what can be ground-breaking moments….

It's really interesting - as well as doing the surgeries and appointments and casework and representation, through the queries we get data that we collect to try to identify where things could do with changing, and to work out ways to try and do that - if it can be done judicially in any way – either through judicial review in the right circumstances, or through human rights challenge.

What's the uptake been so far, on the Scottish Women's Rights Centre?

I still have some capacity at the moment and I have, very recently, taken on quite a few new clients. So with the staffing of the helplines and the surgeries, and the representation and advice/information as well, my capacity is going to be used up shortly.

What kinds of issues are women contacting the centre with? I know that there are two main aspects to inquiries in terms of nature of abuse/ experience

and legal remedies available.

When women contact the centre, they don't really contact with a specific legal issue. So I usually go through their story with them; part of that is the nature of the abuse and then we can move on to the legal remedies available. So it's the nature of abuse, but also mixed with their other circumstances – do they have children? Do they own a property with their partner or former partner? Do they have debts? Are they working? Has the abuse affected their right to work? Is there anybody else involved that can assist in any way? I talk to them about support workers and offer access to that as well. I also talk to them about their safety – are there criminal proceedings? Are there bail conditions? I'll talk to them, as part of that, about reporting to the police if they've not done that, and if they have done that, I'll talk to them about the criminal justice process – and if they are still in the criminal justice process but, for example, there's a trial, shortly, I'll talk to them about how much they know from the procurator fiscal about likelihood of conviction. I'll also talk to them about whether or not they've spoken to the procurator fiscal about getting a non-harassment order in criminal proceedings. If they have been told whether there's any risk that that won't happen, then I'll speak to them about the civil protective orders they can get and the process of that. If they have children, I'll talk to them about contact and residence, what the father's rights are, whether or not somebody is registered as a father, and what the risks are there, about their rights to go to court to seek orders, but also about his rights to do so, and what their response to that would be. Just trying to give them as much information, based on what they've told me about their story – about the different legal remedies available.

Many of the issues involved in these cases, are not something women would necessarily know anything about unless they are directly affected. For example the accessing of medical records is something that many people are just not aware of. What would you say are the main challenges involved in offering a service like this?

One of the main challenges is probably women knowing when to contact a solicitor - sometimes, a woman even identifying that she has a legal issue. What we want to do to help combat that is, with the website, have information and guides available. Those guides will be tailored so that they're accessible to somebody who doesn't have a legal background.

And if they don't get an answer from what they've got online, then they can then contact the helpline or the surgeries. Another issue is that women are often in a very vulnerable state. Talking about a lot of these issues is very difficult, and we're trying to provide legal advice in a context where there's support available. As much as I can provide information and advice, it's not my decision how a criminal process proceeds – you're very reliant on how the procurator fiscal is dealing with things. You're reliant on how the police are dealing with things - maybe there's social work involvement, maybe there's medical involvement - there's a wide range of people involved that you're reliant on in certain situations.

Development of the guides sounds interesting. Could you say a bit more about that?

As well as providing the guides to women, we're aiming to provide guides to professionals – so that for other solicitors who work in that area there is a resource to help them understand issues in relation to violence against women.

Also, I think we want to have a guide available on how to choose and instruct a solicitor. I find that a lot of women have never had to use a solicitor before – so advice on how to go about finding one using the Law Society website, the Family Law Association, asking about whether they do Legal Aid work, information around instructing that solicitor, so that they can find out about the complaints process and understand what questions to ask.

What about the support that's available to women using the Scottish Women's Rights Centre? How does that work?

Rape Crisis support workers are available at surgeries for support, immediately after an appointment with me, and that has been used on a number of occasions. Sometimes we're providing advice to women who would not fall within the Rape Crisis remit because they've not experienced sexual violence of any sort. But support can still be provided and referrals on to other support organisations such as Women's Aid or whoever would be most appropriate.

We can also do referrals to the National Rape Crisis Helpline, so that support is available at night for example. So that's been very helpful. There are also situations where I think that it would be helpful for Rape Crisis to provide some input, then I'll ask for consent to speak to somebody at Rape Crisis about the situation.

The advocacy workers for Rape Crisis have just gone into post, and already I've been working very closely with them; there was a national training day earlier in February which I spoke at.

And for you, personally, what has it meant to do this work?

It's been a big change in career for me, but I think it's an important area. Until I came into this area, I didn't appreciate how victims' rights were dealt with within the criminal justice process, and that's been really interesting to find out about and to see that there is obviously, a need for support within that process. Also, I think, to feel that I'm able to use the skills I've been lucky enough to get through my education and legal training to help people who are in a more vulnerable position is something that I'm really happy to be doing.

Any learning points or things you'd like to see developed?

In terms of the centre, we're obviously very new at the moment, so we're still trying to work out if our processes are right, if our surgery provision is right.

