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## Chapter 16

# CHALLENGES IN THE INVESTIGATION AND PROSECUTION OF RAPE AND SERIOUS SEXUAL OFFENCES IN SCOTLAND

Michele Burman and Sandy Brindley

### **Abstract**

In the context of increased attention paid to sexual violence by governments across the UK jurisdictions, the response of the criminal justice system in dealing with rape and serious sexual offences, and its impact upon those reporting these offences, continues to be subject to scrutiny. Of particular concern are high rates of attrition, low conviction rates, the prevalence of rape myths and the marginalisation of those who report. This chapter focuses on particular challenges posed for the investigation and prosecution of rape and serious sexual offences. Drawing on the Scottish experience, it highlights the ways in which evidential challenges posed by corroboration and the admissibility of personal records, combine with procedural issues such as delays and uncertainties in the progression of cases to impact negatively on the ability of those reporting rape to give their ‘best evidence’.

### **Introduction**

In the context of increased attention paid to sexual violence by governments across the UK jurisdictions, the response of the criminal justice system, and its impact upon those reporting rape continues to be subject to scrutiny. This chapter draws on recent developments and ongoing debates in Scotland, in order to highlight practical and evidential challenges posed for the investigation and prosecution of rape. Like other UK jurisdictions, Scotland has seen a raft of reform in this area, but concerns remain about high rates of attrition, very low conviction rates, the

prevalence of rape myths and the marginalisation of those who report sexual offences. Particular consideration is given to the challenges faced by victim-survivors in the investigation, prosecution and trial processes, and the value and importance of advocacy services to assist victim-survivors in giving their ‘best evidence’ is highlighted. The chapter draws on the testimony of victim-survivors and from the experiences of Rape Crisis Scotland to propose ways in which these challenges may be ameliorated, and points towards some key survivor-led initiatives which, encouragingly, have gained some political traction in Scotland.

### **Rising numbers of reports**

In contrast to other types of recorded crimes in Scotland, which have steadily fallen since 2007-08, numbers of sexual crimes recorded have increased year on year. Currently accounting for five percent of all recorded crime, sexual crimes have been on an upward trend since the mid 1970’s, increasing by eight percent from 12,487 in 2017-18 to 13,547 in 2018-19. Sexual crime in Scotland is now at the highest level since 1971, the first year for which broadly comparable crime groups are available (Scottish Government, 2019). Rape and attempted rape constitute 18 percent of sexual crimes, sexual assault constitutes 38 percent, and other sexual crimes, which include sexual exposure, public indecency and cyber-enabled sexual crimes constitute forty-three percent. Numbers of rapes and attempted rapes have more than doubled (increasing by 115 percent overall) between 2010-11 and 2018-19 (Scottish Government, 2019).

Various reasons have been proposed for these rises, ranging from increased reporting due to improved confidence in the police, to greater media coverage. The Scottish Government has long acknowledged under reporting and positioned tackling rape as a national priority. Police Scotland

prioritises rape within Scottish policing, signalled by the establishment of a National Rape Task Force and dedicated specialist Rape Investigation Units. Scotland's prosecution service, the Crown Office and Procurator Fiscal Service's (COPFS) introduced changes to the way rape and other sexual offences are prosecuted, with a shift towards specialisation, seen most clearly in the establishment of a national Sexual Crimes Unit, heralded as a means of improving the conviction rate. There have also been legislative and procedural changes, a key one being the introduction of the Sexual Offences Act (Scotland) Act 2009 which, in its creation of an entirely new set of statutory sexual offences, amended an unsatisfactory mixture of common law and statutory provision seen as outdated, inconsistent and problematic.<sup>1</sup> The Act broadened the definition of rape to include penile penetration of the mouth and anus, enabling male rape victims to be recognised for the first time. With rape no longer gender-specific, victims can be of either sex, although the retention of a gendered definition of perpetration – penile penetration – means that only a male can commit rape. The widened definition has accounted for some increase in reported rapes, but nevertheless, the vast majority of those who report rape are women (Police Scotland, 2020).

