

# **Review of Victim Care in the Justice Sector in Scotland**

by Dr Lesley Thomson, QC

## **Report and Recommendations**

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## Foreword by Lesley Thomson, QC

I served five years as Solicitor General for Scotland during a thirty year career as a prosecutor with the Crown Office and Procurator Fiscal Service (COPFS). I have spent a great deal of time speaking to victims of crime and bereaved families, listening to their experiences of the criminal justice system. No one could be unaffected by their stories and I have been humbled by the dignity and resilience shown by, often, ordinary people dealing with extraordinary events. Many have expressed frustration at their treatment and offered suggestions about improvements that can be made, to ease the strain caused by involvement in the criminal justice system. Accordingly, COPFS has worked with government, law enforcement and victim support agencies to seek improvement in the treatment of victims and the considerable changes which have taken place are documented in this report. But despite this, and despite the very best efforts of individuals and organisations working across the sector, the level of dissatisfaction reported by many victims about their experience with the criminal justice system remains high.

I commissioned this Review into the provision of services to victims in Scotland to explore what we could **aspire** to deliver in the support and care of victims in Scotland. This Review was a chance to capture the ills and failings; the ideas and ideals victims, families and support agencies have described to me. The Review report aims to provide a **voice** for those victims - to set a common agenda and ambition for service providers, and from victims of crimes themselves. I believe the necessary change must be influenced by those who have direct experience of the system; and that no single agency has the remit or resources to achieve this alone.

The context in Scotland is important: an adversarial system with a proud tradition of justice and the recent introduction of measures to ameliorate the impact of crime and the criminal justice system on those affected. Notably, we are on the brink of considerable system change as work commences to implement the recommendations of the Evidence and Procedure Review around the capture and presentation of evidence from victims and vulnerable witnesses. This presents an important opportunity to explore how the system changes anticipated in the Evidence and Procedure Review could accommodate - and be complemented by - better ways of supporting victims.

I consider it important that we explore, too, how other jurisdictions provide good victim care. This Review touches upon the various services and models to be found in other countries. In my view there is nothing 'off the shelf' for us in Scotland to adopt wholesale; but there are myriad methods and experiences from which we can and should learn.

I have made recommendations required to be taken forward at this stage by COPFS, but in relation to the wider issues I hope the Review provokes debate about the relationship between victims and the criminal justice system in general; and provides a platform for mature reflection on the direction we in Scotland now take to better support and care for victims of crime. Their collective experiences deserve careful consideration and a response from the criminal justice system – and wider society – which is sensitive to their needs and respectful of their individual experience and trauma.

### Introduction and Background

- 1.1 I initiated this Review as a result of the first-hand accounts provided to prosecutors by victims and bereaved families about dealing with the aftermath of crime and, crucially, coping with their interaction with the systems of criminal justice and investigation of deaths. Until recently, the story of the development of victims' rights in Scotland is largely one of incremental change to law, policy and practice. Since the beginning of this century our system has seen considerable change which has: introduced tangible rights for victims; sought to identify and support the most vulnerable; and provided greater transparency in decision-making. This has been achieved through government leadership, system responses by criminal justice agencies and the combined efforts of the third sector and crime victims themselves, who have shone a critical spotlight onto victims' experiences. We should be in no doubt that the experience for many victims can be of a system which does not recognise or accommodate their needs.
- 1.2 The Scottish Government has stated its aim to place victims' interests at the heart of the justice system and that ambition has driven the exploration in this Review of the position in Scotland. The recent commencement of the Victims and Witnesses (Scotland) Act 2014, underpinned by the Victim's Rights (Scotland) Regulations 2015<sup>1</sup> and now expressed as commitments on the part of criminal justice agencies in the new Standards of Service for Victims and Witnesses, together with the Victims' Code for Scotland, all underline the Scottish Government's commitment to victims. This suite of measures seeks to ensure that Scotland upholds the European standards for victims by complying with, and in some respects, going further than the 2012 European Directive establishing minimum standards on the rights, support and protection of victims of crime<sup>2</sup>.
- 1.3 To maintain this momentum, the Review team has considered the part that the prosecution (COPFS) can and should play in seeking to continually improve victims' experiences, but have also explored the whole system response in light of what victims have told us and whether there are means of improving service delivery which have not yet been in contemplation.
- 1.4 At the same time, the criminal justice system in Scotland has commenced a debate about some of its basic tenets – from the requirement of corroboration, to the safeguards in place to secure the accused's rights and to underpin the presumption of innocence as the foundation of the system of criminal justice. In particular, the Evidence and Procedure Review<sup>3</sup> and Next Steps Report highlight the potential use of technology to alter radically how the criminal justice system captures and tests evidence. There is no doubt that implementation of the recommendations resulting from that Review would transform the experience of the victim who is required to give evidence in the course of a criminal investigation and/or trial. These reports demonstrate the appetite for change in the criminal justice system in Scotland and the shared drive to improve and modernise the system, with the rights of victims at the centre.
- 1.5 The experience of being a victim can disrupt quite core assumptions about safety, fairness and the natural order of things. Being a victim is emotional, personal, unfair, disturbing and can be utterly random. The justice system, on the other hand, is impartial, independent, governed by rules (for example, about admissibility of evidence) and focuses its examination of facts around relevancy to the crime alleged. This can exclude from consideration by the legal system a host of information and impacts which, for the victim, strikes at the heart of their experience.
- 1.6 Victims often speak of feelings of re-victimisation or secondary victimisation once they enter the criminal justice arena. In the course of this Review a victim of rape described the trial experience as worse than the crime itself. That is a deeply troubling view. There is no doubt that for some their contact with the criminal

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<sup>1</sup> Victim's Rights (Scotland) Regulations 2015 available at: <http://www.legislation.gov.uk/ssi/2015/444/contents/made>

<sup>2</sup> Directive 2012/29/EU of the European Parliament and of the Council, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>

<sup>3</sup> Evidence and Procedure Review: <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report--publication-version-pdf.pdf?sfvrsn=2>

justice system - and frustration at its particular aims and rules - can displace and overtake even their feelings about the crime committed against them. Victims may expect 'closure' from the criminal justice system – that may however be absent by the end of the formal process. The desire on the part of law enforcement for the victim to engage, to participate, to assist in meeting the ends of justice can all feed into a narrative that investigation, prosecution, a trial, a conviction might all somehow make the victim feel better. That just does not happen in general. Many victims tell us they are left feeling disappointed, empty and dissatisfied, even if a conviction is secured. As Judith Shklar<sup>4</sup> expresses it: 'doing justice' and 'undoing injustice' are two separate phenomena. So far in the 21<sup>st</sup> century the criminal justice system has engaged in a process to try and bring these phenomena closer together, but it is appropriate to acknowledge this underlying duality. The fact that two different responses to a crime are working to two different sets of measurements can cause tension. But that is not to say we must ever be complacent in our response to victims as we strive in Scotland to find ways to serve justice and to reduce harm caused by the crime and /or contact with the justice system.

- 1.7 As we face what could be considerable system change it seems timely to consider the current landscape for crime victims' rights and victim care and how that could similarly be transformed. It is hoped that the recommendations of this Review will prompt further work by COPFS and across Government and public life, to enable us to recalibrate the experience of victims, witnesses and bereaved families in Scotland, to allow it to be the best possible.

### **Aims and Remit**

- 1.8 The aim of this Review is to set a vision, for the twenty first century, of how Scotland's justice sector should respond to victims, witnesses and vulnerable accused. In exploring the role of the Scottish prosecution service in respect of victims of crime, providing case and system information (including reasons for decisions taken) and securing support at court it is necessary, too, to explore the wider support in place for victims across the criminal justice system - beyond the prosecution service. This can be set against the needs which victims and their supporters described eloquently to the Review team.
- 1.9 The views gathered to inform this Review have not formed a piece of empirical research. The commissioning of a piece of research of that nature may, however, be a natural outcome of this Review. What it is hoped the Review will achieve is the launch of discussion and debate about the relationship between victims and 'the system' and the best means of meeting identified needs. I set out some thoughts about what work could be initiated to reset that relationship and bring about improvements in the experience of victims in the criminal justice system; and to suggest a vision against which that work could be measured.
- 1.10 This is a vision I hope could be shared across the justice and third sectors, and be used to measure all policy and practice development.

### **Vision:**

*Routine provision of quality information and high standards of support is made available for victims, bereaved families and vulnerable witnesses in their involvement with the criminal justice system, sensitive to individual needs, reducing the possibility of secondary victimisation and facilitating high levels of trust and engagement with the justice system, all of which meets the interests of the people of Scotland in the efficient and effective prosecution of crime and protection of the public and communities.*

- 1.11 In this Review the term 'victim' is used, rather than 'complainer' which is the traditional description in Scots Law for the person against whom it is alleged a crime has been committed. The description of an individual as a victim within the formal criminal justice process continues to be controversial for some in the justice system, as it is taken to imply guilt on the part of the accused person. In the 2006 COPFS Review of Rape and Serious Sexual Offences the word 'complainer' is described as neutral in respect of whether any crime has been committed against that person, meaning it does not imply that the person charged or being tried for the crime did in fact commit the crime. It is sometimes asserted that a complainer does not become a victim

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<sup>4</sup> See Shklar, 'The Faces of Injustice' 1990 Yale University Press

unless and until the accused is convicted. On the other hand, someone can be the victim of a crime even though no one is ever charged or prosecuted. Some of the rights articulated in legislation passed by the Scottish Parliament apply to a person against whom an offence has been, or appears to have been, perpetrated even where there are no criminal proceedings. The 2012 European Directive on Victims' Rights also makes clear that a person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted<sup>5</sup>. It is accepted that caution should be exercised about the terminology in the course of a criminal trial, but notably it is the word endorsed in legislation.

- 1.12 The term 'victim' is used in this Report in its widest form as understood within communities, intended to embrace: direct victims of crime; those required to engage with the justice system as a witness but who are themselves vulnerable by reason of physical characteristics or mental health issues; and bereaved families who have lost a loved one to a criminal death or sudden or unexpected death. The Report also reflects upon the issues as they affect vulnerable accused in the criminal justice system, conscious that there can be a great deal of cross-over in that frequently vulnerable accused are themselves victims of crime at differing times (see Chapter 6).

### Scope

- 1.13 To restrict consideration of 'services to victims' to those actions and reactions which fall only within the remit of the prosecution service in Scotland would be too narrow. It is recognised from the outset that crime can cause people to experience a wide range of emotions and to encounter a complex set of practical problems. The response of the criminal justice system and, indeed, of the prosecutor is an important part, but only one part, of society's response to that individual. A victim should be recognised as such irrespective of whether the perpetrator can be found or whether there is insufficient evidence in law to permit the case to be reported to the prosecution. The criminal justice system may therefore be in no position to offer any support to a victim, but their level of need remains. It is, therefore, impossible to consider the work of COPFS in isolation. Moreover, I consider that any reform which seeks to place the victim at the heart of society's response to crime must look beyond the work of individual criminal justice services (and indeed beyond the system of *criminal* justice) and consider not only what services are provided but also the way in which services are organised to ensure that they are properly focussed on the needs of the victim. The victim's experience should be of a coherent, cohesive response which is centred around his or her individual needs.
- 1.14 This is an ambitious aim but should not be unattainable and it is one which is necessary if we are truly to put victims' interests at the heart of the system of justice in Scotland. Accordingly, an immediate agenda for COPFS is set out, but this Report also touches upon the roles and responsibilities of other parts of the community's response to crime. The measures being initiated by COPFS will be implemented in the short term to make the work of COPFS and its in-house Victim and Information (VIA) service more focused on individual victim need. This could inform future work, to place Scotland on the path to being a world-leader in the provision of victim care.
- 1.15 In identifying the issues, this Report suggests there are 3 broad themes around the response to victims: **structural, cultural and legal**. I have considered whether there are structural obstacles to the delivery of the current legal framework, given the existing responsibilities held within and between the various parties involved; what cultural changes have taken place or may still require to be achieved to ensure sufficient recognition of, respect for and response to the needs of victims on the part of the agencies and individuals working within criminal justice; and whether the legal framework itself is sufficiently robust and offers a sufficiently clear source of support for those who, through no fault of their own, find themselves in contact with the criminal justice system.

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<sup>5</sup> Directive 2012/29/EU, Recital 19, found at:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>

## Methodology

- 1.16 The Review comprised 3 parallel pieces of work. Firstly, a consideration of the role of the prosecution in Scotland in respect of its commitments to victims – and what we understand of their needs. Secondly, an examination of available services in context, looking at their interaction across the justice sector, to meet those needs. Finally, a comparison of the approach taken in other jurisdictions to consider lessons to learn. The Review process involved consultation (see Annex C), speaking to critics, to those representing the principal victim support organisations and, so far as possible within the timeframe, to victims themselves. Colleagues in England and Wales have provided a great deal of assistance regarding their approach and I have considered models in place elsewhere to learn how best to develop, reform and remodel the interface between victims and the justice system, in the context of need to provide quick and streamlined access to responsive and responsible services, all with the priority of reinforcing a central tenet that the experience of the system itself does not cause further harm.
- 1.17 This approach has comprised a blend of first-hand experience, across a range of organisations in contact with victims, including front line experience within COPFS, and direct participation by a number of individuals who wished to assist the Review by sharing their own experiences and thoughts. I am hugely indebted to everyone who took the time to speak and share knowledge and ideas. The Review team consisted of a number of COPFS personnel: Andrew McIntyre, Shona Barrie, Paul Beaton, Susan Cameron, with assistance too from Catherine Dyer, the then Crown Agent.

## Summary of Findings

- 1.18 It is accurate to say that gaps remain in service provision and levels of satisfaction amongst victims with the criminal justice system are inconsistent. It is convenient to group the main findings of the Review under the three headings formulated from discussions with victims, stakeholders and support groups:

### STRUCTURAL ISSUES

- 1.19 Many of the issues raised relate to communications – as between agencies and between agencies and victims. Such communication issues are classed as ‘structural’ when there is no apparent legal obstacle to addressing the issue.
- Victims and vulnerable witnesses may require to turn to a succession of organisations / websites / leaflets and support agencies to learn information about the criminal justice process and what they are entitled to and when.
  - Protocols and information-sharing arrangements are largely dependent on manual intervention – if they fail it is to the detriment of the victim.
  - Victims and vulnerable witnesses in serious cases would benefit from better preparation before trial. This should include what they can be told about the evidential issues in dispute; the role of the defence; and what to expect during cross-examination / defence challenge.
  - Ahead of the reform which the Evidence and Procedure Review may bring, floating trials within the High Court are an increasing issue with the changes of dates / venue causing great distress.
  - There can be a tension in the lower courts where victims and witnesses may wish an explanation from the prosecutor about decision-making in their case – but the prosecutor remains engaged in court with many other cases.
  - Support and information at court – particularly at Sheriff Court level - can be fragmented and there is scope for an enhanced role, co-ordinating effort.
  - ‘Style’ responses can cause distress and can undermine what might otherwise have been a professional, sensitive approach by an agency.
  - The availability of interventions for vulnerable accused continues to present difficulties:
    - In achieving timely examination of their fitness to engage with the criminal justice system;
    - Offering diversion from prosecution where that would be a helpful and proportionate response;
    - Providing treatment, to prevent re-entry into the system;

- Securing the services of an Appropriate Adult where necessary for interview to take place and to ensure delivery of the accused's rights (and admissibility of evidence) can be difficult.
- The numbers of agencies who can be involved in the transmission of information about bail conditions can cause confusion to victims and would benefit from an efficient, nationally agreed approach.
- Early trauma work / providing safe spaces can be essential for recovery from crime, but accessing same can be challenging.

## 1.20 CULTURAL ISSUES

- A great deal of distress is caused to victims by cross-examination. This was reported to the team by individuals and by victim groups as being one of the biggest concerns. The opportunity presented by the Evidence and Procedure Review could transform the experience of giving evidence. Better preparing victims and witnesses about the role of the defence (see above) and agreeing cross-sector guidance about cross-examination which is aggressive or intimidating would provide a good baseline, pending the introduction of systematic digital recording of evidence.
- There are benefits to encouraging witnesses to take up access to their statement – and to building a system which gives them control of how and when to access it.
- Awareness-raising amongst all court officials would assist with confidence and accuracy in dealing with victims and witnesses and their rights and responsibilities.
- Victims in serious cases report huge benefits, particularly in serious cases, in having their own support person or 'case companion', acknowledging that this requires to be an individual who:
  - is highly knowledgeable about the entire justice sector and system
  - has the requisite skills, problem-solving approach and empathy.

## 1.21 'LEGAL' ISSUES

- Whilst the law is clear about the rights of victims in terms of Article 8 not to be subject to abusive, intimidating or aggressive cross-examination, additional work may be required meantime to ensure all court practitioners adhere to those principles. Victims and witnesses also need to know what they can expect of prosecutors and judges in terms of interventions.
- The work of the Evidence and Procedure Review will consider how defence challenge to digitally captured evidence will be achieved to secure the accused's rights and this will also be pivotal for victims.
- Information-sharing is crucial to the identification of victims and witnesses and the rights they can invoke. Examples exist of agencies being able to access criminal justice information at source, for example, in undertaking risk assessments. Observing data protection principles, there is scope for better information sharing to:
  - Increase efficiency and reduce bureaucracy
  - Improve response time
  - Reduce the number of people/agencies victims require to contact
 Crucial to this would be identification of common criteria (training/accreditation) for approval of access/information-sharing.
- Under the 2014 Act victims are entitled to seek referral to a support agency. Section 3D of the Act does not specify who should provide those services nor place any obligation for support services to be provided to any particular standard. Victims' rights are articulated in a number of key sources (see the Victims Code and the 2015 Regulations). For them to be truly effective, they require to be accessible to all. The current arrangements require victims to have regard to a number of documents /criminal justice agencies / service providers. **There is a strong desire amongst victims for a single source of support and information, eliminating or reducing the need to approach numerous agencies at different stages.**
- As described to the Review by representatives of the Sheriff's Association, an unintended consequence of the extended ambit of the Victim and Witnesses (Scotland) Act 2014 is the automatic provision of special measures for those deemed vulnerable, even when they do not engage with the criminal justice system. It may be beneficial to conduct an exercise to examine this practical impact as against the policy aims of the legislation.

## Recommendations

1.22 From the evidence and information gathered during the Review it is clear that there requires to be further work done to ensure that victims' experience is of a comprehensive and cohesive information and support system, available for all victims of crime based on both individual need and crime type. No single organisation is providing that service, nor indeed can provide that service, as currently composed. The case put forward by victims is for a single service.

1.23 Accordingly it is proposed:

- The Justice Board considers – in the context of broader strategic changes – appropriate governance to ensure victim care comprises an element of the proposed new Victim Strategy and is accommodated and progressed.

This comprises:

- A new system of victim care in the Justice Sector in Scotland in the form of a co-ordinated service to bring together all criminal justice partners and third sector groups working as part of a multi-disciplinary team operating on a "one front door" model. This model would provide services directly to victims and to criminal justice agencies, ensuring 'routes in' to specialist services such as Rape Crisis Scotland, Scottish Women's Aid, Victim Support Scotland, PETAL and others, including essential counselling services. Remodelling in this way would provide a crucial interface with the constituent parts of the criminal justice system and further the provision of routes in to equally important civil justice matters.
- This should be underpinned by:
  - Commissioning of research into victims' needs and expectations in the Scottish context to inform the design of any future service;
  - Commissioning of a study to examine the best way to integrate existing services to form a single cohesive service for victims;
- Separately, research should be commissioned into the impact of the adversarial system upon a system of victims' rights, in particular in the area of child victims, to inform future policy making.

1.24 The above multi-disciplinary approach, which I suggest requires further consideration by all interested groups, would ultimately provide vital support for the victim throughout the entirety of the criminal justice system with necessary cross-over to civil justice, health and housing issues, where required.

1.25 Meanwhile, the following undertakings on the part of COPFS will place the prosecution in Scotland on the path to contribute to that vision.

1.26 COPFS will:

- continue to explore increasing use of digital contact to provide system and case progress information to victims and witnesses;
- deliver an updated programme of mandatory training for all staff and Crown Counsel on the impact of crime on victims;
- further develop the role of VIA in supporting victims and witnesses to give best evidence.

## CHAPTER 2 – VICTIMS’ RIGHTS – THE JOURNEY

**2.1 This chapter examines the development of services to victims over the last 15 years or so, taking us up to the most recent statements and sources of victims’ rights.**

### Background

2.2 The provision of information, support and advice to victims of crime in Scotland has been a complex, evolving story over the last 15 to 20 years, culminating in the publication in December 2015 of the Victims’ Code. This is a journey that has seen third sector groups and campaigners become an integral part of the criminal justice system. They have secured ‘a voice’ for the victim and many continue to work to seek improvement in the treatment of victims; and in turn, the system looks to them to increase victim participation, to provide essential front line services and to work in conjunction with other criminal justice agencies.

