A Human Rights-Based Approach to the Prosecution of Sexual Crime: Victims and Prosecutorial Decision-Making

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LLB (Hons), Dip L.P., LLM (distinction)

Submitted in fulfilment of the requirements of the University of Glasgow for the Degree of Doctor of Philosophy (Law)

College of Social Sciences

August 2022

ABSTRACT

The key to the successful reform of the criminal justice response to sexual crime lies in understanding the structural position of victims within the criminal process and the role that they play in criminal justice decision-making. This thesis accordingly confronts the conflicting narratives of progressive law reform and stymied delivery in the investigation and prosecution of sexual crime in Scotland. It explores the structural barriers to the effective integration of victims' interests into the criminal process and frames the entrenched, systemic challenges in meeting victims' justice needs as a human rights issue. By combining a review of legislative and policy developments in Scotland with in-depth interviews with Advocates Depute and other specialist sexual offence prosecutors, it explores the victim's current role in criminal justice decision-making and what, in terms of Scotland's legal and constitutional commitment to human rights norms, that role ought to be.

Ultimately, this thesis advances a principled framework for integrating victims' substantive and procedural justice needs into the criminal process and proposes a human rights-based approach to prosecutorial decision-making in sexual offence cases. By re-positioning victims of sexual crime, not as tools in the prosecutor's case, but rather as rights-bearers – respected individuals with a legitimate, legal interest in the process and the decisions that are taken – it argues that much can be done to improve the criminal justice response to sexual crime, while at the same time future proofing the justice system from Convention rights-based challenges in years to come.

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GLOSSARY

Advocate	Advocates are members of the Faculty of Advocates and have rights of audience to appear in the High Court of Justiciary.
Advocate Depute	Scottish Prosecutor with rights of audience in the High Court and criminal Appeal Court; Advocates Depute prosecute cases in the High Court and give instructions to Procurators Fiscal on behalf of the Lord Advocate in connection with criminal cases
CEDAW	Convention for the Elimination of Discrimination Against Women
Complainer	The individual who has reported to the police that they are a victim of a crime
COPFS	The Crown Office and Procurator Fiscal Service is the independent public prosecution service in Scotland. It is responsible for the investigation and prosecution of crime in Scotland, the investigation of sudden, unexplained and suspicious deaths and allegations of criminal conduct against police officers.
Crown Counsel	The term Crown Counsel refers to the Scottish Law Officers (the Lord Advocate and Solicitor General) and their Advocates Depute.
Devolution	In this context, by virtue of the Scotland Act 1998, almost all of Scotland's justice system was devolved to the Scottish Parliament in 1999.
ECHR	European Convention on Human Rights and Fundamental Freedoms.
ECtHR	European Court of Human Rights.
High Court	The High Court of Justiciary is Scotland's supreme criminal court, hearing the most serious cases. It is the only court in Scotland with jurisdiction to try rape cases.

HM Inspectorate of Prosecution in Scotland	Independent body responsible for scrutiny of COPFS operations.
Indictment	The indictment is the document under solemn procedure (see section 1.2.1) which contains the charges that the accused will face at trial, together with a list of productions and witnesses. It calls the accused to a First Diet or Preliminary Hearing, with the expectation that a jury trial will follow.
Justice Committee	Scottish Parliament committee responsible for the justice system in Scotland.
Law Officers	The Lord Advocate and the Solicitor General for Scotland are Scotland's Law Officers.
Lord Advocate	The head of the system of criminal prosecution in Scotland. Together with the Solicitor General, the Lord Advocate is a member of the Scottish Government.
Lord Justice General	Scotland's most senior judge.
National High Court Sexual Offences Team	Specialist team within Procurator Fiscal's offices, responsible for decision-making and case preparation for High Court level sexual offences cases.
National Sexual Crimes Unit	Specialist team of Advocates Depute who receive reports from the Procurators Fiscal in solemn cases. Advocates Depute from the National Sexual Crimes Unit prosecute sexual offence cases in the High Court.
Nobile Officium	The unique power of the High Court of Justiciary to provide an equitable remedy where none exists in law.
Police Scotland	The authority responsible for policing across the whole of Scotland.
Precognition or precognition statement	A witness interview conducted by the Procurator Fiscal after the case has been reported by the police and prior to a case calling in court.

Precognition Report	In solemn procedure, the document prepared by the Procurator Fiscal after taking the precognition statement from a witness, providing recommendations to Crown Counsel on initial decision-making.
Procurator Fiscal	Procurators Fiscal are civil servants and independent public prosecutors, constitutionally responsible to the Lord Advocate. Procurators Fiscal (and their Deputes) receive and consider reports from the police and other agencies and decide whether to raise criminal proceedings in the public interest. They also prosecute all criminal cases in the Sheriff Courts and Justice of the Peace Courts in Scotland.
Rape Crisis Scotland	Scotland's leading rape crisis organisation, supporting survivors of sexual violence and working to end sexual violence.
Scottish Child Abuse Inquiry	Independent Inquiry set up in 2015 by the Scottish Government into abuse of children in care in Scotland; responsible for furnishing the Scottish Government with recommendations to improve the law, policies and practices in Scotland.
Scottish Courts and Tribunals Service	An independent public body, responsible for the administration of the courts and tribunals in Scotland.
Scottish Human Rights Commission	Established in 2008, an independent public body whose purpose is to promote human rights, make recommendations for best practice and changes to the laws of Scotland and conduct inquiries into policies and practices of Scottish public authorities.
Scottish Women's Aid	Scotland's leading domestic abuse organisation.
Sheriff Court	The majority of Scotland's criminal cases are dealt with in the sheriff courts. Cases are heard by either a Sheriff and Jury (solemn procedure) or by a single Sheriff (summary procedure).

Solicitor General for Scotland	One of Scotland's Law Officers. The Solicitor General supports the Lord Advocate in the exercise of the Lord Advocate's functions and may exercise, as required, their statutory and common law powers.
UNCRC	United Nations Convention on the Rights of the Child
VIA	Victim Information and Advice Service A service provided by COPFS to support victims and vulnerable witnesses after their case has been reported to the Procurator Fiscal.

ACKNOWLEDGEMENTS

This thesis would not have been possible without the financial assistance and support that I received from the Crown Office and Procurator Fiscal Service and the encouragement that I received from colleagues, managers, and senior leaders. Working full-time as a public prosecutor, while pursuing part-time research has not been easy - and there have been times when I questioned my decision to begin this project – but I have frequently been inspired by my colleagues and motivated by their kindness, enthusiasm, and commitment to the administration of justice. My most sincere thanks go to the Advocates Depute and Procurators Fiscal who gave up their time to participate. Each participant was extremely generous with their time, knowledge and expertise, on which the research relied. I am truly grateful.

While I will personally thank everyone at COPFS who has supported me, I would like to offer special thanks to Emma Forbes and Alison Montgomery. They have been a source of immeasurable support and friendship, granting leave so that I could study, championing my research within COPFS, picking up my slack whenever I needed to focus on writing and always having my back. Emma has been hugely generous with her time and has read various draft chapters, always offering detailed, insightful feedback. I am not sure how she had the time, but I am extremely grateful.

I would also like to thank my supervisors, Professor Fiona Leverick and Professor James Chalmers. I sought them out because I had read their work and knew that they were experts in their field, but I did not know that they would be such kind, generous and inspirational supervisors. After 6 years, I am still somewhat star struck by them and I have been hugely privileged to learn from them. I can't thank them enough for guiding me through this process.

Most importantly, I would like to thank Em, Sam (8) and Oliver (6). Sam was 2 years old when this journey started, and Oliver was not yet born – they don't remember a time when I wasn't working on this thesis. They have been a constant source of inspiration and motivation for me. And to Em, who transcribed hours of interviews, read numerous draft chapters and has suffered through long discussions about victims' rights, I am forever grateful. I'm conscious that the time I've dedicated to this thesis has had a disproportionate impact on her, and my timing was awful, but she understood that this was important to me and made it happen. We got this done together.

Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Peter Michael Reid

Signature: Peter Michael Reid (signed)

Date: 16 August 2022

Chapter 1: The Prosecution of Sexual Offences in Context: Setting the Scene

1.0 Introduction

As a Procurator Fiscal Depute[1] working within the West Federation and – following the re-structuring of COPFS[2] in 2016 - the National High Court Sexual Offences Team,[3] I have spent the last 10 years specialising in the investigation and prosecution of sexual crime. I am familiar with the challenges of gathering and effectively analysing evidence in sexual offence cases and the difficulties that prosecutors face in responding sensitively and appropriately to victims' needs, all while prosecuting in the public interest. Over the years, I have worked with colleagues who are professional, talented, and committed to the administration of justice and I have directly witnessed the implementation of genuinely progressive law reform and policy developments: from the widening of the definition of rape under the Sexual Offences (Scotland) Act 2009 to the "clear-sky thinking"[4] of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. There is no doubt in my mind that there have been real, tangible successes; not just in terms of individual cases, but also in the development of the law and in the improvement of the overall policy landscape in which the prosecution of sexual crime is pursued.[5]

Nevertheless, as my experience has grown, and as my professional interest inspired me to read more widely about the social and criminological context within which sexual crime is prosecuted, I began to understand that the criminal

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[1] See Glossary.
[2] See Glossary.
[3] COPFS went through a period if restructuring from circa 2010, moving from a regional structure to three large federations (East, West and North) and finally settling on a structure based on three 'functions' – Serious Casework, Local Court and Operational Support. The prosecution of High Court level sexual offences falls with Serious Casework, which is now organised nationally.
[4] Lord Carloway, Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking, Criminal Law Conference, Murrayfield 9 May 2013 <CarlowaySpeech.CriminalLawConferenceMurrayfield-9May2013.pdf (shirleymckie.com)> accessed 3 August 2022.
[5] See Chapter 4 for a discussion on the development of victim-centred legislation and policy since devolution.

justice response to sexual crime is not all that it should be.[6] Not only were my eyes opened to the substantive failure of the justice system in adequately tackling sexual offences,[7] but I became increasingly aware of the disconnect between the "kaleidoscopic justice" needs of victims – concerned with themes like recognition, dignity and voice - and the capacity of the criminal justice system to meet these needs within the context of an adversarial contest between the prosecution and the defence and the linear, finite process in which "you either get [justice] or you don't." [8]

It is against this background that this thesis confronts the conflicting narratives of progressive law reform and stymied delivery in the investigation and prosecution of sexual crime in Scotland. The fundamental proposition that runs through this thesis is that the key to successful reform lies in understanding the structural position of victims within the criminal process and the role that they play in criminal justice decision-making. With this in mind, the thesis explores the structural barriers to the effective integration of victims' needs within the criminal process and frames this challenge within the context of the traditional adversarial justice system and its marginalisation of victims from the decision-making process. By combining a review of legislative and policy developments with in-depth interviews with Advocates Depute and other specialist sexual offence prosecutors,[9] it explores what the victim's role in criminal justice decision-making is and what, in terms of Scotland's legal and constitutional commitment to human rights norms, it ought to be. Ultimately, this thesis advances a principled framework for integrating victims' substantive and procedural justice needs into the criminal justice process and proposes a human rights-based approach to prosecutorial decision-making in sexual offence cases. By re-positioning victims of sexual crime, not as tools in the prosecutor's case,

[6] See e.g., F Leverick, 'Improving the Management of Sexual Offence Cases in Scotland: the Dorian Review' (2021) 25 Edin LR 385.
[7] See Chapter 2.
[8] C McGlynn and N Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2019) 28(2) Social & Legal Studies 181; Also see K Daly, 'Sexual Violence and Victims' Justice Interests' in E Zinsstag and M Keenan (eds) *Restorative Responses to Sexual Violence – Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 108.
[9] Advocates Depute prosecute cases in the High Court. Specialist Procurators Fiscal also work on High Court level sexual offence cases, but their role lies in working with the police and case preparation, rather than prosecuting in the High Court.

but rather as rights-bearers – respected individuals with a legitimate, legal interest in the process and the decisions that are taken – it is argued that much can be done to improve the criminal justice response to sexual crime, while at the same time future proofing[10] the justice system from human rights-based challenges in years to come.

In this introductory chapter, I explain my choice of terminology; provide introductory context to the prosecution of sexual crime in Scotland, including the human rights landscape in which this takes place; and describe my approach to the structure of the wider thesis, thereby setting the scene for the discussion in the substantive chapters that follow.

1.1 Terminology

1.1.1 Complainers or victims?

As a prosecutor and a practitioner in the criminal courts in Scotland, I am used to hearing the term 'complainer' when reference is made to an individual who has reported that they are a victim of crime to the police. The preference for this terminology is often explained with reference to the presumption of innocence – a basic tenet of the Scottish justice system – which might be undermined if 'complainers' were to be superseded by 'victims' in the criminal courts (at least prior to a conviction being secured). As Lord Eassie observed in the 2013 case of *Wishart v HM Advocate*:

[10] The Carloway Review: Report and Recommendations (17 November 2011) page 2 <The Carloway Review - Parliamentary Business : Scottish Parliament> accessed 03 August 2022.

> "…in the context of criminal proceedings, it will generally be the case that until guilt is admitted or proved it will not be appropriate to refer to a complainer as being a 'victim'."[11]

Notwithstanding the well-established use of complainer as the "constitutionally correct term" in the Scottish criminal process,[12] it is interesting to note that the drafters of the Victims and Witnesses (Scotland) Act 2014 - a flagship piece of legislation aimed at improving the support available to victims throughout the justice system - did not refer to complainers at all. Instead, the 2014 Act places obligations on the criminal justice authorities to have regard to various principles when carrying out their functions relating to victims (and witnesses). This legislative endorsement of the term 'victim' has not, however, resolved the debate amongst practitioners, and the appropriate use of terminology - even outwith the formal criminal process - remains a contentious issue that the legal profession in Scotland continues to grapple with.[13]

In this thesis, however, I have opted to use the term 'victim' rather than 'complainer' as it more appropriately recognises an individual's complaint that they have suffered harm because of the criminal actions of another. Like Doak, I use it as "a form of criminological shorthand" for alleged victim[14] without intending to displace or undermine the presumption of innocence.[15] In the context of sexual crime however – where a substantial proportion of sexual abuse is never reported to the authorities – to insist on narrow terminology which equates victimhood with a successful conviction, is often inappropriate and requires the wilful denial of the lived experience of innumerable individuals

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[11] *Wishart v HM Advocate* [2013] HCJAC 168 at [7].
[12] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) para 213 < https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/104512.aspx> accessed on 11 August 2022.
[13] K Summan, 'Crown Office 'Victims' of Misunderstanding?' *Scottish Legal News* (22 December 2017) < Crown Office 'victims' of misunderstanding? | Scottish Legal News> accessed 03 August 2022; Also see discussion about the use of the term 'victim' during the interviews with specialist prosecutors at section 5.4.
[14] Also see the language used in s 1A(1) of the Victims and Witnesses (Scotland) Act 2014, which makes it clear that references to 'victim' in that legislation include "a person who is *or appears* to be a victim in relation to a criminal investigation or proceedings" [my emphasis].
[15] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third* Parties (Hart Publishing: Oxford, 2008) 24.

who have experienced sexual violence. Furthermore, the use of the term 'victim' is not only consistent with the legislative approach set out in the 2014 Act, but also with established norms of international law and human rights protection.[16] This will be explored further in Chapter 3, where I consider the framework of obligations requiring states to mobilise the criminal law in order to prevent or redress Convention rights violations.[17] These important obligations would make little sense, and impunity for human rights violations would be increased, if the status and language of victimhood were reserved to that small minority of cases where a conviction is achieved.

1.1.2 Which victims?

In Scotland, only the High Court of Justiciary – Scotland's supreme criminal court – has jurisdiction to try allegations of rape.[18] Given that the empirical research which underpins this thesis relates to the perspectives of specialist sexual offence prosecutors working in High Court teams,[19] much of the research data naturally gravitated towards rape cases. That said, rape is not the only sexual offence that is prosecuted in Scotland's High Court, which has jurisdiction as a trial court over any indictable[20] offence committed anywhere in Scotland.[21] Equally, a broad range of sexual crime is prosecuted in Scotland's Sheriff Courts, where the challenges experienced by the victims involved are likely to be just as significant,[22] and are played out on a larger scale due to the higher volume of caseload.

While the nature of the empirical research which informs this thesis presupposes a focus on the criminal justice response to victims of rape and other sexual

[16] See section 1.3.3.
[17] L Lavrysen, 'Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the European Court of Human Rights' in L Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law Under the ECHR* (Hart Publishing: Oxford, 2020) 29.
[18] Criminal Procedure (Scotland) Act 1995 s 3(6).
[19] See Chapters 5 and 6.
[20] See 'Indictment' in Glossary.
[21] Criminal Procedure (Scotland) Act 1995 s 3(2).
[22] Broadly the same form of criminal procedure is used to try serious sexual crime before a jury in both the Sheriff Court and the High Court – see section 1.2.1 below.

offences that are likely to be prosecuted in the High Court, the research findings have wider application to the way that victims are treated in Scotland's justice system and the role that they play across all sexual crimes. As a result, I have opted to use the phrase 'victims of sexual crime' or 'victims of sexual offending' - rather than rape or other specific offences - when referring to victims throughout this thesis. This approach reflects the broad application of the research findings and is also consistent with the focus of the ongoing agenda for criminal justice reform and policy development in Scotland, which seeks to improve the experience of victims of sexual crime across the wider justice system.[23]

1.2 Scotland's approach to the prosecution of sexual offences in context

Before moving on in subsequent chapters to explore the role that victims of sexual crime play in the criminal justice system and how the structural barriers to the effective integration of their needs might be removed, or at least mitigated, it is appropriate to consider the domestic landscape relating to the prosecution of sexual crime in Scotland. In this introductory section, I briefly outline the domestic criminal procedure and key aspects of the criminal law relating to the prosecution of sexual offences, providing essential background to the discussion relating to criminal justice decision-making that is to follow.

1.2.1 The Scottish court system: summary and solemn procedure

The overwhelming majority of prosecutions in Scotland are brought at the instance of the Lord Advocate[24] or the relevant Procurator Fiscal. There are two distinct modes of criminal procedure: summary procedure, where a Sheriff or a lay Justice of the Peace adjudicates; or solemn procedure, where a High Court

[23] See for example, the Terms of Reference which informed Lady Dorrian's review of the management of sexual offence case: Scottish Courts and Tribunal Service, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group (March 2021) p.140.
[24] The Lord Advocate is the head of the system of prosecution in Scotland – see Glossary.

judge or Sheriff determines the legal issues and a jury of fifteen randomly selected members of the public determine matters of fact.[25] Generally speaking, solemn procedure is reserved for the most serious offences, albeit a Sheriff sitting without a jury under summary procedure still has sentencing powers of up to twelve months' imprisonment.[26] As a result, many serious crimes are still prosecuted summarily in the Sheriff Courts, including sexual offence cases.[27] Under solemn procedure, a Sheriff has sentencing powers of up to five years,[28] while a High Court judge can impose a sentence of up to life imprisonment.

Except for rape[29] - which must be tried in the High Court – and sexual assault by penetration,[30] which must be prosecuted under solemn procedure in either the High Court or Sheriff Court, all statutory offences proscribed by the Sexual Offences (Scotland) Act 2009, and all common law sexual offences,[31] can be tried under either summary or solemn procedure. It is a matter for the Procurator Fiscal (subject to the instructions of Crown Counsel)[32] to determine which procedure is to be used.[33] Where reference is made to prosecutorial decision-making in sexual offence cases throughout this thesis, I refer - for the most part - to solemn procedure, but it should be borne in mind that victims of sexual crime may also find themselves engaged in the criminal process under summary procedure too.

In either case, the process is an adversarial one,[34] where the Lord Advocate or Procurator Fiscal (and their deputes) represent the public interest in a contest with the accused. The victim in this context is not a party to proceedings and is

[25] S Moody and J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press, 1982) 80.
[26] Criminal Procedure (Scotland) Act 1995 s 5(2).
[27] This claim is based largely on professional experience but is reinforced by the Prosecution Code which states that when determining the forum of prosecution "the general rule is that cases should be taken in the lowest competent court unless there is some good reason for prosecuting in a higher court."
[28] *Ibid* s 3(3).
[29] Including the separate offence of rape of a young child (Sexual Offences (Scotland) Act 2009 s 18).
[30] Including the separate offence of sexual assault on a young child by penetration (Sexual Offences (Scotland) Act 2009 s 19). See Sched 2 of the 2009 Act.
[31] Although the Sexual Offences (Scotland) Act 2009 provides a new framework of statutory sexual offences, common law sexual offences are still available to prosecutors for conduct which pre-dates the 2009 Act – see Sexual Offences (Scotland) Act 2009 s 52.
[32] See Glossary.
[33] See S Moody and J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press, 1982) 80 – 99.
[34] A Brown, *Criminal Evidence and Procedure: An Introduction* (Avizandum Publishing, 4th Ed, 2022) 21.

formally considered to be a witness.[35] Historically, therefore, the victim has no legitimate interest in Scottish criminal procedure or in criminal justice decision-making and, as Moody and Tombs explain, Scottish prosecutors under this traditional approach to criminal justice:

> "Would appear to be in the unique position of enjoying a wide measure of autonomy in decision-making…Prosecutorial decisions at the pre-trial stage are not subject to judicial review, are determined in private and may be scrutinised only by the Lord Advocate."[36]

This traditional approach to criminal justice decision-making resonates with Christie's account of the response to crime being "stolen"[37] by the state but, more than this, there are obvious tensions with modern human rights norms which emphasise the principles of participation, accountability, non-discrimination, empowerment and legality in decision-making.[38] A key aim of this thesis is to explore the extent to which this traditional approach to criminal justice remains extant in Scotland, and if so, whether a human rights-based approach - empowering rights-bears to participate in the vindication of their rights-based interests - might provide a more appropriate framework for re-conceptualising the relationship that victims of sexual crime ought to have with criminal justice decision-makers in the future.

1.2.2 The substantive law of sexual offences: The Sexual Offences (Scotland) Act 2009

Scotland's framework of laws relating to the criminalisation of sexual abuse and sexual violence has transformed since devolution.[39] Indeed, until 2002, the actus

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[35] *RR v HM Advocate and LV* [2021] HCJAC 21 at [51].
[36] S Moody and J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press, 1982) 30.
[37] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1.
[38] See e.g. Scottish Human Rights Commission, Human Rights Based Approach: A Self-Assessment Tool (December 2018) <Human Rights Based Approach | Scottish Human Rights Commission> accessed 09 August 2022.
[39] See Glossary.

reus of rape was understood at common law to be "the carnal knowledge of a female by a male person obtained by overcoming her will".[40] In recognition that the law did not reflect contemporary attitudes towards sexual behaviour,[41] the Scottish Law Commission was asked in 2004 to review the substantive law of rape and other sexual offences,[42] leading to a "radical overhaul"[43] of the law of sexual offences in Scotland, which was ultimately codified in the Sexual Offences (Scotland) Act 2009.

Although it has been argued that this opportunity for law reform could have gone further,[44] the 2009 Act implemented a comprehensive rewrite of the law of sexual offences, built around four principles: (i) that the law ought to be clearly formulated, (ii) that the law should secure respect for sexual autonomy, (iii) that the law should protect the vulnerable from exploitation, and (iv) that the law should apply without discrimination on grounds of gender or sexuality.[45] Within this framework, the 2009 Act is split into five substantive parts: parts 1 and 2 dealing with consent-based offending, while parts 3, 4 and 5 focus on the protection of the vulnerable from sexually exploitative behaviours.

Section 1 of the 2009 Act, for example, concerns the crime of rape, and subsection (1) defines the new statutory offence in Scots law in the following terms:

> "(1) If a person ("A"), with A's penis—

[40] J Chalmers and F Leverick, *Gordon's Criminal Law, Volume II* (Scottish Universities Law Institute, 4th Ed, 2017) para 39.02. It was held in *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 that the actus reus should be understood as a man having sexual intercourse with a woman without her consent.
[41] See P Ferguson, 'Reforming Rape and Other Sexual Offences' (2008) 12 Edin LR 302.
[42] See Scottish Law Commission, *Report on Rape and Other Sexual Offences* (The Stationery Office, 2007), Scot.Law Com.209.
[43] *Sexual Offences (Scotland) Act 2009 Now in Force* (*Rape Crisis Scotland*, 2 December 2010)< https://www.rapecrisisscotland.org.uk/news/news/sexual-offences-scotland-act-2009-now-in-force/>accessed 08 August 2022.
[44] See e.g., S Cowan, 'All Change or Business as Usual? Reforming Rape in Scotland' in C McGlynn and V Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge Cavendish, 2010) 154.
[45] P Ferguson, 'Reforming Rape and Other Sexual Offences' (2008) 12 Edin LR 303.

(a)without another person ("B") consenting, and

(b)without any reasonable belief that B consents,

penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape."[46]

There are accordingly three elements of the crime of rape that require to be established in any successful prosecution under Scots law: (i) that there was penetration of the victim's vagina, anus or mouth with the accused's penis, (ii) that the victim did not consent to penetration, and (iii) that the accused did not reasonably believe that the victim consented.

Notwithstanding the relative clarity of this definition, the proof of rape remains fraught with difficulty in Scots law and there is a wealth of judicial authority, both pre- and post-2009 Act, which explore the essential elements of the crime of rape and the complexities of their interactions with the requirements of Scotland's corroboration rule.[47] A brief explanation of the corroboration rule and its application to decision-making in sexual offence cases accordingly follows, as it will provide important context to the discussion in subsequent chapters.