Sexual offences are considered 'core' business for Scotland's prosecution service, constituting around 75 percent of overall COPFS High Court workload. Yet securing convictions is challenging and the process for those seeking justice still experienced as traumatic (Brooks-Hay et al, 2019). The high rate of attrition (the process whereby cases drop out of the criminal justice system at any point) and the low conviction rate remain a source of concern. To put this in some context, in 2018-9, there were 2,426 rapes and attempted rapes recorded by the police but only 324 prosecutions and 152 convictions. The conviction rate for rape/attempted rape has been the lowest of all crimes

in each of the last ten years; in 2018-19 it was 46.9 percent as opposed to an average of 87 percent conviction rate for all crimes and offences (Scottish Government, 2019).

Other key concerns relate to ‘secondary victimisation’ (Adler, 1987; Kelly et al, 2005), experienced as a result of the trauma of the investigation, prosecution and court room processes, and compounded by a lack of coordinated service provision to victim-survivors (Brooks-Hay et al, 2019). These concerns reveal a challenging landscape for the pursuit of safe and effective routes to justice for victim-survivors of rape and sexual assault.

Despite significant increases in the numbers reporting rape, only around half of those in contact with rape crisis services in Scotland reported to the police (Rape Crisis Scotland, 2019a). Reasons given include: fear of not being believed or being blamed for what happened; not feeling strong enough to go through police and legal procedures; fear of aspects of their private lives being brought up, and; fear of what would happen in court, especially during cross-examination by the defence. Scottish research with rape survivors suggests that these are legitimate and enduring fears (Brooks-Hay et al, 2019).

## **Prosecuting Sexual Crime: Evidential Challenges**

Scotland has an adversarial legal system in which COPFS is responsible for investigating and prosecuting crime. Following a report of rape, the police carry out initial investigations and submit a report to the local prosecutor, known as the Procurator Fiscal (PF), who decides whether to prosecute and/or investigate further. Following a review of the evidence, the PF reports with recommendations to senior prosecutors (Crown Counsel), who make the final decision about

charging and prosecution. COPFS are responsible for providing information to victim-survivors about whether or not the case will proceed. This a crucial time for maintaining victim-survivor engagement and confidence, but one in which there can be long periods of silence with victim-survivors not knowing what is happening with ‘their’ case (Brooks-Hay et al, 2019).

The challenges of successfully prosecuting sexual offences are not unique to Scotland, though there is little doubt that Scotland’s low conviction rate for rape reflects, in part, the demanding evidential requirements to prove this crime. Corroboration is a distinctive feature of Scots criminal law, requiring that, to find the accused guilty there must be two separate sources of evidence that (a) the crime charged was committed, and (b) the accused was responsible for committing it (Gordon, 1993). Corroboration is a significant hurdle to overcome, impacting most acutely on offences that occur in private, a feature of many sexual crimes since there are rarely any witnesses to what occurred. Under the corroboration rule evidence from victim-survivors alone, no matter how strong and credible, is not legally sufficient and additional evidence is required. Without independent corroboration, cases will not meet a sufficiency of evidence to proceed.

A thematic review of the investigation and prosecution of sexual crime undertaken by HM Inspectorate of Prosecution identified several problematic issues, including poor standards of communication from COPFS and considerable delays in case progression. It also highlighted concerns with ‘floating trial’ diets, where a trial is due to start within a specific period (usually two weeks) but has not been allocated to any particular High Court; this can result in significant uncertainty regarding where a trial might take place. As such, disengagement of victim-survivors

during the lengthy investigation or subsequent court proceedings is not uncommon (HM Inspectorate of Prosecution in Scotland, 2017).