### Chronology of Historical Developments

- 2.3 In 1998 the then Scottish Executive published its examination of Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil cases, ‘**Towards a Just Conclusion**’. This consultation opened up a dialogue with a legal profession which it was understood viewed victims as, primarily, a straightforward source of evidence. Indeed it dismissed the need for legislation to bar the accused from cross-examining the victim of a sexual offence as unnecessary in Scotland, a prospect raised after a notorious English criminal trial which involved protracted cross examination by the accused of his victim, in what was accepted was an abuse of process, only for the trial of HMA v John Anderson (June 2000, Perth High Court)<sup>6</sup> to illustrate the issue was live in our domestic setting.
- 2.4 In January 2000 the then Scottish Executive published the **Scottish Strategy for Victims**<sup>7</sup>, with the aim of supporting victims and improving participation in the criminal justice system. The COPFS response to the delivery of its responsibilities to the Strategy for Victims was to establish **VIA – Victim Information and Advice** (described more fully in chapter 5).
- 2.5 Around the same time, the then Scottish Executive established a pilot **Vulnerable Witness Officer service**. Its remit was largely to bring together the various agencies and third sector organisations with a role in respect of victims to co-ordinate the provision of services – information, advice and support. They had a local remit to oversee, for example, approval of sites for use by witnesses granted special measures to give their evidence remotely from the court building. Interestingly, this was an example of early recognition of the challenges in co-ordinating efforts, delivering on commitments and bringing a cohesion to services.
- 2.6 The response to the Anderson case was swift and the consultation paper ‘**Redressing the Balance**’ led to the provisions in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. This legislation prevented an accused from personally conducting the defence of the case and put in place new provisions requiring notice of a defence of consent. In respect of sexual history and character evidence, it enacted provisions designed to ensure only that which was material / relevant in all the circumstances would be admitted, and on the authority of a judge.
- 2.7 The next significant development surrounded the tragic circumstances of the death of a young rape victim, who took her own life in the wake of the crime and subsequent trial. Great controversy flowed from the fact that she had been made to examine her underwear in court under questioning by the defence advocate, initiating a discussion about the protection available to vulnerable witnesses and fear and intimidation in the courtroom.
- 2.8 The consultation paper ‘**Vital Voices – Helping Vulnerable Witnesses Give Evidence**’<sup>8</sup> then followed, in May 2002. This in turn led to the enactment of the Vulnerable Witnesses (Scotland) Act 2004 which expanded the range of special measures available to assist vulnerable witnesses give evidence at court,

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<sup>6</sup> HMA v John Anderson (June 2000, Perth High Court)

<sup>7</sup> <http://www.gov.scot/Resource/Doc/158898/0043164.pdf>

<sup>8</sup> <http://www.gov.scot/Publications/2003/02/16453/18641>

whilst also redefining those who could be said to be vulnerable and in need of assistance. Hitherto, the definition of vulnerability – permitting use of a special measure – was found at s 271(12)(b) of the Criminal Procedure (Scotland) Act 1995, in which vulnerable adult persons were defined as individuals subject to an order under mental health legislation or those who, in the opinion of the court, were ‘suffering from significant impairment of intelligence and social functioning.’

- 2.9 The passing of the 2004 Act significantly expanded the definition of ‘vulnerable’ to include: a person aged under 16; a person aged 16 or over who is the subject of one of a number of mental health related court orders; and a person aged 16 or over who suffers from significant impairment of intelligence and social functioning.
- 2.10 Crucially, the definition was also expanded to permit someone vulnerable due to ‘fear or distress in connection with giving evidence at trial’ to be entitled to special measures. As a result of this legislation there were two categories of witness:
- those automatically entitled to use special measures; and
  - those witnesses who have a discretionary entitlement to use special measures.
- 2.11 Provision was made within the legislation to permit child witnesses automatic entitlement to what were deemed as ‘routine’ special measures.
- 2.12 Further protection was given to particularly vulnerable young children. In criminal cases relating to sexual or violent matters, other than in the most exceptional cases, the aim was that no child witness under 12 should have to attend court to give their evidence. The intention was to create a general rule that children under 12 in such cases give their evidence by a method which did not require their personal attendance at court e.g. by remote TV link, or on commission.
- 2.13 The **Victim Notification Scheme** was established in 2004 permitting victims to opt to receive information about offender release under a two part scheme, where the offender has been sentenced to 18 months or more in prison. Part 1 entitles victims to receive information about the offender's:
- Release
  - Date of death, if they die before being released
  - Date of transfer, if they are transferred to a place out with Scotland
  - Eligibility for temporary release (for example, for training and rehabilitation programmes or home leave in preparation for release)
  - Escape or absconding from prison
  - Return to prison for any reason.
- 2.14 Part 2 of the scheme entitles victims to information about the offender being considered either for parole or release on Home Detention Curfew (sometimes known as “tagging”):
- When the Parole Board for Scotland is due to consider the case affecting the victim, the victim will be given the chance to send written comments to the Board
  - When the Scottish Prison Service is considering a prisoner's release on HDC, the victim will be given the chance to send written comments to the prison service
  - The victim will be told whether the Board recommends or directs the release of the offender
  - The victim will be told whether any conditions have been attached to the license that relate to them or their family.
- 2.15 After sentencing, COPFS (through VIA) provides a form to eligible victims to complete and send to the Scottish Prison Service should they want to receive this information.
- 2.16 From 1 April 2009 victims or relatives of those affected in serious crimes, were given the opportunity to make a written **Victim Statement** that tells the court how the crime affected them – physically, emotionally and financially - to be given to the court if the accused pleads guilty, or is found guilty after a trial, to be considered before the accused is sentenced. A copy of any victim statement will be given to the defence at

the same time. The Judge must take into account any victim statement when deciding on the sentence to be given. COPFS identifies those victims eligible to submit a Victim Statement which is passed to the sentencing judge at the point of conviction and provides them with an information pack and form for completion and return. (This also provides contact numbers for support agencies should the individual want extra help or advice about making the statement.)

- 2.17 Section 54 of the Criminal Justice and Licensing (Scotland) Act 2010 enabled the prosecution to provide witnesses likely to be cited to give evidence with **access to a copy of their witness statement(s)** prior to giving evidence at trial.
- 2.18 The provision was enacted, recognising that in the court room the Crown, defence and sometimes the judge could be sitting with a copy of a victim's statement but the very person who made it and is being questioned on it would be in the dark. The provisions allow witnesses to have sight of their statement(s) before giving evidence in court. The Policy Memorandum to the 2010 Act referred to Lord Coulsfield's "Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland" was published in September 2007. It stated that 'the report noted that, although not strictly an issue of disclosure in criminal proceedings in Scotland, this issue is linked and that there was general support for change, to allow witnesses being able to refer to copies of their statements, in all cases where these statements have been made available to the Crown and to the defence. The issue was one of fairness to witnesses who could be presented with their statement(s), or parts of their statement(s), in court for the first time which does not allow any inaccuracies or misunderstandings to be addressed and could have an inadvertent, detrimental effect on their ability to give evidence. Further, with developments in the law on disclosure, witnesses now are commonly the only people in court who have not seen their own statement prior to a trial. There is concern that this is unfair and could turn the witness's testimony into little more than a memory test'.
- 2.19 COPFS put in place processes to implement this provision, providing access to those victims deemed eligible and who wished to see their statement(s), through VIA. Now, as part of the development of a witness website designed to provide convenient and secure information to witnesses about their case, work is now ongoing to develop on-line access for witnesses to see their statements.

### **EU Directive 2012/29 on Victim's Rights**

- 2.20 In 2011, the European Commission put forward a legislative proposal for a binding and enforceable Directive to establish minimum standards on the rights, support and protection of victims of crime. The resulting Directive<sup>9</sup> required to be implemented by the EU member states by 16 November 2015.
- 2.21 The Directive replaced a previous 2001 Framework Decision on the rights of victims and built on the minimum standards established there on the rights to access information, support, protection and basic procedural rights in criminal proceedings. The Directive strengthens the rights of victims and their family members to information, support and protection.
- 2.22 The Directive also requires that the Member States ensure appropriate training on victims' needs for officials who are likely to come into contact with victims and encourages cooperation between Member States and coordination of national services of their actions on victims' rights.
- 2.23 The Directive also provides a definition of a victim of crime:  
*"A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them."*<sup>10</sup>
- 2.24 While many of the provisions of the Directive were already supported in Scotland, implementation of the Directive led to the Victims and Witnesses (Scotland) Act 2014 and the Victims' Rights Regulations

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<sup>9</sup> Directive 2012/29/EU, found at:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>

<sup>10</sup> Directive 2012/29/EU, Recital 19, found at:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>

(Scotland) 2015, discussed further below, and the extension of many of the protections within the Directive to witnesses as well as victims.

### **The Victims and Witnesses (Scotland) Act 2014**

- 2.25 To fulfil the implementation of the EU Directive in relation to victims as described above, the Scottish Parliament has enacted the 2014 Act. It sets out who is to be considered a vulnerable witness in criminal proceedings, provides an entitlement to special measures for certain witnesses, all with a view to ensuring that witnesses are able to give evidence to the best of their ability. In line with the Directive, particular support and protection is provided for those who are vulnerable.
- 2.26 The Act places obligations on the principal agencies in the criminal justice system to support and protect victims in criminal investigation and proceedings, provides that agencies in the criminal justice system must have regard to general principles and to fulfil certain specific obligations to victims and witnesses, discussed below.

### **The Current Legal Framework of Victims' Rights in Scotland**

- 2.30 The recent implementation of the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) demonstrates the importance placed on the rights of victims in Scotland. It provides what is designed to be a clear framework for the support and protection of victims of crime during criminal investigation and proceedings. The Act represents the most significant legislative effort to provide for victim's rights in the law of Scotland thus far.
- 2.31 All victims of crime in Scotland now have certain rights which must be recognised, respected and upheld by the criminal justice system as a whole, and by the agencies involved in criminal investigation and proceedings in particular. Significantly, for the first time, certain categories of adult victims of crime are now entitled in law to use special measures when giving evidence in court.

### **General Principles**

- 2.32 Section 1 of the Act sets out general principles relating to victims and witnesses to which regard must be paid by the criminal justice agencies, underpinning the more specific rights that follow. The combination of general principles and specific victims' rights which must be ensured by the agencies represents the strongest legislative commitment to victims in Scotland thus far.
- 2.33 The principles set out in section 1 are:
- that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
  - that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
  - that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
  - that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.
- 2.34 These four principles, for victims and witnesses are joined by a further five in section 1A for victims specifically:
- that victims should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner,

- that victims should, as far as reasonably practicable, be able to understand information they are given and be able to be understood in any information they provide,
- that victims should have their needs taken into consideration,
- that, when dealing with victims who are children, the best interests of the child should be considered taking into account the child's age, maturity, views, needs and concerns,
- that victims should be protected from secondary and repeat victimisation, intimidation, and retaliation

2.35 Section 1(2) of the Act lists those who are required to have regard to the principles- the Lord Advocate, the Scottish Ministers (to ensure that the Scottish Prison Service is included in respect of their role in the Victim Notification Scheme), the Chief Constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland. This comprehensive approach demonstrates the broad commitment to the support and protection of victims throughout criminal investigations and proceedings required by the Act and the formal criminal justice agencies.

### **Standards of Service**

2.36 Building on these principles, section 2 of the 2014 Act requires the criminal justice organisations to set and publish standards of service for victims and witnesses.

2.37 The standards of service should set out what all victims and witnesses can expect from the criminal justice agencies throughout the investigation and prosecution of crime and in the event of a complaint being made.

2.38 As five different agencies were required to publish standards of service, COPFS, the Police Service of Scotland, the Scottish Courts Service, the Scottish Prison Service and the Parole Board for Scotland agreed to a single document<sup>11</sup> which sets out common standards supported by all as well as specific standards for each agency.

2.39 The standards of service document includes a 'Victim's Map'. The map is designed to set out the different stages of the criminal justice system in Scotland for victims and witnesses. The victims map highlights, however, the complexity of the system and multiplicity of players in criminal justice in Scotland.

### **Access to Victim Support Services**

2.40 Section 3D of the Act, as amended by the 2015 Regulations, relates to access to victim support services. All victims are therefore entitled to be referred to such services as required by the Directive. It is now the responsibility of the Chief Constable of Police Scotland to make sure that a person is informed that they may request a referral to these services, or that they may contact the services directly without a referral.

2.41 While victims are able to request referral from the key criminal justice agencies at any stage of criminal proceedings, the Act does not specify who should provide those services, nor does it place any obligation for support services to be provided to any particular standard.

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<sup>11</sup> Standards of Service for Victims and Witnesses, found at:  
[http://www.copfs.gov.uk/images/Documents/Victims\\_and\\_Witnesses/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%20April%202015.pdf](http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%20April%202015.pdf)

## **Victims' Right to Understand and Be Understood**

- 2.42 Section 3E of the 2014 Act provides that victims have a right to understand and be understood. This means that communications, whether oral or written, are as clear and easy to understand as possible and that they take account of any personal characteristics of the person which may affect their ability to understand the communication and be understood in responding to the communication.
- 2.43 This right is closely linked to the provision of interpreting and translation services for people involved in criminal proceedings now added to the 2014 Act at Section 3F by the Victims' Rights (Scotland) Regulations 2015.
- 2.44 Victims who do not understand or speak English should be provided with an interpreter during criminal investigations and proceedings to ensure they understand questions asked, information given to them and that they can communicate effectively throughout.
- 2.45 Victims must also be provided with translated versions of information in certain circumstances to ensure they understand the investigation and proceedings. Where information is to be provided to a victim who does not understand or speak English, and that information is essential to the victim's participation in investigations or proceedings, and where the victim has requested a translation of the information into a language they understand then COPFS should arrange for all correspondence to be translated into the chosen language or format requested by the victim.

## **Provision of information- section 6 of the Victim and Witnesses (Scotland) Act 2014**

- 2.46 As the central objective of the Victim and Witnesses (Scotland) Act 2014 (the Act) is to improve the experience of victims and witnesses within the criminal justice system one of the key provisions is to be found at section 6 which provides victims with a legal right to request and be given information about their case.
- 2.47 Information can be requested from the police, the prosecutor and the court. The published Access to Information Protocol - A Guide for Victims and Witnesses sets out the information to which victims are entitled.<sup>12</sup>
- 2.48 The categories of information which can be requested are:
- a decision not to proceed with a criminal investigation and any reasons for it
  - a decision to end a criminal investigation and any reasons for it
  - a decision not to institute criminal proceedings against a person and any reasons for it
  - the place in which a trial is to be held
  - the date on which and time at which a trial is to be held
  - the nature of charges libelled against a person
  - the place in which the hearing of an appeal arising from a trial is to be held
  - the date on which and time at which the hearing of an appeal arising from a trial is to be held
  - the stage that criminal proceedings have reached
  - the final decision of a court in a trial or any appeal arising from a trial, and any reasons for it

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<sup>12</sup> Access to Information Protocol- A Guide for Victims and Witnesses, found at:  
[http://www.copfs.gov.uk/images/Documents/Victims\\_and\\_Witnesses/accesstoinformationprotocoljuly2015.pdf](http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/accesstoinformationprotocoljuly2015.pdf)

## Right to Review

- 2.49 The Directive provides that victims of crime should have the right to seek review of decisions not to take criminal proceedings in their case.
- 2.50 The right for a victim to receive information found in section 6 of the 2014 Act is linked to the right found in section 4 to seek review of a decision taken not to instigate criminal proceedings, or to bring proceedings to an end. This new right, again based on the Directive, allows victims to challenge directly decisions taken by prosecutors in the public interest.
- 2.51 The Lord Advocate has published rules about the right to review decisions<sup>13</sup> which set out the circumstances in which a victim may seek review of a decision. It is important to note that the right applies to decisions taken by prosecutors not to take action in the case, but not to decisions taken by courts.

## Vulnerability in Criminal Proceedings

- 2.52 The 2014 Act amended the existing provisions in the 1995 Act on vulnerability, special measures, notices and applications and sets the grounds upon which a witness will be classed as vulnerable.
- 2.53 For the first time in Scotland, and in line with the Directive, all witnesses aged under 18 years at the commencement of proceedings are child witnesses. The legal definition of a child is not universal across the law of Scotland, but the clarity of this provision for the purposes of criminal proceedings is welcome and ensures that all under 18 years of age are entitled to the protection of special measures in court.
- 2.54 The 2014 Act created the new category of 'deemed vulnerable' witness. The previous position, as set out above, was that the use of special measures in court by any adult witness needed to be justified to the court against legislative criteria and would only be authorised where the court was satisfied that it was appropriate. Section 271(c) of the 1995 Act sets out that victims of certain offences are deemed vulnerable and are therefore entitled to use special measures. Deemed vulnerable adult witnesses are victims of:
- Sexual Offences (offences in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003) (section 271(1)(c)(i))
  - Trafficking for prostitution (Offences under s 22 of the Criminal Justice (s) Act 2003) (section 271(1)(c)(ii))
  - Trafficking for exploitation (Offences under s 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004) (section 271(1)(c)(iii))
  - Offences the commission of which involves domestic abuse (section 271(1)(c)(iv))
  - An offence of stalking ((section 271(1)(c)(v))
- 2.55 One of the key provisions of the Act is that all child and deemed vulnerable witnesses are entitled to use special measures to assist them to give evidence in court. As discussed above, while children aged under 16 years had been provided with that entitlement previously, this was the first time that any adult witnesses could access special measures by right. This is an important development in that it provides certainty for victims.
- 2.56 Other adult witnesses, including victims of other crimes, may be considered vulnerable if there is a significant risk that the quality of their evidence will be diminished by reason of:
- mental health (section 271(b)(i)), or
  - fear or distress in connection with giving evidence (section 271(1) (b) (ii)).

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<sup>13</sup> Found at:

[http://copfs.gov.uk/images/Documents/Victims\\_and\\_Witnesses/Lord%20Avocates%20Rules%20-%20June%2015%20v2.pdf](http://copfs.gov.uk/images/Documents/Victims_and_Witnesses/Lord%20Avocates%20Rules%20-%20June%2015%20v2.pdf)

2.57 A witness may also be considered vulnerable if there is considered to be a risk of harm to them because they are due to give evidence (section 271(1)(d)). In terms of section 271(2) of the 1995 Act, when determining whether other adult witnesses are vulnerable in terms of fear and distress, the court will take into account:

- the nature and circumstances of the offence
- the nature of the evidence the witness will give
- any relationship between the witness and the accused
- the person's age and maturity
- any behaviour towards the person by the accused, their family or associated or other accused or witnesses and
- other relevant matters including the social and cultural background and ethnic origins of the witness, their sexual orientation, their domestic and employment circumstances, their religious or political beliefs, any physical disability or impairment the witness has.

Special Measures:

2.58 The Act continues the previous split between standard and non-standard special measures. No justification is needed for any child or deemed vulnerable witness to use any of the standard special measures in court. The views of any such witness also need not be included in any Notice. The law therefore aims to provide for a streamlined and efficient approach for the protection of victims of domestic abuse, sexual offences, stalking and trafficking and children.

2.59 The standard special measures available for witnesses are:

- The use of a live television link in accordance with section 271J
- The use of a screen in accordance with section 271K
- The use of a supporter in accordance with section 271L.

2.60 The non-standard special measures are:

- Taking evidence by a commissioner in accordance with section 271I
- Giving evidence in chief in the form of a prior statement in accordance with section 271M
- Excluding the public during the taking of evidence in accordance with section s271HB (closed court)

2.61 A closed court is now available as a special measure for which an application can be made. This is in addition to the court's common law power to regulate its own proceedings, including the ability to exclude the public from proceedings where this is necessary for the administration of justice, commonly exercised in relation to sexual offences.<sup>14</sup> There are also statutory provisions that allow for a hearing to take place in private in relation to specific offences<sup>15</sup>.

2.62 Additionally, in terms of section 50(3) of the 1995 Act where proceedings are in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child is called as a witness, the court may direct that anyone other than those specified below shall be excluded during the evidence of the child:

- members or officers of the court;

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<sup>14</sup> See, for example, *HMA v M* 2007 SLT 462

<sup>15</sup> Section 92(3) of the Criminal Procedure (Scotland) Act 1995 provides that in a trial for rape or the like (which has been held to include offences of a sexual nature as in *HMA v M* 2007 SLT 462), the judge may, if he thinks fit, cause all persons, other than the accused and counsel and solicitors to be removed from the courtroom. This need not be restricted to the period during which the victim is giving evidence.

- parties to the case before the court, their counsel or solicitors or persons otherwise directly concerned in the case;
- bona fide representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings; or
- such other persons as the court may specially authorise to be present,

#### Notices And Applications for Vulnerable Witnesses to use Special Measures:

- 2.63 Written Notices and Applications continue to be required and lodged with the Court in order for special measures to be used. Vulnerable Witness Notices for child or deemed vulnerable witnesses to use standard special measures need not include any justification of the measure and cannot be objected to. The legislation states that on receipt of a Vulnerable Witness Notice for a child or deemed vulnerable witness to use standard special measures, the Court shall make an order granting it. The law therefore removes any discretionary element in relation to deemed vulnerable witnesses and their use of standard special measures. Other Notices and Applications, which can be objected to, will be only be granted where the court is satisfied that the use of the special measure is appropriate, and may be the subject of a hearing.
- 2.64 Notices can be lodged for a witness to give evidence using only standard or non-standard special measures, or to use a combination of standard or non-standard special measures. There is no entitlement to use the non-standard special measures and any such Notice or Application must include the views of the witness and the reason that the special measure is considered the most appropriate for the witness.
- 2.65 While the Directive requires that the vulnerability of witnesses is individually assessed, the 2014 Act goes further in defining certain witnesses as automatically entitled to special measures given either their age or the nature of the offence committed against them. The recognition of the particular vulnerability of victims of domestic abuse, sexual offences, stalking and trafficking reflects long standing concern at the prevalence of such offences, the significantly damaging effect such offences have on victims and the need for the criminal justice system to do considerably more to assist victims to come forward to report crime and to give evidence in court.
- 2.66 The 2014 Act places a duty on the party citing any witness to make an assessment determining whether the witness is:
- likely to be vulnerable
  - and if so what special measure or combination of special measures ought to be used for the taking of the evidence<sup>16</sup>
- 2.65 When considering whether a person is vulnerable the Court will consider:
- the nature and circumstances of the offence,
  - the nature of the evidence the witness will give,
  - any relationship between the witness and the accused,
  - the person's age and maturity,
  - any behaviour towards the person by the accused, their family or associated or other accused or witnesses and
  - other relevant matters including the social and cultural background and ethnic origins of the witness, their sexual orientation, their domestic and employment circumstances, their religious or political beliefs, any physical disability or impairment the witness has.<sup>17</sup>
- 2.66 In terms of section 271A(5)(a)(ii) of the 1995 Act, if the Court is satisfied that the use of a non-standard special measure is appropriate, an order will be made by the court that the witness is a vulnerable witness and authorising the use of the special measures for the purpose of taking the witness's evidence.