At the moment we've got surgeries in Hamilton and Glasgow but it's not only women in Glasgow and Lanarkshire that need assistance – we'd like to widen those, but with me being the only solicitor, at the moment, there's not really capacity to do that. At the moment, we provide the helpline on a Wednesday afternoon – there are plans from 1st March to put in place a Tuesday evening helpline to improve access and capacity.

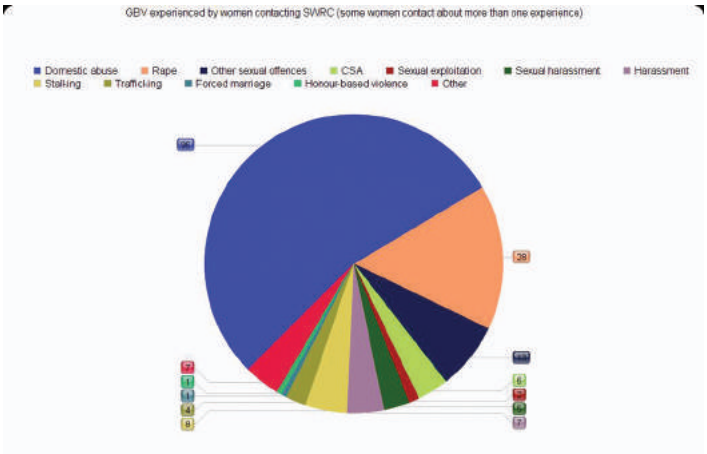
What, in more general terms, do you feel needs to change in order to improve women's access to justice?

At the moment, I do think women feel, within the criminal justice system, like there's nobody speaking for them. I think with the organisations involved, a good job's been done and the PF are doing a good job, and they do understand the issues, but their duties don't always coincide with what a woman wants to happen. Independent legal representation within certain aspects of the criminal

Interview with Jennifer Dalziel

justice system might improve things. So, for example, with medical records and if the defence seeks access to those, or on cross examination, if somebody is there and able to object to certain questions being asked. So maybe somebody there to take instruction, and to understand. But I appreciate that the adversarial nature of our criminal justice process could make it difficult.

Within the criminal process, the standard of proof - beyond reasonable doubt - is higher than in a civil court, and evidence needs to be corroborated, which isn't the case in the civil courts. So even without a conviction of an offence that would allow a sheriff to grant a non-harassment order, one might be granted in the civil courts. Sometimes after sentencing - for perfectly valid reasons in a lot of situations - no non-harassment order is granted, but then a woman can see a solicitor to get one put in place in the civil process. There will necessarily be a gap at this point because there sometimes has to be an application for Legal Aid - information has to be taken by the solicitor who's going to do the civil application, which means a court hearing – and although that can happen fairly quickly, it's unlikely to take less than a week. So there is a gap, and that can be dangerous in some situations. If some kind of interim arrangement was possible – if a sheriff was able to say, within a criminal process, 'no, we can't get a non-harassment order', could there be something worked out?' that's something that could help, though it would have to be looked at to see how that could work.



Scottish Women's Rights Centre

Victims & Witnesses (scotland) Act

VICTIMS AND WITNESSES (SCOTLAND) ACT 2014

Background

The Victims and Witnesses (Scotland) Act 2014 aims to improve the information and support available to victims and witnesses of crime, and to place certain elements of EU Directive 2012/29/EU – widely known as the Victims' Rights Directive - onto a statutory basis.

The Act received Royal Assent on 17 January 2014 and the Scottish Government has since been working with organisations across the justice sector to bring the various measures within it into force.

Key provisions and implementation progress

A phased approach to implementation has been taken, reflecting the different levels of preparatory work involved in the various changes being made, but victims and witnesses are now benefitting from many of the measures in the Act.

From 13 August 2014, alleged victims of sexual offences, domestic abuse, human trafficking and stalking have had the right to specify the gender of their police interviewer, recognising that this can make what is often a very stressful experience less traumatic. There are some exceptions to this – for example, if doing so would risk harming a criminal investigation – but requests are met wherever possible.

On 30 January 2015, a duty was placed on certain criminal justice organisations – the Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service, Police Scotland, Scottish Prison Service, and Parole Board for Scotland – to develop and publish standards of service for victims and witnesses. These standards (https://www.mygov.scot/victim-witness-rights/standards-of-service-for-victims-and-witnesses/) provide clarity to victims and witnesses as to what to expect from each organisation as they pass through the criminal justice system. More recently, on 1 July 2015, a duty was placed on the Lord Advocate to make and publish rules about the process for reviewing a decision not to prosecute, on the request of an alleged victim of a particular offence. These rules have been published by the Crown Office and Procurator Fiscal Service (http://www.crownoffice.gov.uk/publications/victims-and-witnesses) and set out the process by which individuals can seek a review of a decision not to take action in a particular case, or to stop or discontinue a case.

Perhaps the most significant change made during 2015, however, is the commencement on 1 September of various improvements to the support available for vulnerable witnesses.