1.2.3 The corroboration requirement

The corroboration requirement is a unique and controversial[48] feature of Scots criminal law that applies to almost all criminal offences but has a particularly profound impact on decision-making in sexual offence cases.[49] A classic

[46] Sexual Offences (Scotland) Act 2009 s 1(1).
[47] See section 1.2.3 below.
[48] See e.g., discussion in P Duff, 'Scottish Criminal Evidence Law Adrift?' in P Duff and P Ferguson (eds), *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh University Press, 2018) 224.
[49] See e.g., I Cairns, ''Access to Justice' for Complainers? The Pitfalls of the Scottish Government's Case to Abolish Corroboration' in P Duff and P R Ferguson (eds), *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh University Press, 2018) 41 at 54-55.

statement of the corroboration rule was set out with deceptive clarity by the then Lord Justice Clerk in *Morton v HM Advocate:*

> "By the law of Scotland, no person can be convicted of a crime…unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime…with which he is charged."[50]

And a slightly more nuanced summary can be found in the Carloway Review, where Lord Carloway explains:

> "According to the requirement [of corroboration], there must first be at least one source of evidence (i.e., the testimony of one witness) that points to the guilt of the accused as the perpetrator of the crime…Secondly, each "essential" or "crucial" fact, requiring to be proved, must be corroborated by other direct or circumstantial evidence…"[51]

Notwithstanding these relatively clear summaries of the corroboration rule, it remains the case that its application in practice is "not as simple or straightforward as we sometimes think,"[52] and it is accepted that the rule has become "technical and highly complex."[53] In the context of sexual crime, this complexity has undoubtedly caused confusion within the legal profession and judiciary,[54] leading to questionable legal concessions,[55] inconsistent decision-

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[50] 1938 JC 50 [55].
[51] Carloway Review: Report and Recommendations (2011) para 7.2.6.
[52] G Gordon, 'At the Mouth of Two Witnesses: Some Thoughts on Corroboration', in R Hunter (ed), *Justice and Crime, Essays in Honour of the Right Honourable the Lord Emslie* (T&T Clark, 1993) 33.
[53] J Chalmers and F Leverick, "'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure?" (2012) 75 Modern Law Review 837.
[54] Senators of the College of Justice, Response to the Consultation on the Not Proven Verdict (12 July 2022) p.18 < https://www.judiciary.scot/home/media-information/media-hub-news/2022/07/12/senators'-consultation-response-on-not-proven-verdict> accessed on 08 August 2022.
[55] *McKearney v HM Advocate* 2004 SCCR 251 at [8].

making[56] and "strange and anomalous"[57] outcomes that have had a profound impact - not just on individual victims - but on the ability of the justice system to develop and maintain an effective and predictable legal framework.[58]

Reflecting on the impact that the corroboration requirement had on his own judgment in sexual offence cases, Lord Hope poses the rhetorical question:

> "…it must follow that private acts of indecency which are not inflicted on at least one other person…which leave no trace and which the perpetrator does not admit to, however distressing that may have been to the victims, are beyond the reach of the criminal law. Is this acceptable in a civilised society?"[59]

The idea that the corroboration requirement might leave certain crimes outside the scope of the criminal law echoes Lord Carloway's broad conclusion that corroboration acts as an "impediment to justice"[60] and, in the same vein, the Scottish Government's claim that the corroboration requirement negatively impacts on "access to justice" for victims, particularly in sexual and domestic abuse cases.[61] While the arguments made to justify the proposed abolition of corroboration following the Carloway Review have been subjected to persuasive criticism,[62] it remains the case that the corroboration rule permeates the whole

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[56] See for example the dilemma discussed by Lord Hope and the impact that this had on the way that he approached the corroboration requirement in sexual offence cases, in Lord Hope of Craighead, 'Corroboration and Distress: Some Crumbs from Under the Master's Table' in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 12.
[57] *Jamal v HM Advocate* 2019 JC 119 at [18].
[58] Senators of the College of Justice, Response to the Consultation on the Not Proven Verdict (12 July 2022) p.17.
[59] Lord Hope of Craighead, 'Corroboration and Distress: Some Crumbs from Under the Master's Table' in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 12 at 13.
[60] Carloway Review: Report and Recommendations (2011) para 7.2.34.
[61] I Cairns, ''Access to Justice' for Complainers? The Pitfalls of the Scottish Government's Case to Abolish Corroboration' in P Duff and P R Ferguson (eds), *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh University Press, 2018) 41 at 49-54.
[62] J Chalmers and F Leverick, "'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure?" (2012) 75 Modern Law Review 837; P Duff, 'Scottish Criminal Evidence Law Adrift?' in P Duff and P R Ferguson (eds), *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh University Press, 2018) 224.

criminal process, impacting on the police investigation and on prosecutorial decision-making - it is "not just a test adopted in court."[63] In this sense, the corroboration rule represents a crucially important part of the landscape against which sexual crime is prosecuted in Scotland and interacts with the wider discussion in this thesis concerning the role that victims of sexual crime play in the criminal process and how their rights-based interests are engaged, and sometimes undermined, by criminal justice decision-making.[64]

1.3 Human rights in context

Any overview of the domestic context in which the prosecution of sexual crime is pursued would not be complete without also considering the mechanisms for Convention rights protection in Scotland and the wider human rights landscape in which the protection of Convention rights sits. In the next section, I will accordingly outline the domestic mechanisms for human rights protection which frame the prosecution of sexual crime in Scotland, together with relevant perspectives on the international human rights responses to gender-based violence.

1.3.1 Domestic mechanisms for human rights protection

Although it is true to say that many of the rights with which the ECHR is concerned have long been protected in Scotland at common law,[65] the constitutional settlement put in place at the turn of the twenty-first century - through a combination of devolution and the 'incorporation' of Convention rights into domestic law - undoubtedly brought the protection of human rights into "a new phase".[66] Indeed, the Scotland Act 1998 and the Human Rights Act 1998

[63] Carloway Review: Report and Recommendations (2011) para 7.2.14.
[64] See discussion at section 3.2.1.
[65] J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (Bloomsbury Publishing, 4th ed, 2017) para 1.06.
[66] A Boyle, 'Human Rights and Scots Law: Introduction' in A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights and Scots Law* (Hart Publishing, 2002) 1.

operate to give effect to Convention rights in domestic law, welcoming the ECHR as a legitimate source of legal authority where previously it had been "virtually ignored in domestic legal proceedings."[67]

Very briefly, both the Scotland Act 1998 and the Human Rights Act 1998 are central to the protection of human rights in Scotland's justice system and both give effect to Convention rights, among other things, by placing limitations on the powers of public authorities, for example the police, the courts and prosecutors.[68] The Human Rights Act 1998, for example, makes it unlawful for a public authority to act in a way which is incompatible with a Convention right;[69] while the Scotland Act 1998 went further still, placing *vires* controls on executive power and preventing Scottish Ministers from competently acting in any way that fell outwith the scope of Convention rights compatibility.[70]

This powerful framework of human rights protection - which included the acts of the Lord Advocate as head of Scotland's prosecution service – led to "a plethora of disputed issues"[71] in the criminal courts as "virtually any act of a prosecutor"[72] fell to be challenged as outwith the Lord Advocate's competence if it could be argued that a Convention rights issue was engaged.[73] After a degree of political controversy over the United Kingdom Supreme Court's jurisdiction in matters of Scottish criminal law and procedure, the Scotland Act 2012 was passed, removing the acts of the Lord Advocate, as head of the system of criminal prosecution, from the scope of s.57(2) of the Scotland Act 1998.[74] Instead, a statutory right of appeal was created from the High Court to the Supreme Court to deal with any future claims that the Lord Advocate has acted

[67] J Murdoch, 'Protecting Human Rights in the Scottish Legal System', in A McHarg and T Mullen (eds) *Public Law in Scotland* (Avizandum Publishing, 2006) 324.
[68] Human Rights Act 1998 s 6(3).
[69] Human Rights Act 1998 s 6.
[70] Scotland Act 1998 s 57(2).
[71] Submission by the Judiciary in the Court of Session (October 2008) para 13, cited in A Page, *Constitutional Law of Scotland* (Scottish Universities Law Institute, 2015) para 9-15.
[72] *Ibid*.
[73] For example, see *Cadder v HMA Advocate* [2010] UKSC 43.
[74] Scotland Act 2012 s 36.

incompatibly with Convention rights, under what are now called Compatibility Issues.[75]

While this updated framework of Convention rights protection has been criticised for weakening of the original *vires* controls under the Scotland Act 1998,[76] the constitutional matrix for human rights protection in Scotland[77] continues to limit the powers of public authorities. In the criminal justice context, it is clear that the police, the courts and the prosecuting authorities must at all times ensure that their functions are carried out in compliance with Convention rights or risk being challenged on the basis that they have exercised their powers unlawfully. This is a key aspect of human rights protection in Scotland that runs through the heart of the proposals that are developed in this thesis.

1.3.2 Convention rights and victims of sexual crime

Given that the domestic mechanisms for human rights protection in Scotland require that the lawful functioning of the criminal justice system must be carried out in compliance with Convention rights, it follows that there are implications for everyone involved in the criminal process. There are, for example, huge untapped implications for victims of sexual crime whose rights-based interests are likely to be engaged, not just by their potential treatment within, and by, the justice system itself,[78] but by the criminal act – the index rights violation - that brought them into contact with the criminal justice authorities in the first place. A central proposition of this thesis, therefore, is that sexual crime is a human rights issue that is likely to engage Articles 3, 8 and 14 ECHR, requiring the domestic authorities to meet the victim's allegations

[75] See discussion in A Page, *Constitutional Law of Scotland* (Scottish Universities Law Institute, 2015) paras 9-01 – 9-29.
[76] See, for example, I Jamieson, 'Scottish Criminal Appeals and the Supreme Court: *Quis Custodiet Ipso Custodes*?' (2012) 16 Edin LR 77.
[77] A. O'Neill, "The Human Rights Act and the Scotland Act – the New Constitutional Matrix" in Lord Reed (ed) *A Practical Guide to Human Rights Law in Scotland* (W. Green/Sweet & Maxwell, 2001).
[78] See obligation to protect at section 3.4.

with an effective criminal justice response. I will discuss this in more detail in Chapters 3 and 7, but a brief introductory overview of the scope of the relevant Convention rights is set out below.

The principal rights-based interest that is likely to impact on the justice system's obligations to victims of sexual crime is Article 3 ECHR. Article 3 is concerned with the protection of both physical and psychological well-being[79] and requires, without any qualification, that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The purpose of Article 3 is closely associated with the protection of human dignity in the ECtHR's jurisprudence,[80] leading Mavronicola to argue that the severity threshold at which Article 3 is engaged is linked as much to the degree of the harm or suffering inflicted, as it is to the nature and character of the treatment concerned.[81] Similarly, Webster points out that the language of dignity is ingrained in the ECtHR's approach to Article 3, arguing that respect for dignity takes the form of a fundamental value which drives the legal meaning of Article 3 and the threshold at which it is engaged.[82] Against this background, it is likely that allegations of sexual crime, particularly those which are prosecuted under solemn procedure, will invariably engage the severity threshold of Article 3 ECHR, triggering the framework of rights-based obligations discussed in Chapter 3.

Article 8 ECHR is also likely to be engaged in sexual offence cases, with the notion of 'private life' being developed to include protection for the "physical

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[79] *Z and Others v United Kingdom* (2002) 34 EHRR 97 at [74].
[80] See, for example, *Bouyid v Belgium* (2016) 62 EHRR 32 at [81].
[81] N Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, 2021) 92.
[82] E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018) 50-54.

and moral integrity of the person."[83] Bessant points out that the scope of Article 8 accordingly implies freedom from interference with an individual's physical or personal space, while also offering protection from interference with their mental state.[84] Like Article 3 ECHR, the ECtHR jurisprudence explicitly states that Article 8 imposes positive obligations on states, requiring domestic authorities to protect actual and potential victims from acts of violence by private individuals.[85]

Finally, Article 14 operates in conjunction with Articles 3 and 8 to ensure that the victim's rights-based interests in their physical and psychological integrity "are secured without any discrimination." As will be discussed below, sexual violence - and gender-based violence more broadly - is now recognised in international human rights law as an act of discrimination due to its disproportionate impact on women. The discriminatory nature of gender-based violence has been acknowledged by the ECtHR and used to inform a developing body of jurisprudence.[86] This has important consequences for the way that domestic authorities must respond to gender-based violence,[87] allowing the ECtHR to draw on wider international perspectives developed by specialist UN treaty bodies such as CEDAW.[88] I will briefly outline the significance of these international perspectives below.

1.3.3 International human rights perspectives

It is true that international human rights law has not always conceived of sexual violence as a human rights issue, and has accordingly been criticised for focusing

[83] *X and Y v Netherlands* (1986) 8 EHRR 235.
[84] C Bessant, 'Protecting Victims of Domestic Violence – Have We Got the Balance Right?' (2015) 79 Journal of Criminal Law 102.
[85] *Bevacqua and S v Bulgaria* [2008] ECHR 498 at [64]– [65].
[86] See S Murray, 'Domestic Violence as Sex Discrimination: Ten Years Since the Seminal European Court of Human Rights Decision in *Opuz v Turkey*' (2019) 51 Journal of International Law and Politics 1347.
[87] P Londono, 'Developing Human Rights Principles in Cases of Gender Based Violence: *Opuz v Turkey* in the European Court of Human Rights' (2009) 9 Human Rights Law Review 657.
[88] See Glossary.

on interstate, rather than interpersonal relations.[89] Indeed, human rights discourse has long been predicated on a public/private dichotomy, where the private realm was perceived to be devoid of power relations and human rights protections were characterised as a means of securing individual rights against the power of the state.[90] Within this paradigm of the separate public and private realms, violence committed in the private sphere by private actors was not readily conceived as a human rights violation and so, while incidents of sexual violence or domestic abuse might be contrary to domestic laws, they were not traditionally captured in the framework of international human rights protection – for example in the wording of the ECHR itself - that was created after the Second World War.

In recent decades, however, the norms of the public/private dichotomy have been breaking down. Gender-based violence has been recognised as a global issue that reflects "the degree and persistence of discrimination that women continue to face" [91] and it has been recognised at the level of the United Nations that:

> "States have a duty to prevent acts of violence against women; to investigate such acts when they occur and prosecute and punish perpetrators."[92]

State responsibility for gender-based violence in the private sphere is accordingly engaged by the failure of the state to uphold its duty to protect its citizens and to address the structural inequality that propagates and tolerates gender-based violence in society, regardless of the perpetrator's association

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[89] R Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 Columbia Human Rights Law Review 291; H Charlesworth, C Chinkin and S Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.
[90] K Libal and S Parekh, 'Reframing Violence Against Women as a Human Rights Violation: Evan Stark's Coercive Control' (2009) 15 Violence Against Women 1480.
[91] UN General Assembly, *In-depth Study on all Forms of Violence Against Women: Report of the UN Secretary General* (UN Doc. A/61/122/Add.1, 6 July 2006) < Etpu (un.org)> accessed on 04 August 2022.
[92] United Nations, Ending Violence Against Women: From Words To Action, Study of the Secretary-General (2007) < VAW/for printer/1/14/0 (un.org)> accessed on 04 August 2022.

with state power. As Stark argues, "security, dignity, autonomy and liberty are rights that are universally recognised as worthy of protection".[93] In this sense there is a growing consensus that the state is responsible for failing to prevent human rights violations committed by private actors and for permitting or facilitating the conditions in which such violations are able to occur.

Although it has been pointed out that victims of non-state violence may still face barriers to the realisation of their rights through the UN human rights redress mechanisms,[94] the progress that has been made in recognising gender-based violence as a human rights issue at the international level is well illustrated in the interpretation of the CEDAW. In its General Recommendation No.19, the CEDAW Committee elaborated on its understanding of the convention, explaining that:

> "…The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately…"[95]

and went on to emphasise that:

> "…discrimination under the Convention is not restricted to action by or on behalf of Governments…Under general international law and specific human rights covenants, States may also be responsible for private acts if

[93] E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2008).
[94] Alice Edwards, 'Everyday Rape: International Human Rights Law and Violence Against Women in Peace Time' in C McGlynn and V Munro (eds), *Rethinking Rape Law International and Comparative Perspectives* (Glasshouse, 2010) 92.
[95] CEDAW, General Recommendation No.19 (11th Session, 1992) Violence Against Women, para 6 < https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=11> accessed on 15 August 2022.

> they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence…"[96]

At the UN level then, gender-based violence is accordingly characterised as a human rights issue that states must respond to with due diligence in order to prevent, investigate and punish, even when such violations are committed by non-state parties.

At the level of regional human rights protection, the idea that states may be responsible for human rights violations that occur in the private sphere is also now well established.[97] In Chapter 3 I will consider, in greater detail, the framework of obligations that are placed on states to respond to private acts of violence that has manifested itself in the jurisprudence of the ECtHR. Indeed, the development of positive duties by the ECtHR - requiring states to mobilise the criminal law to protect against, or provide redress for, human rights violations committed by private actors - is now so well established that some academics warn of coercive overreach, with possible implications for the culture of law enforcement and the shaping of operational discretion.[98]

In terms of Scotland's domestic legal system, however, the inclusion of human rights norms into the private sphere is filtering down more slowly. While the interactions of those accused of crime with the criminal justice system have long been understood to engage human rights considerations to keep the carceral power of the state in check,[99] the obligation to respond to human rights violations that are committed by private actors has yet to be fully explored in the Scottish context. It is argued that this is not a sustainable position. Given that gender-based violence is internationally recognised as a human-rights issue

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[96] *Ibid*, para 9.
[97] For example, see *Velasquez Rodriguez v Hondruas* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[98] L Lazarus, 'Preventive Obligations, Risk and Coercive Overreach' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020) 249.
[99] See J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (Bloomsbury Professional 4th edition, 2017) para 1.15 – 1.16.

and given the robust mechanisms for human rights protection embedded in the post-devolution constitutional framework, Scotland's criminal justice system must accelerate its response to the obligations that flow from human rights violations that are committed by private actors. In other words, when responding to sexual crime, the domestic criminal justice authorities must accept that they owe duties which span the public/private paradigm if they are to keep pace with the trajectory of human rights norms. Rights-based interests must therefore be secured, not just in the public sphere – that is to say, to secure the rights of the accused against state power – but also in the private sphere – protecting the rights of victims who have been or might be harmed by the acts of other private citizens.

1.3.4 Conflicting rights

Given the growing consensus around this defensive and offensive function[100] of human rights protection – to secure the rights of the accused from state power, while at the same time mobilising state power through the criminal law to prevent, investigate and punish the acts of sexual violence – it is appropriate to provide some context about the possibility of conflicting interests in the application of human rights to the criminal process.

Despite political narratives which frequently set victims' interests up as falling in direct opposition with those of the accused, this is not always the case in practice and, in Sanders' words, it often amounts to "a false conflict."[101] Nonetheless, lessons must be learnt from Scotland's experience of legal reform following the *Cadder* judgment,[102] where political rhetoric and the simplistic characterisation of the justice system as a zero-sum game, put the legitimacy of rights-based criminal justice reform at risk, after success in securing further rights-based protections for the accused led to proposals to re-balance the

[100] F Tulkens, 'The Paradoxical Relationship Between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.
[101] A Sanders, 'Involving Victims in Sentencing: A Conflict with Defendants' Rights?' in E Cape (ed) *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group, 2004) 99.
[102] *Cadder v HM Advocate* [2010] UKSC 43.

justice system "in the interests of the rest of the community."[103] While it is true that tensions will inevitably arise across the rights-based interests of different groups inside the criminal process, it cannot reasonably be argued that the accused's right to a fair trial would be prejudiced if victims were able to assert their rights-based interests in securing transparent, rational, rules-based decision-making; or to ensure that irrelevant and highly sensitive personal information is not led at trial. Similarly, the accused's right to a fair trial cannot be said to encompass the right to pursue an aggressive, demeaning or insulting approach to cross-examination; or to preventing the victim from accessing appropriate information about the investigation and the reasoning which underlies important decisions. Although it would be wrong to argue that the interests of victims' and those of the accused will always run in tandem, the rights-based interests of the accused and of victims do frequently converge. Both have an interest in consistent, transparent decision-making; both have an interest in a prompt and expeditious enquiry; and both have an interest in the maintenance of a robust criminal justice system that produces accurate outcomes that are widely perceived to be legitimate and procedurally fair. In short, neither the accused nor the victim benefit from a process that leads to miscarriages of justice and much of the conflict in the justice system can actually be linked to conflict that occurs between the accused vis-a-vis the state (the public sphere) and the victim vis-a-vis the state (the private sphere), rather than in direct conflict with each other.[104]

It must be acknowledged, however, that the rights-based interests of victims will inevitably conflict with those of the accused in some areas of criminal justice decision-making. As Doak points out, the fact that a clash of interests may occur does not, however, mean that the rights of victims are invalidated or that they should simply be subservient to those of the accused.[105] The proper approach is to reconcile the competing interests by reference to alternative procedures and safeguards so that all relevant interests can be accommodated

[103] See the discussion relating to the 'counterbalance approach' to victim-centred reform at section 2.3.1.
[104] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 187.
[105] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008).

with the least possible impact on the rights of the accused.[106] As Van Ness suggests, the question is not how to avoid conflict in the criminal justice system, but how to manage it effectively so that competing interests can be accommodated in a principled manner.[107] Indeed, the principles of fairness in any jurisdiction do not allow any one party to demand "the most favourable procedures that can possibly be imagined"[108] and it is already the case that procedural safeguards for the accused are shaped, qualified and influenced by public interest considerations relating to the overall fairness of proceedings and considerations of expediency and efficiency. While the extension of human rights law into the private sphere may potentially complicate matters by adding the rights-based interests of victims into the overall equation, it also provides a principled framework for assessing competing claims[109] and thereby increases the legitimacy, proportionality and transparency of criminal justice decision-making.

1.4 The structure of this thesis

Having reviewed the broad context in which the prosecution of sexual crime takes place in Scotland – the relevant procedural and substantive aspects of domestic law and the human rights landscape against which the prosecution of sexual crime is pursued – this thesis focuses on the role that victims of sexual crime currently play in Scotland's criminal justice system and how effective reform might be achieved by explicitly realigning this role with established human rights norms.

In Chapter 2, I confront the challenges that Scotland's criminal justice system faces in meeting victims' needs and I link this to the structural marginalisation of victims from criminal justice decision-making and the systemic problems of

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[106] *Van Mechelen & Others v The Netherlands* (1997) 25 EHRR 647.
[107] D W Van Ness, 'New Wine and Old Wine Skins: Four Challenges of Restorative Justice' (1993) 4 Criminal Law Forum 251.
[108] *R v Darroch* [2002] SCR 443.
[109] F Klug, 'Human Rights and Victims' in E Cape (ed) *Reconcilable Rights? Analysing the Tensions Between Victims and Defendants* (Legal Action Group, 2004) 119.

attrition and re-traumatisation that undermine the efficacy and legitimacy of the criminal justice response to sexual crime. In Chapter 3, I take an in-depth look at the jurisprudence of the ECtHR, detailing the framework of obligations that are now placed on domestic authorities to respond effectively to private acts of violence which engage Articles 3 and 8 ECHR. This forms the basis of my thesis that the criminal process engages the Convention rights of victims of sexual crime, who have a rights-based interest in ensuring that the criminal justice authorities effectively respond to the human rights violations that they have reported, while also protecting them from further violations of their rights as they participate in the criminal process.

Chapter 4 goes on to explore the landscape of victim-centred policy and legislation that has been developed in Scotland since devolution, with a view to better understanding the role that victims of sexual crime currently play in Scotland's justice system. This is complemented by Chapters 5 and 6, which deal with my empirical research, interviewing specialist sexual offence prosecutors to gain an in-depth understanding of their approach to victims of sexual crime and how the victim-centred policy and legislative framework is applied in practice to prosecutorial decision-making. Chapter 5 deals with my methodological approach to the interviews, while Chapter 6 sets out my findings.

Drawing upon the preceding chapters, and on Scotland's domestic framework for human rights protection, Chapter 7 explores the role that victims of sexual crime ought to play in Scotland's criminal justice system. I set out the human rights-based approach in more detail and argue that victims have a lawful, rights-based interest in criminal justice decision-making which ought to form the fulcrum for a re-alignment of their role: away from their objectification as witnesses and towards the recognition of their personhood as rights-bearers.

Finally, Chapter 8 draws the thesis together with concluding comments and recommendations. It illustrates the ways in which the criminal justice response to sexual crime - and the experience of victims who participate in the process - could be improved by the implementation of the human rights-based approach

and the recognition that victims of sexual crime have legitimate rights-based interests *inside* the criminal process, providing a principled basis for their integration into criminal justice decision-making as active agents in the vindication of their Convention rights.

Chapter 2: The Prosecution of Sexual Offences: A Systemic Problem

2.0 Introduction

In Chapter 1, I discussed the domestic context to the prosecution of sexual crime in Scotland, providing a brief overview of the adversarial criminal procedures that are available to prosecutors; the challenges in the application of the substantive criminal law; and the human rights framework within which the justice system operates. I alluded also to my professional experience as a sexual offence prosecutor and highlighted the disconnect between my professional experience of progressive policy improvement on the one hand, and the persistent failure of the justice system to meet the "lived, ongoing and ever evolving"[110] justice needs of victims on the other.