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<sup>16</sup> Section 271C

<sup>17</sup> Section 271(2)

## ‘Working Together for Victims and Witnesses’ Protocol:

- 2.67 The protocol ‘Working Together for Victims and Witnesses’ is agreed between the Crown Office and Procurator Fiscal Service, Victim Support Scotland, the Scottish Courts and Tribunals Service and Police Scotland.
- 2.68 Responding to the challenge of the working culture of the criminal justice system in the Act, the Protocol begins with a strong public statement in support of victims’ rights’ in Scotland:
- “Victims and witnesses are the most important people in the Scottish criminal justice system. Every part of that system shares the responsibility to improve the rights, support, protection and participation of victims and witnesses in criminal proceedings. The experience of victims and witnesses is a measure of the effectiveness of our justice system and of our society as a whole. Victims and witnesses have legitimate interests and needs and must feel confident that their contribution to the criminal justice process will be worthwhile, valued and supported.”<sup>18</sup>*
- 2.69 The agreement to this strong statement of principle by Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and Victim Support Scotland demonstrates a clear commitment to refocus justice on the needs of victims, the progress made in support the rights of victims and acknowledges that without the successful participation of victims there can be no justice.
- 2.70 This Protocol has been agreed in order to identify best practice and obtain consistency of approach to improve victims and witness engagement and support. It includes a commitment for the agencies to work together to understand and meet victim and witness needs, treating them appropriately, professionally and with respect at all times.
- 2.71 The Protocol sets out how the agencies share information; arrange for victims and witnesses to look around a court before trial; identify and explore the vulnerability of victims and witnesses; consider the impact this may have on their ability to give their best evidence; and assess what special measures and/or additional support will make a difference.

## Victim Statements and the Victim Notification Scheme

- 2.72 As described above, certain victims of crime have the right to make a statement on the effect of the crime on them, which will be considered by the Court and victims of charges where an offender has been sentenced to 18 months or more have the right to receive information about the release of the offender.
- 2.73 The 2014 Act amended the existing provisions in relation to both victim statements and the victim notification scheme. In relation to both, the minimum age of participation was lowered to 12 to allow more victims to participate.
- 2.74 Greater flexibility was provided for the victim notification scheme with the removal of the list of prescribed offences. Victims of any charge are therefore entitled to join the scheme if a suitable sentence is imposed.

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<sup>18</sup> At page 3 of the Protocol, found at:

[http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Protocols\\_and\\_Memorandum\\_of\\_Understanding/030915%20Working%20Together%20for%20Victims%20and%20Witnesses-%20Amended.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/030915%20Working%20Together%20for%20Victims%20and%20Witnesses-%20Amended.pdf)  
[http://www.crownoffice.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Protocols\\_and\\_Memorandum\\_of\\_Understanding/030915%20Working%20Together%20for%20Victims%20and%20Witnesses-%20Amended.pdf](http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/030915%20Working%20Together%20for%20Victims%20and%20Witnesses-%20Amended.pdf)

2.75 The Act did not amend the list of prescribed offences in relation to victim statements, and remains governed by the Victim Statements (Prescribed Offences) Order (No 2) (Scotland) 2009<sup>19</sup>. There has therefore been no change to the offences in relation to which a victim may make a statement since before the introduction of either the section 38 threatening and abusive behaviour or section 39 stalking offences in the 2010 Act, or offences aggravated by prejudice. There is also no provision for victims to make such a statement on any basis other than the specific offences. Cases involving victims who are vulnerable or otherwise significantly affected by the crime are therefore excluded from falling within the Order, leaving victims of significant crimes unable to provide information to the court on how the offence has affected them.

### The Victims' Code for Scotland

2.76 On 23 December 2015, the Victims' Code for Scotland was published<sup>20</sup>. Drawing together many of the developments set out above, the Code sets out:

- The types of support that victims may obtain and from whom that support can be obtained,
- the procedures for making complaints with regard to a criminal offence and the victim's role in connection with such procedures,
- how and under what conditions victims may obtain protection, including special measures under sections 271 to 271M of the Criminal Procedure (Scotland) Act 1995 and measures under section 9C of the Victims and Witnesses (Scotland) Act 2014,
- how and under what conditions victims may access legal advice, legal aid or any other sort of advice,
- how and under what conditions victims may obtain compensation,
- how and under what conditions victims are entitled to interpretation and translation,
- in relation to a criminal offence which was not committed in Scotland, any measures, procedures or arrangements, which are available to protect victim's interests in Scotland,
- the available procedures for making complaints against any competent authority in relation to a breach of victim's rights under any enactment,
- the contact details for all competent authorities, as defined in section 1 of the 2014 Act,
- the available restorative justice services,
- how and under what conditions victims may be reimbursed for the reasonable expenses incurred by them as a result of their participation in criminal proceedings.

2.77 The Code does not in itself create additional victims' rights, but rather seeks to provide a single source for the measures found elsewhere. While the intention to create such a document is positive, as is the opportunity of providing victims with a clear statement of the operation of the system and their rights within it, the Code adds to the already complex landscape.

### The Future

2.78 A number of current initiatives may also affect the framework for the protection of victims in Scotland. These include the Community Justice (Scotland) Bill which aims to develop an improved model for the planning and delivery of justice services with a view to improving outcomes for victims, communities and offenders by building a collaborative approach at local level. The policy memorandum for the Bill states that:

*"In emphasising collective responsibility through a partnership approach, decision-making will be placed with local organisations and agencies who know their communities best; who understand the problems that are*

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<sup>19</sup>Available at:

<http://www.legislation.gov.uk/ssi/2009/71/made>

<sup>20</sup>Found at:

<https://www.mygov.scot/victims-code-for-scotland/>

*unique to their region; and who will be most affected by community justice issues that relate to both victims and offenders.*<sup>21</sup>

- 2.79 The Children and Young People (Scotland) Act 2014 puts in place a new system for the protection of children in Scotland. While the Children's Hearings System is designed to deal with the needs and deeds of children at risk with their interests at heart, children continue to be required to give evidence in the adult criminal justice system focussed on justice in the broader context. The Scottish Government are also currently consulting on whether to introduce a specific offence to target domestic abuse.
- 2.80 While the question of corroboration in Scotland remains outstanding, consideration is ongoing to the recommendations made in the recent Evidence and Procedure Review.<sup>22</sup> The Report considers the provision of evidence from child and vulnerable witnesses in detail and offers significant recommendations for the improvement of the Scottish system, including in relation to case management.

## Conclusion

- 2.81 It is clear that in Scotland a continuous programme of law reform, aimed at improving the position of the victim in the criminal justice system, has provided an expansive framework providing victims with a range of important rights. Those reforms have taken place within the context of an increasing understanding, in public life, of the needs and expectations of victims and it must be beyond question that, in 2016, Scots law makes greater provision for the needs of victims than has ever been the case before. However for victims that is only part of the answer.
- 2.82 I agree with the views put forward to the review team that while the many improvements have been welcomed, the law is one aspect of the challenge. It is only an approach building on the effective implementation of the law, with a commitment to respecting the fundamental rights of victims that will result in change. That policy approach, and the challenge of effective reform, is discussed below.
- 2.83 One issue which was raised many times in the course of the Review is the fact that issues around victims do not lie exclusively in the Justice portfolio – there are cross-overs to Health, where pertinent issues about forensic examination and recovery of evidence is located; and Education, which has responsibility for in-care survivors. And awareness of wider equalities rights and barriers to same (Equally Safe) lies largely with Communities. The funding and co-ordination of services can, accordingly, be complex. The great challenge for government and agencies is to ensure the necessary links in each of these areas in the development of policy and practice – and the challenge for victims and their supporters can be in navigating who to turn to, when. A good deal of the local response is vested in local authorities who will be pressed for ongoing commitment to various interventions, such as refuge provision and Appropriate Adult services (without which the police may not be able to interview a suspect).

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<sup>21</sup> Para.24, found at:

[http://www.scottish.parliament.uk/S4\\_Bills/Community%20Justice%20\(Scotland\)%20Bill/b68s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Community%20Justice%20(Scotland)%20Bill/b68s4-introd-pm.pdf)

<sup>22</sup> Found at:

<http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>

## CHAPTER 3 – VICTIM NEEDS and SERVICE RESPONSE

This chapter considers what we know broadly about victims' needs, examining issues raised by those consulted. General themes are identified. Setting this knowledge against system responses to date, particularly the development of support services, begins to give shape to priorities and potential efficiencies – and to the identification of gaps.

### 3.1 A. Ensuring Safety

- 3.2. Work to ensure safety can range from preventative work in our communities to the immediate, bespoke response to individuals at risk. Safety is a fundamental need in the aftermath of crime.
- 3.3. There can be no more traumatic event than loss of a loved one to crime or in tragic circumstances that require exploration of systems of safety etc. I note the encouraging reduction in the numbers of homicides in Scotland over the last decade or so (The Homicide in Scotland Statistical Bulletin states that, since 2005/6 the numbers of victims of homicide has reduced from 137 to 59 in 2014/5<sup>23</sup>). A great deal of preventative work has been undertaken at government and criminal justice agency level in that time period to tackle the causes of violence in Scotland, with work focusing on gangs, organised crime, the knife culture, and domestic abuse, given the high proportion of female victims of homicide killed by partners or ex-partners. (For all homicides recorded in the last ten years, just over half (53%) of the female victims aged between 16 and 70 years were killed by their partner or ex-partner<sup>24</sup>.)
- 3.4. Ensuring safety in the immediate aftermath of crime is, of course, primarily for the police. In the most acute situations formal witness protection may be required and risk assessment processes are in place to identify this in the most serious cases. Arrest of the offender can be crucial to ensuring the safety of the victim or next of kin, but there may be other levels of protection required, ranging from personal alarms, emergency mobile telephones, to the installation of CCTV etc. Securing property where its security has been overcome would also be an immediate safety need.
- 3.5. If an accused is remanded in custody as a consequence of the allegation of a crime, that can be an enormous relief to the victim. If, however, they are at liberty pending any trial the conditions of bail attached to their release can provide important protection. But crucial to this is the need for the victim and law enforcement to be aware of the terms of the bail order. To that end a complex network of communications has been put in place across criminal justice agencies to intimate – as soon as possible - the details of bail releases to those who require to know. Proactive policing of compliance with special conditions of bail has become an important protection for vulnerable victims together with robust systems to review / revoke bail and pursue additional charges in the event that bail conditions are breached.
- 3.6. Delays in intimating the grant of bail, on what terms, and any variations of the bail order thereafter cannot be countenanced. This is vital, for example, for victims of stalking and in domestic abuse cases where arrangements have been put in place across the different agencies in different parts of the country to inform the victim. However, at present, where the offender has appeared from custody at court following arrest, a victim of domestic abuse can find themselves being contacted by 3 separate organisations on the same day, each essentially providing the same information albeit for different purposes. VIA will contact a victim to advise them of special bail conditions including any special conditions regarding residence or contact, which are common in domestic abuse cases. If VIA are unable to contact the victim during their time at work they will ask Police Scotland to make the contact for them. Within the same 24 hour period Police Scotland will also in any event contact the victim and provide the same information but with the additional purpose of establishing the welfare needs of the victim and carrying out a risk assessment. Depending on location, a number of agencies will contact the victim to update on what has happened at court: In Glasgow this will be ASSIST (Advocacy Support Safety Information Services Together) (See Annex A for a description of the work of ASSIST), in Edinburgh and Midlothian by EDACS (Edinburgh Domestic Abuse Court Service), in West Lothian by DASAT (Domestic Abuse Sexual Assault Team) or SWA (Scottish Women's Aid) in other locations,

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<sup>23</sup> Homicide in Scotland- Statistical Bulletin 2013/14: <http://www.gov.scot/Publications/2014/12/6792/5>  
Homicide in Scotland- Statistical Bulletin 2014/15: <http://www.gov.scot/Resource/0048/00486224.pdf>

<sup>24</sup> Homicide in Scotland 2014/15, at <http://www.gov.scot/Publications/2015/09/8172/3>

particularly the north of the country. Agencies also use this opportunity to introduce themselves and offer their services.

- 3.7 Victims report being understandably confused and inconvenienced by receiving 3 intimations of the same information within a 24 hour period. Each contact requires them to relive the crime. This does raise the question, should the responsibility for this task lie with the police alone at this stage, as a necessary piece of information they require to have as part of a suite of measures they can deploy?
- 3.8 I consider that a key component of any new model contemplated as a result of the recommendations of this Review must be the development of a collaborative approach which ensures that key safety information is provided by the right people, at the right time and in the right way. In discussions with those operating the domestic abuse service ASSIST, there was recognition of the advantages in a cohort of advice and support workers who are vetted, trained to national standards, able to undertake approved risk assessments and have access to police and court information at source. Other models exist in other jurisdictions to assess risk, especially around relationship abuse. In 2014 visited the Integrated Threat and Risk Assessment Centre (I-TRAC) in Alberta, a multi-disciplinary agency that conducts formal threat assessments. I-TRAC also develops case management plans; provides recommendations for investigations, charges, court orders, and victim safety strategies; provides expert testimony; conducts case conferencing; and delivers specialized training. In order for I-TRAC to be able to provide all these services with accuracy and efficiency, they receive information from police files, Child Protection Services (CPS), and corrections.<sup>25</sup>
- 3.9 There are similar considerations in respect of stalking. Scotland has robust anti-stalking legislation, and in turn COPFS has developed a rigorous prosecution policy to tackle this crime. Prosecutors, police and those supporting victims of stalking must understand the dynamics behind the crime and crucial to this will be the conditions that should apply to the perpetrator until proceedings are concluded. The impact of often prolonged, intrusive offending – and perhaps when the identity of the perpetrator is unknown – can disrupt very basic needs of safety and security. The reporting of crimes of stalking and harassment has increased exponentially, with social media and digital communications used to access and intimidate victims. This indicates the need for good information and careful thought about requests to the judiciary for protective bail conditions.
- 3.10 In the context of sexual offences, the importance of protective conditions of bail, if the accused is not remanded in custody, are all too apparent. Victims of stranger rape described the terror of wondering whether they might bump into the accused inadvertently. The Review was also given graphic insight about the trauma of attending an identity procedure and the anxiety over the prospect of seeing an image of the attacker. This raises questions around the availability of support to participate effectively in what can be a key aspect of evidence-gathering; and the level of information which ought to be provided to prepare the victim for what to expect at an identity procedure.

## **B. Practical Assistance and Information**

- 3.11 The aftermath of crime can of course bring a range of immediate needs, some emotional, some practical. Assuming the involvement of law enforcement, the initial response generally lies with the police. A victim of housebreaking may need help in securing their property. A victim of assault may need medical assistance and / or examination to capture any forensic evidence leading to identification of the perpetrator or support for the crime alleged. A victim of domestic abuse may need refuge accommodation and a range of practical assistance, with a focus on safety. Arrangements have been put in place with support agencies, notably VSS, Rape Crisis and Scottish Women's Aid ensuring that police first-responders discuss with victims of crime a referral to these individual support groups, as appropriate and in line with the victim's wishes. Dependant on the nature of the crime and the impact upon the particular victim, the information and practical

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assistance these groups can provide is wide-ranging. For example, we were provided with a powerful account of the trauma to a rape victim in returning to the locus of the attack – a local, public place, which was unavoidable. The practical and emotional support provided by her advocacy worker, planning and patiently supporting her, was crucial in helping her re-visit the locus.

- 3.12 In the event of a homicide, a Family Liaison Officer (FLO) will attend with the bereaved relatives to assist with early communication, around, for example, release of the body and funeral arrangements. If the scene of the crime has been the family home, assistance will be provided in securing the property and making arrangements for cleaning after any forensic work is completed. The FLO can be a significant source of practical advice and support and can help steer the family through an extremely distressing time, in the initial stages of an investigation. In discussions with Police Scotland and PETAL, we understand discussions are taking place to train all FLOs in bereavement counselling, a proposal which we agree should have a positive impact on their ability to support families at a traumatic time.
- 3.13 If the necessary immediate, practical assistance has been put in place, the provision of information is likely to be the next most pressing need for victims. The police will update the victim on the reporting of the crime to the prosecutor, assuming a perpetrator is identified and a sufficiency of evidence is available to establish a crime. The provision of information – both about the system of criminal prosecution and updates in the particular case – will then transfer to the prosecution (the manner in which COPFS meets these needs is described in chapter 5).
- 3.14 In the case of a homicide being reported to the Procurator Fiscal, a handover meeting will be arranged (see the protocol ‘In Partnership, Family Liaison’<sup>26</sup>) attended by the procurator fiscal leading the Crown’s investigation and a VIA representative, to allow the next stage in provision of information about case progress to properly transfer to COPFS. Families and support groups tell us it can be very difficult to absorb detailed information whilst coping with the trauma of the crime, particularly very serious crime. The criminal justice system (and system for investigation of sudden, unexpected or unexplained deaths) is likely to be completely alien and encountered at a time of utmost distress. Leaflets and information sheets will be provided but may be put into a drawer, with every intention of looking at them later. We heard from families - and from services who told us about families – who felt overwhelmed at the initial information from well-meaning support services and professionals. The lesson for criminal justice agencies has to be that it is not enough to explain processes once, at the outset. The need for explanation and interpretation is ongoing.
- 3.15 Ongoing explanation and availability was an observation made by a number of the victims groups consulted. In particular in deaths cases there was a strong sense that, albeit meetings are held with the police and prosecution and notes of those meetings may be provided for clarity, there is a need for there to be someone present who is separate and can help ‘debrief’ the family afterwards, perhaps over a number of discussions. Some of those who participated in the Review who had been bereaved were at pains to emphasise this need. Where this assistance had been made available, it was described as invaluable. What families considered essential was someone available to them who had in-depth knowledge of the criminal justice system but who was there for them, when they needed it, with the focus on their well-being and needs, in a way that neither the police nor the prosecution service could be. It was emphasised that this is not about legal advice; it is about good, accurate information and practical and emotional support.
- 3.16 It is necessary to note at this point that there are parameters around what the prosecution can discuss with the victim about the evidence in the case. Particularly in deaths cases, it is the experience of prosecutors that families may look for detail about the evidence which the prosecutor is simply not able to provide, ahead of trial. While it will be explained to families that it is crucial to ensure that the integrity of evidence is preserved before trial it does mean families feel they are being deprived of information at a point they most want it. The time limits for service of an indictment (the document listing the charges) and the

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[http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Protocols\\_and\\_Memorandum\\_of\\_Understanding/Revised%20Joint%20ACPOS%20COPFS%20Family%20Liaison%20Protocol.PDF](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Revised%20Joint%20ACPOS%20COPFS%20Family%20Liaison%20Protocol.PDF)

commencement of trial within Scotland mean that victim meetings with the FLO and the prosecution do need to take place quite quickly, to explain next steps. The funeral may have only recently taken place; or bereaved relatives report a feeling of re-traumatisation when the perpetrator is arrested, if that is at any distance from the time of the death. The prosecution will explain all it can in terms of how someone died, but that is different from detailing the evidence that goes to support who was legally responsible and which proves the crime. These restrictions apply, too, to the media with strict rules in place about the information which can be provided and published in advance of criminal proceedings.

- 3.17 Clearly there can be a different dynamic and set of responsibilities when the victim is a witness. This is discussed in more detail in chapter 4, which outlines the information which can and ought to be shared with the victim about the evidence and steps I recommend be taken to better prepare the victim for giving evidence at court.
- 3.18 As above mentioned, there is no doubt that the limits on the information which can be shared pre-trial can add to a sense of frustration that the accused is receiving information, in the form of detailed evidence supporting the allegations, which it may not be possible to share with the victim or bereaved family, for the reasons described above. This sense of imbalance is heightened by the fact that the accused has his / her own dedicated legal representative. It is crucial that the wider public and those victims and bereaved families who are drawn into the criminal justice system at a time of immense upset and grief have confidence in the criminal justice system, and have explained to them the reasons for this distinction. In a system of public prosecution this can create a tension in the relationship between the prosecutor (and VIA) and victim or bereaved family. It is entirely understandable that the victim / bereaved family looks to the prosecutor for information and to represent their interests. And in the vast majority of cases – particularly in serious crime – the interests of the victim / bereaved family will coincide entirely with the wider public interest. But it cannot be guaranteed to be so. As is frequently said, it is the role of the prosecutor to make decisions about prosecutions, based on the evidence and an assessment of the public interest, regardless of how unpopular these decisions may be.
- 3.19 There is a perspective reported by victims that the system provides for the accused, but victims can be passed from authority, to agency, to service, with little in the way of continuity or consistency. I heard heartfelt pleas for there to be made available a routine service involving a ‘case companion’ or advocacy worker who is professional, knowledgeable, and available to steer victims and families through the web of criminal justice agencies and other arms of the state with whom they may need to engage, particularly in the aftermath of a death. This can involve the Department for Work and Pensions, the Criminal Injuries Compensation Authority, Housing Associations, etc.
- 3.20 The Review heard a great deal about the stress of fluctuating court dates and venues and the impact that this can have upon victims and families. Some court buildings are better able to accommodate arrangements for separate reception of victims and safe spaces for them to wait. Others may have only one communal entrance, raising the fear of seeing the accused and his or her supporters. This can of course extend to travel to court if the victim requires to use public transport. Awareness of these and other issues can be lost in the formal justice process, where the availability of court dates determines where and when a trial (or Fatal Accident Inquiry) can take place. I am aware of a great deal of planning in individual cases between Police, Prosecutor and SCTS in serious cases to put in place transport and accommodation arrangements for vulnerable victims, witnesses and next of kin, but there are other instances where victims and families report distressing experiences of case delays and concern at court facilities.

### **C. Emotional Well-Being**

- 3.21 Victims and the organisations which support them frequently raised the lack of availability of specialist psychological services to assist them in overcoming the effects of trauma which can be long lasting and impact severely on future well-being. This is particularly so for victims of emotional and physical abuse and bereaved families. The acting Chief Executive of Victim Support Scotland noted at their 30<sup>th</sup> anniversary event that they frequently found that there was no such provision available for their clients.

