

## STATEMENT BY CHIEF EXECUTIVE OF RAPE CRISIS SCOTLAND

1. Rape Crisis Scotland welcomes the advances that are now being made to try and resume the business of the Scottish Courts, and in particular the steps now being taken to try to resume jury trials in Scotland. In this connection Rape Crisis welcomes the fact that the Justice Committee of the Scottish Parliament is to begin to hear evidence on this matter on 19 May 2020, and that Lord Justice Clerk's Jury Trial Working Group had its first meeting on 14 May 2020.
2. As Chief Executive of Rape Crisis Scotland, I wish to make a statement on the issue of the resumption of jury trials from the perspective of those who have experienced sexual crime.
3. Taking part in criminal proceedings brought against one's rapist or sexual offender is profoundly challenging for every victim/survivor. It is traumatic to be forced to relive the painful experiences from the past and to open them to more or less public scrutiny. It is recognised by all of those professionals who deal with these cases that proceedings should be concluded as soon as the administration of justice allows. The prerequisite of promptness of the proceedings is therefore an aspect of victim protection - ever more so in cases of heightened vulnerability of survivors of rape or domestic abuse.
4. It is in this context that I wish to express certain concerns about the resumption of jury trials. As a starting point, it is essential that the decision

to proceed with the resumption of jury trials would have to be made on the basis that an effective jury system can be put in place which;-

(a) is likely to avoid the risk of cases collapsing and complainers of sexual violence requiring to give evidence again and,

(b) will function at an effective level.

5. In relation to (a) - the risk of a case collapsing. I suggest that before approval is given to any new way of jury trials operating, there requires to be a body of evidence available that permits a conclusion to be reached on the level of risk of trial collapse. I suggest that the risk must be capable of being categorised as minimal in the prevailing circumstances of Covid 19. There are many factors that are relevant to this consideration, however, the most obvious would seem to be the potential impact on individual jury members of the concern that they may have about spending time in the company of others who may be infected with the virus, or who may be associating with others who are infected, where it is recognised that those carrying the virus may be symptom free. The more difficult it is to get jurors to attend, or to ensure that they continue to attend without becoming contagious, the more the risk of the case collapsing increases. If one juror is tested positive or acquires symptoms it is likely that all who have been in contact with that juror will have to isolate. This may well mean that any time a juror tests positive the whole case is abandoned. The more people involved with the process the greater this risk becomes.

6. In relation to (b) - the level of functionality is also a critical consideration. I say this because of the impact that delay in cases proceeding and concluding has on complainers of sexual crime. From my experience at

Rape Crisis Scotland I understand this has an intolerable impact - particularly on complainers of serious sexual crime - who are by their nature amongst the most vulnerable category of witnesses who come before the courts. I am sure this is well understood by all professionals who take part in these proceedings and I am supported in this by many scholarly articles and expert opinion on this subject. Any jury system proposed and approved of has to deliver a meaningful result in the sense that it is more than a token gesture and capable of providing a reasonable number of trials over a reasonable period of time.

7. If in fact there is no practical way of recommencing jury trials capable of functioning at meaningful and effective level, then it is only reasonable to suggest that some change has to be made to the way in which cases, particularly cases involving serious sexual offences, are conducted. The option of doing nothing is unacceptable and I therefore implore those involved in this process to consider other options alongside the current process that the Scottish Parliament and the Lord Justice Clerk's working group are concerned with. The UK signed the Istanbul Convention in 2012 to signal the UK's strong commitment to tackling violence against women and girls, and under Article 49 signatories to the Convention require to take the necessary legislative or other measures to ensure that judicial proceedings in relation to all forms of violence covered by the scope of the Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings. Further, Scotland has a positive procedural obligation inherent in Articles 3, & 8 in association with Article 13 of the ECHR to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. The prerequisite of promptness of the proceedings is an aspect of victim

protection and therefore, where no or an inadequate number of jury trials dealing with serious sexual offences are capable of proceeding on indictment, then I do suggest that the Scottish Government are obliged to consider a different way of proceeding consistent with their legal obligations.