Beyond my professional perspective, the wide-ranging difficulties faced by the criminal justice system in responding to gender-based violence, and to sexual crime in particular, are well known and well documented. In recent years research has highlighted the existence of various entrenched and systemic problems, ranging from the frequent and inappropriate use of sexual history evidence;[111] to the prevalence of secondary traumatisation;[112] high rates of attrition;[113] the pervasive use of myths and stereotypes to downplay and justify sexual violence;[114] and the barriers to justice presented by the adversarial trial

[110] C McGlynn and N Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2019) 28(2) Social & Legal Studies 186.
[111] M Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, 2007); S Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials* (Equality and Human Rights Commission Research Report, August 2020).
[112] JL Herman, 'Justice From the Victim's Perspective' (2005) 11 Violence Against Women 571.
[113] J Gregory and S Lees, 'Attrition in Rape and Sexual Assault Cases' (1996) 36 British Journal of Criminology 1; K Hohl and EA Stanko, 'Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12 European Journal of Criminology 324.
[114] J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008); L Ellison and V Munro, 'Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 17 International Journal of Evidence & Proof 299; E Daly, *Rape, Gender and Class: Intersections in Courtroom Narratives* (Palgrave MacMillan, 2022).

itself.[115] Not only are the challenges multi-faceted, but they are long-standing too and stubbornly resistant to law reform in a system that "is not geared to the perspective of the victim."[116] Indeed, the study of the police and court response to rape conducted by Chambers and Millar nearly four decades ago makes painfully familiar reading today.[117] And just as Pizzey lamented the "wide gap between what the law says and what the police will actually do" in the 1970s,[118] so Forbes' more recent account of "the stubborn gap between the ambition to improve…and women's lived reality of the process"[119] remains a troubling indictment of the justice system's failure to respond effectively to gender-based crime, and with it, to solve the "intransigent problem of sexual violence."[120]

In this chapter, I explore the challenges that Scotland's justice system faces in responding to sexual crime, setting out the underlying problem that this thesis ultimately seeks to confront. I start with a statistical overview of attrition rates in sexual offence cases, with a particular focus on reports of rape and attempted rape. Next, I consider the findings of various official reports and research studies relating to the lived experience of victims, drawing out the valuable contribution that they have made to our understanding of the entrenched, system-wide problems that stymie the justice system's response to victims of sexual crime. Finally, I consider the theoretical and historical perspectives which underpin the traditional criminal justice response to victims and how these feed into the absence of a conceptually consistent and principled role for victims of sexual crime, capable of recognising their legitimate interests and integrating their needs into the criminal process.

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[115] O Smith, 'The practicalities of English and Welsh rape trials: Observations and avenues for improvement' (2018) 18 Criminology & Criminal Justice 332.
[116] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 177.
[117] G Chambers and A Millar, *Investigating Sexual Assault* (Edinburgh: HMSO, 1983); G Chambers and A Millar, *Prosecuting Sexual Assault* (Edinburgh: HMSO, 1986).
[118] E Pizzey, *Scream Quietly or the Neighbours Will Hear* (Penguin, 1974) 116.
[119] E Forbes, *Victims' Experiences of the Criminal Justice Response to Domestic Abuse: Beyond Glass Walls* (Emerald Publishing, 2022) 16.
[120] S Cowan, 'Sense and Sensibilities: A Feminist Critique of Legal Interventions Against Sexual Violence' (2019) 23 Edin LR 22.

2.1 Reporting, attrition, and conviction rates

There is no doubt that gender-based violence remains a pervasive global issue,[121] with world-wide estimates indicating that one in three women have been subjected to either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.[122] In Scotland this is reflected, at least in part, in the volume of reports to the police each year. In contrast with other types of crime, the number of sexual crimes recorded is at its highest level since comparable crime groups were made available in 1971.[123] Indeed, the number of sexual crimes recorded by the police in Scotland increased by 15% from 13,131 in 2020-21 to 15,049 in 2021-22. And since 2012/13, the number of reported sexual crimes have increased by 96%.[124]

This increase in reporting to the police has of course travelled through the justice system, resulting in increases in the scale and complexity of sexual offence cases being dealt with by the prosecuting authorities and the criminal courts. Between 2015 and 2017, for example, sexual crimes went from constituting 50% of the High Court workload of Scottish prosecutors to 75%.[125] Indeed, in the year April 2019 to March 2020, 69% of all High Court trials related to sexual offence cases,[126] and with the growth pattern in both the volume and complexity of sexual crime likely to continue, consensus is growing that the status quo is unsustainable.[127] Without substantial reform of the criminal justice response to sexual crime there is a risk that the plight of victims (and indeed

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[121] Secretary-General's Study of Violence Against Women, Background documentation for: 61st session of the General Assembly Item 60(a) on advancement of women (A/61/122/Add. 1) < violenceagainstwomenstudydoc.doc (un.org)> accessed at 03 August 2022.
[122] World Health Organisation, *Violence Against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence Against Women and Global and Regional Prevalence Estimates for Non-Partner Sexual Violence Against Women* (Geneva, 2021) https://www.who.int/news-room/fact-sheets/detail/violence-against-women accessed on 11 August 2022.
[123] M Burman and S Brindley, 'Challenges in the Investigation and Prosecution of Rape and Serious Sexual Offences in Scotland' in R Killean, E Dowds and A-M McAlinden (eds), *Sexual Violence on Trial: Local and comparative Perspectives* (Routledge: London, 2021) 200.
[124] Scottish Government, *Recorded Crime in Scotland, 2021*-22 (2022) 24.
[125] HM Inspectorate of Prosecution, Thematic Review of the Investigation and Prosecution of Sexual Crimes (November 2017) p.3.
[126] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 1.2.
[127] *Ibid.* para 1.6.

those accused of crime too) will be compounded by increased delays and capacity issues.

In parallel with this increase in pressure of business, the conviction rate for indicted cases of rape in Scotland has dipped to as low as 39%[128] and, for the last 10 years or so, the conviction rate for rape and attempted rape has been the lowest of all crime categories.[129] The statistics look even worse when the conviction rate is considered, not against indicted cases, but against incidents of rape/attempted rape reported to the police. In 2020/21, for example, 2,298 rapes/attempted rapes were reported to the police, but only 78 convictions were achieved – a conviction rate of approximately 3% of reported cases.[130] As Leverick points out, this "is not acceptable",[131] particularly when it is considered that these statists only capture a proportion of the overall prevalence of sexual violence as many incidents are never reported to the police.[132] The emerging picture is of a justice system that does not command the confidence of victims,[133] and when individual victims do feel safe enough to engage, routinely fails to deliver.

2.2 Meeting victims' needs in a 'mechanistic' process: A systemic problem

A statistical overview of the justice system's difficulties in responding to sexual crime can, however, only ever reveal so much. Helpfully, in a series of reports

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[128] 'Scottish Rape Conviction Rate Drops to 39%' (*BBC News*, 27 February 2018) < Scottish rape conviction rate drops to 39% - BBC News> accessed 05 August 2022.
[129] For a useful review of the statistical context in which sexual crime is prosecuted in Scotland, see M Burman and S Brindley, 'Challenges in the Investigation and Prosecution of Rape and Serious Sexual Offences in Scotland' in R Killean, E Dowds and A-M McAlinden (eds), *Sexual Violence on Trial: Local and comparative Perspectives* (Routledge: London, 2021).
[130] Scottish Government, *Criminal Proceedings in Scotland 2020-21*; Rape Crisis Scotland, Statistics and Key Information https://www.rapecrisisscotland.org.uk/resources-stats-key-info/#rlslider_6 accessed 11 August 2022.
[131] F Leverick, 'Improving the Management of Sexual Offence Cases in Scotland: The Dorrian Review' (2021) 25 Edin LR 392.
[132] Rape Crisis Scotland, *Annual Report* (2019-20) 35 < RCS-Annual-report-2019-2020.pdf (rapecrisisscotland.org.uk)> accessed 05 August 2022; Scottish Government, *Scottish Crime and Justice Survey 2019/20: associated Data Tables table 7.26a* < Scottish Crime and Justice Survey 2019/20 - gov.scot (www.gov.scot)> accessed 05 August 2022.
[133] L Regan and L Kelly, *Rape: Still a Forgotten Issue* (London: Child and Women Abuse Studies Unit, 2003) 8.

published over the course of 2017, COPFS,[134] the Justice Committee[135] and HM Inspectorate of Prosecution[136] have also provided an invaluable insight into the challenges that the justice system faces. More recently, the work of the Lord Justice Clerk's Review Group[137] and vital research into the lived experience of victims[138] has shed further light on the nature of the problems that underpin the available statistics. Key themes relate to the high levels of dissatisfaction reported by victims, disempowerment, significant delays in reaching decisions, re-victimisation, and a dearth of reliable information from the relevant criminal justice agencies. It may be useful at this stage to engage with the findings of these reports to better understand the wider domestic context within which the prosecution of sexual crime takes place, the difficulties experienced by victims and the pathways to reform that may be available.

2.2.1 The Thomson Review of Victim Care

The Thomson Review was published by COPFS in January 2017 and was led by the then Solicitor General, Lesley Thomson QC. The aim of the review was to set out "a vision for the twenty-first century" of how Scotland's justice sector should respond to victims (not just victims of sexual crime) across the whole justice sector, with the wider ambition of generating discussion about the relationship between victims and the criminal justice system.[139] The key thrust of the Thomson Review's findings relate to the gaps that remain in service provision for

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[134] L Thomson, *Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations* (COPFS, 2017).

[135] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) < https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/104512.aspx> accessed on 11 August 2022.

[136] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22.

[137] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021)< https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6> accessed on 11 August 2022.

[138] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through the Lived Experience of Victims-Survivors of Rape and Serious Sexual Assault, Final Report* (Scottish Centre for Crime and Justice Research, 2019)< https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf> accessed on 11 August 2022.

[139] L Thomson, *Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations* (COPFS, 2017) paras 1.8 – 1.9.

victims of crime and the high levels of dissatisfaction that they report. From the perspective of sexual offences, the Thomson Review recognised the problem of attrition (the process by which cases drop out of the system) and linked this to the lack of confidence that the justice system instils in victims of sexual crime.[140]

Ultimately, the Thomson Review confirmed that victims frequently feel disempowered by the criminal process and the victims who contributed to its work expressed a desire for a system that is more "sensitive or responsive or bespoke."[141] The Thomson Review reported that the most common complaint, heard "over and over", was that victims want one point of contact in order to co-ordinate a response to all of their needs for practical assistance, support, information and explanation.[142] Against this background, the Thomson Review puts forward the case for a single service for victim care in Scotland, co-ordinating a multi-disciplinary team operating a "one front door" model for accessing victim focused services.

In welcoming the publication of the Thomson Review, the then Lord Advocate, James Wolffe QC, acknowledged that, while "the Crown has effected remarkable change in its approach …there continue to be systemic aspects of the criminal justice system which cause difficulties for victims" that prosecutors alone cannot address.[143] This idea that victims face systemic barriers to the realisation of their interests within the criminal process is one that will be returned to throughout this thesis. Although the Thomson Review explicitly sought to stimulate debate "about the relationship between victims and "the system",[144] it did not explore this relationship in any detail and its key finding essentially amounts to a call for improvement in the services that are provided

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[140] *Ibid*, paras 3.37 – 3.38.
[141] *Ibid*, para 7.1.
[142] *Ibid*, para 7.3.
[143] James Wolffe, QC, *Review of victim care in the justice sector on Scotland*, (COPFS 11 January 2017) http://www.copfs.gov.uk/media-site-news-from-copfs/1462-review-of-victim-care-in-the-justice-sector-in-scotland accessed 08 October 2018.
[144] L Thomson, *Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations* (COPFS, 2017) para 1.9.

to victims of crime as they navigate the criminal process. It recommended further research to inform policymaking and improve practice.[145]

2.2.2 The Justice Committee Report into the role and purpose of COPFS

By April 2017, only a matter of months after the publication of the Thomson Review, the Scottish Parliament's Justice Committee concluded its inquiry into the role and purpose of COPFS and published its associated report.[146] The Justice Committee had a wide-ranging remit to scrutinise the work of Scotland's prosecution service but also explicitly considered its response to witnesses and victims of crime. Like the Thomson Review, its remit extended to all victims in the justice system, but it nonetheless provided a useful insight into the particular difficulties that victims of sexual crime experience.

Notably, the Justice Committee expressed concern about the marginalisation of victims within the criminal justice process and highlighted the impact of communication errors.[147] Other key themes relate to the dissatisfaction of victims with their experience, significant re-traumatisation and the impact of delay, particularly in sexual offence cases. Evidence from Rape Crisis Scotland and Scottish Women's Aid highlighted the gap between "good intentions…and the way COPFS interacted with victims and witnesses at an everyday level" and reference was made to "a system lacking in consideration of the impact on individuals as human beings."[148] Importantly, the Justice Committee confirms that it heard "troubling" and "consistent" evidence from third sector bodies, reporting that "the system traumatised [victims] or increased the negative impact they experienced."[149]

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[145] *Ibid*, para 1.23.
[146] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017).
[147] *Ibid*, p.2.
[148] *Ibid*, para 260.
[149] *Ibid*, para 261.

Against this background, the Justice Committee questioned whether the current system meets its "duty of care" towards victims,[150] concluding that there are "serious failings by the criminal justice system, of which the COPFS is a key component, to provide the confidence necessary for…victims to participate in court proceedings."[151] Observing that the justice system can "come across as a mechanistic process" where victims "are sometimes made to feel like an afterthought", the Justice Committee called for "comprehensive" and "system-wide" solutions.[152]

Building upon the Thomson Review, the Justice Committee's report describes and acknowledges the ways in which systematic problems manifest themselves in the lived experience of victims: delays, poor communication and re-traumatisation, all undermining the ability of victims to engage and thereby driving attrition. While the Justice Committee condemned these failings and called on COPFS and the Scottish Government to confront them as a matter of priority, it did not explore the source of the systemic issues themselves.

2.2.3 Thematic Review of the Investigation and Prosecution of Sexual Crimes

Finally, in this series of reports over the course of 2017, the Inspectorate of Prosecution in Scotland published its Thematic Review of the Investigation and Prosecution of Sexual Crimes.[153] The Inspectorate's work involved interviews with prosecutors[154] and relevant personnel across the justice sector, as well as a "document review" of COPFS casework and interviews with 16 victims of sexual crime.

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[150] *Ibid*, p.2
[151] *Ibid*, para 267
[152] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) para 306.
[153] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22.
[154] As a specialist sexual offence prosecutor within the National High Court Sexual Offences Unit at the time, I was one of a number of Procurators Fiscal who gave evidence to the Inspectorate.

In terms of the Inspectorate's approach to victims and witnesses, their report echoes the findings of the Justice Committee and the Thomson Review, acknowledging that "many victims of sexual crimes feel marginalised and ignored rather than being placed "at the heart of the criminal justice system."[155] More broadly, the Inspectorate's review highlights key failings in the justice system's approach to victims of sexual crime, particularly in terms of communication,[156] re-traumatisation at trial[157] and the impact of delay on the victim's ability to participate throughout the entire process.[158]

Notably, the Inspectorate also highlighted the lack of agency that victims of sexual crime exercise within the criminal process and linked this to the high levels of disengagement that they observed:

> "The criminal justice system places an onus on victims to seek updates, decide about special measures, find appropriate support, deal with the shifts and uncertainties in scheduling of trials and narrate what happened in an environment over which they have no control. For many dealing with the trauma of the offence, the process is too much…"[159]

Although the Inspectorate's review focuses specifically on the performance of COPFS and does not make wider observations about the systemic problems, this is a significant observation. It provides important context to the wider discussion in this thesis about the role that victims of sexual crime play and how their interests might be more effectively integrated into the criminal process so that their sense of control, agency, and dignity might be retained.

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[155] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22, para 183.
[156] *Ibid*, para 211.
[157] *Ibid*, para 303.
[158] *Ibid*, paras 312 – 314.
[159] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22, para 289.

2.2.4 Justice Journeys

The findings of the three official reports narrated above were further reinforced in 2019 with the publication of research by Brooks-Hay, Burman and Bradley at the Scottish Centre for Crime and Justice Research.[160] Their Justice Journeys report documents the lived-experience of seventeen victims of rape and sexual assault as they navigate the Scottish criminal justice system and highlights the challenges that victims face at each stage of the criminal process. It concludes with 28 recommendations to improve policy and practice, including a focus on the introduction of independent legal representation, "allowing victim-survivors to be more adequately represented, and less marginal to, the criminal justice process."[161]

Key themes which emerged from the research relate to inadequate communication, which impacted on victims' ability to endure the criminal process;[162] the perceived inability of the prosecution service to meet victims' needs;[163] and the cumulative impacts of engaging in the justice system after experiencing sexual violence.[164] One of the most striking findings that emerged from the Justice Journeys report, however, was that none of the victims involved - including those whose cases had ended in a conviction - believed that 'justice' had been achieved.[165] While it is accepted that the research project involved a relatively small sample of participants, this finding adds to concerns about the legitimacy of the criminal justice response to sexual crime and highlights the importance of reforms that focus on improving access to procedural justice in the criminal process.

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[160] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through the Lived Experience of Victims-Survivors of Rape and Serious Sexual Assault, Final Report* (Scottish Centre for Crime and Justice Research, 2019).
[161] *Ibid*, recommendation 3.7 at p.32.
[162] *Ibid*, para 3.4.1.
[163] *Ibid*, para 3.5.3.
[164] *Ibid*, para 3.6.
[165] *Ibid*, para 3.6.

2.2.5 Lord Justice Clerk's Review Group

The final report for discussion in this section was published by the Scottish Courts and Tribunal Service in March 2021, outlining the work of Lady Dorrian's Review Group on improving the management of sexual offence cases.[166] Lady Dorrian's appointment to the leadership of the Review Group was prompted, at least in part, by the recognition that the growth in the volume and complexity of sexual offence cases[167] was becoming "unsustainable",[168] and required a "'clean sheet approach' in considering how best to create a modern system"[169] for the prosecution of sexual offence cases.

Clearly the Review Group was mindful of the findings from the reports and research studies discussed above. Drawing, in particular, on Justice Journeys, the Review Group considered "'the experience of complainers and witnesses' as central to the question of how to create a modern system" and was particularly mindful of the need for an approach that "maintains and improves public confidence in the criminal justice system at large."[170] Key themes which emerged from the Review Group's report include poor communication with victims and a lack of adequate information about legal rules and procedural issues that directly affected them;[171] the perception that victims are marginal to the whole process, compounding ongoing stress and anxiety;[172] delays in progressing cases and the justice system's role in the re-traumatisation of victims.[173]

One of the most notable aspects of the Review Group's report is its exposition of the benefits of pre-recording the victim's evidence in sexual offence cases.[174]

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[166] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021).
[167] See section 2.1 above.
[168] *Ibid*, para iii.
[169] *Ibid*, para iv.
[170] *Ibid*, para vi.
[171] *Ibid*, para 1.17.
[172] *Ibid*, para 1.25.
[173] *Ibid*, para 3.26.
[174] *Ibid*, para 2.5.

This is not currently the norm in Scotland, except in High Court cases involving child witnesses,[175] and it is routinely the case that victims of sexual crime require to go through the "confusing, intimidation and demeaning" experience of attending the trial in person.[176] That said, the Review Group recognised that the expansion of the use of pre-recorded evidence has been part of the vision for improvement for some time,[177] and called for police interviews with victims in the most serious sexual offence cases to be video recorded to capture evidence at the earliest possible opportunity, with cross-examination pre-recorded on commission.[178] While, on first glance, this might appear to be a technical change – shifting the victim's engagement as a witness to an earlier stage in the procedure – there are significant potential benefits for the victim's experience of the justice system and this is reflected in the urgency of the Review Group's call for change.[179]

While the Review Group's most controversial recommendation concerned the proposal for consideration of a pilot of juryless trials in sexual offence cases,[180] perhaps its most important recommendation in practice relates to the introduction of a specialist sexual offence court, underpinned by a trauma-informed approach and specially trained personnel.[181] To this end, the Review Group drew upon the principles of trauma informed practice – Choice, Collaboration, Trust, Empowerment and Safety –[182] and highlighted how these principles might assist in improving the criminal justice response to sexual offence cases. The overlap with the PANEL principles (Participation, Accountability, Non-discrimination, Empowerment and Legality) which underpin the approach advocated in this thesis are clear to see,[183] and there is potential for a human rights-based approach to the prosecution of sexual crime to complement the practical realisation of the Review Group's vision of a

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[175] See section 4.2.3.
[176] L Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001) 1.
[177] Scottish Court Service, Evidence and Procedure Review Report, March 2015 (2015 Report) < https://www.scotcourts.gov.uk/evidence-and-procedure-review> accessed at 11 August 2022.
[178] Criminal Procedure (Scotland) Act 1995 s 271I.
[179] See section 4.2.3 for further discussion relating to pre-recorded evidence and the 2019 Act.
[180] *Ibid*, p.118.
[181] Ibid, para 3.1 - 3.56.
[182] *Ibid*, para 3.31
[183] See section 7.1.1.

specialist, trauma-informed and rights-respecting approach to the prosecution of sexual crime.

2.2.6 Concluding observations: a systemic problem

There is a consensus that the criminal justice system faces significant systemic challenges in responding effectively to victims, and to victims of sexual crime in particular. As the Thomson Review observes, this systemic problem ultimately manifests itself in a range of structural, cultural and legal issues which undermine the way in which victims experience the criminal justice system and dilutes the impact of victim-centred reform and service delivery.[184] In order to navigate a way forward, the Victims Taskforce was established in December 2018,[185] with the primary aim of co-ordinating the improvement of victims' experiences within the criminal justice system. With the Lord Advocate ordering a review of how prosecutors deal with sexual offence cases in late 2021[186] and with the Scottish Government going into a process of consultation on improving the experience of victims in 2022, "transformational change" is now the recognised aim of victim related reform.[187] The Victims Taskforce has identified key areas for improvement under the broad themes of: 'being heard', 'accessing information', 'feeling safe' and 'compassion'.[188] The challenge, however, lies in addressing these themes within the confines of a criminal justice paradigm that is structurally designed to exclude victims and marginalise their interests. To better contextualise the challenges that reformers and policy-makers face, the next section briefly explores the theoretical and historical response to victims within this traditional criminal justice framework and considers the underlying

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[184] L Thomson, *Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations* (COPFS, 2017), paras 1.19 – 1.21.

[185] The Taskforce brings together senior decision-makers from justice agencies, the legal profession, academia and the voluntary sector, including direct representation of victims. It is co-chaired by the Justice Secretary and the Lord Advocate.

[186] Lord Advocate announces sexual crime prosecution review (*Scottish Legal News*, 23 December 2021) < Lord Advocate announces sexual crime prosecution review | Scottish Legal News> accessed 05 August 2022.

[187] Scottish Government, *Improving Victims' Experience of the Justice System: Consultation* (12 May 2022) p.2 < improving-victims-experiences-justice-system-consultation.pdf> accessed 5 August 2022.

[188] *Ibid*, p.8

approaches that have been developed to help us to understand victim focused reform to date.

2.3 Conceptual approaches to meeting victims' needs

The critique of the criminal justice response to sexual crime narrated in sections 2.1 and 2.2 provides a useful insight into the challenges that victims face when engaging with the criminal process: low conviction rates, lack of agency, barriers to accessing appropriate information and re-traumatisation are long-standing and well-known themes that drive attrition and underline the systemic problems in the justice system's response to sexual crime. While the reports above all highlight the same problems and call for reform, their remits did not extend to an exploration of the underlying cause of these themes, nor why they remain so entrenched and insoluble. Against this background, it is helpful to understand the theoretical and historical perspectives about victims and their role in the justice system. Seen through this lens, the structural causes of the justice system's difficulties in integrating the needs of victims into the criminal process become less opaque and the focus of reform might be more easily identified.

Turning first to the theoretical underpinning of the criminal justice system, Braun observes, for example, that traditional theories of criminal justice see crime as a conflict between the accused and the state. As a result, jurisdictions heavily influenced by retributivist and utilitarian theories of punishment are less likely to provide victims with a central role in the process due to the absence of a theoretical underpinning capable of supporting the integration of victims' interests.[189] Similarly, Doak draws upon the historical centralisation of state power in England and Wales to explain why victims do not have any conceptual role to play in the modern criminal justice system other than to act as witness to the facts. Echoing Braun, he notes that "the contemporary criminal justice system is normatively and structurally built around a contest between the State

[189] K Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Springer International Publishing, 2019) 75.

and the accused, which inherently excludes the rights and interests of the victim."[190] Indeed, the exclusion of victims from the adversarial criminal process and the associated barriers to meaningful participation are well documented in the available literature,[191] and while there is some evidence that these barriers are being eroded in favour of a greater focus on victims,[192] "the rise of victims' rights is still challenged as incompatible with institutions of public justice", resulting in a "discourse that places or houses victims in an administrative context away from the criminal trial."[193]

This idea that the interests of victims are incompatible with traditional justice norms - such that victims require to be kept at arm's length from criminal justice decision-making - is important, and has resonance in Ashworth's categorisation of victims' rights as being divisible into service rights and procedural rights.[194] In general terms, service rights involve access to information, the provision of specific facilities and access to complaints procedures when service standards are not met.[195] Procedural rights, on the other hand, imply a level of direct participation within the criminal process and might involve, for example, the right to be consulted on key decisions. Where service rights are associated with external complaints procedures, procedural rights are more likely to give rise to justiciable claims within the criminal process itself. While the case for strengthening service rights for victims is not generally considered to be controversial, the nature of procedural rights makes them contentious and gives rise to issues of principle which, for Ashworth, threaten both the public nature of the criminal justice system and the due process rights of the accused. Indeed, for Ashworth, the state's public function

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[190] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 7.

[191] P Rock, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (Clarendon Press, 1993); N Fielding, *Courting Violence* (Oxford University Press, 2006); J Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 Criminal Law Forum 395; J Shapland and M Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in A Bottoms and JV Roberts (eds) *Hearing the Victim: Adversarial Justice, Crime Victims and the Stage* (Willan, 2010) 163.

[192] See Chapter 4.

[193] T Kirchengast, *Victims and the Criminal Trial* (Palgrave MacMillan, 2016) 14.

[194] A Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR 498.