- 3.22 In discussion with bereaved families who have experienced the death of a loved one – whether as a result of a criminal act or not - there are myriad reactions they may experience and concerns which will need addressed. But there is also a range of other consequences and issues in the aftermath of the death around which families may require assistance. Coping with even the most routine of affairs in the midst of such trauma can be challenging. The more serious the crime, the more likely the victim will require some assistance to aide trauma recovery and to deal with day-to-day life.
- 3.23 It was emphasised in the course of the Review that if there has been a trial, these impacts does not come to an end with the conclusion of an investigation or a jury verdict. The effects of a death or serious crime and the consequences which can radiate from that trauma can be felt for many years to come, long after contact with criminal justice agencies has ceased. Families described situations where the perpetrator is traced, perhaps decades later, but the ensuing investigation and court proceedings import to the present day precisely the same heartbreak and distress for victims. It is every bit as acute as it was at the time of the crime, many years previously. What is apparent is that the needs of victims and bereaved families go far beyond the case progress and justice system information provided by the Crown or the immediate assistance which the FLO can provide; and that there can be serious challenges in accessing trauma counselling.
- 3.24 The groups which exist to assist those bereaved through homicide or sudden death have tended to evolve from the experience of those who have been directly affected by bereavement in similar circumstances. PETAL (People Experiencing Trauma and Loss), The Moira Fund (established in memory of Moira Jones) and HALO (Healing and Looking Onward) each emerged to provide a level of assistance which was found to be missing, or to fill gaps in existing services, and there are of course others. These groups can experience uncertainties around continuity of funding and may have constraints in terms of their geographic reach to victims. (Indeed, HALO has now ceased operation). Speaking to these groups, they are approached regularly by criminal justice agencies anxious to secure practical or emotional assistance for the families they are dealing with, those agencies finding their options are otherwise limited.
- 3.25 The statistics show that women are more likely to die at the hands of a partner meaning children of the relationship effectively lose both parents or carers. Grandparents can often be left to look after grandchildren and to navigate agencies to secure assistance for a range of practical and emotional needs, at the most difficult time.
- 3.26 Some needs will be immediate, some more medium to long term. Systems relying on volunteers for support - as excellent and committed as they can be - may not have the resource to tend to the immediate, crisis needs of bereaved families. An account was given of a family being left a message 10 days after they made contact with a service, in which it was explained that an appointment could be available in another 7 days hence. All of this can exacerbate the stress, helplessness and feeling of isolation.
- 3.27 In England and Wales the Homicide Victims Service was established in 2011, funded by the Home Office, as a specialist arm of Victim Support to provide support and services to those bereaved though homicide. 42 officers operate throughout the regions providing a service which links in and assumes responsibility from FLOs in the immediate aftermath of a homicide and can connect to a number of other agencies to ensure the financial, practical and counselling needs of victims are identified and addressed.
- 3.28 Scotland does not have such a specialist Homicide Victims service. There are parallels in the service provided by PETAL which has established locations in Hamilton and Glasgow and recently opened a service in Edinburgh. The organisation has ambition to reach out to other parts of Scotland beyond the central belt, subject to the availability of funding. This would be most welcome, as although the demographic tends to show the majority of homicides occur in the urban, central belt area, homicides (particularly domestic homicides) happen anywhere.
- 3.29 Within PETAL there is an emphasis on counselling and therapies, with opportunity for ongoing peer support. Quite early in its development, PETAL also opened its service to those who suffered the loss of a loved one to suicide. It is reported that the client base has confidence in the service, in part because of the roots from

which it has grown, having been developed by those who had been affected by trauma through the loss of a loved one to murder.

- 3.30 PETAL can assist in identifying vulnerabilities for those who may require to give evidence at court and in the victims' communications with the prosecution service, particularly around decision-making. They will also work with clients whose lives have been thrown into chaos because of bereavement and issues may have arisen around mortgage payments, pensions, access or adjustments to benefits. One account given illustrated the strengths of this holistic approach: a family were struggling financially in the aftermath of a traumatic death and the PETAL advocacy worker was able to sort out a benefits payment. This was described by the counsellor dealing with the victim as a very significant step. Removing the stress of the financial problem put that individual on the path to recovery, optimising the benefits of the counselling. However it must be emphasised that there are many geographical areas not currently covered.
- 3.31 Rape and serious sexual crime is another area in which there can of course be enormous impact upon emotional well-being with the need for prolonged support and counselling. In this regard, the roll out of Rape Crisis National Advocacy Project providing support workers who can also assist in the interaction with the criminal justice system is to be welcomed (discussed further in chapter 5).

#### **D. System Confidence – and Being Believed**

- 3.32 We know in the context of domestic abuse the strength it takes for a victim to break from an abusive relationship and to engage with the criminal justice system. The issues around safety – as noted above - will be very acute and the victim's resilience and confidence are likely to have been affected adversely by the experience of abuse. The importance of the need for victims to have faith in the system of justice cannot be overstated. What builds confidence in the system is nuanced, multi-layered and can be resource-intensive. Conversely, what can undermine confidence could be a fleeting indiscretion, or perception of impatience sensed by the victim.
- 3.33 Building confidence will mean sensitive input from a number of individuals and agencies. It can be the listening ear; the provision of good, early information to allow decisions to be made by the victim; someone who believes their experiences and does not question decisions to stay or leave, nor pressure the victim if s/he decides to withdraw from the formal process at this juncture; the help to find a safe environment and to be protected from an abuser; a swift and robust response should the abuser breach conditions of bail; the need for decision-makers to have cognisance of the allegations of abuse when considering access arrangements with any children of the relationship; the understanding that when they are cited to give evidence against their abuser they may require special measures to alleviate the stress or intimidation they may feel facing them at court. The whole-system response must be meshed together, with no failures at any stage, for the victim to feel confident that they can stay with the process.
- 3.34 These are acute considerations, too, in the context of sexual crimes, acknowledging that often sexual and physical or mental abuse can go hand in hand in an abusive relationship. Different dynamics may apply when the accused is not known to the victim, but fear, trauma and vulnerability can make it extremely difficult to place faith in a system which can appear as impersonal and impenetrable. It was repeatedly explained in the course of the Review the difference a single person can make - of the positive impact of a caring, empathetic approach; and conversely of the damage that can be done by unthinking, 'style' responses.
- 3.35 A great deal of debate and reform of policy, practice and the law has taken place over the last 5-10 years in Scotland around the response to rape and serious sexual crime. COPFS has created a highly specialist approach to the investigation and preparation of sex crimes and Police Scotland has transformed its response with the creation of specialist Sexual Offence Liaison Officers. Despite these steps, this remains perhaps one of the most contentious areas in respect of responding to victims' needs. In the course of this Review these improvements were acknowledged and welcomed but familiar concerns about longstanding issues, such as the impact of cross-examination, were reiterated as well as some new issues which have emerged.

- 3.36 Rape and sexual crimes are recognised as being some of the most difficult to prove; and research and attitudinal surveys indicate that myths and stereotypes about what rape entails and how rape victims should present continue to have traction in the minds of the public.
- 3.37 Crime Surveys consistently conclude that sexual crimes are under-reported. While the results of such studies vary considerably, they lead to the inevitable conclusion that the prevalence of sexual offending in Scotland is likely to be far higher than the number of such offences that are reported to the police. Such studies are useful not only in estimating real rates of sexual offending, but also in calculating levels of under-reporting. Rape Crisis statistics<sup>27</sup> disclose that only about 48% of their clients decided to report the crime to the police, while the British Crime Survey statistics suggest that up to 20% of rape victims choose not to report the allegation. Attrition (the process by which cases drop out of the system and therefore do not result in conviction) occurs at this point because, for one reason or another, the victim takes the decision not to report the incident to the police. Studies have identified a range of possible factors which discourage victims from reporting rape to the police<sup>28</sup>. These include:
- not recognising the incident as a rape;
  - thinking that the authorities will not recognise the incident as rape;
  - fear of not being believed;
  - fear of being blamed;
  - fear of the criminal justice process;
  - lack of confidence in the criminal justice process;
  - fear of public disclosure of the incident;
  - fear of further attack;
  - divided loyalty in cases involving partners or former partners; and/or
  - secondary concerns related to diversity issues for some disabled victims or victims whose first language is not that of the country in which they were assaulted / abused.
- 3.38 Many of these factors relate directly to the response which victims believe they will receive from the justice system if they decide to report their allegation to the authorities. One way of addressing under reporting in relation to rape and other sexual offences and human trafficking is of course to ensure that the criminal justice system instils confidence in the public by providing a response which is sensitive to the needs of victims and which meets the public's proper expectation that offenders will be brought to justice. In discussions with those supporting rape victims it was generally acknowledged that the work done over recent years has changed positively the response by law enforcement.
- 3.39 Many of these issues are also familiar to those working with victims of human trafficking. A great deal of work is ongoing across relevant agencies around the issues facing those who are victims of human trafficking which brings together an extremely complex range of factors, which we discussed with representatives of TARA (Trafficking Awareness Raising Alliance). Offences which often involve physical and sexual abuse and coercion, with victims who have been isolated, threatened and whose first language is not English present huge challenges to a justice system which is trying to build confidence in its approach. Whilst there has been some success in securing convictions in Scotland, we cannot underestimate the barriers to victims in securing support and breaking away from their abusers.
- 3.40 The COPFS Review of Rape, published in 2006, examined the need for the victim to feel believed, as against the role of the prosecutor to objectively and impartially assess the evidence in a case. It found that the prosecution approach to investigation was often characterised by a reluctance to raise with the victim any

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<sup>27</sup> [http://www.rapecrisisscotland.org.uk/RCS/assets/File/RCS-004\\_annualreport%202016%20Web\\_A.pdf](http://www.rapecrisisscotland.org.uk/RCS/assets/File/RCS-004_annualreport%202016%20Web_A.pdf)

<sup>28</sup> L Regan, and L Kelly, *Rape: Still a Forgotten Issue*, London: Child and Women Abuse Studies Unit, London Metropolitan University, 2003, p 8.

apparent evidential weaknesses in the case. It sometimes happens that the victim's account is contradicted and undermined by other evidence in the case or that there are inconsistencies in the account that he or she gives. It was concluded that such issues should be explored and addressed where possible and that this should take place at the investigation stage. While no doubt the cautious approach of some investigating staff was born of a desire to make the victim feel believed, it was concluded that this did not serve the interests of the victim or the wider public. Accordingly, the prosecution signalled a shift in approach in these cases, with investigations proceeding on the basis of an open, honest dialogue between the case investigator and the victim. Ultimately, this ensures that evidential weaknesses are identified and, if possible, addressed at an early opportunity, and that victims have a clear and realistic expectation about the prospects of the case. It is clear that there are parallels, too, for human trafficking victims where confidence in authority in general might be low.

- 3.41 As a learning organisation, COPFS has used the experience of the specialist sexual offences units created over the last 5-10 years which has led to identification of issues affecting investigation and prosecution. This in turn has led to further work being done to better communicate with victims of sexual offences. To maintain momentum and seek continuous improvements COPFS has convened Independent Review Panels (described further in chapter 4) with key stakeholders to analyse prosecution decision-making and communication, allowing us to adjust policy and practices, as required.
- 3.42 One aspect which remains of concern when speaking to victims and their supporters is the prospect of questioning at court. It seems that victims anticipate close, repeated and aggressive questioning by defence counsel which causes them huge concern. The Lord Justice General has spoken recently about the right to cross-examine a witness noting it does not extend to questioning which is insulting or intimidating (which is discussed in more detail in chapter 4). This is a concern which I suggest requires wider debate across the justice sector and, meantime, makes the case for better preparation of victims for trial by both the Crown and those supporting victims. Whilst instances of aggressive and repetitive cross examination have been highlighted, equally there are many examples where cross examination has been thorough and testing but conducted in a way which is professional and respectful.

## **E. Resilience / Staying Power**

- 3.43 It is axiomatic that anxiety and fear are not erased by delay. Frequently, it will only serve to heighten concerns and undermine faith in the system of criminal justice. Delay can impede justice by raising challenge to the accused's rights to a fair trial and can also dilute the quality of evidence over time. In this regard the proposals by Lord Carlway for digital capture and presentation of evidence have enormous potential to remove delay - or at least the impact of delay of trial upon victims - and to preserve evidence.
- 3.44 In discussion with those supporting victims of human trafficking we were given powerful insight to the impact of delay in the criminal justice system on their clients. Victims of human trafficking can of course have extremely complex vulnerabilities which can impact upon access to justice. Victims may have issues around language, culture, trauma associated with the offending against them, which may have involved sexual and physical abuse, and severe financial constraints. There are likely to be immigration procedures taking place in tandem, with the necessity to repeat their account of their situation and their treatment to a number of officials, as well as obviously, the police. It is likely they will be placed in local authority or charity accommodation and access to funds and support may be very limited. Victims are likely to find themselves dealing with a multiplicity of different authority figures, in a language which is not their first, and in a system which is entirely alien. If the victim is not permitted to stay in the UK as a result of an immigration enquiry, this can of course impact upon their ability to participate in criminal proceedings – they may return to the country of origin or 'disappear' and organisations like TARA do not have the reach or funding to continue to provide support abroad.
- 3.45 Similar issues around resilience can affect victims of domestic abuse. The courage it has taken to approach the authorities can begin to dissipate when there are delays in hearing the case. The victim may be left with a number of pressures beyond the anxiety about the case itself and the prospect of attending court. There can be difficulties around housing, benefits, child care / access and other cultural or family pressures. This

can be compounded when the victim has had to seek refuge provision and there can be a sense of life being on hold; or when there are additional cultural pressures which can heighten a sense of isolation.

3.46 For victims of domestic abuse and stalking, one aspect of risk which was highlighted to us is at the point of sentencing, in the event of a plea or finding of guilt. Where bail conditions have been in place and have been effective, if there has been a significant passage of time it can be very upsetting and anxious for a victim when at the time of sentencing the court declines to make any order – usually a Non Harassment Order - providing a continuing equivalent protection. Even where a conviction has been obtained, the victim can be left with a sense that the criminal justice system has let them down when that explicit protection disappears. This can leave prosecutors trying to explain what mitigation it seems a judge has accepted and the balancing act which the judge must apply to the facts in assessing the need for ongoing protection of that kind.

#### **F. Learning Each New ‘Agency Language’**

3.47 This was a description used by one of the victims groups consulted during the Review which captures the frustration and confusion for victims in navigating not just the various criminal justice agencies, but potentially to have to turn, too, to housing, welfare, health professionals etc., requiring to repeat their story to get access to essential services, necessitated by the crime they experienced. From the police to the prosecution to the courts and beyond, we each have our distinct areas of responsibility and the language used to explain and define that will change between agencies. Victims already coping with the impact of the crime will encounter these layers of terminology and institutional cultures which can compound the feeling of an impenetrable and uncaring system.

3.48 It should be acknowledged that the landscape is daunting for those involved in the system, even those with a professional focus in this area who themselves do not encounter a simple, cohesive response to deliver victims’ rights. It can only be harder for those affected, distressed and potentially damaged by crime and who, it bears repeating, through no fault of their own are involved in criminal justice. For victims, the task of confidently navigating and engaging with a system which, despite best intentions, may remain focussed on the protection of procedure and the rights of the accused, remains deeply challenging, before adding to this the differing language, culture and focus of the various institutions and agencies.

3.49 Victims will turn to those tasked with their support to give them good, accurate information and interpret for them the role and responsibilities of other agencies. The delivery of this is key; and there were mixed reviews about levels of success around this in the course of the Review. In this regard the Victim Code is to be welcomed, to provide a baseline for the task. However, if a system is to be truly victim and outcome focussed, an effective document would be one which does not require victims of crime to refer to other documents, to multiple agencies and to multiple support providers. In the course of the Review, a rape victim described the support she received at court from a Witness Service volunteer (for whom she had the highest praise). Her first reaction was bemusement that this most fundamental need was provided by a volunteer. Whilst she had friends attending court, some of them were cited with the possibility that they might be called as witnesses, if not by the Crown by the defence. The volunteer advised her that she could not speak to her friends all week – not that she could not discuss the evidence with them, but rather that she could have no contact with them at all for the duration of the trial. Unfortunately this advice was wrong and the inability to have any comfort from her friends at a time of high stress caused her a great deal of upset. She explained, too, that this was underlined by other court administrative staff (who have no formal role in such matters). This example and others suggests there may be issues, too, about awareness and confidence on the part of those dealing with victims around the parameters of what can/cannot be done or said, leading to an inclination to ‘play safe’. But the errant advice left this victim bereft of any social, emotional or physical support her friends could provide, albeit they well understood they could not talk about the case or what happened in court.

3.50 Again, considering victims of human trafficking, the barriers around language, culture and, perhaps, fear of authority can pose enormous challenges to those working with victims – how much more difficult for a victim to contemplate engaging with a multitude of agencies without close, knowledgeable assistance. One

particularly pertinent issue in respect of victims of human trafficking relates to the immigration process *per se* and the repeat statements the victim will be required to give in the context of any asylum claim alongside any criminal investigation into human trafficking. These immigration status statements – obtained by a different department for different purpose – become disclosable in the criminal process. They can form a rich seam of challenge for use by those defending individuals charged with human trafficking offences as they may contain apparent inconsistencies or may omit details – details which might be important for the criminal justice process but may be of no necessity in the asylum seeking process.

### **G. Providing Choice**

- 3.51 ‘The core experiences of psychological traumas are disempowerment and disconnection from others..... Recovery therefore is based upon the empowerment of the survivor and the creation of new connections’ (J Herman Trauma and Recovery, 1992).
- 3.52 Disempowerment is a strong theme which has emerged from this Review. That, and the sense that the harm done by a crime should not be compounded by contact with the criminal justice system. I heard repeatedly that where possible, choice should be built into a service response. This is respectful to the individual and their experience, but it can also assist in reducing harm / secondary victimisation and can form part of recovery.
- 3.53 So where might choice be made available? Again, drawing upon the accounts provided to the Review by victims this could refer to choice about the gender of their medical examiner, to the number of people present during an intimate and distressing examination or to arrangements that go some way to preserve their privacy and dignity, all whilst acknowledging the need for corroboration. It could amount to some aspect of control over the environment where and when their statement being taken, or choice about where and when any follow up statement(s) will be obtained. Crucially, it can be about the option of access to that statement, ahead of giving evidence at trial. At the trial itself, it could relate to the availability of special measures – or choice over who is best placed to support the victim as they give evidence.
- 3.54 The ability of a crime victim to choose the level of information they receive from criminal justice agencies is another interesting aspect. It can be easy to make assumptions about victims’ desire for information. The Review heard, equally, from victims who put on hold contact from the justice system updating them on progress, as they wished to get on with their lives meantime. A number of people highlighted the stress of calls from ‘officials’ and feeling a lack of control. It is apparent therefore that here is a great deal of merit in a system which is flexible enough to allow victims to access information themselves, at a time, place and pace which is convenient to them. What would be important is to build in to that the option of a discussion with someone knowledgeable about what that information means, where necessary.

## CHAPTER 4 – THE PUBLIC PROSECUTOR AND VICTIMS OF CRIME

**In this section of the Review consideration is given to the role of the public prosecutor in respect of duties towards victims of crime, placing these responsibilities in the context of the wider public interest.**

### The Public Prosecutor

- 4.1 Prosecution in Scotland is by the independent public prosecutor, acting in the public interest. The Law Officers – the Lord Advocate and Solicitor General – are Government Ministers and lead the prosecution service.
- 4.2 It is manifest that the public interest will include the interests of the victim. However the factors informing the overall picture which comprises the public interest may go beyond the private interests of the individual victim. Victims, who may have no prior knowledge of the system of public prosecution, may be unhappy to discover that the public prosecutor is not ‘their lawyer’. It must be explained sensitively to victims the importance of the independence of the prosecution and the protections that provides to wider society.
- 4.3 There can be tension, too, around the quasi-judicial role performed by prosecutors in Scotland in deciding whether and in what form there should be proceedings (or some other form of action, such as warnings, Fiscal Fines or work orders etc.). At times this has caused deep concern to individual victims and families. It is the responsibility of the prosecution service to take decisions and, if questioned, to explain the reasons for them, however unpopular they may be.
- 4.4 It is important that victims understand that if a prosecution is to take place that it will be conducted fairly, robustly and thoroughly. The prosecutor’s duties of fairness are absolute; and the overriding duty to the court exists at all times. That can lead to some difficult decisions if evidence does not emerge as expected. And at no point is the manifestation of the prosecutor’s independence more clear than when it comes to discussion about the acceptance of pleas of guilty. It is the duty of the prosecutor to give careful consideration to any offer by an accused person to plead guilty to a part of the charge or charges s/he faces. This may require careful explanation to the victim. The decision as to whether that offer is acceptable is, again, taken in the public interest. It will be influenced by, for example, the strength of the available evidence; known challenges to the credibility and reliability of that evidence such as may potentially affecting the likelihood of conviction; and an assessment of the overall impact on the likely sentence to be imposed. Confusion can be caused by the need to include ‘evidential’ charges, about which there is no intention or expectation that a conviction will follow but which provide a legal basis to lead chapters of evidence. This also requires careful explanation.
- 4.5 The fact that decisions about partial pleas of guilty are largely out with the hands of the victim can be a source of tension or of relief. In some situations it might be helpful for a victim to know that they do not have responsibility for the decision. Others may feel that the system fails to recognise their harm and their pivotal role. It is inherent in independent prosecution in the public interest that not all decisions will be popular with the victim – or the wider public. Decisions not to prosecute may be unwelcome for obvious reasons. But equally, there are victims who are strongly opposed to decisions to prosecute. Correct decisions, properly taken, may nonetheless attract criticism from victims of crime. This perhaps again reflects the parallel but distinct principles of ‘doing justice and ‘undoing injustice’.
- 4.6 The journey of victims’ rights over the last decade or so has sought to acknowledge and ameliorate some of these tensions. Chapter 5 outlines the way in which COPFS delivers its commitments to victims, looking at the Victim Information and Advice service (VIA). It is the prosecution which makes decision about whether, where and when a case comes to court and the responsibilities for selection and citation of Crown witnesses, naturally, lies with the Crown. It is therefore entirely appropriate that the Crown explains the decisions for which it is responsible and provides information to those with whom it has contact.
- 4.7 At this stage it is timely to examine the growth of the prosecutor’s duties in respect of victims.