## **Going to Court**

As part of the review, the Inspectorate held focus groups with victim-survivors. Their experiences of court in particular were overwhelmingly negative:

‘I was not prepared... it was the most degrading and terrifying thing.’  
‘In our court system, you are totally humiliated. It was the most degrading experience I have been through’.  
‘Court was absolutely horrendous, it was worse than being raped.’  
(HM Inspectorate of Prosecution in Scotland, 2017)

Research tracing the journey of victim-survivors through the criminal justice system highlighted related concerns about the trial process (Brooks-Hay et al, 2019). Questioning by the prosecution and the defence was experienced as extremely challenging, especially that which demanded discussion of intimate matters, and questioning about past sexual behaviour to challenge credibility or suggest a propensity to consent (Brooks-Hay et al, 2019: 25). ‘Sexual history’ evidence is rooted in the so-called ‘twin myths’ that: a) complainants who have previously consented to sexual activity are more likely to consent in future, and b) that complainants with more extensive sexual histories are less credible witnesses (McGlynn, 2017). In relation to consent, adducing sexual history evidence relies on an assumption that previous consent is indicative of consent on the occasion in question. Such a rationale profoundly challenges the notion of consent being person and situation specific.

Character evidence is often implied by innuendo, references to lifestyles, personal habits, dress and demeanour (Burman et al, 2007; Burman, 2009; Ellison, 2009; Ellison et al, 2015) as well as medical and psychiatric evidence, previous allegations of rape, alcohol or drug use, dishonesty, and maintaining contact with the accused after the alleged offence. It can be more nebulous than specific instances of sexual history, making it more difficult to control or deny (McGlynn, 2017). In practice, evidence implying sexual character invites moral judgments about complainers, with the risk of influencing determinations as to their credibility and responsibility.

The elicitation and use of sexual history and sexual character evidence is highly contentious; its potential for undermining policy aims of encouraging reports has long been recognised, as has its likely impact on the perception of juries, and its consequences in terms of trial outcomes (Kelly et al, 2006). Key questions concern the relevance, admissibility and potential prejudicial effects of such evidence. Since the early 1970s several jurisdictions, including Scotland, have enacted ‘rape shield’ legislation, designed to curtail the use of questioning and evidence about the past sexual history and/or sexual character of the complainer in sexual offence trials. Whilst such laws have varied in scope and procedural detail, they share a broadly similar set of legislative intentions, which are to: restrict the extent to which details of the complainer’s past sexual activities and sexual character (or reputation) can be disclosed to the jury; protect complainers from unnecessary humiliation and distress when giving evidence, and; challenge or bring to an end the presumption of admissibility of such evidence (Burman, 2009).

Scotland has made two legislative attempts at restricting the use of sexual history and character evidence, in 1986<sup>2</sup> and in 2002.<sup>3</sup> Both are considered ineffective, with prohibited evidence being



introduced in the trial despite applications to do so being refused, as well as evidence being introduced in the absence of an application (Brown et al, 1993; Burman et al, 2007). Despite well-intentioned reform, there is little doubt that legal practice weakens reform intent such that the court room remains a key site of secondary victimisation. Whilst there has been no recent comprehensive research on the use of rape shield legislation in Scotland, victim-survivors and support organisations continue to report the use of such evidence to challenge statements of non-consent and attack credibility (Brooks-Hay et al, 2019). There have however been some encouraging appeal judgements concerning the use of past sexual history evidence with the accused. *LL v HMA*<sup>4</sup> concerned a rape case in which consent was alleged. An application was made to introduce sexual evidence on the basis that the appellant and complainer had consensual sex three years previously. Whilst not opposed by the Crown, this was refused by the judge. On appeal, the three-judge appeal bench viewed the probative value of allowing the evidence to be slight in relation to the offence charged and refused the appeal, stating: ‘We simply do not see why free agreement (to sex) on one occasion ... makes it more or less likely that there was free agreement ..... on another occasion many months later.’

