1. Introduction
Rape Crisis Scotland welcomes the opportunity to comment on the Victim and Witnesses (Scotland) Bill, which in broad terms we support. We consider that the Bill contains a number of positive developments which, if approved, will have a positive impact on the experience of victims and witnesses within the criminal justice system.

2. Special measures

2.1 Rape Crisis Scotland is very supportive of the move to make access to special measures an automatic right for complainers of sexual offences. When the Vulnerable Witnesses (Scotland) Act, which introduced the legal provision for special measures in Scottish courts, was going through Parliament we pressed for complainers of sexual offences to have automatic rather than discretionary entitlement to special measures.

The particular trauma associated with giving evidence in sexual offence trials is well documented. Survivors in contact with rape crisis centres in Scotland frequently describe the experience as akin to being ‘raped again’ by the system they believed would protect them.

The Youth Evidence and Criminal Justice Act 1999 in England and Wales recognised the particular trauma associated with giving evidence in sexual offence trials by classing complainants in these cases as automatically vulnerable and therefore eligible for special measures.

Giving evidence in a sexual offence trial will always be a traumatic experience. The Scottish criminal justice system does, however, have a responsibility to reduce the additional trauma caused by the system as far as possible. Giving an automatic right to special measures for complainers in sexual offence trials would be a significant start in addressing this.

2.2 Under the current discretionary approach to special measures, adult complainers of sexual offences do not know whether they have any access to special measures until a few weeks before the trial. This significantly increases the uncertainly complainers experience during the often lengthy wait for a trial to proceed.

The prospect of giving evidence of such a potentially distressing and intimate nature can cause considerable trauma to survivors of sexual violence. This trauma is heightened by the criminal justice process itself. It can take up to 18 months for a case to reach court.
One of the major concerns of survivors contacting rape crisis centres who are going through the criminal justice process is the uncertainty around what is happening, and what their rights will be in court.

2.3 A further benefit of moving towards automatic entitlement is that support agencies such as rape crisis centres will be able to be clear with survivors considering reporting their experience to the police what their rights will be. Knowing that, for example, they will have access to a screen and will not need to see the accused in court might make the different between someone feeling able to report or not.

2.4 It is important to note that the provisions in the Bill would create an automatic right – it will still be for complainers to decide whether or not they wish to utilise this right. Some complainers may not wish to use special measures such as screens and this should be respected.

2.5 We note that for the first time the Bill makes clearing the public gallery a special measure. This already happens as a matter of course in sexual offence trials during the complainer’s evidence, and we would be keen to ensure that the process of making this subject to a special measures application does not make this any less certain.

3. Compensation orders

We have some concerns about the appropriateness of applying compensation orders in sexual offence cases. In our experience, what complainers are looking for is access to justice, and the imposition of a sentence which reflects the gravity of the crime committed against them. They are not looking for money from their rapist or abuser. We cannot speak on behalf of every rape or sexual abuse survivor; it may be there may be some survivors who would be open to receiving financial compensation from their attacker. In our experience however many would not. It would be impossible for any judge or sheriff to arrive a sum (particularly where a means tested sum) which would represent for a survivor a fair representation of what they have suffered. Any sum is likely to seem derisory in the face of this.

4. Gender of interviewer

4.1 Rape Crisis Scotland welcomes the acknowledgement in the bill that complainers of sexual offences should have a right to choose the gender of the person interviewing them. This choice should be extended to cover forensic examinations. There is extensive research demonstrating that both female and male survivors of sexual offences prefer female doctors to carry out this examination. In many areas of Scotland, it continues to be the case that survivors have no choice over the sex of who carries out what can be a very intimate and distressing exam, which is often carried out in the hours immediately following a rape or sexual assault. One of the most common complaints we hear from survivors is about how distressing it can be to be examined by a male doctor immediately following an experience of sexual violence.
4.2 If it is acknowledged that complainers of sexual offences have a legitimate preference to be interviewed by a female police officer, it is hard to see why this should not also be extended to cover what is a very personal and intimate examination carried out in extremely difficult circumstances.

