

Justice Committee

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Written submission from Rape Crisis Scotland

Rape Crisis Scotland welcomes the opportunity to provide evidence on the role and purpose of the Crown Office and Procurator Fiscal Service.

Introduction

1. Since the review of the investigation and prosecutions of sexual offences in 2006, significant changes have been made to how sexual offences are prosecuted in Scotland. There is now a specialist team of dedicated prosecutors in the National Sexual Crimes Unit who prosecute all High Court sexual offence cases. An Expert Advisory Group on Sexual Crime has been established by the Crown Office, which Rape Crisis Scotland and Children First are represented on. We have also had successive law officers who have publicly stated their commitment to improving the prosecution of sexual offences. Although we outline in our evidence issues and concerns raised by complainers about their experience of the prosecution process, Rape Crisis Scotland would like to acknowledge the significant dedication and skills amongst many COPFS staff in prosecuting this often complex area of crime.

Communication with complainers

2. One of the most common concerns raised by complainers we are supporting is the lack of information about the progress of their case. The previous Solicitor General undertook a comprehensive Victims Review which considered, amongst other issues, the question of communication with complainers. We look forward to hearing the outcome of this review. Keeping complainers informed and updated is a key means of reducing distress and uncertainty, and minimising the possibility of victim withdrawal from the prosecution process. Our experience is that more needs to be done in this area.

3. There has been some recent criticism by the Faculty of Advocates that the Crown is too close to complainers / victims. This is not borne out by our experience. It used to be the case the rape complainers would go into court to give potentially very difficult and traumatic evidence and not know which lawyer was the prosecutor and which was the defence. This is not the way to secure best evidence, and returning to this would be a seriously retrograde step.

Decisions to prosecute & delays in cases proceeding

4. It remains the case that the majority of rapes reported to the police do not make it to court. In 2014-15, 1,901 rapes and attempted rapes were reported to the police, 270 rapes and attempted rapes were prosecuted and there were 125 convictions. We need much better data relating to rape and the justice process, and better information about the reasons for cases not proceeding. The most

common explanation, however, which complainers we are in contact with are given for cases not being prosecuted is lack of corroboration.

5. Rape complainers report to us that they are experiencing significant delays in finding out if their cases will proceed to court, particularly in prepetition cases. Survivors tell us that they are going significant periods of time without communication from COPFS and are unaware of what is happening with their cases. This is particularly difficult for survivors where the case is prepetition, where there are no bail conditions in place. Complainers often think that their case has been dropped, and may be unaware that the accused has been charged or that enquires are ongoing.

Privacy issues – use of sexual history and character evidence and access to complainers' sensitive records

6. There are long standing concerns about the use of sexual history and character evidence in sexual offence trials. The most recent evaluation of the provisions in place in Scotland to restrict evidence of this nature took place 10 years ago, and found that a significant amount of sexual history and character evidence was still being admitted. A summary of the key findings of the evaluation is here: tiny.cc/jcc2fy

7. We do not have a clear picture of the current situation. Following concern about the use of complainers' medical records in rape and abuse trials, the Scottish Government undertook a data counting exercise in the first 3 months of 2016. They found that during this period there were 57 applications to lead sexual history or character evidence in trials in Scottish courts. 51 of these applications were unopposed. 43 were granted in full, and 5 in part. On the face of it, the very low level of opposition to these applications, and their high success rate, is worrying, but we need proper research to analyse what type of applications are being made and approved. We need to know whether or not the law is protecting rape complainers in the way the Scottish Parliament intended when they passed the legislation. There is a clear need to commission an up to date evaluation of the provisions in the Sexual Offences (Procedure and Evidence) (Scotland) 2002 Act.

8. In a recent judicial review¹, Lord Glennie found that access to a complainer's sensitive records represented a significant breach of privacy, and that complainers should have a right to be told when the person she has accused of abuse makes application for her records and a right to be heard on that application.

9. In our experience, these records are frequently 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 subject to scrutiny acts as a direct deterrent to complainers reporting what has happened to them to the police. Where they do

¹ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=2af906a7-8980-69d2-b500-ff0000d74aa7>

report it, it can add considerably to the trauma and sense of violation experienced by them.

10. Clear rules need to be put in place governing access to medical or other sensitive records. A complainant 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. In cases where it is the Crown who wish access to a complainant's medical or other sensitive records, we consider that complainants should be signposted to the Scottish Women's Rights Centre or other legal advice.

The trial

11. It remains the case that rape complainants continue to speak of giving evidence in rape trials as being a violating and traumatic experience. While we acknowledge that evidence needs to be tested, and that giving evidence of this nature is always going to be difficult, we consider that more can be done to alleviate any unnecessary distress caused to the complainant. The proposals in the Evidence & Procedure Review provide a very encouraging outline of how to improve the process of obtaining evidence from children and other vulnerable witnesses, and we are very much in support of the approach being recommended.

12. In the meantime, however, we consider that more can be done to protect complainants giving evidence in rape trials. Everyone in the courtroom, in our view, has a responsibility to ensure that complainants are not subjected to unnecessarily bullying or harassing questioning. The Lord President has made a number of comments in recent judgements² about the need to protect complainants from inappropriate questioning. While the judiciary clearly have a responsibility to intervene if questioning becomes inappropriate, in our view at times the Crown could take a more proactive role in protecting rape complainants in court.

Rape Crisis Scotland
19 October 2016

² for example see http://www.heraldscotland.com/news/13582843.Judge_calls_stop_to_prolonged_questioning_of_rape_victims_in_court_after_woman_called_malicious_vindictive_liar/ for coverage of the Dreghorn case