[195] See, for example, the Victims' Code for Scotland < Victims' Code for Scotland (mygov.scot)> accessed on 05 August 2022.

in maintaining a criminal justice framework is key and his rejection of procedural rights, centred on the assumption that victims have no legitimate interest in the criminal process, at least beyond that of any other citizen.[196] Within this traditional criminal justice paradigm then, victims have no legitimate locus to participate in the criminal process itself, other than as witnesses: victims are structurally marginalised – a "problem to be managed, rather than…integral parts of justice."[197]

It is within this wider context that the stymied progress in responding to victims of sexual crime and the entrenched, systemic problems highlighted in section 2.2 can be usefully framed and understood. Despite the implementation of various victim-centred measures over the years, "adversarialism and bipartisanship remain firmly ingrained in the mechanics" of the traditional criminal justice response to victims.[198] Until a principled conceptual basis for integrating victims into the criminal process is identified, the built-in, structural marginalisation of victims will continue to delimit progress and will ensure that their needs and interests do not routinely "make their way into the minds of lawyers and other practitioners of the criminal justice system."[199]

In the absence of a principled framework for integrating victims into the adversarial system, various theoretical models have nonetheless been advanced to develop our understanding of the criminal justice system and how victim's interests might be integrated into the criminal process. The 'freedom model',[200] the 'victim participation model'[201] and Roach's 'punitive' and 'non-punitive'

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[196] A Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice?' (2001) 54 Current Legal Problems 367.
[197] J Shapland, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice* (Ashgate Publishing, 2000) 147.
[198] J Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (2015) 21 International Review of Victimology 140.
[199] A Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017) 3.
[200] L Welsh, L Skinns and A Sanders, *Sanders & Young's Criminal Justice* (Oxford University Press, 5th ed, 2021) p.38-39.,
[201] D Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) Utah Law Review 289.

models of victims' rights[202] all provide useful theoretical perspectives on how the integration of victims' interests might be understood alongside the traditional emphasis on crime control and due process.[203] Different practical approaches can also be identified as we try to understand how and why victim centred reforms have been pursued and accommodated within the traditional criminal justice paradigm. I have accordingly identified three broad approaches from the existing discourse about victims' rights. The first, I call the counterbalance approach, which seeks to improve the position of victims at the expense of the safeguards available to those accused of crime; the second, I call the partnership approach, which aims to support victims in order to improve their performance as witnesses in the criminal process; and the third, I call the therapeutic approach, which looks to improve the position of victims in their own right, but comes into direct conflict with the theoretical foundations of the traditional criminal justice paradigm. It is useful to consider the benefits and limitations of these approaches before looking more closely at the alternative approach – the human rights-based approach – that is outlined in this thesis at Chapter 7.

2.3.1 The counterbalance approach

Perhaps the most widely[204] asserted rationale for enhancing the influence of victims in the justice system is the counterbalance approach, which looks to improve the position of victims to achieve parity with the benefits enjoyed by the accused. This approach sees victims' interests as being in direct conflict with those of the accused and is often associated with political rhetoric, characterising the criminal justice system as a zero-sum game in which the interests of victims and those accused of crime are diametrically opposed and must be balanced against each other. Adopting this approach, the integration of victims' interests into the criminal process might be justified, for example, by reference to the due process rights of the accused and the perceived need to

[202] K Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (University of Toronto Press, 1999).
[203] H Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).
[204] At least in political and popular media discourse relating to victims.

redress the balance of competing interests so that victims are not disadvantaged. For too long the accused has been at the centre of the justice process, so the counterbalance approach asserts, and therefore if balance is to be maintained, the rights that those accused of crime have acquired must either be granted to victims or taken away from the accused. As Edwards argues, this sort of reasoning is inappropriately simplistic. He warns that there is often a considerable overlap between those calling for improvements in the position of victims and those demanding curbs on the accused's rights.[205] Nevertheless, the underlying value of the counterbalance approach seems to lie in the intuitive appeal of its very simplicity and the associated impact of this approach as a rhetorical tool.

In terms of the counterbalance approach's application in practice, the notion of balance which it invokes has been prevalent in much of the public debate around victims in both Scotland and the wider United Kingdom. It can be identified, for example, as the impetuous behind the Scottish Government's moves to abolish the corroboration requirement after the *Cadder* decision in 2010,[206] with the Cabinet Secretary for Justice observing during a Parliamentary debate:

> "When [the scales of justice] are changed in one direction, in the interests of the rights of the accused, they require to be balanced in the other direction, in the interests of the rest of the community."[207]

For some, this approach is linked to the politicisation of the victim as a means of bolstering state legitimacy and enhancing public support for new criminal justice policies and initiatives, with little apparent connection to the real needs of victims.[208] This in turn has oversimplified the debate about the victim's role in

[205] I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.
[206] *Cadder v HM Advocate* [2010] UKSC 43.
[207] Scottish Parliament, Official Report, col 29,557 (27 October 2010).
[208] R Elias, *Victims Still: The Political Manipulation of Crime Victims* (Sage, 1993); also see P Duff 'Scottish Criminal Evidence Law Adrift' in P Duff and P Ferguson (eds) Scottish Criminal Law: Current Developments and Future Trends (Edinburgh University Press, 2018) 224.

the criminal justice system and has allowed complex matters of law, principle and policy to be situated in a zero-sum game, in which you are either for victims or soft on crime.[209] As a result, it has been argued that many reforms which have, on the face of it, been promoted as being capable of benefitting victims have, upon closer scrutiny, amounted to little more than "political palliatives",[210] promising to salve the well-known plight of victims while, in practice, addressing the needs of a crime control agenda instead. At best then, this sort of approach diverts attention from the real needs of victims and at worst it places "victims in the service of severity,"[211] using the emotive appeal of a fictional, idealised victim to undermine proper criminal justice standards and safeguards.

As a foundation for principled legal reform of the victim's relationship with the justice system therefore, the counterbalance approach is of dubious value as it provides no coherent, principled basis for responding to victims' needs. It is not enough to simply assert that victims should be treated better to achieve parity with the benefits enjoyed by the accused. Indeed, as Ashworth and Redmayne suggest, we must be "extremely wary" of simplistic language invoking balance in the context of criminal justice reform – a metaphor that too often falls to be little more than a substitute for principled argument and misleading claims of conflict.[212]

2.3.2 The partnership approach

The criminal justice system could not operate without the engagement of the victim in reporting crime and, certainly in most sexual offence cases, in

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[209] See e.g. 'The SNP's Soft-Touch Justice System Puts Criminals, Not Victims, First' (Scottish Conservatives, 7 August 2021) < https://www.scottishconservatives.com/policies/justice-policing/> accessed on 24 May 2022.

[210] E Fattah (ed), *Towards a Critical Victimology* (MacMillan, 2016) xii; J-A Wemmers, 'Procedural Justice and Dutch Victim Policy' (1998) 20 Law and Policy 57.

[211] A Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in J Crawford and E Goodey (eds), *Integrating A Victim Perspective within Criminal Justice* (Ashgate Publishing, 2000) 186.

[212] L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (Oxford University Press, 5th Ed, 2019) 42.

participating as the chief prosecution witness. The partnership approach recognises this and seeks to improve the treatment of victims within the criminal process for the straightforward and pragmatic purpose of maintaining the justice system's response to crime. If victims are appropriately supported, informed and protected, so advocates of the partnership approach would argue, they are more likely to have trust in the criminal justice system and are therefore more likely to fulfil their role in reporting crime and in cooperating with the criminal justice agencies as a witness thereafter.[213] The former Lord Advocate, James Woolffe QC, articulated this position well in his speech to the 2017 James Wood Lecture:

> "In relation to sexual offences, the evidence of the victim is at the heart of the case. Unless victims of these crimes – which are among the most serious which we prosecute – are willing to come forward and to give evidence, we cannot prosecute the perpetrators of sexual violence and sexual crime, and if we cannot prosecute the perpetrators of these crime, then we cannot fulfil our public responsibility…Our responsibilities as prosecutors demand, then, that we engage with victims of crime…"[214]

The partnership approach therefore recognises the importance of victims to the success of the criminal justice system. As a result, the criminal justice authorities are genuinely interested in working in partnership with victims, but only insofar as victims' interests can be accommodated within existing criminal justice structures. Unlike the counterbalance approach, the partnership approach does not seek to pit victims against the accused in a direct clash of interests, but rather seeks to improve the treatment of victims with the minimum disruption to the structural parameters of the traditional approach to criminal justice. Rather than characterising victim-centred reforms as a means of redressing a perceived imbalance, reforms which are underpinned by the partnership approach tend to be couched in more neutral, technical language

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[213] See for example, the consultation document which preceded the Vulnerable Witnesses (Scotland) Act 2004: Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases (Scottish Office, 2000).

[214] J Wolffe, QC, *'A Constitutional Trust'* (31st James Wood Lecture, Senate Room, University of Glasgow, 15 November 2017).

and will seek to down-play conflict while focusing on the benefits that the improved treatment of victims will bring to the wider administration of justice.

The partnership approach is therefore inherently conservative in its response to victim-centred reform and, at its heart, is the instrumentalisation of victims for the benefit of the public interest. Although it recognises that the plight of victims requires to be managed if the justice system is to function, it ultimately maintains the traditional conception of the criminal process as a dichotomous clash between the interests of the state and the accused. Victims are not essential actors under this approach and are reduced to only an instrumental role, "with no status save as givers of evidence".[215] The partnership approach's core interest therefore lies in supporting and informing victims so that they may be better able to fulfil their role as information providers within the criminal process but, as Waller observes, this leaves the victim's dignity as a person – as a rights bearer – unacknowledged and undermined.[216] Dearing goes further still, arguing that "treating the victim instrumentally as a means to the state's ends is a second abuse…and stands in contrast to respecting the victim as a person…".[217]

There is much of the partnership approach that is mirrored in the traditional relationship between victims and the criminal justice system in Scotland. In effect it represents the status quo, where important victim-centred reforms are possible, but their impact is likely to be limited by the structural marginalisation and instrumentalisation of victims that this approach implies. As a foundation for principled reform, capable of integrating victims needs into the criminal justice system and addressing the systemic problems discussed in section 2.2, the partnership approach offers more of the same and is conceptually ill-suited to

[215] P Rook, 'The Standing of Victims in the English Criminal Justice System' (2002) 3 ERA Forum 37.
[216] I Waller, *Rights for Victims of Crime: Rebalancing Justice* (Rowman & Littlefield Publishers, 2011) 7.
[217] A Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017) 12.

supporting the sort of transformational, "person-centred" reforms that are now required.[218]

2.3.3 The therapeutic approach

Unlike the two other approaches that are outlined above, the therapeutic approach attempts to directly address victims' needs. The therapeutic approach recognises that the criminal justice process marginalises and re-traumatises victims and so seeks to meet victims' needs to mitigate the negative consequences of contact with the criminal justice system. The therapeutic approach accordingly focuses on providing victims with procedural access to the justice process to give them a voice and thereby reduce trauma and increase the victim's sense of satisfaction with the process.[219]

Indeed, there exists a growing body of research which suggests that victims often benefit from participation and input, [220] in part by making the experience of engaging with the criminal justice system more positive and empowering. While victims may not want to be burdened with decision-making responsibilities, Erez, for example, argues that victims are nonetheless interested in having a voice.[221] Critically, Erez points out that victims' level of satisfaction with justice is often positively correlated with the levels of participation that they are given.[222] More than this, it seems that providing input into the process helps victims cope with the criminal justice experience, improves mental welfare and reduces the harmful effects that marginalisation

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[218] Scottish Government, *The Vision for Justice in Scotland* (8 February 2022) < Supporting documents - The Vision for Justice in Scotland - gov.scot (www.gov.scot)> accessed on 04 August 2022.
[219] E Erez, 'Integrating Restorative Justice Principles in Adversarial Proceedings Through Victim Impact Statements' in E Cape (ed) *Reconcilable Rights? Analysing the Tension between Victims and Defendants* (LAG 2004) 81.
[220] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985); J Chalmers, P Duff and F Leverick, 'Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)' [2007] Crim LR 360.
[221] E Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debate* (Ashgate, 2000) 170.
[222] E Erez and E Bienkowska, 'Victim Participation in Proceedings and Satisfaction with Justice in the Continental Legal Systems: The Case of Poland' (1993) 21 Journal of Criminal Justice 47.

from the process would otherwise bring.[223] In short, therapeutic approaches place greater emphasis on input and participation in order to combat the sense of powerlessness experienced by many victims, increase their sense of procedural fairness and reduce secondary traumatisation.

The therapeutic approach's focus on the participation of victims is, however, often associated with the theory and practice of restorative justice.[224] While the growing prominence of restorative justice is a positive development, it cannot replace the public institutions of traditional justice systems, particularly in sexual offence cases.[225] That being so, the extension of procedural rights to improve victim welfare under the therapeutic approach must be explained with reference to the state's obligation to respond to public wrongs and maintain the accused's right to a fair trial. This goes to the heart of Ashworth's critique of procedural rights, which raises concerns about independence, proportionality and, crucially, the legitimacy of the victim's role in participating directly in the criminal process.[226] Similarly, Fenwick notes that the emergence of procedural rights for victims would herald a re-alignment of the criminal process "towards a 'private' as opposed to public ordering", arguing that the extension of victims' procedural rights should not be undertaken until the issue of principle arising from the likely conflict between such rights and those of the accused have been resolved.[227]

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[223] PF Hora and WG Schma, 'Therapeutic Jurisprudence' (1998) 82 Judicature 9; J Doak, The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trial and Truth Commissions' (2011) 11 International Criminal Law Review 263.

[224] Ashworth points out that there is no single notion of restorative justice, but endorses Marshall's characterisation of restorative justice as "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future" – see T Marshall, *Restorative Justice: An Overview* (Home Office Research and Development Directorate, 1999) cited in A Ashworth, 'Responsibilities Rights and Restorative Justice' (2002) 42 British Journal of Criminology 578.

[225] Although it may have a role to play, see C McGlynn, N Westmarland and N Godden, 'I Just Wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice' (2012) 39 Journal of Law and Society 213.

[226] A Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice?' (2001) 54 Current Legal Problems 367.

[227] H Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 Modern Law Review 317.

Van Ness, on the other hand, points out that the traditional criminal justice paradigm is inadequate precisely because the interests of victims are not legally relevant and argues that it is inevitable that the interests, rights and needs of victims will conflict at some point with those of the state.[228] The question then, for Van Ness, is not how to avoid conflict, but how to manage it effectively so that any competing interests can be accommodated in a principled manner. While the therapeutic approach therefore differs from the counterbalance approach due to its genuine desire to confront the issues faced by victims who become engaged with the criminal process, it suffers from the same underlying absence of principle. To provide a coherent basis for future criminal justice reform, the therapeutic approach must be capable of explaining why the promotion of the victim's interests should be a legitimate value for the public criminal process to consider and how competing interests should be managed and fairly resolved. The therapeutic approach seeks the integration of victims' interests but does not confront the issues of principle that interaction with the public institutions of criminal justice creates. The solution lies in identifying a paradigm in which victim's interests are clearly relevant, but also which provides a coherent and principled framework for managing these interests alongside the various other important values that the criminal process enshrines. In Chapter 7, I will discuss how the human rights-based approach is capable of achieving this.

2.4 Concluding Observations: The nature and source of the problem

The efficacy of the criminal justice response to sexual crime is, on any view, inadequate. More than this, it is causing harm: compounding trauma and driving attrition. The perception that victims are marginalised from the process is a common theme, with the criminal justice system being variously described as "mechanistic",[229] "worse than being raped"[230] and "lacking in consideration of

[228] DW Van Ness, 'New Wine and Old Wine Skins: Four Challenges of Restorative Justice' (1993) 4 Criminal Law Forum 251.
[229] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) para 260.
[230] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 303.

the impact on individuals as human beings".[231] Scotland is not by any means unique in grappling with these problems,[232] but the challenges are systemic, entrenched and long-standing.

As Lady Dorrian points out, many of the concerns highlighted in this chapter, and in the various reports and research studies outlined above, "precisely echo the concerns which were being expressed 20 and even 40 years ago."[233] This is a compelling and, ultimately, damning observation. If we are to avoid the "real possibility that our successors will be examining the same issues forty years hence",[234] then it is important not just to act, but to identify the cause of the problem, so that solutions can be tailored to meet the call for "profound change."[235] This chapter observes that the root of the problem remains a structural one, linked to the limitations of the victim's traditional role in the justice system; the absence of a conceptually consistent means of integrating their interests into the process; and their systemic marginalisation from criminal justice decision-making. If the issues echo the past, then the solution – a "respected and acknowledged" role for victims – is rooted in earlier research too.[236]

In the following chapters I will explore the extent to which these observations still hold true, drawing on a review of victim-centred law reform and interviews with specialist sexual offence prosecutors to gain a deeper insight into the role that victims of sexual crime currently play in the justice system and the extent to which the assumptions of the traditional approach to criminal justice still hold sway. Next, however, I draw upon the rights-based prism through which the problems of attrition, marginalisation and re-traumatisation must be viewed in

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[231] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) para 306.
[232] See, for example, HM Government, *The End to End Rape Review Report on Findings and Actions* (June 2021)< End-to-End Rape Review Report on Findings and Actions - GOV.UK (www.gov.uk)> accessed on 11 August 2022.
[233] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 5.52.
[234] *Ibid*.
[235] *Ibid*.
[236] J Shapland, J Willmore & P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985).

the modern legal landscape. Since sexual violence is, as has been discussed, a human rights issue,[237] then the efficacy of the justice system's response to sexual violence is a human rights issue too. In identifying the principled underpinning of a new "respected and acknowledged" role for victims within the justice system, we must first of all understand the nature of the rights-based obligations that the justice system owes to victims of sexual crime, not merely as witnesses, tools or objects in the criminal process, but as active and engaged agents with a legitimate interest in the vindication of their rights.

[237] See section 1.3.2.

Chapter 3: A Framework of Rights-Based Obligations: Duties Owed to Victims of Sexual Crime

3.0 Introduction

Prior to devolution, the Scottish courts adopted a restrictive approach to Convention rights,[238] rejecting the ECHR as an aid to statutory construction on the basis that its provisions were "irrelevant in legal proceedings."[239] The passage of time, and the incorporation of the ECHR into Scotland's post-devolution constitutional framework, however, has seen the growing influence of human rights discourse as a powerful vehicle for reform in Scotland's criminal justice system. The introduction of the Criminal Justice (Scotland) Act 2016, reinforced disclosure rules, and access to legal advice prior to police interview are all examples of substantial criminal justice reforms that were grounded in human rights challenges made possible by the domestic mechanisms for human rights protection under the Human Rights and Scotland Acts of 1998.[240] As discussed, however, these rights-based reforms have all focused on the public sphere, checking the carceral power of the state over its interactions with those accused of crime.[241]

While it would be inaccurate to suggest that there has not also been a concerted legislative and policy focus on victims since devolution,[242] there has been very little judicial consideration of the Convention rights of victims in the domestic criminal justice context and the obligations placed on the criminal justice authorities in Scotland to secure rights-based interests that arise in the private

[238] P Ferguson and M Mackarel, 'The European Convention on Human Rights and Scots Criminal Law' in A Boyle, C Himsworth, A Loux and H MacQueen (eds) *Human Rights and Scots Law* (Hart Publishing, 2002) 308.
[239] *Kaur v Lord Advocate* 1980 SC 319 at 329, although it was later accepted, shortly before devolution, that the courts should presume that Parliament had intended to legislate in conformity with the Convention: *T, Petitioner* 1997 SLT 724.
[240] See section 1.3.1.
[241] See section 1.3.3.
[242] See discussion in chapter 4.

sphere. The reasons underlying this are multi-faceted,[243] but can be linked to the structural exclusion of victims from a criminal process that focuses on the contest between the prosecutor and the accused – if victims do not have a formal role within the criminal process and do not have access to professional advice, then opportunities to assert their legal interests will of course be limited.[244] It does not, however, follow from this dearth of domestic jurisprudence that the Convention rights of victims are not legitimately engaged by the decisions taken by police officers, prosecutors and judges during the course of criminal proceedings. Indeed, there is now a substantial body of case-law from the ECtHR that establishes the ECHR as a powerful vehicle for asserting the rights-based interests of victims. While it is notable that this is not yet mirrored in the case-law of Scotland's domestic courts, there may be opportunities for significant development in this area.[245]

A clear understanding of the nature and scope of the obligations that are owed to victims will accordingly be essential if we are to develop a criminal justice response to the investigation and prosecution of sexual crime that secures the Convention rights of everyone involved in the process - not just of those who are accused of crime, but of victims as well. In this chapter, I provide an overview of the ECHR jurisprudence relating to the rights-based interests of victims and the various obligations placed on domestic criminal justice authorities to criminalise violations of Convention rights; to investigate violations of Convention rights; and to protect victims from Convention rights violations while they participate in the criminal process. Taken together, these obligations create an extensive framework of duties that criminal justice authorities owe to victims throughout the investigation and prosecution of sexual crime cases. In view of the entrenched, systemic problems that the justice system faces in responding to victims of sexual crime, this chapter provides important further context to the discussion that follows about the role of victims of sexual crime in Scotland's

[243] See Nicola Westmarland, *Rape and Human Rights: A Feminist Perspective* (Unpublished PhD Thesis, University of York, 2005).
[244] See discussion in Chapter 6.
[245] See, for example, the discussion relating to *HM Advocate v Cooney* [2022] HCJAC 10 at section 7.1.1.

criminal justice system and the implications of adopting a human rights-based approach to future prosecutorial decisions-making.

3.1 The framework of positive obligations

Although the rights set out in the ECHR are principally expressed in negative terms, it is well established that positive obligations requiring states to take action to secure Convention rights are now ingrained in the fabric of the Convention.[246] Despite this, the ECtHR has not definitively articulated a body of general principles relating to the nature and scope of positive obligations and there is no settled framework for categorising the practical manifestation of the duties that the ECHR imposes on domestic authorities.[247] As Webster observes, there is considerable overlap in the academic literature, but no uniform approach.[248] Starmer, for example, has identified five broad positive duties from the ECtHR's case law, namely: (i) the duty to put in place a legal framework to secure Convention rights, (ii) the duty to prevent breaches of Convention rights, (iii) the duty to provide information and advice relating to a breach of Convention rights (iv) the duty to respond to breaches of Convention rights, and (v) the duty to provide resources to prevent breaches of Convention rights.[249] Mowbray, on the other hand, discerns three groupings of positive obligation: the duty to take reasonable measures to protect individuals from the infringement of their Convention rights, the duty to treat detainees appropriately and the duty to conduct effective investigations.[250] Lavrysen, meanwhile, discusses just two: namely the substantive and procedural aspects of the obligations that states are required to meet in the mobilisation of the criminal law.[251] For the purposes of

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[246] E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018) 33.
[247] J Murdoch, Reed and Murdoch: *Human Rights Law in Scotland* (Bloomsbury Professional, 4th Ed, 2017) para 3.31.
[248] E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018) 34.
[249] K Starmer, 'Positive Obligations Under the Convention' in J Jowell & J Cooper (eds) *Understanding Human Rights Principles* (Hart Publishing, 2001) 146.
[250] A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 225.
[251] L Lavrysen, 'Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the European Convention of Human Rights' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020) 29.

the present research - where the focus is on the rights-based interest of victims of sexual crime - I have borrowed aspects from these different, overlapping frameworks, capturing the range of obligations that are borne by the criminal justice authorities in adequately securing the Convention rights of victims. I propose a framework that proceeds under three headings, namely: the obligation to criminalise, the obligation to investigate and the obligation to protect. I will address each in turn below.

3.2 The obligation to criminalise

The existence of an obligation to criminalise behaviour that amounts to a violation of the victim's Convention rights was first discussed in the 1980s case of *X and Y v The Netherlands*.[252] Here, the applicant claimed that there had been a violation of Articles 3, 8, 13 and 14 of the Convention on the basis that the Dutch authorities had failed to effectively protect his daughter, Miss Y, from an act of rape due to inadequate criminal law provisions. In short, a combination of Miss Y's learning disability and her young age meant that it was procedurally impossible under the Dutch criminal code for a criminal investigation and prosecution to be instigated. The sexual attack that was inflicted upon Miss Y had been effectively decriminalised by the failure of the Dutch authorities to put in place appropriate criminal law provisions. This was found to amount to a violation of Miss Y's physical and moral integrity as protected by Article 8 ECHR.

In response to the Dutch government's suggestion that civil remedies would be an appropriate alternative to criminal investigation, the ECtHR ruled that:

> "The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and can be achieved only

[252] (1986) EHRR 235.

> by criminal law provisions; indeed, it is by such provisions that the matter is normally regulated."[253]

While the judgment in *X and Y* has been criticised for focusing only on Article 8 and demurring to analyse the sexual abuse of Miss Y as a violation of Article 3 ECHR, [254] it nonetheless laid the jurisprudential foundations for the obligation to criminalise by making it clear that states must use their criminal justice systems to regulate relations between private individuals where there is an allegation amounting to a serious interference with the victim's personal integrity.

A significant further development of this principle, and the wider obligation to criminalise, can be found in the 1999 case of *A v UK*.[255] The context here was that of a stepfather who had beaten the applicant with a cane when he was just 9 years old, leaving multiple bruises on his legs and buttocks. The stepfather was arrested and prosecuted, but ultimately acquitted by the jury due to the formulation of the law in England and Wales at the time, which required the prosecution to prove that the beating of the applicant went beyond reasonable and moderate chastisement.

In unanimously finding that there had been a violation of Article 3 ECHR, the ECtHR confirmed that,

> "…the effective protection of vulnerable individuals such as children against treatment or punishment falling within Article 3 of the Convention requires the deterrent effect of the criminal law."[256]

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[253] *Ibid* [27].
[254] I Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations' (2008) 3 European Human Rights Law Review 363.
[255] (1999) 27 EHRR 611.
[256] *Ibid* [47].