In common with other UK jurisdictions, complainers in sexual offences are mere witnesses in the case and, unlike the accused, have no legal representation. Prosecution is in the public interest and many victim-survivors receive limited information about the nature of the adversarial process. Brooks-Hay et al. found a stark disparity between victim-survivors’ expectations of the prosecutor’s role, and their actual experiences. Many believed that the prosecution was supposed to ‘win their case’, be ‘on their side’, and provide them with support in preparation for giving evidence, and so felt ‘let down’ and unprepared for the trial situation (Brooks-Hay et al, 2019: 23).

With regard to giving evidence in court, the inability to ‘tell their story’ was a recurring theme. This was linked to having a lack of control over proceedings; a theme that runs through victim-survivor accounts from the point of reporting onwards but is felt acutely at court since the trial often represents the forum where they could finally stand up and ‘say their piece’ (Brooks-Hay et al. 2019).

Rape trials in Scotland are held ‘in camera’, with public benches cleared during the complainer’s evidence, so few people see what actually happens over the course of the trial. However, appeal cases give some insight into the conduct of at least some cases. In *Dreghorn v HM Advocate*<sup>5</sup> the defence counsel was heavily criticised for his approach to cross examination in a sexual offence case. His questioning began with:

Defence: You are a wicked, deceitful, malicious, vindictive liar

Complainer: No, I’m not

Defence: And you have been for the last twenty years?

Complainer: No, I have not

Defence: Because you’ve been trying to get (the appellant) into trouble for the last twenty years?

Complainer: No. I have not.

Defence: And this is your last hurrah?

In *Donegan v HMA*,<sup>6</sup> the judge was heavily criticised for making ‘wholly inappropriate comments’ and criticised for failing to intervene when defence counsel carried out ‘lengthy, unjustified and sometimes insulting cross-examination’, including questions about the complainer ‘taking up with another man’ weeks after the attack. The judge said:

It was clear from the transcripts of the evidence at trial that the complainer, who was in the witness box for three days, was subjected to a lengthy, unjustified and sometimes insulting cross-examination on issues which included her delay in

reporting the offence, the reasons for that, her varying accounts as to what occurred and her failure to shout out or seek help from others during the attack.

She went on to describe the questioning from the defence advocate as ‘derogatory and insulting’, and she was surprised that there was no objection from the Crown. She also stated:

Moreover, rather than being tempered by the bench, the experience for the witness was merely prolonged further by the inquisitorial nature of the trial judge’s own questioning, which in some instances took the form of cross examination in itself.

It is encouraging to see such strong condemnation from the appeal bench but worrying that complainers continue to feel (at times with justification) that no one is protecting them in court.

In Scotland, rape cases are always prosecuted in the High Court presided over by a judge with a fifteen-person jury, rather than the more typical twelve. Other serious sexual offences are prosecuted either in the High Court, or the Sheriff Court before a Sheriff and fifteen-person jury. Verdicts are returned by a simple majority (eight out of fifteen jurors, rather than requiring unanimity or near unanimity). Scotland has three verdicts – guilty, not guilty and not proven. This third verdict, unique to Scots law, has long been controversial. It has the same legal outcome as the not guilty verdict, meaning an acquittal with no legal consequences for the accused. Not proven is used disproportionately in rape cases. In 2017-18, just 43.3 percent of rape and attempted rape cases resulted in convictions, the lowest rate for any type of crime. Thirty-five percent of acquittals were not proven, compared with 17 percent for all crimes and offences.

The not proven verdict is viewed sceptically, with some suggesting that it allows guilty individuals an extra chance of acquittal (Curley et al, 2019). In addition to being seen as confusing, the verdict

has also been said to undermine the presumption of innocence principle, suggesting that the Scottish three-verdict system breaks Article 6 of the European Convention on Human Rights (Curley et al, 2019). As discussed later, removing the not proven verdict is the focus of a joint campaign between a rape survivor and Rape Crisis Scotland.