## **Prosecutor's Duties to Victims**

### **A. Information to the Court about the Victim**

4.8 The list of improvements and innovations in the sphere of victim policy over the last 10-15 years, as detailed in Chapter 2, have tended to impose new duties upon the prosecution, to secure delivery of these policies. As such, it is for the prosecution to:

- seek special measures for its witnesses;
- arrange interpreters;
- identify victims eligible to make Victim Statements and provide the relevant forms, to be submitted to the Crown, for lodging with the court;
- identify and contact those entitled to information about the release of an offender and to make representations in that regard to the Parole Board;
- seek a non-harassment order in eligible cases (having sought the views of the victim)
- provide information about financial loss in cases where compensation might be in contemplation.

4.9 The identification of vulnerability is a significant challenge for the criminal justice system, with a great deal of reliance placed upon police observations, police recording of crime and victim information, and sharing of that information. Since the commencement of the Vulnerable Witnesses (Scotland) Act 2004 there have been detailed programmes of awareness-raising within the police and COPFS, supported by IT changes, to ensure the capture of accurate, early information about vulnerability. This is key to securing victim rights around the provision of information and for, example, use of special measures.

### **B. Explaining the 'system' and Case Progress**

4.10 Much of the work over the last decade or so has aimed to give victims general information about the system at the outset of the process. But they can and do have questions specific to their own experience for which they may turn to COPFS or a support agency. Experience suggests that victims and witnesses can look to the Crown, as the formal organisation with whom they have most contact, to raise issues about their treatment in the criminal justice system in general. Thus, prosecutors can find themselves explaining decisions and outcomes which are not within their direct sphere of influence.

Examples can include:

- explanations about delays in fixing High Court trials;
- explanations about trials being adjourned;
- preparing victims and families about the accused's rights of appeal;
- anticipating and discussing defence sentence appeals and complaints about reductions in sentences;
- complaints about sentencing in all of its guises;
- queries about jury decisions.

4.11 It can of course be a barrier to this communication that the prosecutor is generally engaged in court all day – sometimes these explanations and discussions have to be delayed until the conclusion of court business. Dialogue can perhaps be more easily accomplished in the higher courts, where fewer cases are scheduled. The Sheriff and Justice of the Peace courts on the other hand deal with volume business and there can sometimes be a tension between the desire of the prosecutor to provide a service to victims and witnesses and the responsibility of the presiding judge to ensure best use is made of court time, when many other witnesses are in attendance for other cases.

4.12 This was discussed with sheriffs in the course of the Review, who recognise the tension between these two aims and the potential challenge for the prosecutor. I recommend further work be done in an attempt to reconcile these aims. The VSS-led Witness Service plays an immensely helpful role at court in passing on information from the court, but experience suggests there can be matters of interpretation of information which a volunteer may not be in a position to provide and so looks to the prosecutor for answers, with the delay that that may involve.

- 4.13 A great deal of the prosecutor's / VIA's time is spent trying to help victims understand the workings of the criminal justice system. Understandably, victims often want to fast-forward to what the likely outcome will be. It is natural that the prosecution becomes the focus of these queries or concerns, but there are often questions that simply cannot be answered; or invitations to speculate which it would be unwise to accept. What we cannot assess is the degree to which frustration at the system undermines confidence in the prosecution or individual prosecutor.
- 4.14 This can be felt acutely around sentencing. There is properly no locus for the Crown once a conviction has been obtained. The question of sentence is for the presiding judge. That applies, too, at the stage of Appeal. During sentence appeals a representative of the Crown is present to assist the Court in the event that any facts need clarified, but the Crown has no formal role. Appreciating the distress that can be caused when a conviction is quashed or a sentence reduced, VIA will (in serious cases) inform the victim/s of the appeal and its scheduling, in the event they wish to attend. Victims will often seek the professional assessment of the prosecutor as to what may happen. If there seems a strong likelihood that a defence appeal will have some level of success, it is fair to forewarn the victim. After proceedings, prosecutors will make themselves available to explain as best they can the basis for the outcome. It will be apparent that the prosecutor may be dealing with upset, angry victims who feel that the system is loaded against them. In this regard I welcome the creation of the Sentencing Council in Scotland and the opportunity it provides to raise awareness of the principles of and set guidelines as to the approach to sentencing, with representation from those who have experience and expertise in victims' issues.
- 4.15 However, in the recommendations made in this Report I see value in exploring a new way of engaging with victims which could potentially see victims receiving information and advice about the system separately from individual organisations (such as COPFS) which may be dealing with the case at a particular stage. This would be an important means of separating the victim's need for information from organisational interests, and making the victims needs *the* priority, rather than, potentially, a competing priority.

### **C. Explaining Prosecution Decisions**

- 4.16 Over recent years a detailed programme of work has considered the legal framework around victims' rights, their expectations and how to meet them, consistent with the role of the prosecutor and the commitments made by COPFS. There was concern at the beginning of this century about prosecutors being remote, disconnected and potentially unaccountable for decisions which were not explained. The COPFS Review of Rape published in 2006 reflected, too, the apparent conflict in victims' need to be believed, and the duty of the Crown to review evidence critically, objectively and assess any weaknesses. That Review led to a detailed training programme for prosecutors in the critical evaluation of such cases, setting out careful and comprehensive guidance on the search for supporting evidence and the requirements of discussing cases and their prospects openly and objectively with victims, whilst ensuring the integrity of the evidence.
- 4.17 That will happen in the most serious cases, and must now be considered alongside the rights afforded to victims under the 2014 Act and 2015 Regulations, and the commitments of COPFS in the Victims Code, detailed in chapter 2.
- 4.18 The Crown accepts fully the duty to the victim to be sensitive, but open; to adhere to principles of integrity of evidence, but deliver on the right of the victim to information about and explanations of procedures and case progress. Good preparation of the victim (which is discussed below, in relation to trial) can involve discussion around a number of aspects of the prosecution or death investigation. It may explore the complexity and timing of investigations and when decisions can properly be reached. It may also touch upon an assessment of the likelihood of criminal proceedings and the prospects of the case. These are of course decisions to be made by the prosecution and explanations which require to be given by the prosecutor. How it is those explanations about decisions can best be delivered, across the range of casework, is a matter that requires further consideration, particularly as the public increasingly expects information to be available in digital format.

#### D. Preparing victims (for the adversarial process)

- 4.19 Much of the literature provided to victims and the information agreements developed across the criminal justice system to support contact with victims is to inform them about the criminal justice process. At its core this is a form of preparing victims – particularly those who may require to give evidence as a witness in an adversarial system. This is different and distinct from detailed discussions about evidence, ahead of trial, often referred to as ‘witness coaching’. Coaching about evidence is permitted in some other jurisdictions but is not allowed in Scotland.
- 4.20 What is the role of the prosecutor then in preparing victims for court? Protocols developed with the Witness Service, operating under Victim Support Scotland, provide for victims to visit a court in advance of any trial. This can be invaluable preparation for appearing in court. There are many DVDs and leaflets available in hard copy or via websites which prepare victims for the experience of court – it can be as basic as knowing how you will be addressed, and how to address others, together with an understanding of who will be present in court. There is no requirement that this be done by the prosecution service.
- 4.21 Leaving aside the more generic aspects of preparation, in serious cases there may be more searching questions by, and of, the victim.
- 4.22 In approaching the treatment of victims and witnesses in the criminal justice system consideration must be given, not only to the services which are provided, but to the very nature and constitution of the system itself. The nature of the proceedings, the roles of the parties and the composition of the decision-making panel all influence the way in which trials are conducted and evidence presented. It is clear that the adversarial nature of the criminal justice system in Scotland – or in any jurisdiction - is one factor which can serve to heighten the pressure which victims and witnesses feel when required to give evidence. That is particularly so where the outcome of the case is likely to turn on the evidence of a particular witness as is so often the case in trials for sexual offences or other crimes which tend to be committed in private. The need, in the context of an adversarial jury trial, to persuade 15 members of the public of the guilt or innocence of the accused, requires parties to make assumptions about the likely views, beliefs and preconceptions which the individual decision makers may hold. Having anticipated how a jury *may* assess a set of circumstances, a major focus of questioning at trial can thereafter be designed either to overcome unhelpful preconceptions or to encourage those which may assist – by either side.
- 4.23 It is well established through research that victims in sexual offence cases can be compared against established stereotypes. But it is not, of course, only victims of sexual crime who may be disadvantaged by established stereotypes. There may require to be adjustments to the trial process to allow proper participation by victims, witnesses and accused persons with disabilities, but in an adversarial system it must be borne in mind that we must guard against patent or latent opportunity for preconceptions and prejudices to influence the way that a case is presented or witnesses questioned. This is something considered in more detail in Chapter 6, looking at the prosecutor and vulnerable accused.
- 4.24 There is, therefore, scope in any system for victims and witnesses to be disadvantaged by assumptions made by decision-makers about their personal circumstances or the circumstances of the crime; and the potential for such views to be exploited in favour of one side must be heightened in an adversarial system.
- 4.25 COPFS has previously considered the impact on outcomes of an adversarial system when compared to the approach of inquisitorial systems. In 2006, as part of the Review of Rape, consideration was given to the distinction between inquisitorial and adversarial systems, and the different approaches which each takes to the decision-making process. While the adversarial common law systems which were studied relied exclusively on juries to decide questions of fact in rape cases, the inquisitorial civil law systems tended to rely on decisions about facts being taken by professional judges, sometimes assisted by full-time lay advisers. It was noted at that time that conviction rates in rape cases tended to be higher in inquisitorial jurisdictions.
- 4.26 In this connection it is of note that in modern times some continental legal systems have reformed their approach to jury trials. In Norway, for example, in 1995 criminal procedure was reformed to bring serious cases (previously tried by lay juries) into the jurisdiction of the District Courts where a tribunal composed of two professional judges and three lay assessors determine guilt. In Denmark major reform of the jury

system in 2008 saw the introduction of lay judges in all trials. A panel of three professional judges sits with six jurors in more serious cases. Less serious cases are decided by one professional judge and two lay assessors. And in Sweden (where, historically, there have been no juries) a District Court is normally composed of one professional judge and three lay assessors.

**(i) Questioning at Court**

- 4.27 Chapter 2 explores the many reforms introduced in Scotland over the last ten to fifteen years designed to provide measures to support victims and witnesses while giving evidence, measures which are intended to allow the witness to give his or her best evidence. But of equal importance have been developments intended to ameliorate some of the impact of the adversarial system by curbing excesses of questioning in court and ensuring that questions are relevant, focused and, therefore, fair. In statutory form this can be seen in the amendments to sections 274 and 275 of the 1995 Act in relation to sexual history evidence. But there has also been growing judicial comment on the content and manner of cross-examination.
- 4.28 A concern which loomed large in the consultation around this Review and which was raised repeatedly by those the team spoke to was the fact and nature of cross-examination at trial. The Lord President has recently underlined the duty upon the judge and the role for the prosecutor to challenge harassing and insulting questioning. I conclude there is more which can be done to prepare victims, sensitively, about the aims of cross examination and what to expect. Victims should understand that it is the role of the defence to probe and, in all likelihood, challenge the veracity of their account; that that should not be done in a harassing or abusive manner; if it is an abusive line of questioning the prosecutor may object; and judge should oversee the process to ensure fairness and observation of the witness' right to be respected.
- 4.29 Victims tell us again and again that they were offended and upset at being called liars in court. Victims are clear that even legitimate but forthright cross examination can cause great upset, never mind when it becomes repetitive, harassing or confrontational. It may be that preparation for trial needs to explain and place in context the role of the defence. That is a role which the prosecution could assume; but should also be reflected in the policies and practices of all support agencies.
- 4.30 The courts in Scotland have long since recognised the right of witnesses to be protected from “insulting or intimidating” questioning. As was said in B v Ruxton:
- “It is indeed the duty of the court to protect witnesses against unduly harassing questioning while at the same time allowing the defence properly to develop any line of cross examination which may be appropriate. It is sometimes a fine line to draw but it is . . . the duty of the court to protect the witness . . .”*
- 4.31 The dilemma for any tribunal of fact is identifying precisely where that line is drawn. Harsh questions may seem reasonable when a witness is lying. And the same questions will seem utterly unacceptable when the witness is telling the truth and is, in fact, a victim. The problem is that, until any verdict is reached, the position is unknown and the accused, quite properly, is presumed to be innocent. The question, then, is whether this is an inevitable aspect of a system of criminal justice, in which the pressure on a witness is, sometimes, a necessary consequence of the paramount need to test the veracity of what the witness is saying.
- 4.32 In one recent case, however, the High Court in Scotland has made clear that the right to test a witness's evidence through proper and focused cross examination did not extend to insulting or intimidating a witness. In Begg v HM Advocate<sup>29</sup>, the accused was convicted of a number of charges of physical and sexual assault and rape involving two complainers. In considering an appeal against conviction the then Lord Justice Clerk commented on the nature of defence counsel's cross examination of the complainer:
- “...given the latitude which seems still to be afforded in practice in cases of this type, it has to be said that both the manner and length of examination and cross-examination give cause for concern in relation to the treatment of a vulnerable, or indeed any, witness testifying in the criminal courts. The examination lasted*

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<sup>29</sup> High Court of Justiciary, 2015 S.L.T. 602

for many hours and must have been what can only be described as a substantial ordeal for the complainer. From the outset of cross-examination, she was subjected to not just in depth questioning testing the veracity of her testimony, but to direct insults of her general character as, for example, being a 'wicked, deceitful, malicious, vindictive liar'. The cross-examination itself then lasted for hours. It was conducted in a manner apparently calculated to break the will of the witness, which at times it undoubtedly did."

And,

"Due regard must be had to the right or privilege under domestic law to test a witness's evidence by properly focused cross-examination. That right, however, does not extend to insulting or intimidating a witness .... It also requires to be balanced against the right of a witness to be afforded some respect for her privacy and dignity... The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and length of time for which a complainer can be expected to withstand sustained attack."

- 4.33 A particular source of distress for victims is the uncertainty about what will happen at trial. Current arrangements seek to address these concerns through the provision of information about the process and, where appropriate, pre-trial court visits. But for many victims the uncertainty over the nature of the questions they will be asked at court will remain a constant source of pressure with witnesses fearing that they will not remember important information or will be "ambushed" by questions about aspects of their case or their past. For good reason criminal justice services must be cautious about discussing evidence in the case and must ensure, at all costs, that a witness's evidence is not tainted by what is said in the preparation of the victim for trial. Above all, any discussion which might coach, or be seen to coach, the witness must be avoided. Equally, however, the Courts in Scotland, and elsewhere, have recognised that there is a legitimate level of information about the process and the particular case which a victim is entitled to receive. In MM v HMA<sup>30</sup> the court was considering the fairness of the complainer being given notice about the defence line of cross-examination in advance of trial in an application under s 275 of the Criminal Procedure (Scotland) Act 1995. The court held that there was nothing inherently unfair about such a system:

*"In my view, there is no human right to spring a surprise line of questioning on the complainer . . . If the line of cross-examination is well founded, it will establish itself to the jury, or at any rate be relevant to the question of reasonable doubt, whether it comes to the notice of the complainer before the trial or during the course of cross-examination."*<sup>31</sup>

- 4.34 In reaching its decision the High Court cited the Canadian case: Darrach v R [2000] 2 SCR 443 This judgement held that while the right to make full answer and defence and the principle against self-incrimination are certainly core principles of fundamental justice, they can be respected without the accused being entitled to "the most favourable proceeding that could possibly be imagined." Nor is the accused entitled to have procedures crafted that take only his interests into account. Still less is he entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial.
- 4.35 In the 2006 Review of Rape, following MM v HMA, it was accepted that policy around section 275 applications to lead evidence about sexual history or character evidence could and should require discussion with victims about the material the defence wished to lead in such an application. It was recognised that that was part of good *preparation* – for both the prosecution to fulfil its duty to keep its case under assessment, and to serve the wider public interest. The victim may have a perfectly good explanation for the behaviour or rebuttal of the allegation which the defence sought to raise. The Crown should know the victim's position; the defence should know the victims position; and the victim should be given opportunity to explain.

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<sup>30</sup> MM v HM Advocate, 2005 1 J.C. 102

- 4.36 The Sexual Offences (Scotland) Act 2009 brought in a regime requiring the defence to give special notice if, for example, the defence is to be one of consent. There is no reason why that cannot be shared with the victim.
- 4.37 Other jurisdictions have considered the ways in which victims can best be prepared for trial. In England and Wales (where witness coaching is also prohibited) the Crown Prosecution Service has considered what level of information a victim should have about the issues which are likely to arise at trial and I recommend a similar exercise be undertaken by COPFS. One recent development which could be helpful to victims and vulnerable witnesses is the possibility of automated access to their police statement. COPFS plans to digitalise this are described in chapter 5.
- 4.38 In summary, I see benefit in a review of the extent to which victims who will be required to give evidence should be advised about the role of the defence; the role of the presiding judge; and consideration be given to a structured means of providing those witnesses who wish it with information about the issues likely to arise at trial in serious cases.

**(ii) Training of trial lawyers**

- 4.39 The observations by the then Lord Justice Clerk in Begg do suggest that there remain pockets of practice which do not give sufficient regard to the rights of the victim, particularly around cross-examination. On one view, time has shown that precedent and legislation are not enough; cultural change is required and this is most likely achieved through the training and development of trial lawyers. The Faculty of Advocates embarked in recent years in a wholesale review of advocacy and best practice in relation to vulnerable witnesses. The resulting programme of training clarifies many misapprehensions about the efficacy – and fairness – of certain styles of advocacy. The programme is informed by the findings of Plotnikoff and Woolfson<sup>32</sup> about communication challenges of vulnerable witnesses and issues around access to justice, an issue just as acute for victims as it is for vulnerable accused.

**E. Listening and Learning from Victim Experiences**

- 4.40 The last decade has seen wholesale change to prosecution policies around certain crime types and raising awareness with prosecutors about the impact of crime. Particular effort has been focused on sexual offences, domestic abuse, stalking and hate crime in all of its guises. The prosecution response to housebreaking was amended as a result of feedback and improved understanding and is a crime viewed very seriously because of the impact on a victim's fundamental feelings of security in their home. Further work has been undertaken in relation to older people and prosecution policy adjusted to recognise particular vulnerabilities that require to be considered.
- 4.41 COPFS has developed Independent Review Panels, around domestic abuse and sexual violence to demonstrate that its policies and practices in the prosecution of crime are fair, sensitive and robust and to learn from cases. The Panel allows selected, finalised case files to be independently reviewed by organisations that represent the interests of victims and witnesses, with a number of aims:
- To review the way in which COPFS interacts with victims and witnesses and to make any appropriate recommendations on the individual cases looked at to improve COPFS service to victims and witnesses.
  - To test and challenge COPFS policies and practices to ensure operational effectiveness in all cases
  - To make recommendations for improvement based on the review and scrutiny of the cases
  - To raise awareness and understanding of the decision making processes of COPFS.
- 4.42 The membership is drawn from the following organisations:
- COPFS
  - Scottish Women's Aid

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<sup>32</sup> see Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants

- Victim Support Scotland
- ASSIST (expand with full title)
- AMIS
- Police Service of Scotland
- Rape Crisis
- SHAKTI
- Children 1<sup>st</sup>
- Scottish Government

4.43 COPFS is a learning organisation, determined to continuously check that practices and policies meet the public interest in the prosecution of crime in Scotland. But it is apparent that the prosecution cannot work in isolation. Some of the immediate steps I recommend include:

- encouraging victims to take up the opportunity to access their statement/s electronically
- advising victims if a special defence has been lodged and an early alert to victims if personal records are required in the course of an investigation / prosecution (i.e. educational, medical, social work ) and if it is assessed that they require to be disclosed to the defence in order that the victim can seek to make representations
- discussing with victims that it will be the defence job to challenge the veracity of their account and the general way that will be done– that should not be done in an abusive manner – and judge should oversee that.

4.44 This is to ensure a prosecution service which is professional but sensitive. The prosecution’s public duties may not coincide entirely with the wishes of the victim, but COPFS must endeavour to identify policy and practice to have those sometimes frank communications with victims, recognising, if not reconciling, the aims of ‘doing justice’ and ‘undoing injustice’.

## CHAPTER 5 – VICTIM INFORMATION AND ADVICE – VIA, THE THIRD SECTOR AND BEYOND

Previous chapters describe the development of Scots criminal law this century in the treatment of victims, examining the changes within organisations, including COPFS. Chapter 3 considers the range of victim needs described to the Review and Chapter 4 sets out the nature of the relationship between the independent public prosecutor and the victim. This chapter now explores the services established in Scotland and looks beyond our jurisdiction to models elsewhere which might inform our desire to improve service delivery.

### The Development of COPFS' Victim Information and Advice Service

- 5.1 Since the year 2000, a central component of the COPFS strategy for victims and witnesses in Scotland has been the service developed and delivered by the Victim Information and Advice service (VIA).
- 5.2 VIA was first launched in June 2002 with the aim of making the experience of a criminal prosecution less traumatic for victims, witnesses and next of kin. It was intended to increase their access to justice by facilitating provision of information and signposting of support so that they would not feel as bewildered in having to navigate the criminal justice process as often happened in times past when no one reached out to offer that guidance. It was recognized that COPFS was uniquely placed to provide information about individual case progress and decisions. Being involved in the criminal justice system can be daunting for anyone but particularly for people trying to cope with the often difficult and distressing effects of crime. In the late 1990s and early 2000s, support services for victims were not widely available across Scotland and victims often did not know what organisations, if any, were in their area and could offer them support.
- 5.3 The service was piloted by COPFS in 2001 at offices at Aberdeen and Hamilton and these pilots had, in part, been inspired by new approaches that had been adopted by COPFS in engaging with the families of the victims of the Lockerbie bombing over several jurisdictions. In addition, examples of successful victim engagement were observed in a number of different countries and COPFS staff worked alongside bespoke victim services in the United States of America where there had been a specific bereaved victim service in operation for some years. Following a successful pilot the VIA service was rolled out across Scotland between 2002 and 2004 and since then VIA has provided a national service as part of COPFS. The provision of a consistent service across the whole of the country is one of VIA's distinguishing features as a service to victims in Scotland.
- 5.4 The intention at the time of VIA's creation was to offer any victim in a solemn case (before a jury) who was known to be (or likely to be) vulnerable:
  - information about the criminal justice system generally;
  - information about the case they were involved with,
  - referral to local support agencies which could offer support or counselling.
- 5.5 In 2008, the VIA service extended to certain summary cases and the specific categories of crime in which VIA receives a referral have extended considerably over the past 12 years, sometimes in response to emerging research or awareness raising campaigns, but also as COPFS has developed its own understanding through experience of dealing with vulnerable people and seeing, first hand, the effects of crime on victims. For example, stalking cases and cases with witnesses aged over 60 years are now referred to reflect Law Officers' policy on prioritising these particular types of crime.
- 5.6 An important aspect of the VIA service, from inception, has been that information is provided to victims, witnesses and next of kin *pro-actively* with information and updates being provided, regardless of whether or not the victim maintains contact with VIA. Procurators Fiscal refer victims to VIA in appropriate cases and, thereafter, the service is provided unless, or until, a victim "opts out". The rationale behind this approach (which was promoted by groups supporting victims) was to ensure that the most vulnerable victims did not lose out on the service as a result of a failure to understand or appreciate the offer which was being made, or as a result of a lack of stability in their personal circumstances or a simply disinclination to engage with the process. This approach has remained unique to VIA.