Unlike the circumstances in *X and Y*, however, the mechanisms of criminal law protection that were available to the applicant in *A* were nonetheless capable of facilitating both an investigation and a criminal trial. That said, the subjective and arbitrary nature of the reasonable chastisement defence meant that the protection afforded to the applicant was still found to be insufficient, as the available legal framework did not "provide practical and effective protection of the rights guaranteed by Article 3."[257] It is not enough therefore for domestic authorities to simply point to laws that provide victims with superficial protection against the violation of their Convention rights. Rather, any ill treatment that reaches the threshold of Article 3 requires criminal law provisions that are effective in practice. Not only, therefore, does the obligation to criminalise require that states put in place a framework of criminal law and procedure to protect victims, but it extends to the detailed scrutiny of the domestic legal framework to ensure that the available system of laws remains capable of deterring acts that are contrary to Article 3.

Significant further clarification of the scope of the obligation to criminalise occurred in the 2003 judgment of *MC v Bulgaria,*[258] with the ECtHR this time relying on Articles 3 and 8 combined to scrutinise the Bulgarian criminal justice response to the applicant's allegations of rape. In *MC,* the applicant complained that the Bulgarian authorities had failed to provide effective protection against rape following the prosecutor's decision to terminate criminal proceedings on the basis that the applicant, who was a 14-year-old child, had not offered resistance during the sexual attacks upon her and because the use of force or threats by her assailants could not be established. Against this background, the applicant argued that the Bulgarian legal framework – a framework that in practice required proof of physical resistance by the victim in rape cases - left certain acts of rape unpunished and was therefore inadequate. In finding that there had been a violation of the applicant's Convention rights under Articles 3 and 8 combined, the ECtHR confirmed that:

[257] *Ibid* [48].
[258] (2005) 40 EHRR 20.

> "States have a positive obligation under Arts 3 and 8 to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution".[259]

The specific context here concerned allegations of rape, allowing the ECtHR to build on the *X and Y* judgment by making it clear that *both* Articles 3 and 8 of the ECHR require "the penalisation and effective prosecution of any non-consensual sexual act."[260] Furthermore, the ECtHR also engaged in detailed scrutiny of Bulgaria's criminal justice response to rape by considering the judgments of the Bulgarian Supreme Court and the general practice of the Bulgarian authorities in investigating rape within this legal context. The result of this analysis was the conclusion that the Bulgarian approach had been "restrictive" due to its focus on the victim's efforts to physically resist.[261] Ultimately, when this "restrictive" approach was then viewed "in light of the relevant modern standards"[262] the ECtHR found that the response of the Bulgarian authorities to victims of rape fell short of the requirement "to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse."[263] The obligation to criminalise, therefore, requires not just the existence of laws which protect victims from sexual crime, but also the proper application of these laws within the wider "criminal law system," and all against the backdrop of ever evolving "modern standards."[264]

The evolving scope of the obligation to criminalise also requires consideration of the 2010 case of *Opuz v Turkey*.[265] Although this case considered the applicant's claims under Articles 2, 3 and 14 ECHR in the particular context of domestic abuse, it raises important issues relating to international standards in responding to gender-based violence and is therefore of wider significance to victims of sexual crime. The applicant in *Opuz* claimed that the Turkish authorities had

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[259] *Ibid* [153].
[260] *Ibid* [166].
[261] *Ibid* [182].
[262] *Ibid* [185].
[263] *Ibid* [185].
[264] *Ibid* [185].
[265] (2010) 50 EHRR 28.

failed to protect her mother from sustained domestic violence and thereby failed to safeguard her mother's right to life after she was murdered by her ex-husband, HO. It was furthermore claimed that the domestic law in Turkey was discriminatory and insufficient to protect women.

In finding that there had been a violation of Articles 2, 3 and 14 (in conjunction with Articles 2 and 3), the ECtHR focused on the inaction of the domestic authorities in the face of an escalating pattern of violence and, in particular, on the domestic legislative framework that prevented a criminal investigation from being pursued after the applicant's mother withdrew her complaint about HO's conduct to the police. The ECtHR concluded that "the criminal-law system, as applied in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts committed by HO"[266] and confirmed that "the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against HO despite the withdrawal of complaints by the applicant."[267]

The *Opuz* judgment is particularly significant to victims of sexual crime as the ECtHR also scrutinised the Turkish legal framework against the background of gender discrimination under Article 14 ECHR. Indeed, the ECtHR confirmed that in considering the definition and scope of discrimination, it would "have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women".[268] The CEDAW Committee,[269] the United Nations Commission on Human Rights and the Belem do Para Convention[270] were accordingly cited by the ECtHR in confirming that violence against women is itself a form of discrimination and so "the state's failure to protect women against domestic violence breaches their right to equal

[266] *Ibid* [153].
[267] *Ibid* [168].
[268] *Ibid* [185].
[269] The Committee on the Elimination of Discrimination Against Women is a UN Treaty body of independent experts that monitors the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women.
[270] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, passed in 1994 in Belem do Para, Brazil by the Organisation of American States< https://www.oas.org/en/mesecvi/docs/belemdopara-english.pdf>accessed 07 August 2022.

protection of the law" and, furthermore, "that this failure does not need to be intentional."[271]

Against this background, the ECtHR found that the "passivity" of the criminal justice framework in responding to gender-based violence contributed to the "impunity enjoyed by aggressors" that disproportionately affects women. The "overall unresponsiveness" of the authorities was accordingly found to be a form of discrimination, leading to a violation of Article 14 in conjunction with Articles 2 and 3.[272] With the *Opuz* judgment in mind, and due to the scale of the problem of gender-based violence in England and Wales, Bessant has pointed out that there is no room for complacency in the UK, noting that,

> "it is essential that an effective legal framework is in place to protect victims, and that the authorities…demonstrate clearly that domestic violence is not tolerated, and that…they will act to prevent it, and to punish the perpetrator".[273]

From the perspective of victims of sexual crime in Scotland, where the efficacy of the response to sexual violence is also a matter of considerable concern,[274] the *Opuz* judgment might be a powerful vehicle for challenging any aspect of the criminal justice framework that further stymies the efficacy of the criminal justice response to gender-based violence. In this sense, the *Opuz* judgement reframes the well-established systemic challenges in responding to sexual crime as an issue of gender discrimination that must be responded to if human rights standards are to be maintained – the passive facilitation of an environment or culture that perpetuates, or fails to deter, gender-based violence accordingly

[271] *Opuz v Turkey* (2010) 50 EHRR 28 [191].
[272] *Ibid* [200].
[273] C Bessant, 'Protecting Victims of Domestic Violence – Have We Got the Balance Right?' (2015) 79 Criminal Law Journal 107.
[274] See discussion in Chapter 2.

becomes a human rights issue under Article 14 (in conjunction with Article 3 and 8).

Finally, it is also important to consider the judgment in *Myumyun v Bulgaria*.[275] Although this case involved Article 3 violations perpetrated by state officials rather than private individuals, it remains of general significance in terms of the obligations that are placed on domestic authorities to criminalise acts that violate Article 3 ECHR. In short, *Myumyun* involved torture in police custody, whereby the applicant was beaten and subjected to electric shocks by police officers who suspected the applicant of burglary. While a criminal complaint was raised and the police officers involved were prosecuted and convicted by the Bulgarian criminal justice system, the applicant complained that "the procedural response to the ill-treatment to which he had been subjected had not been adequate" and, in particular, that the leniency with which the Bulgarian criminal justice system treated the police officers "did not correspond to the seriousness of their acts."[276]

In finding that there had been a violation of Article 3 ECHR, the ECtHR expressed concern that the relatively minor offence of bodily harm that was used to prosecute the police officers did not take sufficient account of the applicant's psychological suffering which, crucially, was "one of the distinguishing characteristics"[277] of the rights violation in question. Furthermore, in concluding that the financial penalties imposed on the police officers "were manifestly disproportionate to the seriousness of the officers' acts,"[278] the ECtHR highlighted that the criminal offences that were open to the prosecuting authorities were "not capable of addressing the full range of issues thrown up by the act of torture to which the applicant fell victim."[279]

[275] [2015] ECHR 972.
[276] *Ibid* [54].
[277] *Ibid* [74].
[278] *Ibid* [75].
[279] *Ibid* [77].

For victims of sexual crime, the judgment in *Myumyun* is important as it suggests that the criminal justice response to crimes which meet the threshold of Article 3 must be capable of accurately reflecting the full nature, scope and impact of the human rights violation inflicted on the victim. As Lavrysen puts it, the criminal justice response must "adequately reflect the dynamics involved in the human rights violation" in question.[280] Sexual crime prosecutions must accordingly be capable of capturing the full continuum of abuse described by the victim or risk failing to meet human rights standards under the obligation to criminalise.

3.2.1 Obligation to criminalise: summary and observations

From this overview of key authorities from the ECtHR, it is possible to identify a wide-ranging obligation to criminalise acts of serious physical and sexual violence committed by private individuals, and indeed any act of ill treatment which meets the severity threshold of Article 3. Broadly speaking, once the obligation to criminalise is engaged, the ECtHR looks to the reasonableness and adequacy of the state's legal framework and the mechanisms and structures that have been put in place to give effect to the protection of individuals from ill treatment.[281] From the perspective of victims of sexual crime, this obligation requires, not just the creation of a legal framework to criminalise rape and sexual abuse, but also the effective application of this framework in practice. Victims of sexual crime accordingly have a rights-based interest in the efficacy of the criminal justice response to their allegations and the framework of criminal law and procedure that underpins this.

Although it cannot be claimed that the precise parameters of the obligation to criminalise have been conclusively demarcated, it is suggested that, as a

[280] L Lavrysen, 'Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the European Convention of Human Rights' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020) 37.
[281] N Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, 2021) 139.

minimum, the domestic machinery of criminal justice must meet the following criteria if there is to be confidence that human rights standards are being met:

- A framework of laws must be in place to criminalise sexual crime and facilitate the possibility of criminal sanctions being imposed against alleged perpetrators (*X and Y*).

- The available criminal law and procedure must be capable of leading to convictions, and must not contain arbitrary, restrictive or rigid features (*A v UK* and *MC*) such that the justice system's ability to effectively deter the commission of sexual crime might be undermined.

- The criminal justice framework must comply with modern international standards, including wider human rights standards. This includes adopting and implementing a criminal justice framework capable of providing effective protection against discrimination, including gender-based violence (*Opuz*).

- The criminal justice response must accurately reflect the nature and scope of the rights violation that the victim has suffered. This includes the use of charges that properly reflect the gravity of the allegations and the harm caused by sexual crime, together with proportionate sentencing outcomes on conviction (*Myumyun*).

With these observations in mind, it is worth noting that Londono has drawn attention to a range of empirical studies which point to the broad systemic failure of the criminal justice system in England and Wales to effectively respond to rape and sexual crime. In view of the evidence of low reporting rates to the police, the poor treatment of victims within the system and low rates of conviction in rape cases, Londono suggests that empirical research presents a

number of concerns for consideration on human rights grounds.[282] Although Londono was writing nearly 20 years ago and in the context of another jurisdiction, the problems, challenges and systemic failures that she highlights remain all too familiar in the contemporary Scottish context.

While the introduction of the 2009 Act[283] has updated and improved the framework of legal protection for victims of sexual crime,[284] it remains the case that only 3% of reported rape and attempted rape cases resulted in a conviction in Scotland in 2020/21.[285] Furthermore, these reported cases represent only a fraction of all instances of sexual violence that occur in Scotland's communities.[286] As Chapter 2 highlights, research confirms that the criminal process compounds trauma, while delays and marginalisation from decision-making all too often leave victims feeling that justice has not been achieved, even in those relatively rare cases that do end in a conviction.[287] These long-standing problems are now widely acknowledged, leading to proposals for profound reform,[288] consultation[289] and review[290] at the highest levels. Against this background, no one could credibly claim that the criminal justice response to sexual crime is adequate, and this is a well-known and long-standing problem. In short, there is a risk that Scotland's criminal justice response to sexual crime could fall below human rights standards in terms of Article 3, 8 and 14 ECHR,

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[282] P Londono, *Women, Human Rights and Criminal Justice* (Unpublished PhD thesis, University of Oxford, 2005).
[283] See section 1.2.2.
[284] At least for those victims whose abuse took place after 1 December 2010, when the 2009 Act came into force.
[285] See section 2.1.
[286] See, example, Rape Crisis Scotland, *Annual Report for 2019-20* (2019) 35.
[287] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (Scottish Centre for Crime and Justice Research, 2019) < https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf> accessed 04 August 2022.
[288] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) < https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6> accessed 04 August 2022.
[289] Scottish Government, *Improving Victims' Experience of the Justice System: Consultation* (12 May 2022) p.2 < improving-victims-experiences-justice-system-consultation.pdf> accessed 5 August 2022.
[290] Lord Advocate announces sexual crime prosecution review (*Scottish Legal News*, 23 December 2021) < Lord Advocate announces sexual crime prosecution review | Scottish Legal News> accessed 05 August 2022.

and the adequacy of the framework of laws, procedures and mechanisms for challenging gender-based violence that they require.

The concern here is even more acute when the justice system's longstanding difficulties in responding to sexual crime are considered alongside Scotland's corroboration rule[291] which - like the Turkish law in *Opuz*, requiring victims to remain engaged with prosecutorial action - stands alone within Europe's criminal justice systems[292] and disproportionately impacts on women and victims of gender-based violence. It is significant that the corroboration rule has been highlighted as a cause for concern at the United Nations level by the Committee on the Elimination of Discrimination Against Women, which noted that "the burdensome requirements of corroboration impede the prosecution of rape and other sexual violence cases", before urging Scotland, as a devolved jurisdiction within the United Kingdom, to consider implementing the removal of the corroboration requirement in criminal cases relating to sexual offences.[293]

On a domestic level, the development of case law since the CEDAW Committee's observations in 2013 has done much to increase the flexibility of the corroboration rule and thereby decrease the burden that it places on the efficacy of the criminal justice response to sexual crime.[294] When taken together, these incremental judicial developments have opened the door for prosecutorial action in some sexual offence cases where that would not have been possible prior to 2013. That said, the pace at which the corroboration rule has evolved has led Scotland's highest judicial office holders, the Senators of the College of Justice, to publicly express the concern that:

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[291] See overview of the corroboration rule in section 1.2.3.

[292] Although, see discussion relating to the *Dutch Unus Testis, Nullus Testis* rule in J Chalmers, F Leverick and A Shaw, Post-Corroboration Safeguards Review Report of the Academic Expert Group (Scottish Government, 2014) p.250< http://eprints.gla.ac.uk/99080/1/99080.pdf> accessed 12 August 2022.

[293] United Nations Convention on the Elimination of Discrimination Against Women*, CEDAW: Concluding Observations* (30 July 2013, CEDAW/C/GBR/CO/7) paras 26-27 <N1341198 (1).pdf> accessed on 18 February 2022.

[294] See, for example, *MR v HMA* 2013 SCCR 190*, Maqsood v HMA* [2018] HCJAC 74 and *Jamal v HMA* [2019] HCJAC 22.

> "The [corroboration] rule does not have a settled application of a sort which is conducive to the effective and predictable operation of the criminal law."[295]

and is a:

> "confusing and imprecise requirement which serves no real purpose and may act as an inappropriate impediment to bringing cases based on the evidence of a single witness regardless of the quality of that evidence." [296]

Echoing the CEDAW Committee, the Senators of the College of Justice went on to note that:

> "…the requirement for corroboration acts as a barrier to accessing justice, particularly in the cases of many women and child victims of both sexual abuse and more general domestic abuse…the very large increase in the number of sexual offences cases reported has served to bring this effect into very sharp focus."[297]

Notwithstanding developments in the law of corroboration since 2013, it remains problematic that some victims of sexual crime cannot access justice because of a "confusing and imprecise"[298] aspect of Scotland's unique legal framework, rather than on the basis of a merits-based analysis of the quality of the evidence.[299]

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[295] Senators of the College of Justice, *Response to the Scottish Government Paper: The Not Proven Verdict and Related Reforms* (August 2022) p.16 - 18 < Published responses for The not proven verdict and related reforms - Scottish Government - Citizen Space (consult.gov.scot)> accessed on 26 July 22.
[296] *Ibid*.
[297] *Ibid*.
[298] *Ibid*.
[299] See, for example, *DC v DG and DR* [2017] CSOH 5 - the civil case brought against David Goodwillie and David Robertson by Denise Clair. Ms Clair's case was not prosecuted, with COPFS citing lack of

The concerns outlined by Scotland's senior judiciary can be further illustrated with reference to available case law. In the 2015 case of *AP*,[300] the prosecution sought to rely on the allegations of the accused's nephew and niece, who both spoke to being sexually abused by their uncle in his house when they were young children. Taken in isolation, there was no corroboration of each individual incident (due to the nature of the allegations, only the victim could speak to what happened), but relying on the doctrine of mutual corroboration,[301] the prosecution argued that the allegations of each complainer were capable of corroborating the other due to their similar characteristics. The court, however, held that the allegations of sexual abuse were not sufficiently similar and so the corroboration requirement was not met. The accused was accordingly acquitted before the jury could deliberate on the merits of the allegations and, as a result, the credibility and reliability of the individual accounts of childhood sexual abuse were never formally considered as part of the decision to acquit.

The significance of the *AP* decision should not be overstated and, indeed, in light of the decision of a bench of three judges in *Adam & Daisley v HM Advocate*,[302] the court's approach to the application of the doctrine of mutual corroboration in the AP case was almost certainly too restrictive. That said, the AP decision usefully demonstrates the barrier that the corroboration requirement can place in the path of non-recent sexual abuse cases where, in effect, the prevailing legal framework renders prosecutorial action all but impossible without allegations from multiple victims and builds in additional layers of technical complexity that risk diverting the decision-making process away from a context-sensitive, merits-based analysis of the evidence. Against this background, it is possible to see why calls for the abolition of the corroboration requirement continue and, indeed, there is a genuine human rights-based concern that this

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corroboration as the reason. Although a different standard of proof is applied in civil proceedings in Scotland, the civil judgment sets out detailed reasons for finding Ms Clair's evidence to have been credible and reliable.

[300] *HM Advocate v P* 2015 SLT 485.

[301] The Moorov Doctrine (or the doctrine of mutual corroboration) is a complex aspect of the law of corroboration, deriving from the case of *Moorov v HM Advocate* 1930 JC 68. The doctrine effectively operates to allow one victim's testimony about a particular crime to corroborate another victim's testimony of a different crime; provided both crimes were sufficiently closely connected in time, character and circumstances.

[302] [2020] HCJAC 10.

unique aspect of Scotland's criminal justice framework undermines the ability of the relevant authorities to adequately and effectively respond to all forms of sexual abuse, and non-recent childhood sexual abuse in particular.

Similarly, the restrictive and potentially arbitrary nature of the corroboration requirement's application were further highlighted in the 2021 case of *Reid v HMA Advocate*.[303] This case involved a defence appeal after the accused had been convicted on a charge of rape which occurred in November 2019. The accused accepted that there was sufficient corroboration available to support a conviction for sexual assault but argued that there was insufficient evidence of penetration of the victim's mouth and, as a result, maintained that the conviction for rape could not stand. In terms of the evidential picture narrated in the judgment, the victim's account of the sexual attack - which broadly included digital penetration, the sucking of her neck and penile-oral penetration - was supported by evidence of distress, visible teeth marks on her neck, bruising on her neck (consistent with a "love bite"), DNA evidence (but not such that the forensic evidence directly supported penetration of the victim's mouth) and evidence of sexual comments made by the accused in the presence of others before the incident.

Although the court ultimately found that there was sufficient evidence of penile-oral penetration and refused the accused's appeal, the three-judge decision, which included the Lord Justice General, nonetheless expressed doubt about the question of the sufficiency of the evidence to corroborate penetration *if* the evidence of the accused's sexual comments had not been available. The court chose, for example, to specifically reflect on the limits of the circumstantial evidence and expressed the view that:

[303] *Reid v HM Advocate* HCA/2021/17/XC.

> "We are not particularly impressed with the suggestion that evidence of a love bite, or evidence of digital penetration, could, at least in this case, corroborate the complainer's evidence of oral/penile penetration."[304]

Had the evidence of the accused's sexual comments not been available, therefore, the court seems to be suggesting that the corroboration requirement would have operated to prevent the accused from being convicted of rape, irrespective of the strength of the victim's testimony and the various sources of forensic, medical and circumstantial evidence which broadly supported her account of having been subjected to a non-consensual sexual attack. From a human rights-based perspective, the potential for the corroboration requirement to operate in this way is again problematic. Indeed, the rigid operation of a technical legal mechanism to reduce the nature of the conviction in these circumstances, from rape to that of a substantially lesser crime, risks falling short of the requirements of Article 3 ECHR. As was discussed above, the obligation to criminalise requires that the criminal justice framework can support an adequate procedural response to ill treatment that corresponds with the seriousness of the alleged acts, captures the dynamics of the human rights violation involved and leads to proportionate sentencing outcomes.

The corroboration requirement is not solely responsible for the challenges that the criminal justice system faces in adequately responding to sexual crime. And even if its reform or abolition did lead to more prosecutions and thereby improve access to justice, it does not necessarily follow that the abolition of the corroboration requirement would, of itself, lead to improvements in the position of victims.[305] It is certainly true that the long-standing difficulties with attrition, poor conviction rates and secondary traumatisation cannot simply be blamed on the existence of the corroboration rule – not least because these problems are replicated in other jurisdictions, none of which maintain a formal corroboration

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[304] *Ibid* [17].

[305] I Cairns, 'Does the Abolition of Corroboration in Scotland Hold Promise for Victims of Gender-Based Crimes? Some Feminist Insights' [2013] Crim LR 640.

requirement.[306] That said, the corroboration requirement operates in practice to create a risk that victims of sexual crime will be unable to access justice as a result of a quantitative, rather than a qualitative, assessment of the available evidence. It has been acknowledged at the highest level that this can, and indeed has, led to "strange and anomalous" results in practice.[307] In the context of sexual crime, where conviction rates are already low and the justice system does too little to instil confidence in victims,[308] there is a risk that the overall criminal justice framework might yet fail to meet the standards of adequacy and effectiveness required by the obligation to criminalise. There is accordingly a need for urgent improvement if human rights standards are to be guaranteed. The abolition of the corroboration rule, as recommended in the Carloway Review[309] and as called for by the CEDAW Committee, might be an appropriate focal point for improvement as part of a wider package of reforms and safeguards.[310]

3.3 Obligation to investigate

In addition to the obligation to deter crime and protect victims through the maintenance of an effective framework of criminal law and procedure (the obligation to criminalise), the positive obligations developed in ECHR jurisprudence also impose a distinct investigative duty. This procedural duty to investigate allegations of ill-treatment was first addressed by the ECtHR under Article 3 ECHR in *Assenov v Bulgaria*.[311] The applicant, who was a child, alleged that he was beaten by police officers after being taken into their custody. Although the ECtHR found it impossible to establish whether the applicant's

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[306] See e.g. the reviews of the prosecution of sexual offences conducted in England and Northern Ireland: Sir John Gillen, Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland (2019); HM Government, The End-to-End Rape Review Report on Findings and Actions (2021).

[307] See the Lord Justice-General's comments in *Jamal v HM Advocate* 2019 JC 119 at [18]: "In some situations, in which a complainer has given evidence of penetration, it has been held that only a conviction of attempted rape was available. This is both strange and anomalous".

[308] See section 2.2.

[309] Carloway Review, The Carloway Review: Report and Recommendations (November 2011) < https://archive2021.parliament.scot/parliamentarybusiness/currentcommittees/45421.aspx> accessed on 15 August 2022; also see discussion at section 1.2.3.

[310] J Chalmers, F Leverick and A Shaw (eds), *Post-Corroboration Safeguards Review Report of the Academic Expert Group* (August 2014).

[311] *Assenov v Bulgaria* (1999) 28 EHRR 652.

injuries where in fact caused by the police, it was ultimately held that Article 3 ECHR imposed an obligation on states to conduct an effective official investigation where an arguable claim of ill treatment has been raised.[312] Although the Bulgarian authorities did carry out some enquiries into the applicant's allegations, they failed to secure key pieces of evidence and proceeded upon assumptions relating to the applicant's conduct that did not have any evidential basis.[313] As such, while the ECtHR was unable to find a breach of the Convention based directly upon the ill-treatment inflicted by the police, it read a procedural duty into Article 3, invoking the need to make Convention rights practical and effective, together with the obligation under Article 1 to "secure" to everybody the rights and freedoms defined in the Convention.[314]

A similar approach has been adopted in numerous subsequent judgments[315] and, like the obligation to criminalise - which requires an effective framework of criminal laws to regulate the acts of private individuals - the obligation to investigate is not limited to the transgressions of state agents. Indeed, the ECtHR has also developed a clear and consistent line of jurisprudence confirming that domestic criminal justice authorities are obliged to conduct an effective investigation into crimes that meet the threshold of ill treatment under Article 3 ECHR, even when those crimes are committed by private individuals.[316] At the foundation of this line of authority lies the case of *MC v Bulgaria*, a judgment that was already discussed in the context of the obligation to criminalise above. In *MC*, citing the earlier *Assenov* judgment, the ECtHR confirmed that the obligation to conduct an effective investigation extends to the acts of private individuals. The ECtHR went on to examine not just the Bulgarian law and practice in responding to allegations of rape, but also the shortcomings of the investigation into the applicant's allegations and the consequences of the restrictive operational decisions that were made. Subsequent cases have built

[312] *Ibid* [102].
[313] *Ibid* [103] and [104].
[314] *Ibid* [102].
[315] *Kuznetsov v Ukraine* no.39042/97, 29 April 2003; *Ahmet Ozkan and Others v Turkey*, no.21689/93, 6 April 2004; *Toteva v Bulgaria*, no.42027/98, 19 May 2004; *Afanasyev v Ukraine*, no. 38722/02, 5 April 2005.
[316] *Secic v Croatia* (2009) 49 EHRR 18; *Beganovic v Croatia* no. 46423/06, 25 June 2009; *Vasilyev v Russia* no.32704/04, 17 December 2009; *Milanovic v Serbia* no.44614/07, 14 December 2010.

upon the *MC* judgment, and it is now "incontestably clear" that the duty to conduct effective criminal investigations into behaviour amounting to a breach of Article 3 is a freestanding obligation under ECHR caselaw that covers both systemic and operational investigative failures.[317]

From the perspective of victims of sexual crime, the obligation to investigate is particularly significant as it means that, in addition to an adequate legal framework to deter sexual crime, states must also deploy effective law-enforcement machinery, which extends from the police investigation to prosecutorial decision-making, right through to the judicial response in court. In short, the obligation to investigate compliments the obligation to criminalise as, to be an effective deterrent, the laws which prohibit sexual crime (or indeed any other conduct which constitutes a breach of Articles 2, 3, 4 and 8) must be rigorously enforced and alleged violations properly investigated. As Lemmens and Courtoy explain,[318] the obligation to investigate makes up the procedural limb of Articles 2, 3, 4 and 8 and encompasses the duty, first, to establish the facts where treatment meeting the threshold of severity has been inflicted; second, to prosecute where the investigation yields an indication that one or more individuals are criminally liable[319] and, finally, to punish where guilt has been established.[320]

In terms of the meaning and scope of the obligation to conduct an effective investigation, the line of authority developed by the ECtHR was succinctly summarised in *O'Keeffe v Ireland*:

> "…Article 3 requires the authorities to conduct an effective official investigation into alleged ill-treatment inflicted by private individuals

[317] *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11 [26] and [58].
[318] P Lemmens and M Courtoy, 'Positive Obligations and Coercion: Deterrence as a Key Factor in the European Court of Human Rights Case Law' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020) 62.
[319] This is not, of course, an unlimited obligation. See, for example, *Da Silva v UK* (2016) 63 EHRR 12 [259]-[282].
[320] For example, *Ali and Ayse Duran v Turkey* App No 42942/02 (ECtHR, 8 April 2008) [59]-[73].