Measures to assist vulnerable witnesses when giving evidence – called "special measures" – have been available in the High and sheriff courts for some time. The most commonly used special measures include a screen to prevent the witness seeing the accused, a supporter to accompany the witness, and giving evidence via live TV link from outwith the courtroom.

The Act makes a number of changes to widen the availability of special measures and to ensure that vulnerable individuals have access to the support they need.

A presumption of vulnerability has been introduced for witnesses who are alleged victims of sexual offences, domestic abuse, human trafficking and stalking. This means that such individuals have automatic eligibility to use certain special measures – screens, supporters, and TV links. This automatic eligibility also applies to child witnesses, and the Act raises the age at which this definition

applies from under 16 to under 18.

For those who are not automatically eligible, applications for special measures must be made and assessed against certain criteria for vulnerability. The Act ensures that an individual assessment of every witness is carried out. This is done by the person citing that witness, and is aimed at identifying any vulnerabilities and considering the use of appropriate special measures, taking into account the views of the individual. It also widens access to special measures to cases where the court considers there to be a significant risk of harm to a person only as a result of them giving evidence. Finally, the Act creates a new special measure of a closed court (i.e. excluding the public), which is available at the discretion of the court.

The Scottish Government has also, as of 23 December 2015, extended the availability of special measures to the Justice of the Peace courts.
Other measures in the Act which are already in force include:

- new rights to access case-specific information, such as the reason for decisions not to proceed with a criminal investigation;
- the ability for victims to make oral representations to the Parole Board about the release of prisoners serving sentences of life imprisonment; and
- new rights for victims to make written representations to the Scottish Prison Service about the temporary release of prisoners.

Ongoing work

Implementation of the Act is not yet complete, with some provisions requiring more preparatory work before they can be commenced in an effective manner.
For example, building on the rights of certain alleged victims to specify the gender of their police interviewer, the Act makes provision for alleged victims of sexual offences to request a particular gender of medical practitioner if a forensic medical examination is required.
Before this provision can be made available, however, it is vital to ensure that such requests can be met in practice. Work is underway to progress this under the Equally Safe Strategy (http://www.gov.scot/Publications/2014/06/7483). The Justice Expert Group, on which Rape Crisis Scotland is represented, have commissioned a Sub-Group to look at this area and report back with recommendations.

Recent developments and the Victims' Code for Scotland

In order to further strengthen Scotland's compliance with the Victims' Rights Directive, the Scottish Government recently brought forward a set of regulations to place various rights of victims, many of which were already delivered in practice, onto a statutory basis through amendments to the Victims and Witnesses Act.
These include, for example, the right to information about the release of offenders serving less than 18 months imprisonment (complementing the existing Victim Notification Scheme), the right to interpretation and translation, and the right to written acknowledgements of reports made to the police.
The regulations, which came into force on 23 December 2015, also introduce the Victims' Code for Scotland. The Code sets out, clearly and in one place, the rights and support available to victims in Scotland.

Graham Ackerman

The **Victims' Code for Scotland** is available at https://www.mygov.scot/victims-code-for-scotland/.

National Advocacy Project

Rape Crisis Scotland has secured funding from the Scottish Government to establish a National Advocacy Project to provide support to survivors of sexual violence who have engaged, or are considering engaging, with the criminal justice system following a sexual offence.

Every rape crisis centre in Scotland, along with the Domestic Abuse & Sexual Assault Team in West Lothian, has a dedicated Support & Advocacy Worker to provide support and advocacy throughout the criminal justice process.

The aims of the project are to:

- improve the support available to victims of rape and serious sexual crime;
- improve the experience of the criminal justice process for victims of rape and serious sexual crime; and
- develop a better understanding of motivations to proceed or not to proceed within the criminal justice process and what difference advocacy support makes to this decision

The project is being externally evaluated by the Scottish Centre for Crime and Justice Research. The funding for the project runs until March 2018.

Links & Resources

Information & help after rape & sexual assault: http://tiny.cc/lrdg9x

Evidence and Procedure Review: http://tiny.cc/45uj9x

Recorded Crime in Scotland 2014-15:
http://www.gov.scot/Resource/0048/00484776.pdf

Criminal Proceedings in Scotland 2014-15:
http://www.gov.scot/Resource/0049/00494474.pdf

Judicial Review judgement: http://tiny.cc/i5le9x

Scottish Women's Rights Centre :
https://www.facebook.com/scottishwomensrightscentre/

Independent legal representation for complainers in sexual offence trials: a research report: http://tiny.cc/ggdg9x

Disclosure of records and privacy rights in rape cases: http://tiny.cc/y9cg9x

Sensitive & personal records: information for victims of sexual crimes:
http://tiny.cc/c7cg9x

Scottish Government action to support Victims & Witnesses:
http://www.gov.scot/Topics/Justice/policies/victims-witnesses

Rape Crisis Scotland, Tara House, 46 Bath Street, Glasgow G2 1HG
www.rapecrisisscotland.org.uk
Email: info@rapecrisisscotland.org.uk
Helpline 08088 01 03 02 (Every day, 6pm to Midnight)