- 5.7 The current VIA remit ensures that victims are provided with information in the following categories of case:
1. Victims in all serious cases, where the nature of the offence merits solemn proceedings. If, however, a case is only to proceed on indictment because of the status of the accused, as opposed to any feature of the victim, that victim will not be eligible. For example, the car owner in a case of theft will not be entitled to the service if solemn proceedings are taken only by reason of the accused's record of previous convictions.
  2. The next of kin in cases involving deaths which are reported for consideration of criminal proceedings and death cases where a Fatal Accident Inquiry is to be held.
  3. The next of kin in all cases where there are likely to be, or it becomes clear after initial investigation, that there will be significant further inquiries, or where, in all the circumstances, it is considered that the assistance of VIA would be appropriate.
  4. Victims in cases of domestic abuse (not just assault but any incident of a domestic nature e.g. breach of the peace)
  5. Victims in cases with a racial aggravation and cases where it is known to the Procurator Fiscal that the victim perceives the offences to be racially motivated
  6. Cases involving children (as victims and/or as witnesses)
  7. Victims in cases involving sexual offences
  8. Cases involving vulnerable witnesses, i.e. witnesses who:
    - have learning difficulties
    - have physical disabilities
    - suffer from mental health problems
    - are Asylum Seekers or witness with language difficulties
    - are terrified of accused and/or of reprisals
    - are victims in cases where sexual orientation or gender identity may give rise to vulnerability
    - victims of domestic abuse involving abuse by children against their parents or parents against adult children

#### **VIA today**

- 5.8 Since its inception in 2004, VIA has developed considerably in terms of its remit and caseload. It has developed a body of considerable skill and expertise in meeting the information needs of victims of crime and is now established as a vital part of the justice system's response to victims of crime. We have seen many examples of VIA providing an excellent service to eligible victims in Scotland whose case is reported to the Procurator Fiscal. And that service is offered to an increasing number of victims with referrals to VIA having increased substantially over the years, in part due to the expanded categories of case which COPFS has brought with the remit of the VIA service.
- 5.9 Many of COPFS publicly stated commitments have since been enshrined in legislation as a result of the coming into force of sections of the 2014 Act. For example, since the early 2000s, COPFS provided reasons on request for decisions in cases to the victim and also reviewed the decision if requested to do so. As a result of the 2014 legislation introduction of a victim right to review in compliance with the EU requirements COPFS now advises victims of their right to ask for a review no-action decisions in all solemn cases and has voluntarily extended this to certain summary level cases.
- 5.10 In addition, the categories of "deemed vulnerability" contained within the 2014 Act do not match our VIA categories and despite the fact that the Act specifically excludes hate crime, COPFS still offers such victims VIA services in that respect but have to tell them that they are not deemed vulnerable in the terms of the legislation and that the court will decide whether they are to receive special measures or not.

- 5.11 Set against current crime demographics which has seen significant increase in the reporting, investigation and prosecution of domestic abuse and sexual offences this could lead to around 20,000 additional Vulnerable Witness applications which will come before the courts over each of the coming years.
- 5.12 Overall it is anticipated that the 2014 Act will result in significantly increased customer base for VIA. Initial estimates are that there will be approximately 4000 additional referrals each year to VIA due to the widening definition of a child witness to include 16 and 17 year olds. In addition it is estimated that there will be approximately 16,000 further additional witnesses legally entitled by the Act to the use of special measures as “deemed vulnerable” witnesses.
- 5.13 In 2014/2015 approximately 40,000 victims were referred to VIA for information and advice compared to 27,559 in 2006/2007, representing a 45% increase in referrals over the last seven years. In those cases VIA’s aim has been to provide information by initial correspondence and telephone contact. VIA staff will have written to the victim throughout the life of the case to provide progress information and, ultimately, to provide information about the outcome of the case. In many of those cases VIA’s introduction will have opened a line of communication between the victim and COPFS allowing VIA to assess the particular victim’s vulnerabilities and needs with VIA responding by signposting other sources of support, for example, linking in with the Witness Service and arranging pre-trial court visits.
- 5.14 In many cases, however, the role extends significantly beyond the provision of essential case progress information. In 2014/2015, for example, VIA prepared 2,110 notices or applications to the Court for special measures to be permitted for witnesses at trial. This aspect of the role requires VIA to engage with victims, either in person or by telephone, to assess their vulnerability and decide on the particular measures which will allow them to give their best evidence and, where appropriate, to gather material which supports that conclusion to the court’s satisfaction. Thereafter, VIA officers will prepare the relevant application to the court for special measures. As the categories of witness who are entitled automatically to special measures increase, so too have the number of notices which require to be prepared.
- 5.15 VIA write to all witnesses who are deemed vulnerable to seek their views on special measures. Current experience is that a significant proportion of these witnesses do not respond. Sheriffs who assisted in the consultation for this Review reported that the paperwork will be prepared, arrangements for special measures require to be granted and put in place at court, only for those victims and witnesses to fail to appear, to decline to co-operate, or appear at court stating they do not require special measures. We note that this requires considerable resource to be expended for those who do not engage and this may suggest a disconnect between the policy aims of the legislation and effectiveness of communication to engage with victims, to secure their rights. In light of the significant increase in eligible victims, noted above, we consider that it is necessary to ensure that this ‘right’ is translating into meaningful support to those who require it.
- 5.16 VIA comes to the process quite late in that the victim will have already seen the police and may be in touch with a victim organization such as ASSIST or Victim Support. As has become something of a theme in the consultation around this Review, VIA becomes yet another organization for the victim to learn about and engage with.
- 5.17 VIA has also seen its role expand as COPFS has pursued increasingly victim-focused approaches in important areas of policy. For example, in 2011 the COPFS policy on obtaining and disclosing sensitive records in sexual cases required VIA to be engaged with case preparers and victims about issues surrounding the disclosure of such records. And in 2015 when COPFS developed a strategy for engaging at an early stage with all victims of rape and other serious sexual offences, the policy included an expanded role for VIA. The VIA role is, therefore, a broad one which delivers a service on many levels depending on the nature of the case and the extent to which individual victims are engaged.
- 5.18 I am clear, however, that the role of VIA can be of most value to victims and witnesses where individual VIA officers have the capacity to develop, and sustain, close liaison with victims throughout their case. Excellent examples of this can be found in prosecutions at all levels but it is most evident in serious cases in which VIA officers have the opportunity to be engaged closely with victims and with other support organisations, playing a pivotal role in co-ordinating sometimes complex arrangements and relationships to ensure that victims’ concerns are allayed and their needs met. At court, for example, a great deal of VIA time is spent

with other justice agencies planning the attendance of victims and their supporters, negotiating arrangements with the court for their reception and accommodation, including use of alternative entrances to avoid the accused and his/her supporters, or the media. They can liaise with other agencies about court progress, the availability of special measures and to explain procedures. VIA will frequently facilitate meetings with the prosecutor and will retain a victim focus, to ensure explanations are understood and concerns addressed, in so far as possible. The role is different and distinct from the role of the prosecutor – and deliberately so. There are many examples of VIA undertaking this role to a very high standard and the Review has heard praise for VIAs effectiveness in making the experience a better one for individual victims. Indeed, in discussion with victims who have expressed concerns about the ultimate outcome of their case, or aspects of the system, it has nonetheless been said that the contribution of VIA was invaluable in assisting them through the process.

- 5.19 Indeed, the opportunity for meaningful, personal, engagement with victims is, for many VIA officers, a part of the role which provides tremendous satisfaction and that many regard this as their primary role.
- 5.20 It can be seen that the VIA role is extensive and that VIA is engaged, day and daily, in the provision of practical advice and assistance to victims and witnesses in all levels of prosecution across Scotland optimising the victim's ability to participate and seeking to minimise the risk that they be hurt by the court experience. The role of VIA is broad but it also has clear parameters and for good reason.
- 5.21 From inception it has been made clear that it is not part of the role of VIA, nor of the prosecution service generally, to provide emotional support or any form of counselling to victims of crime. That does not mean that VIA cannot assist people in a way which is supportive, sensitive and empathetic. Indeed, the expressions of gratitude received from victims who have praised individual VIA officers demonstrate the sensitivity with which the role is approached. But it has always been understood that the provision of such support is a specialist skill which should be provided only by those with the training, skill and experience to support and counsel those experiencing distress or trauma as a result of crime or other associated harms. Moreover, it is recognised that for counselling to take place in a way which is effective and unconstrained by the competing interests of the criminal justice system (and the prosecutor's independence), it should be undertaken by people independent of the justice system and whose *sole* interest is the victim's interest. Similarly, as part of the prosecution service, VIA's role does not extend to the provision of advice about matters unrelated to the criminal prosecution. We know that in the aftermath of a crime a victim may need advice and assistance on many legal and practical matters, such as housing, benefits and civil law remedies may need to be considered. It is against this background that a major aspect of the VIA role is to ensure that victims are referred, where appropriate, to other organisations which are available to provide emotional support or counselling or practical assistance in cases which are out with the sphere of the criminal justice system. This presupposes VIA having close knowledge of other organisations. In consulting VIA officers in the course of this Review it became apparent that this is a challenge, with the growth of sometimes ad hoc support and the range of advocacy groups. (In that regard please see **Annex B** for an example of a typical day in the High Court as regards VIA liaison with victims and support services.)

## The VIA Review 2015

- 5.22 In 2015 COPFS undertook a Review of VIA organisational structures and processes. The Review was concerned, primarily, with a new approach to COPFS's internal VIA management and administration. The impetus for that Review was the need for COPFS to meet the imminent requirements of the Victims and Witnesses (Scotland) Act 2014 when fully implemented. (See initial estimates – above - that there will be approximately 4,000 additional referrals each year to VIA due to the widening definition of a child witness to include 16 and 17 year olds and approximately 16,000 additional witnesses will become entitled to the use of special measures). In addition, however, the 2015 Review considered the management structure of VIA and how it should change as part of a wider COPFS "Shaping the Future" programme which was, in turn, looking at the business structures within COPFS as a whole.
- 5.23 As can be seen from the remit of the present Review, we are concerned not with the structures within the current VIA service and the immediate issues arising from the COPFS restructure and the 2014 Act, but with the broader question how COPFS should engage with victims, and the wider justice system, in the future to ensure that victims are provided with a service which truly meets their needs.

- 5.24 Overall, as the 2014 Act starts to bed in, against significant changes in crime demographic<sup>33</sup> and significant reductions in public sector financing, the time seems right for an overarching Review of the response of the criminal justice system to vulnerable victims and witnesses.

### **Refocussing the role of VIA**

- 5.25 Having considered the scope of the VIA role and the way in which it is undertaken in practice, there are two distinct ways in which VIA provides a service to victims in Scotland. The first is a service which meets COPFS's essential commitments to victims, ensuring that victims' rights are effective. In this aspect of the role VIA is primarily occupied with the provision of case information and the administration of aspects of the special measures regime. In some regards this aspect of the VIA role can be seen as being primarily administrative in nature, but nonetheless resource-intensive, as alluded to above.
- 5.26 The second aspect of the VIA role is victim led. Rather than being focussed on the victim's rights or the prosecutor's obligations, it is focussed on the individual needs of the victim. It relies on meaningful engagement with the victim by people who are skilled and experienced in victim engagement and, crucially, who have an intimate understanding of the criminal justice system. The role requires empathy, sensitivity and patience. It requires a professional approach, not only because it demands specialist knowledge, skill and experience but also in the sense that it requires the exercise of judgement and discretion in deciding how to approach matters, the level of information to provide and, crucially, when to raise issues with other criminal justice partners.
- 5.27 I conclude that the work of VIA is best able to improve the experience of victims when it is focussed on delivering a victim-led service of the kind described above. There are many issues to be considered if there is to be an expansion of this role, notably, a move to this model of service would not be an option within current ways of working.
- 5.28 First, the victim-led approach which we favour can be time consuming. It requires VIA officers to have the capacity to discuss and explore with victims their concerns and to identify and co-ordinate a tailored multi-agency response which could involve VSS, its Witness Service, clerks of court, Rape Crisis or liaison with an equivalent advocacy worker, parents and guardians or those with duties of care to looked-after children. A key aspect to the experience and expertise of VIA officers is their knowledge of the court landscape and language, together with their access to other criminal justice agencies. The VIA officer at court can be a pivot in a fast-moving and demanding environment, assisting decision-making.
- 5.29 Secondly, a shift towards a victim-led model would require to be underpinned by a programme of training and / or accreditation / continuing professional development. As noted above, the role requires the exercise of judgement and discretion in approaching sensitive and difficult situations. Equally, however, the provision of such a programme of training would create greater scope to recognise the professionalism of the VIA service affording it greater autonomy in responding to the needs of individuals by applying professional judgement in determining the best approach.
- 5.30 Thirdly, a victim-led role is one which cannot be undertaken in isolation. It requires extensive engagement across the criminal justice agencies and with the third sector if the experience of the victim is to be seamless and so there must be consideration as to what approach allows us to maximise the scope for much closer collaboration between VIA and other partners.
- 5.31 Finally, it is a role which can have a significant focus on the trial stage when the victim gives evidence – whether by attending court, or in future by other means allowing digital capture of their evidence. I consider therefore there is scope to review the role of VIA in assisting victims to give their best evidence. A successful model exists at the main High Court sites for VIA to add considerable value to the delivery of services to victims and vulnerable witnesses (see Annex B, below). For consideration is whether and how the criminal justice system seeks to replicate this in the lower courts; and how this should be delivered along with the innovations to capture evidence envisaged in the Evidence and Procedure Review. Delivering such a service for all victims, or even for all victims referred to VIA, would require considerable change; accordingly, new ways of working should be explored.

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<sup>33</sup> Sexual crimes now account for around 70% of COPFS work in High Court cases.

5.32 I consider that the capacity of the current VIA resource requires to be maximised by reducing the level of routine or administrative work undertaken by VIA officers. Through the automatic provision of essential case progress information, the increasing use of technology and the greater integration of existing systems, opportunity presents to consider how VIA can be freed to adopt a greater role in the direct provision of practical assistance around all aspects of evidential proceedings.

5.33 I consider that the aim should be:

- for VIA to have victim-led approach to the provision of advice and assistance;
- for VIA to work in conjunction with other criminal justice partners and the third sector;
- for VIA to provide a service which is public-facing;
- to remove duplication of work undertaken by the VIA service and other public authorities and the third sector;

There are a number of impending changes which bring opportunity to reflect on the best value that VIA can add:

Witness Website:

5.34 At present, witnesses in the criminal justice system have no way of accessing the information they have given in a case without a personal contact to either the police or the Procurator Fiscal. They can find out when a case has called in court but until then, they have to rely on the personal contact with either the reporting agency or the Procurator Fiscal.

5.35 COPFS is developing a public facing Witness Website that allows for the posting of information by COPFS of witness statements and case progress. It will also allow for the posting of information by witnesses and victims, intimation of change of contact details or general enquiries. The solution will provide the witness with a secure mechanism to log on to the website and access material relevant to their case. The username would be on the witness citation and COPFS would send the password by either SMS or email (whichever the witness had indicated a preference for when they gave their statement).

5.36 The website will hopefully achieve the following:

- Witnesses will get secure access to their statement
- Witnesses will have more confidence giving evidence.
- Witnesses will have the opportunity to see their particular case progress online, at a time and place which suits them
- Witnesses will have the opportunity to ask questions online.

SMS/Email:

5.37 COPFS is also expanding the use of SMS and email to alert witnesses and victims about trial dates and cases outcome.

5.38 It is hoped this will mean:

- More witnesses attending court
- Less trials being adjourned due to non-appearance of witnesses
- Less inconvenience for victims and witnesses attending court
- Greater and earlier interaction and information flow between COPFS and witnesses – this would provide wider provision and access of information to witnesses through the life of a case.

## National Enquiry and Advice Service:

- 5.39 COPFS is trialling a National Enquiry and Advice Service that receives, and scans all correspondence into Case Directories and actively deals with/responds to certain correspondence/enquiries. This pilot is taking place in relation to all Summary level correspondence for Livingston and Perth, supported by dedicated resources. In addition all enquiries relating to a specific case whether by mail or telephone will be logged on the Case Minute Sheet and available online. This includes enquiries made to Enquiry Point by accused, victims, witnesses, members of the public and reporting agencies.
- 5.40 It is hoped this will mean:
- An improved customer service by providing a prompt response to correspondence.
  - A dedicated team trained and managed to a national standard that will be responsible for all mail.
  - One address for all hardcopy mail;
  - One central mailbox for CJSM (criminal justice secure mail, used by legal professionals) emails;
  - The ability to monitor and report on mail received and not actioned.
  - All general enquiries in relation to a cases will be available on the minute sheet
  - All information relating to a case will be available online
- 5.41 This all requires to be considered, too, in the context of Scottish Government plans to create a 'Digital Vault' capturing all key case information.
- 5.42 I consider that this brings opportunity to consider refocusing the role of VIA, upon commencement of the Website. Changing the way progress information is made available to the majority of VIA clients – permitting automatic access through use of technology etc. - would allow existing resource to be freed to adopt a greater role in the direct provision of practical (as opposed to emotional) assistance around all aspects of evidential proceedings.
- 5.43 Undoubtedly, there still requires to be a source of emotional assistance and support for the victim, where required, and that will continue to be provided by third sector organisations. It goes without saying that VIA must be empathetic and sensitive, respectful of individual victims. But equally it must be recognised that there are boundaries to the role. It is complimentary to the support role fulfilled by others. VIA will assist in practical ways to optimise the victim's ability to participate and to minimise the risk that they are hurt by the court experience.

## Public Authority and Third Sector Roles

- 5.44 The research undertaken in this Review suggests that most systems in which there is focus on victims' rights have established models in which services for victims are comprised of both public authority and third sector services for victims. Typically, public authorities such as the police, prosecutors and courts have developed some form of victim liaison role<sup>34</sup>. In Scotland, that role is principally undertaken by VIA but also by the police in the early stages of investigations (see for example the role of FLOs, Chapter 3). In many jurisdictions the third sector response is provided by a range of organisations which often include a national victim support service (supporting victims of all crimes) and a range of support organisations focussed on particular types of crime such as domestic abuse or sexual crime. These parallel services often meet quite different needs. While public bodies often provide information about the system and individual cases, and make practical arrangements throughout the process, the third sector response (in addition to assisting with such matters) may also provide (or access) emotional support, therapy or counselling. However, while this is a common division of the roles undertaken by public and third sector bodies, it is apparent that, in practice, the line between the organisations is less defined. For example, third sector organisations may provide

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<sup>34</sup> See, for example, the VLU and VCU in England and Wales, the VAC in New York and the VIC in the Netherlands.

considerable information about the justice system, may represent the victim in seeking case progress information from COPFS or SCTS, and may advocate on behalf of the victim to secure practical arrangements or special measures in connection with the proceedings. Similarly, VIA does not restrict itself purely to the provision of factual information but will often spend considerable time listening to victims about their fears in connection with proceedings and will seek to provide reassurance, and thereby a degree of support. There is no doubt that the current approaches result in a duplication of industry between the third and public sector. This is however not the only way in which systems have structured their services and below are some examples of structures which depart from this approach, familiar to us in Scotland. Firstly, the current landscape in Scotland is considered looking too at how it has and continues to evolve.

- 5.45 It is timely to note that over the years a common theme has emerged from feedback obtained from individual victims and from groups representing their interests which has been emphasized by those participating in this Review: **victims have regularly and robustly stated that they would prefer to have a single point of contact with the criminal justice system throughout their experience.**

### The Third Sector in Scotland

- 5.46 The first Victim Support groups were established slowly from the start of the mid 1980s<sup>35</sup> in local communities by volunteers, initially in Lanarkshire, with Coatbridge and Hamilton being two of the first. These local groups were the forerunners to the current national service, Victim Support Scotland (VSS).
- 5.47 Over the last 15 years there has been significant increase in service provision by those organisations which specialise in supporting victims of crime, and in the creation of programmes for victims of specific types of crime. Some of these specialist organisations did not exist when VIA was established or did not have the capacity which they now do. The landscape is constantly evolving and this in itself can present one of the challenges for victims and criminal justice agencies in knowing who to turn to.
- 5.48 The history of the development of third sector organisations offering specific support services for victims tended to follow similar patterns. Most were set up by local groups of volunteers concerned with particular aspects of victims' treatment by the criminal justice system. For instance, the first Women's Aid groups were founded in Edinburgh and Glasgow in 1973. Glasgow Rape Crisis Centre, which was the first in Scotland, emerged from a Women's Group at Glasgow University in 1976<sup>36</sup>. PETAL<sup>37</sup> was created in Hamilton in 1994 with a remit to support people experiencing the loss of a family member or friend through murder, culpable homicide (and later) suicide.
- 5.49 Most of the third sector organisations have also been campaigning organisations, trying to raise awareness of issues they want to see addressed as well as providing services to victims.
- 5.50 The last 15 years has seen significant investment in such groups by Scottish Governments and development of increasingly professional and corporate approaches by many of these organisations, leading to enhanced delivery of services. However it is still not the case that all types of support are available across Scotland or that, it seems, all victim need is able to be met routinely by services currently available.
- 5.51 At present, depending upon the nature of the crime, an individual victim can find themselves liaising with a wide range of criminal justice organisations and support services - from Police Scotland, COPFS, Victim Support Scotland, Rape Crisis/Scottish Woman's Aid/ASSIST, COPFS and the Witness Service (the in-court support service arm of VSS).
- 5.52 These each have their own particular responsibilities towards victims which cannot be fully met by another - and service availability is often determined by geography.