> which investigation should, in principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. That investigation should be conducted independently, promptly and with reasonable expedition. The victim should be able to participate effectively."[321]

Although it is possible to break this summary of the obligation to investigate down into smaller segments still, we can see that the requirements of an effective investigation fall within three broad headings: Firstly, the investigation must be adequate and thorough (that is to say, capable in principle of leading to the identification and punishment of the culprit); secondly, the investigation must be procedurally sound (that is to say, conducted independently, promptly and with reasonable expedition); and thirdly, the investigation must be accessible (so that the victim can participate effectively and safeguard their legitimate interests). It may be helpful to look at each of these requirements in turn, and with reference to relevant ECHR authorities.

3.3.1 Obligation to investigate: An adequate and thorough investigation

This aspect of the obligation to investigate places a duty on the domestic criminal justice authorities to conduct a thorough enquiry in response to complaints of violations of Convention rights, and what Kamber describes as "human rights offences."[322] It is clear that it is "not an obligation of result, but one of means,"[323] nonetheless the investigating authorities must take "all reasonable steps available to them to secure evidence" such that the facts can be established and the culprit identified.[324] From the perspective of victims of sexual crime, however, the obligation to investigate also goes beyond the prosaic need to simply gather evidence, and extends to a more nuanced assessment of the enquiry's efficacy based on a proper understanding of the

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[321] (2014) 59 EHRR 15 at [172].
[322] K Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword and the Shield Function of Human Rights Law* (Brill, 2017).
[323] *CAS and CS v Romania* (2015) 61 EHRR 18 [70].
[324] *Ibid*; also see *Secic v Croatia* (2009) 49 EHRR 18 at [54].

dynamics of sexual crime and a "context-sensitive"[325] approach to the analysis of the evidence gathered.

Returning to the judgment in *MC*, for example, the ECtHR acknowledged the fact that many witnesses were approached during the investigation and expert reports were obtained. The ECtHR accordingly made it clear that it did not "underestimate the efforts invested by the investigator and the prosecutors in their work."[326] Notwithstanding this prima facie diligence, the ECtHR still found that the investigation was inadequate due to the absence of a "context-sensitive" assessment of the evidence and, in particular, the investigation's failure to consider the credibility of the applicant's position about the absence of consent; to scrutinise the alleged perpetrators' mens rea in creating "an environment of coercion"; and the broad failure of the investigation and its conclusions to centre on the issue of non-consent.[327] Significantly, the ECtHR also noted that the analysis of the evidence "attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors."[328] Ultimately, in adopting such a "restrictive"[329] approach to the proof of the applicant's allegations - namely one that required explicit proof of force or direct evidence of resistance - the ECtHR concluded that the Bulgarian investigation fell short of modern standards and breached the applicant's Article 3 and 8 rights.

One interpretation of this analysis is that the ECtHR considered the Bulgarian investigation to have been unduly influenced by the application of rape myths, defined by Burt as "prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists."[330] Of particular significance here is the "real" rape myth, which stereotypically positions the victim as a "non-intoxicated woman who was suddenly and violently raped by a stranger in a deserted public place [and]

[325] *MC v Bulgaria* ECHR (2005) 40 EHRR 20 at [177].
[326] *Ibid* [175] and [176].
[327] *Ibid* [181].
[328] *Ibid* [177]-[181].
[329] *Ibid* [182].
[330] M Burt, 'Cultural Myths and Supports for Rape' (1980) 38 Journal of Personality and Social Psychology 217.

sustained obvious physical injuries and apparent emotional distress."[331] The influence of the "real" rape myth on the actions of the Bulgarian prosecutors in *MC* fatally tainted the efficacy of their investigation and prevented their enquiry from placing appropriate emphasis on consent, focusing on physical injuries instead. While there is growing awareness that the "real" rape stereotype does not accurately reflect the most common experiences of rape, it is an embedded feature of the criminal justice response to sexual crime in Scotland, with the satisfaction of the corroboration requirement (and therefore the victim's opportunity to access justice) often turning on "the chance expression of distress,"[332] compounded further by judicial authorities which, until recently at least, privileged the corroborative value of the victim's distress in circumstances where physical force is alleged.[333] Daly[334] points out that "resistance narratives" persist in trials too and research has highlighted the influence of the "real" rape myth on juror decision-making.[335] For victims of sexual crime, the *MC* decision is therefore particularly significant, not least because of its emphasis on the importance of a "context-sensitive" approach to the investigation and the way in which the evidence is analysed in sexual offence cases. The obligation to investigate is accordingly a nuanced one that requires, not just diligence in gathering evidence, but a decision-making process that challenges the application of rape myths and recognises the complex dynamics of sexual abuse, power and consent, particularly in cases involving children and other vulnerable individuals.

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[331] J Hockett, S Smith, C Klausing and D Saucier, 'Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis' (2016) 22 Violence Against Women 139.

[332] The Senators of the College of Justice, Response to the Scottish Government Consultation on the Not Proven Verdict and Related Reforms (July 2022) 18 <Senators' response to the consultation on the Not Proven Verdict (judiciary.scot)> accessed on 28 July 2022.

[333] J Chalmers, 'Distress as Corroboration of Mens Rea' 2004 SLT (News) 141; also see discussion at section 1.2.3 and 3.2.1.

[334] E Daly, *Rape, Gender and Class: Intersections in the Courtroom Narratives* (Palgrave MacMillan, 2022) 20.

[335] L Ellison and V Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology 202; L Ellison and V Munro, 'Turning Mirrors into Windows: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology 363; F Leverick, 'What Do We Know About Rape Myths and Juror Decision Making?' (2020) 24 International Journal of Evidence and Proof 255; J Chalmers, F Leverick and V Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.

The approach in *MC* has since been endorsed in the 2015 case of *CAS and CS v Romania*.[336] This case involved the sustained physical and sexual abuse of a 7-year-old child. After a lengthy investigation, the alleged perpetrator was acquitted and, in seeking to rebut the applicant's claims under Article 3 and 8 ECHR, the Romanian authorities argued that the investigation had been prompt and thorough, instead criticising the victim's family for taking "too long to react despite the fact that there had been visible signs of abuse."[337]

In finding that there had been a violation of Article 3, the ECtHR reiterated that the state's positive obligations required an "effective official investigation." Although the ECtHR once again pointed out that "this is not an obligation of result, but one of means,"[338] it highlighted that "any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard…"[339] The ECtHR also acknowledged the role of the UNCRC in defining the scope of the obligation to investigate in cases involving children and highlighted the importance of its emphasis on the protection of children "from all forms of violence which includes prevention, redress and reparation."[340]

In applying these principles, the ECtHR criticised the length of time that the investigation took, but also expressed concern that "the authorities did not try to weigh up the conflicting evidence and made no consistent efforts to establish the facts by engaging in a context-sensitive assessment."[341] In particular, the ECtHR was scathing about the victim-blaming attitudes adopted by the domestic authorities, and noted that:

> "while it might have been advisable for the parents to take prompt action when they noticed the first changes in the behaviour of the first

[336] *CAS and CS v Romania* (2015) 61 EHRR 18.
[337] *Ibid* [65].
[338] *Ibid* [70].
[339] *Ibid*.
[340] *Ibid* [70]-[72].
[341] *Ibid* [78].

> applicant…the Court fails to see how this could have had a major impact on the diligence of the police in their response to the reported facts. Neither can the Court understand why the domestic courts have attached such a significant weight to that fact."[342]

In ultimately finding that there had been a violation of Articles 3 and 8 ECHR, it is therefore important that the ECtHR considered that the domestic authorities

> "were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors, particularities which could have explained the victim's hesitation both in reporting the abuse and in his description of the facts."[343]

Once again, the ECtHR endorsed the need for domestic authorities to adopt a "context-sensitive" approach to their enquiries if the investigation is to meet human rights standards under the obligation to conduct an effective investigation. In *MC*, the application of a "context-sensitive" approach meant that the "real" rape myth and resistance narratives were critiqued for diverting the investigation away from a proper focus on non-consent. While in *CAS*, the same approach required consideration of "the special psychological factors" inherent in sexual abuse cases, implying that the domestic authorities must apply a proper appreciation of delayed reporting and the impact of trauma to their analysis of the evidence gathered during the investigation.

This is particularly important in the Scottish context, where research has confirmed that juries struggle to understand delayed reporting in sexual offence cases and frequently believe that it should cast doubt on the credibility and

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[342] *Ibid* [80].
[343] *Ibid* [81].

reliability of the victim's evidence.[344] Vigilance, care and a genuine appreciation of the dynamics of sexual abuse are accordingly required as part of a rights-based approach to the investigation of sexual crime – not just while the evidence is gathered - but in the analysis and presentation of that evidence as well. Police officers, prosecutors and, of course, juries who, for example, dismiss the credibility of the victim's evidence simply because the victim did not physically resist, or did not report immediately, accordingly place the integrity of the criminal justice process in doubt and risk further undermining the efficacy of the criminal justice response to sexual crime.

Similarly, a critical eye must be cast on the framework of the available criminal law and how this influences decision-making. The interactions between the corroboration requirement and evidence of distress in Scots law, for example, places an undue emphasis on *de recenti* displays of overt distress and, historically at least, evidence of physical force in sexual offence cases.[345] This created an artificial focus on resistance narratives that influence decision-making and privilege the proof of cases that conform with the "real" rape myth,[346] while leaving "beyond the reach of the criminal law" those allegations which do not so conform.[347] As a result of this relationship between the corroboration requirement and distress evidence in Scots law, it cannot be assumed that criminal justice decision-making in Scotland will always be capable of meeting the minimum standards implied by the "context sensitive" approach,

[344] J Chalmers, F Leverick and V Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.
[345] See, for example, *McKearney v HM Advocate* 2004 SCCR 251 at [16].
[346] Since the Crown's concession in *McKearney* at [8] that mens rea in relation to consent was an essential element of the crime of rape (and therefore requires to be corroborated), an artificial distinction has emerged between the requirements of proof in "force" and "non-force" rapes in Scots law. In "non-force" rapes, it was for many years assumed that distress evidence was not available to corroborate mens rea in relation to consent, rendering rapes which do not conform to the "real" rape narrative particularly difficult to prove by corroborated evidence, and thereby presenting a significant barrier to justice. It was not until the case of *Maqsood v HM Advocate* [2018] HCJAC 74 that this position was eventually clarified and, in terms of the practical application of the requirement of corroboration in rape cases, reversed.
[347] Lord Hope of Craighead, 'Corroboration and Distress: Some Crumbs from Under the Master's Table' in J Chalmers, F Leverick and L Farmer (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 13. Also see discussion in sections 1.2.3, 3.2.1 and 3.3.1.

particularly where the victim does not display, or is not seen to display, overt signs of distress in the aftermath of the offence.

What is clear, however, is that the ECtHR's emphasis on the importance of the "context sensitive" approach in sexual offence cases means that any investigation which is unduly influenced by rape myths; which does not focus on the issue of non-consent; or which otherwise fails to demonstrate an appropriate understanding of the dynamics of sexual abuse, risks falling short of the obligation to investigate. We know from many years of court observation studies,[348] juror research[349] and research into police and prosecutorial decision-making,[350] that rape myths have the potential to influence outcomes throughout the life of sexual offence investigations as they progress through the justice system. Vigilance will accordingly be required in challenging rape myths and in applying context-sensitive analysis to the evidence that has been gathered if the obligation to conduct an adequate and thorough investigation is to be met in the Scottish context. Crucially, where these standards are not met, it is clear that victims of sexual crime have a rights-based interest in holding domestic authorities to account.[351]

3.3.2 Obligation to investigate: A procedurally sound investigation

An effective investigation in the sense envisaged by ECHR jurisprudence must also be procedurally sound: it must be independent and conducted promptly and with reasonable expedition. In the context of sexual offence prosecutions, we know that delay in progressing cases to trial is a particularly significant problem and the disengagement of victims during the lengthy investigative process -

[348] E Daly, *Rape, Gender and Class: Intersections in the Courtroom Narratives* (Palgrave MacMillan, 2022).
[349] J Chalmers, F Leverick and V Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.
[350] J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 38; see also *EVAWC v DPP* [2021] EWCA Civ 350 at [30] – the evidence led by the claimants indicates that decisions have been made by CPS prosecutors on the basis of assumptions about juror attitudes to rape.
[351] See Chapter 7 for further discussion.

including subsequent court proceedings - is not uncommon.[352] Indeed, in its 2017 report on the investigation and prosecution of sexual crime in Scotland, the Inspectorate of Prosecution raised concern at "the number of victims that disengage at various stages throughout the process."[353] Since the publication of the Inspectorate's report, the position has undoubtedly grown worse as a result of the Covid-19 pandemic. Burman and Brooks-Hay have, for example, highlighted the range of adverse consequences that this imposes in sexual crime cases, given the strain that the inordinate length of time taken to progress criminal proceedings places on the personal, domestic and professional lives of victims.[354] Forbes too has raised awareness of delay, highlighting the trauma of waiting and the impact that this has on victims in domestic abuse cases.[355] Research supports the view, therefore, that delay compounds trauma and is likely to drive attrition, undermining the ability of victims to engage throughout the process.[356] Against this background, the obligation to promptly and expeditiously conclude criminal proceedings under the obligation to investigate is particularly pertinent in the context of an effective criminal justice response to sexual crime. It is notable that this obligation compliments the right to a fair trial[357] and exemplifies the congruence that often exists in the rights-based claims of both victims and those accused of crime.

In the 2016 case of *Y v Slovenia*,[358] for example, the ECtHR considered the applicant's claim that the Slovenian authorities failed to secure a prompt investigation and prosecution in response to her allegations of sexual abuse. In this case, the applicant was raped by a family friend when she was a child. She

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[352] M Burman and S Brindley, 'Challenges in the Investigation and Prosecution of Rape and Serious Sexual Offences in Scotland' in R Killean, E Dowds and A-M McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge: London, 2021) 201.
[353] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 29 <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22.
[354] M Burman and O Brooks-Hay, Delays in Trial: the Implications for Victim-Survivors of Rape and Serious Sexual Assault (SCCJR Briefing Paper, July 2020) <Delays-in-Trials-SCCJR-Briefing-Paper_July-2020.pdf> accessed on 09.3.2022.
[355] E Forbes, *Victims' Experiences of the Criminal Justice Response to Domestic Abuse: Beyond Glasswalls* (Emerald Publishing, 2022) 89-91.
[356] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 29.
[357] Article 6(1) of the ECHR.
[358] *Y v Slovenia* (2016) 62 EHRR 3.

reported her allegations in late 2001 and, after a lengthy investigation, the trial commenced in 2008. In finding that there had been a violation of Article 3 ECHR, the ECtHR expressed concern that "proceedings were marked by a number of longer periods of complete inactivity"[359] and noted, amongst other failings, that it took the investigating judge twenty-one months to decide on the prosecutor's request for a judicial investigation. Ultimately, the ECtHR concluded that the totality of the various delays across a seven-year process could not be "reconciled with the procedural requirements of promptness" inherent in the obligation to conduct an effective investigation under Article 3 ECHR.[360]

Although there are no definitive parameters setting out what sort of timeframe would, or would not, comply with the "procedural requirements of promptness" under the obligation to investigate, it remains the case that victims of sexual crime – like those accused of sexual crime - do have a rights-based interest in the expeditious resolution of their allegations through the criminal justice system. Given the increasing volume and complexity of sexual offence cases within the Scottish system, combined with the pressures created by the Covid-19 pandemic, there is a risk that these interests will not be routinely met in the future. As Sandy Brindley and Dr Marsha Scott, respectively the chief executives of Rape Crisis Scotland and Scottish Women Aid, explained to the Justice Committee in 2021, the uncertainty caused by court delays has been exacerbated by the Covid-19 pandemic and, despite the efforts made by the criminal justice authorities to address the backlog of cases, delays continue to cause huge distress and anxiety to victims of sexual crime who feel that there is "nowhere to turn for justice."[361]

With official data from late 2020 indicating that the High Court was running at 240% above normal operating levels and solemn trials in the Sheriff Courts running at 590% above normal levels, it is clear that it will not be possible to

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[359] *Ibid* [99].
[360] *Ibid*.
[361] Criminal Justice Committee, *Judged on Progress: The Need for Urgent Delivery on Scottish Justice Sector Reforms* (SP Paper 75, 1st Report, 2022 (Session 6), 10 January 2022) para 171 – 175<Judged on progress: The need for urgent delivery on Scottish justice sector reforms (parliament.scot)> accessed on 13.3.2022.

keep delay within "manageable limits" going forward, "even in the medium term".[362] With this context in mind, and when seen through the prism of the human rights-based obligations owed to victims of sexual crime, it is clear that "an entirely fresh look at the way in which sexual offences are dealt with"[363] will indeed be required if effective reform is to be achieved. Lady Dorrian's recommendations for improving the management of sexual offence cases provide an excellent focal point for this reform in the Scottish context,[364] but it seems clear that any future programme for change must also recognise, and actively seek to secure, the rights-based interests of everyone impacted by the criminal process if a sustainable criminal justice response to sexual crime is to be built and maintained for the future.

3.3.3 Obligation to investigate: An accessible investigation

The third core aspect of the obligation to investigate relates to the accessibility and transparency of the investigation itself. The underlying rationale for this aspect of the obligation to investigate is to maintain public confidence, facilitate scrutiny and accountability and, crucially, to allow victims of human rights violations – or their next-of-kin, in the Article 2 context – to secure and safeguard their legitimate interests as the investigative process progresses. While this aspect of the obligation to investigate has been principally developed in the context of the right to life under Article 2 ECHR, it is nonetheless apparent that the ECtHR draws little distinction between Articles 2 and 3 in terms of the broad principles that govern the scope of the procedural obligations that they create. Indeed, as Lavrysen observes, Articles 2 and 3 both enjoy the status of fundamental Convention rights and the principles involved "are easily transposed from the one provision to the other."[365] On this basis, there is merit

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[362] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 1.4 – 1.6 <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6> accessed 04 August 2022.

[363] *Ibid*, see Foreword.

[364] See discussion in section 2.2.5.

[365] L Lavrysen, 'Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the ECHR' in L Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law Under the ECHR* (Hart Publishing, 2020) 46.

in considering both Article 2 and 3 jurisprudence on the accessibility of the investigative process if we are to better understand the scope of the positive obligations created and the potential implications for victims of sexual crime.

An appropriate starting point here is the 2003 case of *Jordan v UK*.[366] This case concerned the shooting in Northern Ireland of an unarmed man by the police. The ECtHR held that Article 2 had been violated by the failure of the UK authorities to undertake an effective investigation into his death and, during its judgment, set out the broad requirements of an effective investigation that have since been mirrored in Article 3 jurisprudence as well.[367] The ECtHR found that the obligation to conduct an effective investigation requires appropriate public scrutiny and accountability of the investigation itself and stated,

> "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[368]

In practice, the ECtHR considered that the right to be "involved in the procedure" did not extend to access to sensitive police reports and materials, but it did require access to witness statements so that the deceased's family were not disadvantaged relative to other parties in the process and, significantly, to "ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in events."[369]

Admittedly, the circumstances in *Jordan* involved a Coroner's investigation, where the deceased's family had a pre-existing expectation of involvement in the investigative process as interested parties to the inquest. As Leverick

[366] (2003) 37 EHRR 2.
[367] See for example *O'Keefe v Ireland* at [172] discussed above at section 3.2.
[368] *Jordan v UK* (2003) 37 EHRR 2 at [109].
[369] *Ibid* [134].

suggests,[370] the position is potentially quite different in the Scottish criminal justice context, where victims are not traditionally seen as having a legitimate locus to participate in court proceedings, other than when called as a witness in the prosecution case. That said, although the victim's status in the criminal process is still formally limited to their role as witness, there is evidence of a growing awareness that victims of sexual crime do have legitimate rights-based interests that are engaged by the criminal process,[371] and by related procedures.[372] On this basis, the decision in *Jordan* provides the foundation for a right to access information about the investigation and to actively participate in that investigation, at least to the extent necessary to allow the victim to safeguard and secure their legitimate rights-based interests.

In the Scottish context, the position here is reinforced further by the provisions of the Victims and Witnesses (Scotland) Act 2014.[373] Indeed, s.1 and s.1A of the 2014 Act place a statutory obligation on police officers, prosecutors, and court staff to have regard to various 'general principles' while carrying out their functions in relation to victims and witnesses. Some of the key principles set out in s.1 and s.1A include: (i) that a victim or witness should be able to obtain information about the investigation and proceedings, (ii) that the victim's needs should be taken into consideration, (iii) that the victim should be protected from secondary and repeat victimisation and (iv) 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.

Although the provisions of the 2014 Act have been in force for some years now, the application of the 'general principles' set out in ss.1 and 1A were first considered in the criminal justice context in the 2020 case of *RR v HM Advocate*.[374] This case involved criminal proceedings relating to allegations of rape, during which the accused sought to lead sexual history evidence relating to

[370] F Leverick, 'What has the ECHR Done for Victims? A United Kingdom Perspective' (2004) 11 International Review of Victimology 184.
[371] *RR v HM Advocate and LV* [2021] HCJAC 21.
[372] *WF, Petitioner* [2016] CSOH 27.
[373] See Chapter 3 for further discussion.
[374] *RR v HM Advocate and LV* [2021] HCJAC 21.

the victim's previous conduct.[375] The victim was not told of the accused's application to lead the sexual history evidence and did not participate in, or know about, the court hearing which followed where the application was debated and, in part, granted. After hearing by chance that the accused had been given approval to lead sexual history evidence at the trial, the victim sought legal advice and applied to the *nobile officium*,[376] arguing that the application to lead evidence of her sexual history engaged her Convention rights under Article 8 ECHR and, furthermore, that under s.1(3)(d) of the Victims and Witnesses (Scotland) Act 2014, she had the right to participate effectively in proceedings where her rights-based interests were in issue.

Given the importance of the issue of principle raised in the victim's application, a Full Bench of the High Court of Justiciary was convened to consider it. In delivering the opinion of the court, the Lord Justice General confirmed that "the current system does not provide for victims to become direct participants"[377] in the criminal process and highlighted the various opportunities where Parliament had not elected to alter this position while passing related legislation. The court nonetheless acknowledged that the victim's Article 8 rights "are likely to be engaged"[378] by an application to lead sexual history evidence and, as a result, the court "must be given information on the complainer's position on the facts in, and her attitude to, any [sexual history] application."[379] The court also recognised that the 2014 Act placed an obligation on the public prosecutor to have regard to the principle that a victim should be able to obtain information about what is happening in proceedings and should be able to participate effectively in them. In discussing how this should operate in practice, the court found that the public prosecutor should have ensured that the victim knew about the application to lead sexual history evidence and should also have conveyed the victim's views about the application, and the extent to which the proposed line of questioning would impinge upon her dignity and privacy, to the court. Given that this information was not available to the court at first

[375] Sexual history and character evidence is discussed in more detail in sections 4.2.1, 6.4.2 and 7.4.
[376] See Glossary.
[377] *RR v HM Advocate and LV* [2021] HCJAC 21 [44].
[378] *Ibid* [49].
[379] *Ibid* [51].

instance, it was concluded that the decision to admit the sexual history evidence "was contrary to law and falls to be quashed."[380]

Although the court in *RR* was at pains to point out that, absent statutory intervention, "the complainer's status is still that of a witness to the facts libelled,"[381] there is no doubt that this judgment marks out new territory in confirming that both domestic legislation and ECHR jurisprudence have, albeit to a limited extent, embedded victims and their legitimate interests within the criminal process itself.[382] When this is combined with the broader obligation under Article 3 ECHR - discussed with reference to *Jordan* above - to involve the victim "in the procedure to the extent necessary to safeguard his or her legitimate interests", it is apparent that the traditional assumption that victims have no legitimate basis to participate in criminal justice decision-making may be of limited future sustainability. Indeed, it may be argued that the obligation to conduct an effective, accessible investigation, implies that victims of sexual crime should be entitled to expect transparency and appropriate opportunities to participate effectively in decision-making wherever their legitimate, rights-based interests can be shown to arise within the criminal process. In addition to shaping the future process around sexual history applications, this might, for example, have a future impact on wider prosecutorial decision-making, too.[383]

3.3.4 Obligation to investigate: summary and observations

It is apparent from the overview of ECHR jurisprudence discussed above that the domestic authorities are required to maintain a framework of criminal law and procedure capable of punishing all forms of rape, and to deploy this framework effectively in practice through context-sensitive, prompt and accessible investigations and prosecutions. Crucially, this extends to the operational decisions of law enforcement officials and, as Starmer has observed, the

[380] *Ibid* [48].
[381] *Ibid* [51].
[382] Contrast with the traditional marginalisation of victims discussed in section 2.3.
[383] See Chapters 7 and 8 for further discussion.

jurisprudence developed by the ECtHR "brings human rights law into the heart of prosecution decision-making."[384] The implications for the criminal justice authorities in Scotland are accordingly of real significance: from operational decisions taken in police investigations, to the prosecutor's decision to raise or discontinue proceedings, through to the expediency with which the court system can bring the case to trial, victims of sexual crime have a rights-based interest in scrutinising the response of criminal justice officials and their institutions. Seen through this prism, the inscrutability of prosecutorial decision-making, as observed by Moody and Tombs' research from the 1980s,[385] seem difficult to justify and incompatible with modern rights-based norms.