4.3 As responsibility for forensic services will be moving to the NHS in the near future, the NHS will be responsible for delivering justice services and should therefore be included in the relevant provisions of the bill.

5. Issues not covered by the Bill

5.1 Right to review of decision not to prosecute

The EU directive provides that victims should have a right to request a review of the decision not to prosecute their case. This provision is not included in the bill as it currently stands. We consider that it is important to amend the bill to include provision of a clear and transparent review process where someone has been informed that their case is not being prosecuted. Victims need to be informed that they have this right, and be clear about what the process and timescales will be. Rape is a crime which can take a lot of courage to report, and it can be devastating for survivors to be informed that the case is not going to court. This is particularly common in sexual offence cases: Crown Office figures suggest only a quarter of reported rapes reach court. Complainers in Scotland should have the right, as laid out in the EU directive, to request a review of this decision.

5.2 Right of victims to participate effectively in criminal justice proceedings

It is difficult to see how this principle as set out in the bill can be meaningful for complainers of sexual offences unless they have access to legal representation. This is particularly the case in areas such as sexual history and character applications and access to medical and other sensitive records. Currently, complainers are informed about applications to introduce evidence relating to their sexual history or character but they do not have a right to actively participate in this process i.e. to challenge any application. While the Crown has the right to oppose any defence application to introduce evidence relating to the complainant’s sexual history or character, they are not acting directly on behalf of the complainant and may not oppose an application which the complainant would have wished to be challenged. Similarly, access to medical and other sensitive records is increasingly an issue which survivors are raising with us as one which causes them significant concern. Although the Crown Office seeks consent from complainers prior to accessing their medical or sensitive records, complainers have no access to legal advice to help inform their response. Consent in these circumstances is not, in our view, either meaningful or freely given, as if complainers do not give their consent there may either be no prosecution or the Crown may seek a warrant to obtain the records irrespective of the views of the complainant. One survivor described her consent in these circumstances as ‘forcible consent’; she did not feel she had any option. In our view this is not consistent with victims having the right to participate...
effectively in criminal proceedings. The prospect of having their personal lives subject to scrutiny in this way acts as a direct deterrent to rape survivors reporting what has happened to them to the police, and where they do report it can add considerably to the trauma and sense of violation experienced within the justice process. We believe that for complainers of sexual offences to have any real prospect of protecting their private and family life, as set out in article 8 of the European Convention on Human Rights, they must have access to independent legal representation, funded by Legal Aid, for matters relating to sexual history and character evidence and access to medical records.

5.3 Right to see a female medical examiner
See point 4 above.

5.4 Judicial directions in sexual offence cases

The Scottish Government has committed (in its election manifesto) to introducing judicial directions in sexual offence cases, to give factual information to jury members on delayed disclosure and apparent lack of physical resistance. Reactions to rape can be counter-intuitive; many survivors freeze and are unable to fight back, meaning that there is frequently little or no significant injury. It is common for survivors not to tell anyone about the assault immediately – it may take hours, days, weeks or even years for someone to feel able to disclose what has happened to them. Many jury members will, however, be completely unaware of this and may have strong views to the contrary: in our experience people can hold strong views on what they would or would not do if they were raped, which can influence their judgement of what others should do. Providing factual information to jury members through the introduction of judicial directions could help address concerns about lack of information or attitudinal issues affecting jury deliberations in rape trials. This bill would seem to be an appropriate place to consider introducing these judicial directions.

Conclusion

Rape Crisis Scotland supports the introduction of the Victim and Witnesses (Scotland) Bill and the principles behind it. There is much in the bill which is worthy of support, and which could make a genuine difference. We consider, however, that it provides a crucial opportunity to look more radically at how we can improve both the experience of the justice system for complainers and their ability to access justice.

Sandy Brindley
National Co-ordinator
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