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<sup>35</sup> VSS celebrated its 30 year anniversary in 2015

<sup>36</sup> See Woman to Woman, An Oral History of Rape Crisis in Scotland, Published 2009 by Hampden Advertising Ltd.

<sup>37</sup> Originally called Parents Experiencing Trauma and Loss now known as People Experiencing Trauma and Loss

- 5.53 The Scottish Government announced investment £20 million of additional funding over the 3 years from 15/16 on a range of measures better to support victims of gender based violence. It has invested further resources in COPFS and Scottish Courts & Tribunals Service to ensure that the courts are able to process domestic abuse cases efficiently and reduce delay periods before resolution. Some of that funding has also been invested to widen access to specialist advocacy and support services across Scotland for victims of domestic abuse but the money which has been allocated thus far would suggest that the Scottish Government is continuing with a localised approach. For example for victims of domestic abuse there are a variety of agencies providing similar but, as a result of the strategic focus of each provider, subtly different support to victims in different parts of the country. ASSIST is predominantly based in the West of Scotland, EDAC in the East and Scottish Woman’s Aid provide a comparable service in the North of Scotland. Rape Crisis has been provided with some of this funding to provide a service to victims in Orkney and Shetland. Rape Crisis Scotland has operated a network of rape crisis centres since its establishment in 1976. It recently received funding to establish a national advocacy service. The National Advocacy Project is funded by the Scottish Government and is a partnership between Rape Crisis Scotland and local rape crisis centres across Scotland. The project aims to provide support and advocacy to survivors who have engaged or are considering engaging with the criminal justice system following a sexual crime.
- 5.54 The broad objectives of the project are:
- an improvement in the support available to victims of rape and serious sexual crime;
  - an improvement in the experience of the criminal justice process for victims of rape and serious sexual crime; and
  - the development of 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.
- 5.55 The project will be externally evaluated to determine the extent to which these objectives are met and is funded through the Scottish Government until the 31<sup>st</sup> March 2018.
- 5.56 The funding will enable every rape crisis centre in Scotland to employ a dedicated support and advocacy worker and enables Rape Crisis Scotland to work in partnership with Scottish Women’s Aid to establish a rape crisis service across Orkney and Shetland.
- 5.57 At present Victim Support Scotland provide a wide range of services including coverage of some specialisms provided by the organisations mentioned above, but VSS do not have the resource to provide a national service covering these specialisms. Accordingly,
- There is no single national provider of all victim services
  - There could be issues in identifying any single body which could fulfil the many and varied needs that a victim may have
  - There is a risk that, if not interpreted and explained correctly, victims may be unnecessarily confused and COPFS staff will require to undertake additional work to clarify and explain information
- 5.58 As discussed above, the sharing of information between parts of the justice system has long since been recognised as critical to its effectiveness. I have considered whether there is scope for the prosecution service to work differently with other organisations to improve the experience for victims in Scotland. Historically there have been concerted efforts to achieve “joined up” working through the development of protocols or agreements. One successful example we have seen is that of the ASSIST project at Glasgow. The approach of the ASSIST project is distinguished by the fact that it has direct access to a certain level of criminal justice information. Rather than relying on the provision of information from the court or from COPFS, ASSIST workers are able to access directly case information relevant to the victims they support. The approach ensures that information can be obtained without delay and reduces the need for energy and resource to be devoted to obtaining information from professionals working in other parts of the system. There are key factors underpinning this access: ASSIST staff are trained, professional and undergo disclosure checks. While the ASSIST model is concerned with a discrete group of cases, the approach demonstrates the potential for established parts of the criminal justice system to work directly with those supporting victims to provide a more immediate and effective means of supporting victims in a way which can remove the

duplication of industry by the individual organisations. What has become apparent is that ASSIST *is* a part of the criminal justice system. Its effectiveness and efficiency is improved by access to information at source.

## Models in Other Jurisdictions

5.59 This Review has considered other approaches to the provision of ‘victim care’ services. In doing so I make no comment, at this stage, about the relative effectiveness of those models. Nor is it suggested that these are the only other models which might be considered. The purpose has been to identify options for further consideration in the Scottish context. It is clear that most jurisdictions face similar challenges in seeking to ensure that victims are provided with information about the justice system in general; information about their case; and emotional and practical support. And while all of the systems discussed have developed some common ways of meeting those needs, a common challenge is how to ensure that services are provided in a co-ordinated and seamless way. Having considered the approach in other jurisdictions it can be seen that the outcome for victims can be influenced as much by the structures within which services are provided, as by the quality of the individual services themselves.

England and Wales:

5.60 In England and Wales a key feature of the justice system are the Witness Care Units which aim to provide a single point of contact for victims and witnesses for information about the progress of their cases, and to minimise the stress of attending court. Witness Care Units are in place across England and Wales and are jointly staffed by the police and the Crown Prosecution Service. In addition to providing a single point of contact, the WCU ensures:

- a needs assessment for victims and witnesses with particular support needs, to ensure they are able to get to court and give their best evidence;
- dedicated witness care officers to guide and support individuals through the criminal justice process and to co-ordinate support and services;
- continuous review of victim and witness needs throughout the case;
- communication with victims and witnesses to inform them of the case outcome or trial result, thanking them for their contribution to the case and offering post case support from a relevant support agency.

5.61 The Victim Care Unit does not provide information about the reasons for prosecutorial decisions; that role is undertaken by the Victim Liaison Unit which was first piloted in 2014 and is part of the CPS. The VLU was introduced to provide dedicated teams to improve the way the prosecution explains its decision making to victims. Whilst CPS prosecutors remain responsible for their prosecution decisions, the VLU will be responsible for ensuring that victims are informed about CPS decisions to discontinue or to change significantly the charges.

5.62 Where the decision has not been communicated directly to the victim at court by the prosecutor, the VLU will write to the victim providing a short summary of the reasons for the decision. Thereafter, the victim can contact the VLU for further details or explanation. The aim is to avoid standard letters and to ensure that each piece of correspondence is considered and personal.

5.63 In addition to the provision of reasons for decisions, the VLU also administers the Victims’ Right to Review scheme and responds to complaints and feedback received. Within COPFS these are functions undertaken by the national Response and Information Unit at Crown Office.

5.64 In addition the CPS is currently rolling out a programme to provide more staff in Crown Courts, to make sure victims and witnesses are properly supported and that prosecutors are available to speak to victims and witnesses at court. It is reported that when the rollout is complete, around 350 paralegal staff and managers

will be based at Crown Courts across England and Wales. CPS paralegal staff at Crown Court centres will cover a maximum of two court rooms each, with the aim of providing a public-facing role, including:

- answering routine questions about daily life at court
- thanking witnesses who have given evidence
- ensuring victims and witnesses know how they can follow the rest of the case if they wish to
- responsibility for note-taking when prosecutors meet with victims and witnesses to explain the general nature of the defence's case.

5.65 In Scotland this role is currently undertaken by VIA officers who will attend at Sheriff Courts and High Court buildings in Scotland where vulnerable witnesses require particular support through the trial process. It is notable, however, that the plans in England and Wales will provide a more ambitious and comprehensive at court presence than VIA staff can provide.

5.66 Police Crime Commissioners in England and Wales are also engaged in work to bring together victim services. Plans by, for example, the Staffordshire PCC proposed to:

“develop a victim and witness gateway where the work of support organisations is joined up in an understandable way. This will provide a ‘one stop’ easy access support mechanism that is available at a time and in a way that suits individuals and their circumstances.”

## **United States of America**

New York:

5.67 The New York County District Attorney's Office has established a Witness Aid Services Unit (WASU) which provides a wide variety of services to victims of crime. In addition to providing information about the prosecution process and the progress of the individual cases, the WASU also offers emotional and practical support intended to help victims deal with the effects of crime. The unit has four parts:

- The Victim Assistance Center
- The Notification Department
- The Social Services Department
- The Counseling Department

5.68 The Victim Assistance Center (the VAC) undertakes a role similar to that of VIA and provides information about the criminal justice system and serves as a liaison between victims and prosecutors, the court system and other criminal justice agencies. The VAC also provides information about the victim's case such as progress information and information about bail.

5.69 The Notification Department's primary function is to provide case-related information including information regarding: the status of the case, protective orders; sentencing information and prisoner release information.

5.70 The Social Services Department assesses victims' social, emotional, and financial needs and then provides a combination of direct services as well as advocacy and referral information. The services provided by this Department include:

- Crisis intervention and support
- Assistance with safety services
- Referrals to shelters
- Accompaniment to court
- Specialised assistance for child victims
- Advocacy for government entitlements
- Advocacy and referrals to community agencies

- Compensation assistance through the New York State Office of Victim Services.

5.71 Finally, the Counseling Department helps victims, witnesses, and their families deal with the emotional impact of the crime and difficulties associated with participation in the legal process. The Counseling Department is staffed by New York State licensed social workers who provide:

- Individual counselling
- Group counseling for victims of domestic violence and survivors of homicide victims
- Assistance with the preparation of victim impact statements
- Emergency assessment and intervention

### **The Hague in the Netherlands**

5.72 The Review has considered a model of victim service which has been established at The Hague in the Netherlands. The Victim Information Counter (VIC) at The Hague is a co-operative venture between different organisations in the field of victim rights and victim support. The model is different from that in New York because, rather than being part of the prosecutor's office, it is located separately. The office brings together professionals from the public prosecution service, Victim Support, the police and the Criminal Injuries Compensation Fund. The VIC at The Hague operates according to a "one window" format, allowing victims a single point of entry to seek information and assistance on a whole range of the issues they may be facing. The approach of the VIC is intended to be focussed on the victim. The concentration of services provided by the different organisations within the VIC aims to simplify the process for the victim and, thereby, reduce the risk of secondary victimisation.

5.73 Referrals to the VIC are initially made by the police or the national Victim Support Service. The VIC is then responsible for providing general and case-specific information and, crucially, the VIC has access to the different automated systems of the organisations involved. The VIC facilitates meetings, where appropriate, with the prosecutor and can also make available a support person during court proceedings, where this is authorised. The VIC also has a role in the administration of the Dutch Victim Impact Statement scheme and in assisting victims in making applications for compensation under the government scheme.

### **Analysis**

5.74 It can be seen different systems have chosen to structure their services for victims in different ways. Approaching these issues from the perspective of the public prosecutor, I am interested in the way in which prosecutors and other criminal justice agencies have organised their services for victims and witnesses, but elsewhere in this report have considered the vital role played by other non-governmental organisations. It is clear that victims are best supported where public services and the third sector are able to work together to provide an effective and cohesive service.

5.75 It is clear that in some regards the Witness Care Unit in England and Wales performs a role similar to that of VIA which also provides case progress information, assesses the need for special measures and sign-posts victims and witnesses to appropriate support agencies. A key difference, however, is that the Witness Care Unit provides a single point of contact from the point of charge through to the conclusion of the case. In addition, the Witness Care Unit is located separately from the CPS and has the benefit of a multi-disciplinary team of police and prosecution staff.

5.76 The approach in New York is interesting for a number of reasons. First, the New York WASU is an example of a model which convenes a number of different disciplines in a single service. The approach seeks to join the role of the prosecutor in the provision of information about the justice system and the individual case with the work of those professionals who provide practical support (for example through the work of the Social Services Department) and those who provide emotional support (through the counseling department). A major part of the work of the WASU is currently undertaken by the VIA service in Scotland and, of course, the practical and emotional support described in the remits of the Social Services and Counseling Departments is provided, in Scotland, by the range of public and third sector organisations to which we have referred throughout this report. The New York approach, however, provides a structure within which those

distinct parts are convened together. There is considerable attraction in providing victims with a single service which can meet the need for information as well as practical and emotional support. I consider that that aspect of the New York model would merit further analysis in the Scottish context. The Dutch model is interesting because, like the model in New York, it brings together professionals from different parts of the justice system with the aim of providing a seamless service to victims of crime. Crucially, stepping away from the prosecutor's perspective and viewing the options from the standpoint of victims, there is much to commend systems which better convene and co-ordinate victim care.

- 5.77 The Dutch model illustrates the scope to establish a service co-resourced and co-located by all of the main criminal justice partners in the local system, but operating independently of each of them. The model also demonstrates the possibility - and advantages - of convening criminal justice partners together with third sector support organisations, in this case Victim Support, and the value of providing such an office with appropriate access to information systems thereby increasing both efficiency and effectiveness for the victim.
- 5.78 If it is accepted that there is merit in providing a single service which meets the full range of needs which a victim may have, then careful consideration requires to be given to the way in which such a service is organised. A particular feature of the New York model, of course, is that its services, including those offering counselling and practical support, are convened within the prosecutor's office. In Scotland we have traditionally taken a different approach. It has been recognised that the role of the independent prosecutor is to assist victims and witnesses through the criminal justice process. In many cases that can involve a very high level of engagement with individual victims and witnesses with VIA liaising with and co-ordinating a multiplicity of support services. A primary part of VIA's role is to ensure that needs are assessed and that victims are "sign-posted" to the appropriate support services. Chapter 4 sets out the reasons for which the constitutional position of the prosecutor in Scotland has influenced the development of its role in victim care in terms of the provision of information. As has been considered, while the role of the prosecutor has extended over the decades, the provision of counselling and emotional support or the provision of practical assistance has not been identified as part of the prosecutor's role.
- 5.79 Some jurisdictions have convened multi-disciplinary teams to ensure that different parts of the system work together with the aim of providing a victim-centred response. In particular, it is common for public authority service providers to work as part of a team with third sector organisations. Some jurisdictions have established such teams within the prosecutor's office, while others have been established outwith the prosecutor's office. There are different models of multi-disciplinary teams. There can be various combinations of public authority service providers (such as the police or the prosecutors' offices) working together with third sector organisations. There can be varying degrees of integration. In some cases different organisations are physically located together. There are models where information from one organisation is directly accessible to those from another. For example, in the course of the Review of Rape the COPFS team visited the office of the District Attorney in Los Angeles in which a representative of the national Office for Victims of Crime is embedded in the prosecutor's office, with access to a level of case information, to directly assist victims in the achievement of their rights, notably state compensation.
- 5.80 There are certain questions which prosecutors and justice partners in any jurisdiction must determine when deciding how to structure victims' services within their jurisdiction:
- Whether the system should seek to provide a single entry point (or "one front door") to the criminal justice system for all victims, regardless of the type of crime or the stage their case has reached.
  - Whether (as part of a one front door model or otherwise) the prosecutor's victim information provider (in our case VIA) should work as part of a multi-disciplinary team with other victim service providers and, if so, how that team should be constituted.
- 5.81 I have concluded that there is considerable scope in Scotland to improve the victim's experience by adopting a more integrated model, informed by some of the approaches described above. Not only would this provide what it is victims say they want, it could yield significant business efficiencies. It is important that any new way of working is crafted for the Scottish system making full use of the high level experience and expertise which exists across both the public and third sectors in Scotland. We have identified two important features which would merit further examination in the Scottish context:

- A service which assists a victim throughout the entirety of his or her journey through the justice system. By this, I anticipate that the same body should assist the victim from the point of reporting to the police, through any prosecution, and after the conclusion of a prosecution.
- A single service which provides the full range of services which a victim needs (one front door).

5.82 If there was a model along this basis then it has the potential to:

- Allow individual needs assessments - no 'one size fits all'
- Move away from the crime centred approach to be more victim centred
- Accommodate an element of choice on the part of the victim
- Remove the risk of the chain being broken as victims are passed between organisations
- Develop common language, reducing misinterpretation – as between services and with victims
- Reduce duplication for service providers
- Reduce bureaucracy for victims
- Permit direct access to information by those supporting victims, rather than information passing from one to another with delay, duplication and interpretation issues;
- Involve diversity of skills to allow people to access – swiftly - the right support through timely availability of third sector specialists
- Create a virtuous circle allowing better gathering and sharing of information about vulnerability – to better prepare police and prosecutor – better supporting the aims of the public authorities in the prosecution of crime and protection of communities
- Reduce attrition, if care needs are better supported
- Improve confidence in the system
- Speed up justice
- Improve the victim's perception of the system as boundaries between organisations would be less visible

5.83 Victims are witness in the criminal justice system, but first and foremost they are people to whom some wrong has been done. If their experience of the system is positive, that in itself is the outcome we want. However, we must be mindful that if their experience is negative, that is the story they will tell to family, friends and colleagues which sets the tone for their future engagement with the criminal justice system and each of its constituent parts.

5.84 A single entry point to criminal justice support services has obvious attractions. But a single entry point is of limited value if it is an entry point to only one stage of the process. Information and support prior to a case being reported to the prosecutor is just as important as it is after a report has been submitted. Equally, information and support after conviction and any appeal may be vital to a victim who, for example, is concerned about the accused's release from prison. For these reasons I see it as important that consideration is given to a model which provides a single point of entry throughout the entirety of the criminal justice process and beyond and for that reason it is logical that any such service is capable of being accessed both through each of the parts of the system and independently of each of them. This is important because we know that people access parts of the justice system from different routes. For some, the police or COPFS may have directed them to the support available from Rape Crisis or Scottish Women's Aid. For others, seeking counselling and support may have in turn encouraged them to report an offence to the police. And, of course, there will be victims of crime who do not wish to engage with the criminal justice system at all but whose information and support needs are no less acute.

## CHAPTER 6 – THE PROSECUTOR AND VULNERABLE ACCUSED

**This chapter considers the position of vulnerable accused for whom the routine protections of the criminal justice system may require to be supplemented – and who may themselves be victims of crime at some point.**

### Background

- 6.1 For the majority of members of the public and many commentators, it is understandable, and not surprising, that considerations of vulnerability in the criminal justice system will bring to mind issues affecting victims and witnesses.
- 6.2 However it is understood that many accused persons have significant vulnerabilities. Indeed overall, those accused of crime will suffer from vulnerabilities to a greater extent than other sections of society, for a number of reasons.<sup>38</sup> Even although the accused is likely to have legal representation, there can be wider aspects of their vulnerability of which the justice system is not cognisant.
- 6.3 It is also often observed by those who attend courts that the victim in one case appears as the accused in another. I therefore considered it helpful for the Review team to consider this aspect of cross-over.
- 6.4 The Acts of the Scottish Parliament from 2004 were designed to address vulnerability of *any* person giving evidence in criminal proceedings, so these provisions apply equally to accused persons, but are rarely invoked by the defence.
- 6.5 The criminal justice sector must deal fairly and proportionally with accused persons suffering from psychiatric and psychological difficulties. There are duties upon the prosecution and upon the court to investigate any suspected mental health disorders, to ensure fair treatment before the law, and to best inform decision-making.
- 6.6 Issues around vulnerability and mental health often impact on the ability of those who are affected to operate within the norms set by society. Often an individual's inability to properly empathise with others, or control inhibition, leads them to behaviours that are unacceptable and which are responsible for their entry to the criminal justice system.
- 6.7 For any civilised criminal justice system to be seen to be 'just' it requires that vulnerabilities of accused persons are addressed as well as those of victims and witnesses.
- 6.8 Originating in 1971, Scotland's Children's Reporter and Hearings system has long had an international reputation for dealing well with children who are assessed as being at risk of harm - physical, mental and developmental; as a result of their domestic circumstances and family dynamic; or exposure to other factors including criminal activity by children themselves.
- 6.9 As with all other aspects of the justice system, the approach to children in the criminal justice system has seen significant change over the last four decades both in terms of evolving statutory frameworks and particularly in respect of the demographic of the issues that are now understood to impact children's well-being, with particular emergence of much wider instances of sexual and domestic abuse than was understood to exist by previous generations.<sup>39</sup>
- 6.10 The Early Years and Early Intervention approach formally introduced in Scotland in 2008 continues to develop better options for improved outcomes for vulnerable children. This has all led to focus on improved local provision of multi-agency and multi-disciplinary collaboration in an effort to provide the most appropriate supports for each child or young person.

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<sup>38</sup> See McAra L & McVie S 2010, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' *Criminology and Criminal Justice*, vol 10, no2. (and see footnote 3 below)

<sup>39</sup> The Public Inquiry into Historical Child Abuse in Scotland is making specific arrangements to gather evidence from victims of abuse who are in prison or Polmont Young Offenders Institution as it is recognised that many prisoners have a background as victims of such abuse.