There is evidence that juries can be reluctant to convict in rape cases, and that preconceived notions of how someone should react to rape may impact on their decision making (Ellison and Munro 2008). Recent research with mock juries in Scotland (Ormston et al, 2019) suggests that removing the not proven verdict might incline more jurors towards a guilty verdict in finely balanced trials. The research also suggests that reducing jury size from 15 to 12 might lead to more individual jurors switching their position towards the majority view and asking juries to reach a unanimous or near unanimous verdict might tilt more jurors in favour of acquittal. This research has opened dialogue around the future of jury trials, and the Scottish Government are considering these findings in consultation with a range of stakeholders across the country.

### **Obtaining ‘best evidence’**

Significant problems remain with the ways in which victim-survivors are treated in court, despite a raft of reforms to improve the process of giving evidence, including the use of special measures such as screens, giving of evidence via a live television link and having a supporter present, as introduced under the Vulnerable Witnesses (Scotland) Act 2004. The current way of obtaining evidence from vulnerable witnesses, the definition of which includes rape complainants, does not provide the conditions to obtain ‘best evidence’. In 2015, the Scottish Courts and Tribunal Service undertook a review of evidence and procedure which raised concerns about significant time gaps

between the reporting of incident/s and trial: ‘Given the reasonable assumption that memory alters and fades over time, there must be questions about whether the evidence of witnesses at trial is genuinely the best that could be available’ (Scottish Courts and Tribunals Service, 2015). The review also identified that the manner in which evidence is currently obtained is not likely to elicit the most *accurate* evidence:

Thirty plus years of empirical research in the UK and other common law jurisdictions has shown again and again that conventional cross examination is more likely to confuse and mislead the very vulnerable than draw out accurate and reliable evidence.

There is undoubtedly a need for greater certainty about when rape complainers will be required to give their evidence and where they will give it. There is also a need to rethink the approach to taking and testing of their evidence. One key development is the piloting of video-recording of the giving of police statements in cases of rape and attempted rape, with a view to this potentially being used as evidence-in-chief. The prosecution could then apply to the Court for cross examination to take place on commission (i.e. outside the court setting), meaning that complainers may not need to attend court at all. The pilot, which went live in November 2019 has the potential to make a significant difference to complainers’ experience of the justice process (Leask, 2019).

## **The value of advocacy services**

Within an adversarial context, victim-survivors find themselves in the midst, but not in control of, what can be a protracted and bewildering process, whilst managing the demands of their everyday life and a range of other issues resulting from related abuse (e.g. health, housing and personal safety) (see also McMullan, this volume). These concerns provide both the background and the impetus for the development of advocacy services to assist and empower victim-survivors in their

interactions with criminal justice, health and other agencies (Bybee and Sullivan, 2002; Daly, 2011). The first advocacy services in relation to rape and serious sexual assault in Scotland were implemented in 2013 with the piloting of the ‘Support to Report’ service in Glasgow (Brooks et al, 2015). Thereafter, advocacy services were extended to form the Rape Crisis Scotland National Advocacy Project, operating from 15 hubs across Scotland following positive feedback from victim-survivors who were supported through the initial pilot services and who were overwhelmingly positive about the support that they had received, describing it as ‘invaluable’ and ‘life-changing’ (Brooks and Burman, 2017). The most valued features of advocacy were described as: the extensive range of support provided within an ethos of victim-survivor-led empowerment; the flexibility, reliability and consistency of support, and; the provision of information to assist understanding of developments in both individual cases and the criminal justice system more generally (Brooks and Burman, 2017).

### **Use of personal records**

The past decade has seen an increasing focus on the use of complainer’s personal medical records, psychiatric records and/or social work records, as well as the use of digital evidence from computers and mobile phones. Disclosure of material which might reasonably be considered capable of undermining the prosecution case is required to be made available to the defence under disclosure obligations. It should be important to ensure that all information is really required, to avoid needless scrutiny of personal lives. Yet, disclosure and use of sensitive records frequently turn on links being asserted between a complainer’s mental health and her credibility and reliability. At times the bar for relevance appears very low: *HM Advocate v Ronald (No1)*<sup>7</sup> set out

that evidence relating to a complainer's mental health did not require to relate to a recognised medical condition to be considered relevant.