3.4 Obligation to protect

The final category of positive obligation that falls within the framework of duties proposed in this chapter is the obligation to protect individuals from suffering prohibited treatment at the hands of the state or by third parties. In the context of Article 3 ECHR, the obligation to protect often manifests itself in situations of detention,[386] where the physical environment and the deprivation of personal liberty place the human dignity, health and well-being of individuals at particular risk. That said, the fundamental feature of the obligation to protect is the engagement of state responsibility for the harm in question, rather than the "geography of harm"[387] itself and the ECtHR has attributed state responsibility for prohibited treatment in a variety of different circumstances where there has been a failure to take positive action to prevent harm.

A relatively early example of how the obligation to protect is engaged under Article 3 ECHR arose in the 2002 case of *Z and others v UK*.[388] This judgment involved four children who were subjected to sustained physical and emotional

[384] K Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century' [2014] Crim LR 781.
[385] See section 1.2.1.
[386] For example, *Mouisel v France*, no.67263/01t, ECHR 2002-IX.
[387] E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018) 36.
[388] (2002) 34 EHRR 3.

abuse by their parents. The treatment of the children was brought to the local authority's attention in late 1987, but the local authority did not intervene until April 1992 when the children were taken into emergency care. While the ECtHR acknowledged the "difficult and sensitive decisions facing social services,"[389] it found that the failure of the system to take action to protect the children from serious long-term neglect and abuse amounted to a violation of Article 3 ECHR.[390] Crucially, the ECtHR emphasised the fundamental importance of Article 3 ECHR and the consequent need for domestic authorities to provide effective protection from ill-treatment which met the Article 3 threshold. Against this background, state responsibility was engaged as the authorities had failed to act notwithstanding the fact that they "had or ought to have had knowledge" of the way the children were being treated.[391] One of the mechanisms, therefore, where the obligation to protect could be engaged is where it can be shown that the domestic authorities knew or ought to have known that individuals are being exposed to, or are at risk of being exposed to, acts which violate their Convention rights.

As Mowbray observes, the obligation to protect under Article 3 mirrors the ECtHR approach under Article 2 and accordingly obliges domestic authorities to take "reasonable steps" to intervene where individuals are at risk.[392] This has consequences for the rights-based interests of victims of sexual crime, where the obligation to protect might be engaged by the acute psychological suffering and trauma caused by the criminal process itself. Londono, for example, argues that aggressive and demeaning cross-examination might breach the victim's Article 3 rights in sexual offence cases, particularly when the trauma of the sexual attack that the victim has already suffered is taken into account.[393] In this sense there is an urgency in recognising the human rights implications of responding to sexual crime, where victims may face multiple compounding human rights violations, culminating in trauma and psychological harm that can

[389] *Ibid* [74].
[390] *Ibid*.
[391] *Ibid* [73].
[392] A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 45-46.
[393] P Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' (2007) 2 158 at 163-165.

be directly attributed, and is known to be attributed,[394] to the criminal process itself.[395]

The position here has been repeatedly reinforced in recent times, with multiple research projects and official reports highlighting evidence of the trauma and psychological harm that the justice system causes to victims of sexual crime, and victims of gender-based violence more broadly.[396] At an official level, this unambiguous evidence of the harm that the justice system causes has been repeatedly brought to the attention of the authorities. Following the Justice Committee's 2017 Inquiry into the role and purpose of COPFS, for example, the Committee found "that the evidence taken from victims of crime set out serious failings by the criminal justice system" and highlighted the "sobering" submissions of third sector bodies that recounted evidence of a system that traumatised victims and "increased the negative impact that they experienced."[397] Similarly, the 2018 Thematic Report of the Inspectorate of Prosecution on the investigation and prosecution of sexual crime highlighted the anger expressed by victims at their treatment by the justice system, citing in particular the lived experience of one victim who described the court process as:

> "…the most degrading experience I have been through…Court was absolutely horrendous, it was worse than being raped."[398]

More recently, the Justice Journeys research project has also highlighted the distress and psychological harm that the justice system causes to victims of sexual crime, noting that the way victims are treated "intersects with – and

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[394] See below and discussion relating to the various reports which highlight the trauma that the justice system causes in section 2.2.
[395] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through the Lived Experience of Victims-Survivors of Rape and Serious Sexual Assault, Final Report* (Scottish Centre for Crime and Justice Research, 2019) para 3.6.
[396] See Chapter 2.
[397] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) para 261 and 267.
[398] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 303 <Supporting documents - Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> accessed on 13.5.22.

compounds – the impacts of experiencing sexual violence."[399] This recent research builds upon a substantial body of existing knowledge about the psychological harm that the justice system causes to victims of sexual crime[400] and there can now be little doubt that the criminal justice authorities are aware of, or ought to be aware of, the harm that the justice system causes to many victims. The obligation to protect accordingly creates a rights-based duty to respond, requiring the criminal justice authorities to take action to protect victims from the known sources of ill-treatment that reach the Article 3 threshold.

The scope of the obligation to protect extends beyond Article 3 ECHR, and the case of *Y v Slovenia*[401] provides an important insight into the application of the obligation to protect from the perspective of both Article 8 and the criminal justice response to sexual crime. As noted previously, in this case, the applicant complained under Articles 3 and 8 ECHR that the delay in criminal proceedings concerning the sexual assaults against her had violated the domestic authority's obligation to provide effective legal protection against sexual abuse. In addition, the applicant claimed that the manner of her questioning in court, including personal cross-examination by her alleged attacker, had exposed the applicant to unnecessary trauma and had caused her severe and permanent psychological difficulties which had led to autoimmune diseases.

In responding to the applicant's claims, the ECtHR analysed the efficacy of the overall investigation from the perspective of Article 3 ECHR but elected to analyse the secondary traumatisation caused to the applicant as a violation of

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[399] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (Scottish Centre for Crime and Justice Research, 2019) p.22< https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf> accessed 04 August 2022.

[400] J Herman, *Trauma and Recovery: The Aftermath of Violence: From Domestic Abuse to Political Terror* (Basic Books, 2015); J Herman, 'Justice from the Victim's Perspective' (2005) 11 Violence Against Women 571.

[401] *Y v Slovenia* (2016) 62 EHRR 3.

her personal integrity under Article 8 ECHR. On this basis, the ECtHR confirmed that:

> "criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of art.8 of the Convention."[402]

On this basis, the ECtHR acknowledged the "delicate task of balancing competing interests" and praised aspects of the Slovenian procedure, such as the steps taken to exclude the public from the trial, the breaks given to the applicant when she became distressed, and the warnings given to the accused against repeating questions during cross-examination. Ultimately, however, the ECtHR found that there had been a violation of the applicant's personal integrity under Article 8 ECHR and noted that the trauma caused by the criminal process "substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults" and could not "be justified by the requirements of fair trial."[403]

Notwithstanding the various protections offered by the Slovenian legal system and the efforts made to strike an appropriate balance with the accused's Article 6 rights, the way the criminal proceedings were conducted in *Y* nonetheless failed to meet the obligation to protect the alleged victim when the proceedings were analysed from the perspective of Article 8 ECHR. Unlike in *Z and Others*,[404] where the obligation to protect was triggered by knowledge of harm, state responsibility for the applicant's Article 8 rights in *Y* was engaged by:

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[402] *Ibid* [103].
[403] *Ibid* [114].
[404] (2002) 34 EHRR 3

> "the alleged lack or inadequacy of measures aimed at protecting the victim's rights in the criminal proceedings."[405]

Responsibility for the protection of the applicant's Article 8 rights was accordingly linked to the involvement of the state-run criminal justice system itself. This has obvious consequences for the criminal justice system's response to sexual crime in Scotland, where the intimate nature of the proceedings, the requirements of the adversarial legal process and the victim's loss of agency, combine to create a state regulated experience that is "only too reminiscent of the original crime."[406]

Notably, the judgment in Y v Slovenia was reinforced in the 2020 case of *Mraovic v Croatia*.[407] Here, the applicant claimed that his Article 6 rights had been infringed by the Croatian authorities due to their decision to exclude the public from his sexual assault trial. While the ECtHR reiterated the importance of the fundamental principles enshrined in Article 6 ECHR, it stressed that measures must be taken in criminal proceeding concerning sexual offences to protect the victim's rights-based interests, "provided that the protection of [the victim's] rights could be reconciled with an adequate and effective exercise of the rights of the defence."[408] In finding that the exclusion of the public from the trial did not infringe the applicant's Article 6 rights, the ECtHR emphasised the importance of protecting victims of sexual crime from secondary and/or repeat victimisation and expressed the view that "the justice system should operate in a manner that does not increase the suffering of victims of crime or discourage them from participating in it."[409]

Against the background of these authorities, we can see that where the harm caused by the victim's contact with the justice system meets the severity threshold of Article 3 or impacts on the victim's personal integrity such that it

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[405] *Ibid* [101].
[406] J Herman, 'Justice from the Victim's Perspective' (2005) 11 Violence Against Women 582.
[407] (30373/13), 14 May 2020.
[408] *Mraovic v Croatia* (30373/13), 14 May 2020, [47].
[409] *Mraovic v Croatia* [49].

engages Article 8, the responsibility of the domestic authorities to take action under the obligation to protect will be engaged. From degrading cross-examination techniques to the inappropriate revelation of sensitive records or personal information to the public, to the trauma of delay and loss of agency, there is a myriad of individual and compounding factors which might engage the obligation to protect at almost every stage of the criminal process. While, in the Scottish context, there is much to praise in terms of the implementation of policy and legislative initiatives designed to mitigate harm, particularly during the trial,[410] the discussion in Chapter 2 makes it clear that this is not enough in practice.

Lady Dorrian's recommendations, including the proposal of a specialist sexual offence court, underpinned by trauma-informed practice, may be an effective place to start.[411] In the meantime, however, the Scottish justice system's failures in adequately protecting and respecting the dignity, privacy and psychological integrity of victims have been starkly exposed in practice.[412] In the 2020 case of *MacDonald v HM Advocate*,[413] for example, the Lord Justice General openly lamented the conduct of a trial that "flew in the face of basic rules of evidence and procedure" where repetitive and irrelevant questioning caused the victim to become "extremely distressed."[414] It is likely that the victim's rights-based interests under Article 8 - and possibly Article 3 ECHR - were engaged in the conduct of that trial, and it is clear that neither the trial judge nor the prosecutor recognised their duty to intervene, both under domestic law and in terms of the obligation to protect. Crucially, and notwithstanding the Lord Justice General's intervention in the *MacDonald* judgment, similar failings were again highlighted in the 2022 case of *AW and HB v HM Advocate*.[415] There is a real risk of systemic human rights failings in terms of the practical realisation of the obligation to protect, and profound change will be required if the victims'

[410] See discussion in chapter 3.
[411] See section 2.2.5.
[412] See for example, *Dreghorn v HM Advocate* [2015] HCJAC 69; *Donegan v HM Advocate* [2019] HCJAC 10; *HM Advocate v JG* [2019] HCJ 71; *MacDonald v HM Advocate* [2020] HCJAC 21 and *AW and HB v HM Advocate* [2022] HCJAC 16.
[413] [2020] HCJAC 21
[414] *Ibid* [47].
[415] [2022] HCJAC 16.

rights-based interest in their dignity, privacy and psychological integrity are to be routinely secured in future sexual offence prosecutions.

3.4.1 Obligation to protect: summary and observations

It is now well established in ECHR jurisprudence that domestic authorities must take action to intervene and protect individuals from violations of their Convention rights. As I have discussed above, the responsibility of domestic authorities to protect victims of sexual crime from violations of their Article 3 and 8 rights will be engaged as a result of both the public nature of the state-run justice system and due to the overwhelming body of research confirming that the criminal process causes harm and places victims at risk of treatment which is likely to violate their Convention rights. In addition, the present approach to the investigation and prosecution of sexual crime is structurally ill-suited to secure respect for the rights-based interests of victims in practice. As the Lord Justice General indicated in *MacDonald*, "the situation in sexual offences trials would be unsustainable" if the present position were allowed to continue.[416] Notwithstanding the domestic landscape, victims of sexual crime do have a legitimate rights-based interest in their treatment throughout the criminal process. As a result, real opportunities for improvement are there to be realised if effective domestic mechanisms could be put in place to secure victims' human rights and enforce the obligation to protect in practice.

3.5 Concluding observations: victims as rights-bearers

Notwithstanding the lack of attention given to the rights-based interests of victims in domestic jurisprudence, the ECtHR has developed a complex framework of duties that domestic authorities owe to victims of sexual crime. From the obligation to criminalise and the obligation to investigate, where domestic authorities must maintain an adequate framework of laws and deploy

[416] *MacDonald* at [47].

these in practice to effectively punish all forms of sexual abuse; to the obligation to protect, where domestic authorities must take reasonable steps to intervene in preventing further harm, the rights-based interests of victims of sexual crime are engaged at all stages of the criminal process. Far from being peripheral bystanders with no locus to participate in criminal justice decision-making, a rights-based perspective reveals that the victim should be an important figure, whose legitimate interests must be integrated into the process if the criminal justice response to sexual crime is to be capable of respecting, protecting and securing the rights of all involved. Against this background, the traditional assumption that victims should have no conceptual role within an adversarial system that is structured to accommodate the interests of only two participants,[417] is of questionable legal sustainability.

[417] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third* Parties (Hart Publishing, 2008) 245.

Chapter 4: The Role of Victims of Sexual Crime in Scotland's Criminal Justice System: A Review of Domestic Legislation and Policy

4.0 *Introduction*

At the time of writing,[418] the Scottish Government is actively consulting on a range of potentially radical reforms[419] and the Lord Advocate has ordered a new review of how prosecutors deal with sexual offence cases.[420] It is anticipated that over the course of the next decade, we will see a substantial new tranche of legislative and policy initiatives designed to tackle the well documented and longstanding challenges that the justice system faces in responding to sexual crime.[421] But how can we ensure that this next phase of reform will be effective in practice, and capable of tackling the system-wide problems that have blighted the criminal justice response to sexual crime for decades? How do we bridge the gap between the ambition to improve and the lived experience of victims who so frequently report that the justice system causes further harm and fails to secure their legitimate expectations of justice?

One of the central propositions of this thesis is that the answer to these questions - and the key to securing effective criminal justice reform – lies in the structural positioning of the victim within the traditional, adversarial approach to the criminal process and the role that victims play in criminal justice decision-making. As discussed in Chapter 2, the historical and conceptual underpinning of the traditional criminal justice paradigm places victims in a space that is external to the criminal process, raising structural, cultural, and

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[418] August 2022.

[419] Including the reform of the three verdict system in Scottish criminal trials, reform of the corroboration rule, independent legal representation for victims at certain stages of the criminal process, the possible use of single judge rape trials and the establishment of a specialist court to deal with serious sexual crime – see the Not Proven Verdict and Related Reforms Consultation Analysis, publish 12 July 2022 (available at https://www.gov.scot/publications/not-proven-verdict-related-reforms-consultation-analysis/) and the Improving Victims' Experiences of the Justice System: Consultation, published 12 May 2022 (available at https://consult.gov.scot/justice/victimsconsultation/)

[420] 'Lord Advocate Announced Sexual Crime Prosecution Review' (Scottish Legal News, 22 December 2021)< Lord Advocate announces sexual crime prosecution review | Scottish Legal News> accessed 04 August 2022.

[421] See Chapter 2.

legal barriers to the principled integration of victims' needs and interests into the justice system. It is argued that the marginalisation of victims, and the associated absence of a principled conceptual basis for the integration of their needs, is responsible for the stymied impact of previous victim-centred reforms and legislative interventions that have demonstrably failed to reach their potential. If future interventions are to lead to real change, then they must tackle the structural causes of the justice system's failures and carve out a "respected and acknowledged"[422] role for victims of sexual crime that promotes the realisation of the rights-based interests that are set out in Chapter 3.

It is with this context in mind that this chapter will review the key victim-centred policy and legislative interventions that have been put in place since devolution, with a view to developing a better understanding of the role that victims of sexual crime currently play within the criminal process and the relationship that has developed between the traditional criminal justice paradigm and the formulation of victim-centred reform. I will build upon this in Chapters 5 and 6, by describing the empirical research that I have conducted with specialist sexual offence prosecutors and how victim-centred legislation and policy has been implemented in practice. By developing a better understanding of these relationships, the pathway to effective reform might become clearer. In what follows, I will review the key national (Scottish) policy initiatives relating to victims and their relationship with the criminal process, before going on to look at how this policy platform has manifested itself in important victim-centred legislation over the first two decades of devolution. I will then round off this overview of victim-related reform by considering relevant published and unpublished prosecution policy and how this interacts with the assumptions of the traditional criminal justice paradigm.

4.1 National Policy Initiatives

[422] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) p.181.

4.1.1 *The Scottish Strategy for Victims*

Following devolution of criminal justice matters to the Scottish Parliament in 1999, the main policy approach to victims in Scotland was captured in the Scottish Strategy for Victims, published by the Scottish Executive in January 2001.[423] Although published over 20 years ago, the Strategy has influenced the development of victim related policy and legislation that followed and is accordingly an important statement about the treatment of victims and their place in Scotland's criminal justice system. Notably, the Strategy sought to carve out a unique role for victims and place their needs "at the heart of our criminal justice system,"[424] rather than conflate their status with that of, say, vulnerable or intimidated witnesses.[425] As a result, the Strategy recognises that victims should be afforded a position of importance in the justice system, such that they should be supported, provided with appropriate information and given a voice in the criminal justice process.[426] From these broad principles, the Strategy developed three objectives, namely: (i) to provide for the emotional and practical support needs of victims, (ii) to provide for the information needs of victims and (iii) to encourage greater participation of victims in the criminal justice process itself.

From a policy perspective, the Strategy represents an important development in the criminal justice system's relationship with victims. In particular, the fact that the status of victims is not defined in the Strategy by reference to vulnerable and intimidated witnesses is significant and appears to recognise victims as distinct stakeholders within the criminal process, regardless of whether they will ultimately participate as witnesses. Practically, the Strategy had long-term implications, triggering the creation of COPFS' Victim Information and Advice service (VIA),[427] linking victims to information and support as they

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[423] Scottish Executive, *Scottish Strategy for Victims* (Justice Department, 2001).
[424] *Ibid,* p.3.
[425] Scottish Office, *Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases* (1998).
[426] Scottish Executive, *Scottish Strategy for Victims* (Justice Department, 2001) 8.
[427] L Thomson, *Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations* (COPFS, 2017) para 2.4.

navigate the justice system.[428] It also paved the way for key policy changes within COPFS that have, in the longer-term, made prosecutorial decision-making less opaque and improved access to information.[429]

However, the Strategy fell short of articulating a new and definitive role for victims. Whilst it clearly sets out the practical implications of its first two policy objectives (the provision of information and support to victims), it concedes that the third policy objective (encouraging victims to participate) is merely "aspirational"[430] and narrates only broad and general statements about the importance of providing victims with "the opportunity to articulate their concerns" and of enabling them to "regain some control."[431] While this language could be read to imply that the Strategy envisaged greater victim-input into criminal justice decision-making, its approach to the practical application of this policy objective is vague and ambiguous. It does not, for example, expand upon the meaning of participation in the criminal justice context, nor does it explore the proposed parameters of the sort of "voice" that it is envisaged, as part of the stated policy objective, that victims should be given. Such ambiguity makes the true nature and implications of the proposed policy direction unclear.

The Strategy's broad failure to adequately articulate and build upon its victim participation policy objective is well articulated in the Inspectorate's 2010 Report on victims in Scotland's criminal justice system, which points out that "this third strand of the Strategy was recognised by all stakeholders as the most difficult to define and monitor."[432] Nearly a decade after the Strategy had been published therefore, it seems that criminal justice stakeholders, policy-makers and, indeed, the criminal justice authorities themselves, had very little idea as

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[428] Victim Information and Advice Service (COPFS, 19 May 2022)< https://www.copfs.gov.uk/services/victim-services/victim-information-and-advice-via-service/> accessed 12 August 2022.

[429] Although it should be noted that in 2011, HM Inspectorate of Prosecution in Scotland pointed out that "the current policy of COPFS on how it provides information to victims falls some way short of the requirements of the Strategy" – HM Inspectorate of Prosecution in Scotland, Joint Thematic Report on Victims in the Criminal Justice System - Phase II (November 2011) para 261.

[430] Scottish Executive, *Scottish Strategy for Victims* (Justice Department, 2001) para 3.3.1

[431] *Ibid*, para 3.3.2.

[432] HM Inspectorate of Prosecution in Scotland, *Thematic Report, Victims in the Criminal Justice System – Phase 1* (October 2010) 6.

to what the Strategy's policy aim of increasing victim participation actually meant. It is of note that while the Inspectorate's 2010 report deals almost exclusively with the implementation of the Strategy, it only focuses on the criminal justice system's response to the Strategy's first two policy objectives (information and support) and largely ignores the third (participation).[433]

Overall, the publication of the Strategy was a welcome development. However, the imprecise and "aspirational" status of its third objective appears to have undermined the focus on, and implementation of, reforms designed to increase the participation of victims in practice. This has resulted in a greater policy focus on the other two objectives (the provision of information and support services), while allowing reforms designed to increase victim participation in the criminal process to be marginalised, or at least narrowly focused on the victim's ability to participate as a witness.[434] The Strategy nonetheless remains an important document and it marks the starting point at which Scotland's criminal justice system began to recognise victims as a distinct criminal justice stakeholder, with their own distinct needs and interests. The importance of the Strategy and its ongoing influence in defining the status of victims in our criminal justice system, while not as radical as it might have been, should nonetheless be recognised.

4.1.2 National Standards for Victims of Crime

The National Standards for Victims of Crime were published by the Scottish Government in 2005[435] and mirror the Strategy in terms of their focus on the tripartite policy approach based on access to information, access to support and increased participation. Notably, the Standards are based on the principle that victims should be treated with "dignity and respect at all times"[436] and they

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[433] The focus on the Strategy's first two policy objectives is explicitly stated at HM Inspectorate of Prosecution in Scotland, *Thematic Report, Victims in the Criminal Justice System – Phase 1* (October 2010) para 362.
[434] See section 3.2.
[435] Scottish Executive, *National Standards for Victims of Crime (2005).*
[436] *Ibid*, page 2.

recognise the victim's unique status as one that is distinct from, and independent of, their potential involvement as witnesses in the prosecution case. Like the Strategy, it is also apparent that the Standards struggle to articulate the meaning and implications of victim participation. Indeed, under the heading of "Participation" the Standards revert to the traditional understanding of victim-based participation as being restricted to the victim's obligations as a witness and to service standards in terms of attendance at meetings and telephone contact.[437]

The theme that emerges from the Standards is the notion that victims of crime do enjoy a unique status within Scotland's criminal justice system which allows them to access a range of services and associated service standards from criminal justice agencies, all focusing on the victim's needs in terms of access to support and information. That said, when it comes to victim participation in the criminal process, this third policy objective remains strongly linked to the victim's involvement as a witness in the proceedings and therefore does little to address the traditional exclusion of victims from the internal operation of the criminal process itself. In this way, the national policy approach remains broadly in-step with the traditional criminal justice paradigm, assuming that victims remain external to the formal criminal process and maintaining the bilateral conflict between the state and the accused as the defining relationship in criminal justice decision-making.

4.1.3 The Victims' Code

The next major national policy development emerged with the publication of the Victims' Code for Scotland, published by the Scottish Government in December 2015.[438] The Code expands upon the measures previously offered to victims by adding "minimum service standards", "protection" and "compensation" to the three original policy objectives first set out in the Strategy. In addition to this

[437] *Ibid*, page 5
[438] Scottish Government, Victims' Code for Scotland (22 February 2016) < Victims' code for Scotland - gov.scot (www.gov.scot)> accessed 04 August 2022.

extra substantive detail, the Code adopts, for the first time in the context of the national policy documentation in Scotland, the language of "rights", calling for victims' to "remain at the heart of our criminal justice system" and announcing that it sets out "the rights of victims in one place."[439] Building on the Strategy, the Code's assertion that victims of crime now have "rights" represents an increased policy emphasis on the victim's unique status within the criminal process that is distinct from their involvement as potential witnesses.

Notwithstanding this ambitious language, the various important benefits for victims narrated in the Code are dominated by a list of services such as the access to information, support and compensation that victims should expect to receive outside of the formal criminal process. While the language of rights emphasises the importance that the criminal justice authorities ought to place on the proper provision of these services, the Code does not create legally enforceable rights for victims within the criminal justice process itself. Instead, victims are directed to the complaints procedures of the relevant criminal justice authority if they consider that any of their "rights" have been breached.[440]

Ultimately, the repeated reference to rights together with the repetition of the claim that victims remain at "the heart" of Scotland's justice system represents an important re-emphasis of the victim's status in the criminal process. Substantively, however, the Code says very little that is new. Indeed, even the "right to participate" under the Code focuses on the provision of services such as the right to a translator or the right to request an interviewing officer of a specific gender. As important as these service benefits are, they do not alter the victim's substantive opportunities to participate in the criminal justice process itself. And where the various standards set out in the Code are not met, the mode of redress for victims remains external to the formal criminal process.