8. In this context I also raise the the time requirements of the Convention on the Rights of the Child 1989 (United Nations) and the Beijing Rules. Lord Reed in the case ***HMA v P & SM* 2001 SLT 924** explained the consequences of prosecutorial delay and the particular impact this has on cases involving children. This must be seen to have a broader application to all child complainers and witnesses. Indeed, what he said at paragraph 12 of his judgment is of critical importance.

*“[12] Where a child of 13 is accused of committing a serious offence, it is plainly desirable that the child should be brought to trial (if criminal proceedings are considered appropriate) as quickly as is consistent with the proper preparation and consideration of the case. For a period of two years to elapse between the child's being charged with the offence and the child's being placed on trial has a number of undesirable consequences. Without attempting to list them exhaustively, the following may be mentioned. A child of 13 may be very different from the same child when he or she is 15 years old, both in terms of physical development and in terms of maturity and understanding. If the trial is to be held before a jury, as in the present case, the jury may have a very different impression if a 15 year old boy is in the dock, from the impression which they would have had if they had seen the same individual when he was 13. It may be much more difficult to assess the state of a child's understanding, when he was 13, of sexual matters and sexual relationships, if the child is not placed on trial,*

*and is not able to give evidence, until he is two years older. For the child himself (or herself), a period of two years awaiting trial will form a significant part of childhood, and more particularly of the period of secondary schooling, which cannot be compared with the significance of a two year period to an adult. If the 13 year old child is in fact guilty of an offence and requires the sort of reformatory measures which disposals in respect of child offenders are intended to include, then again it is undesirable that the initiation of such measures should be delayed by a period of years. Reverting to the aims of the “reasonable time” requirement, for a period of two years to elapse before justice is rendered in a case involving a child of 13 is for these reasons liable to jeopardise its effectiveness and credibility; and for the child to remain for that period in a state of uncertainty about his fate may have especially harmful consequences. I have mentioned matters which relate to the child accused, because such matters are particularly relevant in the context of art 6 (1); **it is scarcely necessary to add that prolonged delay in bringing a case to trial may also have seriously harmful effects upon a child complainer, especially (as in the present case) in a case of alleged rape.**”*

9. It is in this context that I note that within the submissions available online from both the Faculty of Advocates and the Law Society there has been no real analysis done and no valid or reasoned criticism advanced as to why a Judge sitting alone, or a panel of three Judges could not conduct cases of serious sexual crime prosecuted on indictment. Indeed, one of the most serious, complex, high profile and difficult solemn trials ever prosecuted under Scottish jurisdiction was conducted without a jury under the scrutiny of the lawyers and the international media, and no valid or reasoned criticism of the ability of the judges to perform the functions of assessment and analysis of evidence was raised. Further, no criticism has ever been

advanced institutionally of the work that Judges in the Court of Session have undertaken for centuries when they have adjudicated upon cases which involve all of the traditional assessments expected of jurors or of sheriffs who undertake summary work and regularly impose periods of imprisonment and take decisions based upon the credibility and reliability of witnesses.

10. I also note that no consideration has been given to the possibility of serious sexual crime cases being considered in a separate category and, that whilst jury trials may be able to proceed for other cases, sexual offence cases should be dealt with either by a single Judge or a three Judge panel reducing the particularly acute risks associated with the case collapsing and the profound trauma this would undoubtedly bring to the victims of serious sexual crime.
11. I therefore propose that in tandem to the work the Justice Committee and the Lord Justice Clerk's working group are undertaking in relation to considering the practicalities of recommencing trials by jury when lockdown restrictions are relaxed, consideration is also given to the way in which the prosecution of serious sexual crime can be accommodated within our system of justice that respects both the accused's and victim's rights during this global pandemic. Not to do so runs the real risk of the serious and important issues I responsibly raise are not properly addressed.
12. I would also wish to make one other short point. The issue of reduced jury sizes is a matter that is of some concern to Rape Crisis. There is a real quality of justice argument and possible ECHR issues. In this context, bearing in mind the case law and psychological analysis that comes from America where the Supreme Court has refused to authorise the

use of a 5 person jury it is an area that requires detailed and careful legal analysis. I understand this is one of the options proposed by the Scottish Government ( a jury of 7 with a majority of 5) and to some extent supported by the Law Society ( only in the Sheriff Court where they suggest 5 jurors) and the Faculty of Advocates.