In 2016 a rape complainer sought a judicial review of the decision by Scottish Ministers to refuse her application for legal aid on the basis that they did not consider that she had any right to appear at any hearing where a decision was made about whether the defence could access her medical records. She had been served with legal papers saying her alleged abuser wanted access to all of her medical and psychiatric records, but was informed that - unlike in England and Wales - there was at the time no provision in Scotland for legal aid to be granted to enable her to oppose this. Her application to Scottish Ministers, who have the discretion to grant legal aid, to enable her to oppose the recovery of her personal records was refused.<sup>8</sup> This judicial review was significant in its impact, as it found that: a complainer has a *right* to be told when the person she has accused of assault makes application for her records; and has a *right* to be heard on that application, and moreover complainers are entitled to apply for legal aid to be represented at any hearing on an opposed application. Rape Crisis Scotland (2016) stated that it was:

[a] very significant step in improving the protection of complainers' Article 8 right to privacy within the Scottish justice system. .... 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 report it, it can add considerably to the trauma and sense of violation experienced by them.

Unfortunately, there is a lack of clear process to realise the rights set out in this case; there is little point in complainers having a right if they are not informed of this right or assisted to realise it.

In *JC, Petitioner*,<sup>9</sup> the High Court of Justiciary heard a petition to the Nobile Officium (i.e. the power of equitable jurisdiction possessed by the Court of Session in cases where the law itself does not provide a clear remedy) against an order for the recovery of a rape complainer's medical records. This action, by the complainer, was unusual - a legal route of last resort. Significantly, the three-judge bench found that individuals have a right to appeal any decision to access their medical records. They quashed an order from the judge that all the complainer's medical records should be accessed by a solicitor to prepare a report for the defence. As such, the case raised important issues about: the protections available to complainers in relation to their Article 8 rights; the importance of a complainer's right to be heard in any decisions about their medical or sensitive records being accessed as part of a criminal prosecution; the need for a clear appeal process around any decisions to allow access to sensitive record, and the approach of the Crown (who took a neutral position in the original hearing which resulted in the order being made for all her records to be accessed). This case is likely to have a significant impact on the approach of the Crown, defence and the courts to applications to obtain complainers' sensitive records, particularly in relation to mental health related records.

### **Survivors speaking out**

Increasingly, victim-survivors are turning to other routes in their search for justice. In early 2019, Rape Crisis Scotland established a Survivor Reference Group, comprised of survivors of sexual crime who have engaged with the justice system. The Group published a report outlining their key concerns about the justice system and making recommendations for change (Rape Crisis Scotland, 2019a). Their concerns range from poor and unreliable communication from the prosecution, unpredictable and significant delays waiting for cases to come to court, to significant concerns about how they were treated whilst in court, reiterating the Inspectorate of Prosecution Report



(2017) and Brooks-Hay et al's research (2019), as discussed above. They described the process of seeking justice as being worse than the assault itself and as 'trapping them in a painful place for far longer than necessary'. Their recommendations include:

- Pre-recorded evidence being taken as close to incident as possible;
- Guaranteed availability of forensic specialists;
- Joined up, trauma-informed communication providing consistent, reliable and appropriate information;
- An end to unnecessary, administrative delays that trap survivors in limbo and negatively impact their health;
- Reform of the corroboration rule;
- Screening of juries for prejudicial attitudes which will impact the case;
- Mandatory training on sexual violence and trauma-informed practice for police, COPFS staff, sheriffs and judges;
- Review of bail conditions/restraining orders;
- A changed approach to cross examination to avoid hostile or insulting questioning;
- Greater awareness of Rape Crisis as lifesaving support.