- 6.11 Moves to extend the parameters of targeted and multiple interventions using the 'Whole Systems Approach', for those above the age of 16 up to 18 years, have seen significant results with young people who offend being kept out of the court system and dealt with holistically, with recognition of their individual vulnerabilities being seen as an essential element in informing successful effort to prevent further offending.<sup>40</sup>
- 6.12 However, as with vulnerable victim and witness support, many of the available offerings have been developed by third sector organisations and individual local authority social work units resulting in provision and access requirements varying significantly across geographic locations. There is also a wide disparity of availability of interventions and support services across the courts and prisons landscape for the same reasons. There is no consistent minimum standard of offering across Scotland. This means that location dictates that there is no access to suitable programmes in respect of offenders who would have their behaviours improved by access to specific programmes available elsewhere in the country.
- 6.13 This wide variety of provision and lack of agreed baseline provision also has an impact in relation to early assessment of accused persons with regard to their fitness to engage with the system at all.
- 6.14 While there are, for example, Community Psychiatric Nurses (CPNs) , operating within the cell area of Glasgow Sheriff Court, available to examine those in custody awaiting first appearance at court following arrest, the provision is limited to those who are referred before 12 noon on the court day. While this may result in some being offered a bed in a psychiatric unit or an urgent appointment as an outpatient it also means that some accused, who are awaiting contact with their solicitor and are not able to be identified as requiring such assessment, continue to be processed that day through the court system. That may result in a remand in prison for such assessment. In many other courts across Scotland no such access to CPN resource is available.
- 6.15 In addition, Procurators Fiscal would consider offering Diversion from Prosecution in many circumstances if there were services available in the relevant jurisdiction, which would assess the suitability of an accused for drug, alcohol, psychiatric or psychological programmes to address underlying behaviours leading to their offending behaviours, only to find that there are no such suitable services available locally.
- 6.16 In terms of securing the rights of a vulnerable accused, the presence of an Appropriate Adult can be an important safeguard at the initial stages of a criminal investigation, particularly police interview. However, we are aware from consultation with Police Scotland that there can be considerable challenge to securing the services of an appropriate adult. This can impede the ability to investigate crime, particularly looking to the time limits within which the police must interview a detained person. However the presence of an appropriate adult for a vulnerable accused can be the very component that ensures that a police interview is fair - and therefore admissible as evidence in any future proceedings. That must be in the interests of not only the accused, but the victim of crime and the wider interests of the community.
- 6.17 It is helpful to reflect upon the needs identified for learning disabled accused, as found in The Criminal Justice Pathway for People with Learning Disabilities, published by SOLD (Supporting People with Learning Disabilities). In terms of support from arrest to court, it is identified that they want:
- *Support from someone who is there for us, as soon as possible after we are picked up by the police until the end of the court process*
  - *We want the police to ask us if we have a learning disability or if we need help to understand*
  - *We want support from someone who knows lots about the criminal justice system and knows how to support someone with a learning disability*
  - *We want them to be there for us*
  - *In interviews with the police*
  - *In meetings with lawyers and other professionals*

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<sup>40</sup> See Scottish Centre for Crime & Justice Research 'Evaluation of the Whole System approach to Young People Who Offend in Scotland' June 2015

- *When we go to court*
- *We don't want them to be called as a witness against us*
- *We want them to have the skills to:*
  - *Explain the charges, the process and our rights in a way we can understand*
  - *Make sure we understand what the police and others are asking us*
  - *Help us think through questions we are asked and give a clear answer*
  - *Be able to work alongside people who know our needs and us best*
  - *To spot and step in if we are finding the process too difficult – say if we need a break or if something should be changed*
  - *We always want the chance to be able to stand trial with reasonable adjustments if we need them*
  - *There should be a range of changes including, but not limited to, extra time, more breaks, changing parts of the process, using clearer language and rewording difficult questions*
  - *The questions in court should be about finding the truth, not making a fool of us*

6.18 *In terms of the court process, the list continues:*

- *Before getting to court we want support to understand the court process*
- *We want the support of a lawyer who understands learning disability*
- *We need enough time to prepare with our lawyer before appearing in court. This could be significantly more time than for a defendant without a learning disability*
- *We always want the chance to stand trial with reasonable adjustments made if we need them*
- *We have the right to a fair trial. If we do not understand parts of the court process they should be explained in a way we can understand*
- *A range of changes including, but not limited to, extra time, more breaks, changing parts of the process, using clearer language and rewording difficult questions should be available. These should be based on our individual support needs*
- *A communication expert should be involved to help the process*
- *Not to be questioned in a way that is deliberately trying to confuse us. The questions in court should be about finding the truth not making a fool of us*
- *Once professionals know what extra support we need this should be passed on so that we are not starting again if we move on to a sentence.*

6.19 What is notable about this expression of needs and accommodations by the system is how closely it correlates to what victims of crime – with or without a learning disability - tell us about how they want the criminal justice system to identify, respond to and pass on their needs.

## **Intermediaries**

6.20 In the Youth Justice and Criminal Evidence Act 1999 the courts in England and Wales had made available to them the regime of special measures intended to aid vulnerable witnesses give evidence. The measures then commenced in Scotland under the Vulnerable Witnesses (Scotland) Act 2004 mirror those provisions to some extent. A notable difference is the availability of special measures in Scotland to a vulnerable accused – no similar provision is extended to accused persons in England and Wales. In terms of the range of special measures available, one innovation not available in Scotland is the provision of an intermediary.

6.21 Intermediaries, as they work in the criminal justice system in England and Wales, are independent communication specialists who assist children and vulnerable adults at police interview and at trial. Their aim is to help improve the quality of the witness' evidence and provide access to justice for some victims and witnesses who may previously have not been able to participate in the justice system.

6.22 The system of intermediaries works within a strong framework of judicial management of a trial and operates to a number of key principles: the intermediary is an officer of the court; and they are a communication interface, to ensure understanding – they do not change the substance of questions. The system requires careful, preparatory work involving those representing the accused and the Crown, to agree

ground rules as to how questioning will be conducted. It might involve the prosecutor and defence representative setting out in advance - for the approval of the intermediary and the judge - each question they want to pose to the vulnerable witness. A detailed plan will be agreed, informed by the advice of the intermediary about the individual witness' needs. This represents a significant cultural shift and could be considered in the context of ongoing discussions about improved, digital capture of evidence from children and vulnerable witnesses under the auspices of the Evidence and Procedure Review. That work does not, however, include considerations around vulnerable accused.

- 6.23 The research<sup>41</sup> into the system of intermediaries highlights some very pertinent findings – particularly when we are considering the criminal justice system and children, or vulnerable accused. It was found that half of children questioned did not understand what they were being asked, and felt unable to admit that at the time. They found instances of very complex questions being posed by lawyers – on both sides – with use of ‘tag’ questions, double negatives and statements being put to witnesses. This experience has led to a great deal of work being undertaken to provide specialist training for barristers and judges – pan-professional advocacy training.
- 6.24 The aspect of judicial control is underlined in Criminal Practise Directions which state that the judge has a duty to ensure compliance with the ‘ground rules’ and to prevent questioning which does not comply. In *R v RL* 2015 EWCA Crim 1215 the English Court of Appeal dismissed a claim that the system ‘emasculated’ cross-examination.
- 6.25 In terms of its foothold and availability as a special measure in England and Wales, a number of challenges have been identified in the research to the availability of the intermediary scheme, including the numbers registered and perceived cost to the criminal justice system.
- 6.26 We note that a similar scheme of intermediaries has been introduced in Northern Ireland in recent years. It is estimated that there are ¼ million people in Scotland with communication support needs, to which should be added those with recognised and undiagnosed mental health needs. The Scottish Government commissioned the Adult Support and Protection Toolkit to provide communication access guidelines, advice and practical resources so that people within communication support needs who are at risk of harm or who are being harmed can more easily access protection as set out in the Adult Support and Protection (Scotland) Act 2007.
- 6.27 The success of the use of intermediaries in England and Wales is of interest and could provide a model for Scotland to expand the protections for vulnerable accused as currently provided in part by Appropriate Adults.
- 6.28 The Faculty of Advocates in Scotland has meantime considered a great deal of the work done in England and Wales (see [theadvocatesgateway.org](http://theadvocatesgateway.org)) and is rolling out an extensive programme of training and evaluation on the conduct of questioning of witnesses, with like aims, to achieve best evidence. The principal premise is that the system should not cause harm to those already harmed, a concept which is central to this Review.

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<sup>41</sup> Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants, Plotnikoff and Woolfson, Policy Press, University of Bristol

## CHAPTER 7 – VISION FOR THE FUTURE

This chapter considers what we have learned about victims needs from the consultation underpinning this Review and whether these needs are matched by current services. It considers the issues which have been identified - or the barriers it is said persist - and offers some thoughts as to how improvements could be made.

### In an Ideal World

- 7.1 In discussions with stakeholders the question was posed – what would victims’ services look like in an ideal world? For many – particularly the third sector or those involved with discrete victim needs - this presupposed sufficient, stable funding. For some involved in the direct support of victims this meant a new - or expanded - service to plug a gap. But frequently it was expressed as a desire that ‘the system’ be more sensitive or responsive or bespoke. Often the response was that lots of people were trying their best and were well meaning, but generic services can be lacking in sufficient system knowledge or expertise in a particular aspect of victim need, or perhaps unable to respond with the speed that the situation demanded. As regards specialist services, they may not have capacity or knowledge to deal with more generic crime, and may also struggle to outreach nationally to victims of the crime they do seek to support. And in terms of VIA and COPFS, they will by definition only deal with crime victims or bereaved relatives whose cases are reported to the Procurator Fiscal.
- 7.2 There were a number of general themes which came through from consultation:-
- things should happen without the need to ask;
  - that information be accurate, consistent and from someone in a position of knowledge
  - that needs be identified once, at the outset, without the need to repeat accounts or information.
  - recognition that individual needs are often wider than issues connected with the giving of evidence
  - that safety – one of the main considerations – could involve housing / access to children and related civil proceedings;
  - that access to ongoing counselling and therapeutic interventions needs to be improved
- 7.3 However by far the most common theme which we heard over and over was that victims wanted **one point of contact** - a single source which could co-ordinate a response to all of their individual needs for practical assistance, support, information and explanation.
- 7.4 Returning again to the needs discussed in chapter 3, i.e.:
- safety / physical integrity;
  - practical assistance and information – about their case and about the system;
  - system confidence and ‘being believed’;
  - emotional support;
  - staying power, over what might be protracted proceedings / prolonged grief or distress associated with the crime;
  - learning a new ‘language’ with every new agency a victim encounters – so a single entry point meaning common language etc.;
  - victim choice – to reintroduce a feeling of empowerment.
- 7.5 All of these needs cannot be met by a single agency or organisation in our current landscape of service delivery. Equally, a number of organisations are contributing in some way to meeting these various needs. Inevitably this means victims require to engage with multiple agencies and organisations. Herein lies one of the principal problems.
- 7.6 In terms of policy development and service delivery for victims, experience shows that services tend to grow up around different crime types, in an expectation that victims of like crimes will tend to have similar

reactions and needs and are best supported in this way. There is no doubt that great experience and expertise exists in specialist support agencies such as Women's Aid, TARA, Rape Crisis and PETAL. It has become apparent, too, in the course of this Review that a good number of victims exit the criminal justice system, motivated by concern at their particular treatment, and go on to campaign and/or establish support mechanisms to address the shortfalls they experienced. As ever, they face funding challenges which can impede their ability to broaden the services they provide - both in terms of numbers of clients and how time intensive the services can be, for example, accompanying them to court. Sometimes small, localised support groups are established which can cover crime types in which established groups work, creating some 'competition' for victims.

- 7.7 The investigation and prosecuting agencies have very constructive links with third sector groups which have been developed and consolidated. There are excellent - if niche - examples of cross-fertilisation of services and third sector advocacy projects which have led at times to formal co-location between 'traditional' criminal justice agencies and third sector services (e.g. ASSIST in Glasgow / DASAT in West Lothian). This transforms information-sharing, risk assessment opportunities and - from the victim's point of view - means up-to-date reliable information and support from a single source. This raises questions about structural aspects to service delivery.
- 7.8 To turn then to the central issues we sought to examine in this Review - the structural, legal and cultural aspects to the provision of services to victims:

### **Structural Issues**

- 7.9 Victims can encounter a complex network of organisations and services, each with their own remits and boundaries which are supplemented with myriad protocols, service agreements and codes across agencies. This is a landscape which can frustrate and confuse the uninitiated as they search for support, advice and information. It manifests, too, in the multiplicity of leaflets, DVDs and web pages created by individual agencies. This has led to calls for a 'single point of contact' and /or a dedicated case worker to steer victims through the system.
- 7.10 The criminal justice system is complex and governed by rules. Some of the materials seeking to explain its operation are excellent, but beyond the generic, the questions which the victim will likely have need to be answered by someone with knowledge of their case. The nuances of decision-making, potential outcomes and their ramifications, and a system giving people informed choice all calls for careful explanation. As I have sought to explain elsewhere in this report, not all of the questions can or ought to be addressed by the prosecutor. Equally, instances have been highlighted where volunteers have been left unable to explain or interpret procedural steps in a case, or where a third sector organisation has in innocence passed on inaccurate information. The risk of error in the repeated passing of complex information is obvious; all of which dents the victim's confidence in the ability and sensitivity of 'the system'.
- 7.11 So the question arises as to what steps can be taken to overcome some of the structural obstacles?

### **Legal Issues**

- 7.12 Experiences at court have featured vividly in the evidence heard during this consultation and the response of the legal system continues to be scrutinised. This is considered under the heading of 'Cultural Issues' below, as there is procedural and substantive law in existence to prevent questioning on matters which are collateral or to prevent aggressive or abusive cross-examination - it is their application in practice which may require exploration.
- 7.13 The issues around application of the law and experiences of victims centre largely on the *rights* afforded to victims (see chapter 2) - whether that be to receive, for example, information, compensation or use special measures at court. It has not been suggested to in the course of this Review that there required to be an *expansion* of victims' rights; issues raised tended to highlight inconsistency of approach or human error which has prevented a victim being given information or a service to which they were entitled.

- 7.14 That said, one new area in which there has been change relates to the right to legal representation for victims in relation to recovery of their personal records<sup>42</sup>.
- 7.15 On the part of the criminal justice agencies, changes in the approach to, for example, victims of rape and serious sexual offences and the investigation of deaths has led to the development of specialist approaches across law enforcement, e.g. Sexual Offence Liaison Officers within Police Scotland, the National Sex Crimes Unit at Crown Office and the national Scottish Fatalities Investigation Unit within COPFS.
- 7.16 The legislation underpinning the right for victims to use special measures at court has changed too. On commencement of the Vulnerable Witnesses (Scotland) Act 2004, the then Scottish Executive stated it did not want to create a 'hierarchy of victims', preferring a principle that individual needs were assessed and applications for special measures made on that basis, rather than based on crime type. The consequence of that was that there could be no guarantee for a victim of serious sexual offence that the court would approve the request that they be permitted to use a special measure, that being a matter to be decided by the judge, on the basis of information contained in an application. This was to be contrasted with the provision for children, where entitlement was automatic. In the most recent 2014 legislation the approach is to deem victims of certain crime types vulnerable and therefore eligible for special measures.
- 7.17 The chain by which this is done relies upon the police to highlight in their reports to COPFS those who are vulnerable and who are eligible by reason of race / age / crime type to receive the VIA service. If a decision is made to prosecute, those individual victims or vulnerable witnesses require to be identified and referred by prosecutors to VIA, who will thereafter make contact to begin a dialogue, with those eligible, about the use of special measures. In the vast majority of instances there will be something patent about the victim / witness or the crime they have experienced making them eligible. It is a much more subtle and resource intensive approach for law enforcement to consider each and every individual - as an individual - to identify vulnerability.
- 7.18 This illustrates the scale of the task at hand for law enforcement. There are certain obvious 'shortcuts' to identifying vulnerability which it is prudent to adopt. That is done in the expectation that the vast majority of those identified in this fashion will indeed meet the criteria for vulnerability in the legislation. However, there may be unintended consequences to this approach. It may overlook some who are vulnerable, whether that be because of an unreported mental health issue or because they do not on the face of it present as fearful or intimidated; equally, it may include many who are in fact not fearful or intimidated. (This was a point highlighted in the course of the Review by representatives of the Sheriffs Association).
- 7.19 At the time of writing, COPFS has been examining VIA's remit and the victims and witnesses within its ambit. Simultaneously, it has commenced work to develop a witness website (see chapter 5) with the aim of providing a resource for those who do not come within the VIA categories, or who may prefer to seek out information themselves at a time and place they prefer.

### **Cultural Issues**

- 7.20 There are two discrete aspects to cultural issues within the criminal justice system in Scotland. There is the culture of the legal system itself; and there is the diverse nature of those within our communities, their language needs, religious beliefs and cultural background and how those elements interact with the system of justice. The latter requires continuous awareness-raising and excellent communication to ensure sensitivity, accommodation – where possible and to meet victims' rights – and minimise the risk that more harm be done to a victim of crime.
- 7.21 Turning to the culture of the legal system itself, this has changed greatly over the last 15 years, underpinned by legislation about sexual history and character evidence, vulnerable witness legislation and victims' right of review. However, the trauma described by some victims about the experience of giving evidence at trial does not reflect well on the Scottish legal system. It is not an issue exclusive to this jurisdiction. There is a sense that some of the factors and feelings can be heightened in an adversarial system, as set out in chapter

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<sup>42</sup> WF (Petitioner) v Scottish Ministers [2016] CSOH 27

4. The extensive training programme put in place by Faculty of Advocates is testament to how seriously it takes the commitments to victims in Scotland to ensure all practitioners are professional and respectful. The first hand experiences provided to the Review of a number of victims who were unprepared for and extremely upset by the experience of cross examination are disturbing. In the majority of cases the defence accurately and professionally put their client's case, as they are obliged to do. This, I would suggest, tells us that at least in part the issues lie with the system itself and not simply treatment by individuals of individuals (albeit there continues to be instances of that). As noted at the outset of this report, the proposals set out in the Evidence and Procedure Review present a significant opportunity to transform the experience of those who require to give evidence.

### Next Steps?

- 7.22 A number of those consulted observed the scope for VIA – or a similar service – to be more far-reaching. COPFS has a proud recent tradition of improving its victim-focus and aspires to provide better services to victims, a common desire across criminal justice partners. But, as this Review explains, the constitutional position of the prosecution sets boundaries to what COPFS can provide. In light of the findings of this Review - highlighting gaps, duplication of agency effort and a frustrating chain of ownership which victims require to navigate - creative, co-operative thinking is needed as to how the segments of support and information can better integrate and coalesce to meet victims' needs.
- 7.23 In an ideal world a service for victims would be flexible, knowledgeable and would address the geographic gaps that persist. But crucially, it should deliver the unity of approach which victims so desire. There is potential in the emerging, multi-disciplinary approaches discussed in this Review, and I suggest for the future that merging a common entry point to victims' services, operating a 'One Front Door' system, may go some distance to address the structural issues discussed above. Into that can be woven the digital services described, allowing those who need it to access their case information direct, but able to turn to a specialist for explanation / support where required. In this network, the ambition would be for the specialist service to procure for the victim the help required across the spectrum of safety, support and advocacy, or be a direct route in to civil justice services or essentials like welfare, housing and health. This does not appear to *necessarily* require co-location of services: some forms of this multi-disciplinary approach might be virtual; some could entail physical co-locations and team-working. I recommend this potential model be the subject of close consultation and exploration across the sector.
- 7.24 The aim – for Scotland to provide the best possible system of victim care – should be a service which is:
- 'Right first time', ensuring provision of accurate, reliable information / explanations, without duplication and future-proofed, too, to take account of potential changes in the criminal justice system;
  - From the best person (professional, trained, impartial, accountable).

ASSIST provides a service to women and men within most of the West Command of Police Scotland – the legacy ‘Strathclyde Police Force’ area. It’s linked to all the Sheriff Courts in this area, including the Specialist Domestic Abuse Courts at Glasgow and Ayr. It also supports male victims where the case is being heard at Edinburgh’s Domestic Abuse Court.

The Service will:

- Try wherever possible to contact you within 24 hours of receiving the referral, especially if the perpetrator is in custody, to offer a risk assessment and safety planning.
- Provide information to the Procurator Fiscal with your views about special bail conditions and safety options.
- Give a more focused service for victims at high risk of further harm, including younger victims, children and young people.
- Convene Multi-Agency Risk Assessment Conferences (MARACs) in six local authority areas (Glasgow, Inverclyde, South Lanarkshire, North Lanarkshire, Renfrewshire and West Dunbartonshire). MARACs are meetings where information about high-risk domestic abuse victims is shared between local agencies. By bringing a number of agencies together, a risk-focussed, coordinated safety plan can be put in place to support victims.
- Provide support to partners or ex-partners of men who are participating in the Domestic Abuse Groupwork programme undertaken by Social Work Services in Glasgow.

## A Snapshot of Support in Two High Court Cases

### Case One

The victim is a child and has had to attend court over a number of days. She is accompanied by (and presumably travels with) 2 support workers from the care institution where she resides. She also has the support of an advocacy worker attached to an organisation specialising in support for rape victims. She has the availability of the Witness Service at court. Information needs (and practicalities such as arranging access via a door to the court building where she will not encounter the accused) are sorted by the COPFS VIA worker at the court, working with the court officials. The victim and her carers proceed, however, to use the wrong door, which causes upset to the court officials who have overall responsibility for all court users.

The care institution workers telephone the VIA officer to find out what stage the victim has reached in the giving of her evidence – does she require to come back? How much longer is she likely to be? The VIA officer liaises with the prosecutors in each court, to update all victims about the timing of their attendance. The contact with VIA is necessary because the care workers report ‘the advocacy worker doesn’t speak to us’. Co-ordination is difficult and pivots around the VIA officer, who is of course available to all victims and vulnerable witnesses in attendance across a number of trial courts. It is difficult to gauge whether the communication difficulty is simply rooted in lack of confidence – in not knowing the criminal justice process sufficiently well. Or whether there is a sense on the part of the advocacy worker that she is only there for her client, the victim?

### Case Two

The case involves allegations of domestic / sexual abuse. On arrival of the victim, the VIA officer finds she is being supported by a worker from an organisation which is unknown to VIA - she has to search for the remit etc. of the organisation on the internet and establishes that it is a domestic abuse service, operating from and for a particular part of Glasgow. It is not known when it was established but they have not accompanied anyone to this High Court before. The complainer is also represented by a member of ASSIST - another Glasgow agency for the support / advocacy needs of victims of domestic abuse. ASSIST only recently began providing support in the High Court. There is no explanation for the presence of both workers. The Witness Service at court service is also available. The VIA officer continues to provide information about case progress / court processes to the group which comprises the victim and the 2 support workers and keeps them updated throughout the day.

In the course of the Review consultation took place with all major statutory partners as well as the principal victim support agencies, including: Victim Support Scotland, Scottish Women's Aid, ASSIST, Rape Crisis, Children 1<sup>st</sup>, Action Scotland Against Stalking, TARA, Cruse Bereavement Scotland, The Moira Fund, PETAL.

The Review team comprised:

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Consultation and assistance also provided by Ruth McQuaid in particular in respect of the internal COPFS Review of VIA