To date, the Group have met the Cabinet Secretary for Justice, the Lord Advocate, and Scottish Government representatives to share their experiences of, and concerns about the justice process, and engaged in consultation around the development of sentencing guidelines for sexual offence cases. Levels of interest from victim-survivors in participating in the Group and demonstrates a significant desire to be involved in shaping improvements, and their feedback shows how powerful, and in some cases, healing, this engagement and activism can be (Rape Crisis Scotland, 2019b).

A recent campaign, by Speak Out Survivors (2019), aims to abolish the corroboration requirement in Scotland, and has received considerable media attention.<sup>10</sup> Another campaign - End Not Proven – has been undertaken jointly between a rape survivor, known as Miss M, and Rape Crisis Scotland. Following a not proven verdict in the criminal trial in 2015, Miss M successfully sued her rapist for damages in the civil courts.<sup>11</sup> This was the second civil damages case for rape in Scotland, and the first where there had been a criminal prosecution. In the first case in 2017, David Goodwillie and David Robertson were judged to have raped Denise Clair, who waived her anonymity. Her case did not reach court, with COPFS citing lack of corroboration as the reason.<sup>12</sup> Following her successful civil case, Miss M has vocally campaigned for the not proven verdict to be abolished, arguing that it enables juries to ‘hide behind’ the verdict (Rape Crisis Scotland, 2018).

### **What next for Scotland?**

Two forums have been established which have the potential to consider and push for change. The Victims’ Taskforce, chaired by the Cabinet Secretary for Justice and the Lord Advocate, comprises members of the legal profession, police and women’s organisations. A judicially-led review into the management of sexual offences is currently underway, led by the Lord Justice Clerk, which promises to take a ‘clean slate’ approach to considering how sexual offence cases should be handled within the Scottish legal system. One of the recommendations being considered is the establishment of specialist sexual crime courts, modelled to some extent on the existing domestic abuse courts in Scotland.

In a critique of legal interventions against sexual violence, Cowan (2019) argues that while efforts to reform the text of substantive law, as well as evidential and procedural aspects of law have been

largely successful in Scotland, in practice the impact of these reforms has not always been felt. The challenge for Scotland moving forward in improving justice responses to rape is to harness the undoubtedly genuine commitment to change expressed by politicians and the judiciary<sup>13</sup> to effect meaningful change to how rape complainers experience the justice process.

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<sup>1</sup> This is also the case in England and Wales (by virtue of the Sexual Offences Act 2003) and Northern Ireland (by virtue of the Sexual Offences (NI) Order 2008).

<sup>2</sup> Provisions restricting the admissibility of sexual history and character evidence were first introduced in Scotland in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s.36, which came into force in 1986.

<sup>3</sup> Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

<sup>4</sup> [2018] HJAC 35

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<sup>5</sup> [2015] HCJAC 69 HCA/2014/3408/XC

<sup>6</sup> [2019] HCJAC 10 HCA/2018/269/XC

<sup>7</sup> [2007] SCCR 451

<sup>8</sup> *WF for Judicial Review of a decision of the Scottish Ministers to refuse to make a determination for legal aid under section 4(2)(c) of the Legal Aid (Scotland) Act 1986* [2016] CSOH 27.

<sup>9</sup> [2018] HCA/2018/000013/XM

<sup>10</sup> Scotsman 'Rape victims launch bid to overhaul law which 'failed' them' 6th November 2018; BBC News 'Abuse survivor calls for end to corroboration' 3 April 2019.

<sup>11</sup> BBC News. 'Woman wins £80,000 in damages from man cleared of raping her in St Andrews' 5 October 2018.

<sup>12</sup> *DC v DG and DR* [2017] CSOH 5

<sup>13</sup> BBC News, 'Rape victims 'should not attend court' says Scotland's top judge' 1 May 2018; BBC News, 'Video aims to demystify justice system for rape survivors' 10 July 2019; Daily Record, 'Rape victims tell Justice Secretary of court ordeal and raise issue of 'not proven' verdict' 11th October 2019.