[439] *Ibid*, page 2.
[440] *Ibid*, page 14.

While the Code is therefore broadly welcome and provides a degree of clarity in terms of what victims should expect and how to complain if these expectations are not attained, the rights that it claims to secure for victims remain unenforceable through the courts. Indeed, the language of rights that the Code adopts is potentially misleading in terms of the implied consequences for the victim's role within the criminal justice system and masks the continuation of the victim's traditional place at the periphery of the criminal process, with little means of recourse and limited opportunities to intervene where their needs and interests are not realised.[441]

4.1.4 *National Policy Approach: Summary*

The Strategy, the Standards and the Code provide an important insight into the foundations of Scotland's policy approach to victims within the criminal justice system from the early days of devolution. All three documents emphasise the importance of victims and set out an unambiguous policy commitment to the principle of proper support and access to appropriate information for victims of crime. Crucially, they reflect a conscious policy decision to elevate the status of victims within criminal justice discourse, away from a category of "vulnerable witness" and towards explicit recognition of victims as important criminal justice stakeholders in their own right. There is little doubt then that victims are now in a better position than at the turn of the century and, as shall be seen below from the legislative response that this policy framework has inspired, victims of sexual crime now have access to a broad range of services which, if delivered properly, have the potential to make a significant positive contribution.

Perhaps more importantly, however, this emphasis on the victim as a distinct stakeholder, points to a policy position that seeks to develop a relationship between victims and the criminal justice authorities that is based on the supply

[441] M Hall, 'The Relationship Between Victims and Prosecutors: Defending Victims' Rights?" [2010] Crim LR 31.

of appropriate services and the maintenance of minimum service standards. While victim participation in the criminal process is still visualised in the national policy documentation through the prism of the victim's instrumental role as a witness, there is an important and recognisable move towards the characterisation of victims as service users who also have legitimate expectations relating to the justice system's reciprocal obligations. Focus is therefore placed on meeting the victim's service needs, responding to complaints and timeously providing appropriate information, while at the same time maintaining the formal criminal process as a space that is occupied by the interests of the prosecution and the accused. This resonates with the partnership approach discussed in Chapter 2 and with Ashworth's advocacy of service rights and the limitations placed on victims' legitimate interests inside the criminal process.[442] While it may no longer be accurate therefore to describe victims as the "forgotten player"[443] of the criminal justice arena, it is clear that the national policy approach still sees victims as outsiders whose primary function is to provide information to further the state's interest in the prosecution of crime. The national policy documentation does not therefore seek to fundamentally change the role of victims *within* the criminal process, and, to this extent, the structures of the traditional criminal justice paradigm are able to remain intact.

4.2 Legislative Reform

In line with this formulation of national policy, a body of legislative reform has also been developed which furthers our understanding of the role that victims of sexual crime are afforded within the criminal process. In what follows, I will discuss the implications of four flagship legislative developments aimed at improving the position of victims of sexual crime: namely the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, the Vulnerable Witnesses

[442] See, for example, A Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A Crawford and J Goodey (eds) *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 185; also see discussion at section 2.3.
[443] I Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 British Journal of Criminology 967 at 967.

(Scotland) Act 2004, the Victims and Witnesses (Scotland) Act 2014 and, finally, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019

4.2.1 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 – Rape Shield*

Scotland first enacted "rape shield" legislation - designed to reduce the use of the sexual history and sexual character evidence of victims in sexual offence trials - in 1986.[444] The modern rape shield regime was thereafter introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The 2002 Act had two purposes: the first, to prevent the accused from personally cross-examining the victim in sexual offence trials;[445] and the second, to strengthen and update Scotland's rape shield regime.[446] Although the 2002 Act was the legislative device which introduced the modern rape shield regime in Scotland, it operated in practice by updating ss.274 and 275 of the Criminal Procedure (Scotland) Act 1995. In what follows, I will accordingly refer to ss.274 and 275 of the 1995 Act when discussing the content of the provisions that the 2002 Act set in place.

By way of a brief overview, the starting point is a broad prohibition on questioning relating to the victim's sexual history and character at trial under s.274 of the 1995 Act. Thereafter, the evidence otherwise rendered inadmissible by s.274 may, on a written application by either the prosecution or the defence, still be admitted at the discretion of the court if satisfied that a tripartite test is met under s.275 of the 1995, namely: (a) that the proposed evidence is sufficiently specific; (b) that the proposed evidence is relevant to the proper focus of the trial; and (c) that the probative value of the proposed evidence is

[444] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, which amended the Criminal Procedure (Scotland) Act 1975.
[445] For an interesting background to this reform and discussion relating to the role that ECHR jurisprudence played, see J Chalmers, 'Cross Examination in Sexual Offences Trials and the ECHR' 2001 SLT (News) 1.
[446] Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offences Trials: An Evaluation Study* (2007) para 1.53 and 1.54.

significant and likely to outweigh any prejudice to the proper administration caused by its admission.[447]

An important aspect of the protection offered to victims under ss.274 and 275 is that it sets out a structured test, which includes the requirement that the court must be satisfied that the probative value of the otherwise prohibited evidence is significant, and is likely to outweigh any risk of prejudice to the proper administration of justice that may be caused by its admission. Importantly, the proper administration of justice in this context includes appropriate protection of the victim's dignity and privacy.[448] On paper at least, the rape shield regime under ss.274 and 275, combined with an increased judicial focus on common law relevancy,[449] provides victims of sexual crime with a substantial degree of protection from inappropriate and irrelevant questioning, while still allowing sufficient flexibility to protect the accused's right to a fair trial.[450]

Despite the apparent strength of Scotland's rape shield legislation, however, early research into its impact noted that the new regime "resulted in the introduction of more sexual history and character evidence than under previous legislation" and concluded that "legal practice has weakened the reform's intent."[451] While there is an urgent need for up to date research on this issue,[452] there is every reason to consider that the problematic implementation[453] of ss.274 and 275 continues, with figures released by the then Cabinet Secretary for Justice revealing that only 4 out of 52 defence applications to lead sexual

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[447] For a detailed overview of the current rape shield regime and the tests that are applied see E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020), p.7 -15 <Proposal for Independent Legal Representation in Scotland for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character — University of Edinburgh Research Explorer> accessed 06 August 2022.

[448] Criminal Procedure (Scotland) Act 1995, s 275(2)(b)(i).

[449] The rape shield provisions do not render admissible evidence that would be inadmissible at common law - see *LL v HMA* [2018] HCJAC 35 [13] – [21].

[450] *Moir v HM Advocate* [2005] 1 JC 102; *DS v HM Advocate* [2007] SCCR 222; *Judge v United Kingdom* 2011 SCCR 241.

[451] Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offences Trials: An Evaluation Study* (2007), para 10.18 and 10.21.

[452] S Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials: Research Report Summary* (Equality and Human Rights Commission, August 2020) p.22.

[453] P Duff, 'The Scottish Rape Shield: As Good As It Gets' (2011) 15 Edin LR 241.

history evidence in the High Court were opposed by the prosecution over a 3 month period in early 2016,[454] while a lexicon of more recent authorities highlight the failure of defence counsel, prosecutors and trial judges to adequately apply the protections that the rape shield puts in place.[455]

Against this background, there are growing calls for victims of sexual crime to be provided with independent legal representation to improve the implementation of the rape shield legislation, ensuring that the victim's interests are appropriately considered in the application of the legal tests.[456] The support for reform highlights a major difficulty with the implementation of the rape shield as, despite the reference to the victim's dignity and privacy in the statutory test, no provision is made for victims to participate in the adjudication of sexual history applications so that the impact on the victim's dignity and privacy can be assessed against competing considerations. Indeed, it is entirely possible under the existing rape shield legislation for an application to admit sexual history and character evidence to be lodged, argued, and adjudicated upon without the victim ever knowing of its existence.[457] While the intention of the 2002 Act therefore reflects the growing importance and status of victims in the justice system in the early days of devolution, it underlines the traditional assumption that victims of sexual crime have no legitimate locus within the criminal process.

Although Kirchengast points to the international trend in modifying the accused's right to examine witnesses as evidence of the greater integration of

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[454] Letter from Michael Matheson to Margaret Mitchell, MSP< 404 | Scottish Parliament Website> accessed on 06 August 2022; cited in S Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials: Research Report Summary* (Equality and Human Rights Commission, August 2020) p.15-16.

[455] *LL v HM Advocate* [2018] HCJAC 35; *RG v HM Advocate* [2019] HCJAC 18; *HM Advocate v JG* [2019] HCJ 71 and *MacDonald v HM Advocate* [2020] HCJAC 21.

[456] F Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010); E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020); R Killean, 'Legal Representation for Sexual Assault Complainants' in R Killean, E Dowds and AM McAliden (eds) *Sexual Violence on Trial* (Routledge: London, 2021) 174; M Iliadis, K Fitz-Gibbon and S Walklate, 'Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation' (2021) 45 International Journal of Comparative and Applied Criminal Justice 105.

[457] Although, see *RR v HM Advocate and LV* [2021] HCJAC 21 and discussion in section 6.4.2 and 7.4.

victims as participants in the criminal trial,[458] this may not be an accurate characterisation of what Scotland's rape shield represents in practice. While ss.274 and 275 are certainly capable of supporting victims in participating in their traditional role as witnesses – by reducing, or at least attempting to reduce, the burden and potential trauma of cross-examination – the rape shield does not provide any mechanism for victims to participate in the adjudication of the sexual history application itself. In this way, Scotland's rape shield might be best seen as a product of policy creation under the partnership approach,[459] where the importance of improving the position of victims is recognised, but only within the parameters of the traditional criminal justice paradigm. Indeed, although the underlying aim of ss.274 and 275 was undoubtedly to improve the position of victims, it nonetheless assumes that the victim has no role to play in the decision-making process and focuses exclusively on the bilateral conflict between the state and the accused,[460] even though the victim's interests are directly at stake. The failure of the current rape shield legislation to attain anything like its full potential in protecting victims from inappropriate questioning therefore provides a useful example of the limitations of legislative reform which attempts to improve the position of victims of sexual crime without first addressing the structural marginalisation of victims under the traditional approach to criminal justice. Ultimately, while ss.274 and 275 reveal a legislative intent to improve the experience of victims in the witness box, the current rape shield legislation does not challenge the assumptions of the traditional criminal justice paradigm and necessarily therefore leaves victims of sexual crime on the periphery of the decision-making process, limiting the ability of the rape shield legislation to deliver meaningful change.

4.2.2 Vulnerable Witnesses (Scotland) Act 2004 – Special Measures

The rape shield regime introduced by the 2002 Act was closely followed by the Vulnerable Witnesses (Scotland) Act 2004, which similarly amended the Criminal

[458] T Kirchengast, *Victims and the Criminal Trial* (Palgrave MacMillan, 2016) 160.
[459] See section 2.3.2.
[460] Under the legislative mechanisms that s.274 and s.275 create, it is entirely a matter for the prosecution or the defence to raise, or as the case may be oppose, applications to lead sexual history evidence.

Procedure (Scotland) Act 1995. The 2004 Act formalised and extended provisions for the use of special measures for the purpose of taking the evidence of children and other vulnerable witnesses in civil and criminal proceedings. Since the commencement of the 2004 Act for example, child witnesses and vulnerable adults have been afforded the opportunity to benefit from the use of screens,[461] supporters[462] and remote CCTV links to the court room,[463] to minimise trauma and increase the quality of evidence adduced at trial. Significantly, the list of updated special measures made available included the opportunity to have evidence taken in advance of trial by a Commissioner.[464] The intention is that proceedings on commission are video recorded and the recording is then received at trial without being sworn to by the victim or witness. Although the use of evidence by Commission has traditionally been seldom used,[465] its increased use is now the focus of future reform and will be discussed further, particularly in the context of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.[466]

The 2004 Act, and the consultation process that preceded it, were both explicit in recognising that improving the treatment of victims was not seen as an end in itself but rather a means of improving the efficacy of the criminal justice system's response to crime.[467] Like the 2002 Act, it is a strong example of legislative reform that can be characterised by the influence of the partnership approach.[468] Indeed, it is noted that the Working Group which introduced the 2004 Act's consultation process included "the importance of preventing and detecting crime" and the need to "encourage…witnesses to give evidence…" within its remit. Its broad conclusions also tellingly highlight the criminal justice system's dependency on the engagement of victims and witnesses and the impact that "stress" can have on both their decision to engage with the criminal

[461] Criminal Procedure (Scotland) Act 1995 s 271K.
[462] Criminal Procedure (Scotland) Act 1995 s 271L.
[463] Criminal Procedure (Scotland) Act 1995 s 271J.
[464] Criminal Procedure (Scotland) Act 1995 s 271I.
[465] L Sharp and M Ross, *The Vulnerable Witnesses (Scotland) Act 2004* (Dundee University Press, 2008) 15.
[466] Also see discussion at section 2.2.5 and 4.2.4.
[467] For example, see Scottish Executive, *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (2003) at para 2.1 "The underlying objective…must be to improve the administration of justice. Improving the quality of a witness's evidence by minimising the stress he or she suffers…will increase the likelihood of a trial or proof coming to the correct conclusion."
[468] See section 2.3.2.

process itself and the quality of the evidence provided thereafter.[469] While the 2004 Act forms part of the wider policy package that sought to help and support victims, it is useful to recognise that its primary purpose was intended to be pragmatic rather than therapeutic; it was intended to improve the experience of victims in the witness box, rather than herald a radical realignment of their relationship with the justice system.

Whatever the primary motivation behind the introduction of the 2004 Act, there is little doubt that special measures play an important role in supporting and protecting victims while giving evidence at trial, particularly in sexual offences cases. A Home Office study reflecting on the impact of a comparable regime in England and Wales suggests that victims and witnesses who used special measures in that jurisdiction generally reported feeling less anxious, less intimidated and more satisfied than those who did not.[470] These benefits are reinforced by research which supports the view that the use of special measures is essentially neutral in terms of the impact on the jury's deliberations,[471] thus emphasising their instrumental value in supporting victims rather than their potential to undermine the rights of the accused.[472]

Like the 2002 Act before it, however, the scope of the 2004 Act is focused very much on the trial and the victim's role in giving evidence as a witness. The impact of this reform on the role of victims in the Scottish criminal justice system is limited by a focus on this important but narrow aspect of the criminal process. As with the 2002 Act, the 2004 Act does recognise the victim's interest in the decision-making process that the legislation creates. Indeed, the 2004 Act requires the court to have regard to the best interests of the witness when considering which special measure to grant and to take into account any views

[469] Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases (Scottish Office, 1998).
[470] B Hamlyn et al, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research Study 283, 2004).
[471] V Munro, *The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (Scottish Government, 2018)<Supporting documents - Pre-recorded evidence and juror decision-making: evidence review - gov.scot (www.gov.scot)> accessed on 15 July 2022.
[472] Also see P Richards, S Morris and E Richards, *Turning up the Volume: The Vulnerable Witnesses (Scotland) Act 2004* (Scottish Government Social Research, 2008)

that the witness has expressed.[473] The legislative position is also reinforced by the practical guidance which was issued alongside the Act itself, emphasising that practitioners should be "prepared to be open to the views and concerns of each individual witness" when deciding which special measure to apply for on their behalf.[474] That said, the legislation does not create any formal mechanism for the victim's view and interests to be heard during the application process. Ultimately, it is for the prosecution and the defence to make applications for special measures on behalf of their respective witnesses, leaving victims with no pathway for intervention should their views be ignored or, for whatever reason, not brought to the attention of the court. While there is a need for more research into the influence that victims have over the choice of special measures in Scotland, recent research into the use of special measures by victims of sexual offending in England and Wales highlights that there are still instances where the choice of special measure is not being made by the victim or where the choice is not offered in a timely manner.[475]

Ultimately, there is little doubt that the 2004 Act is a valuable piece of legislation for victims of crime, and victims of sexual crime in particular. While research supports the view that there is more to do in terms of service provision around special measures, many victims would simply feel unable to give evidence at all if appropriate special measures were not available. Although the 2004 Act recognises the value of the victim's views in terms of the choice of the special measure that is to be used, this legislation should still be seen through the prism of the traditional criminal justice paradigm. Victims do not have any locus in the application for special measures themselves and have no means of knowing if prosecutors have genuinely considered their views, or of otherwise intervening in the application if it does not properly reflect their needs and interests. A prosecutor who, say, for reasons of personal preference, trial tactics or lack of resources, would rather have the victim give evidence in court cannot

[473] Section.271E of the Criminal Procedural (Scotland) Act 1995 as amended by s.1 of the Vulnerable Witnesses (Scotland) Act 2004.
[474] Scottish Executive, *Special Measures for Vulnerable Adult and Child Witnesses: A Guidance Pack* (Edinburgh, 2005).
[475] R Majeed-Ariss et al, 'Could Do Better: Report on the Use of Special Measures in Sexual Offences Cases' (2019) 21 Criminology and Criminal Justice 1.

be challenged by a victim who had, for example, expressed a preference to use a CCTV link or for their evidence to be taken by Commissioner. In this vein, it is instructive to note that Scottish Courts and Tribunals Service statistics suggest that, in the period between 2011 and 2014, next to no use was made of the special measures allowing victims to give evidence in advance by taking their evidence by Commissioner.[476] When the significant benefits of capturing early, pre-recorded evidence are considered[477] - particularly for child victims and victims of sexual offending - it does perhaps raise the question as to why they were not being used if the interests and attitudes of victims were, as a matter of practice, an important consideration in the decision-making process.

Clearly, the utility of the 2004 Act in improving the position of victims of sexual offending while giving evidence at trial should not be ignored. However, the assumption that the prosecution and the defence are the only parties with a substantive interest in the application to secure special measures under the 2004 Act, risks marginalising those victims whose interests do not align with those of the prosecutor and leaves them without a means of redress where proper service standards fail or statutory test are not applied. Although complaints may be taken forward in these circumstances, this would form part of a procedure that is external to the criminal process itself. As such, it might be argued that this legislation is ultimately another example of policymaking based on assumptions about the externality of the victim to the criminal process.

So far, I have highlighted that victim centred reform in the early years of devolution focused on the trial and, in particular, on ways to reduce the burden of the victim's role as a witness in the criminal process. While this reflects the Strategy's policy commitment to support victims and encourage participation (at least insofar as the act of giving evidence is concerned), this first phase of legislation is best understood through the prism of the traditional criminal justice paradigm and, in particular, the partnership approach outlined in Chapter 2. The legislative focus was on improving the experience of victims who

[476] Scottish Courts and Tribunal Service, *Evidence and Procedure Review Report* (March 2015) para 2.14.
[477] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 2.5 – 2.8.

give evidence, but the role of the victim in the criminal process was not fundamentally altered. A second phase of victim orientated legislation can however be identified during the following decade, which perhaps points to a more ambitious conception of the victim's role in the criminal process. Two key pieces of legislation from this more recent phase will be discussed below.

4.2.3 Victims and Witnesses (Scotland) Act 2014 – General Principles

The 2014 Act is a wide-ranging piece of legislation that has significant implications for victims of sexual crime. Indeed, it places obligations on the criminal justice authorities to publish annual standards of service; creates a legislative framework for the provision of information to victims; extends provisions for victims to access special measures in court;[478] and, importantly, creates the legislative underpinning for the Lord Advocate's Rules on the Victims' Right to Review (VRR).[479] The following section, however, focuses on the general principles established by sections 1 and 1A of the 2014 Act and their potential impact on the role of victims of sexual crime within Scotland's criminal justice system.

Section 1 of the 2014 Act sets out a range of general principles relating to victims *and* witnesses to which regard must be paid by the criminal justice authorities. These include the principle that victims and witnesses should be able to obtain relevant information, that their safety should be secured, that they should have access to support and that they should be able to participate effectively in the investigation and proceedings that follow.[480] It is noted that this first list of principles broadly mirrors the policy aims set out in the Strategy, Standards and Code but applies to *both* victims and witnesses in criminal proceedings. Crucially, section 1A of the 2014 Act goes on to set out a further five principles that relate *specifically* to victims. These include the principle

[478] See I Callander 'The Challenge of 'Best Evidence' in Rape Trials: The Victims and Witnesses (Scotland) Act 2014' (2014) 18 Edin LR 279.
[479] I will discuss the Victims' Right of Review (VRR) scheme in further detail in the section on Prosecution Policy below.
[480] Victims and Witnesses (Scotland) Act 2014, s.1(3)(a), (b), (c) and (d).

that victims should be treated in a professional and tailored manner, that they should have their needs taken into consideration, that the best interests of any child victims should be considered and that victims should be protected from secondary and repeat victimisation.[481] The 2014 Act accordingly reinforces the increased status afforded to victims in Scotland's justice system by formalising in legislation the distinction in the way that criminal justice agencies ought to be treating victims as compared to witnesses generally. Indeed, while both victims and witnesses may assume that the criminal justice authorities will consider their safety, information and support needs,[482] it is victims alone who are entitled to benefit from the extended list of general principles covered in s.1A of the 2014 Act. The provisions of the 2014 Act are therefore significant as, for the first time, they carve out a legislative space for victims as a distinct criminal justice stakeholder.

The nature and substance of the general principles are also a matter of importance too. In particular, and when read together, the general principles legitimise and emphasise the needs of victims as a relevant consideration for the criminal justice authorities by placing decision-makers under a statutory obligation to consider the general principles in all aspects of their work that relate to victims. Crucially, the general principles are universal in the sense that they are not restricted to discrete decisions or processes. Instead, they apply across the whole criminal process. In this sense, the 2014 Act represents a genuine move away from the traditional criminal justice paradigm, with the victim's interests being formally brought within the ambit of legitimate criminal justice decision-making at all stages.[483] In this way, the general principles have the potential to complement and reinforce existing legislation, such as the 2002 and 2004 Acts, by creating a statutory obligation for the criminal justice authority to consider the victim as an individual,[484] to consider the victim's needs[485] and to take into account the need to protect the victim from secondary

[481] Victims and Witnesses (Scotland) Act 2014, s.1A(2)(a), (b), (c), (d) and (e).
[482] In terms of Victims and Witnesses (Scotland) Act 2014, s.1(3)(a), (b), (c) and (d).
[483] Victims and Witnesses (Scotland) Act 2014 s. 1(1) of the 2014 requires prosecutors to have regard to the general principles when "carrying out functions…in so far as those functions relate to a [victim] in relation to a criminal investigation or criminal proceedings.
[484] Victims and Witnesses (Scotland) Act 2014, s 1A(2)(a).
[485] Victims and Witnesses (Scotland) Act 2014, s 1A(2)(c).

victimisation when taking decisions that impact upon their interests.[486] Where the victim is a child, the obligations placed on the relevant criminal justice agency to consider the interests of the victim are even more powerful.[487]

Overall, the general principles, and their relationship with the criminal process, have received very little judicial attention. Section 1(3)(d) of the 2014 Act, requiring that victims should be able to participate effectively in proceedings has, however, received recent judicial consideration and accordingly merits further discussion. In terms of section 1(3)(d), the criminal justice authorities are obliged to consider the principle that:

> "in so far as it would be appropriate to so, a victim or witness should be able to participate effectively in the investigation and proceedings."

The potential significance of this provision was first highlighted in the case of *WF, Petitioner,*[488] which was brought before Scotland's highest civil court in 2016. This case involved a petition for judicial review of the Scottish Minister's decision not to grant legal aid to a victim who wanted to challenge her alleged abuser's application to recover her medical records. The victim argued that her Art 8 rights were engaged by the petition for the recovery of her medical records, and it followed that she should therefore be entitled to seek to vindicate those rights by appearing in court in opposition to their production. The Scottish Ministers argued that Article 8 did not require there to be a right to participate in the proceedings themselves; nor did it require the grant of legal aid. After hearing arguments, including written submissions from Rape Crisis Scotland, Lord Glennie concluded that:

[486] Victims and Witnesses (Scotland) Act 2014, s 1A(2)(e)(i).
[487] Victims and Witnesses (Scotland) Act 2014, s 1A(2)(d).
[488] *WF, Petitioner* [2016] CSOH 27.

> "intimation to the [victim] and the provision of an opportunity to be heard before an order for recovery of her medical records is required if there is not to be a breach of [her] Article 8 rights."[489]

In concluding that legal aid must therefore be made available to satisfy the victim's Article 8 rights, Lord Glennie referred to section 1(3)(d) of the 2014 Act as:

> "lending support to the proposition that in so far as the [victim] has a direct right to be heard on an application for recovery of her medical records, that right must be made effective."[490]

Although the petition for the recovery of the victim's medical records did not form part of the formal criminal process, it is notable that s.1(3)(d) of the 2014 Act, when combined with the victim's rights-based interests, played a role in the court's reasoning in extending the victim's participatory opportunities in a process that she would otherwise have been excluded from.

While the statutory reference to effective participation under s.1(3)(d) of the 2014 Act does not necessarily imply that victims must have party status within the criminal process, the decision in *WF* might support the principle that victims should be given a voice in *any* process - including the criminal process itself - which engages the determination of their Convention rights. As I discussed previously in Chapter 3 under the obligation to conduct a transparent investigation, this issue has recently been considered by the Full Bench of the High Court in *RR v HM Advocate*, where the accused sought to lead sexual history evidence relating to the victim's previous conduct. The victim argued that the application to lead evidence relating to her sexual history engaged her Article 8 rights and, furthermore, that under s.1(3)(d) of the 2014 Act, she had a right to participate effectively in proceedings where her rights-based interests were in

[489] *Ibid* [38].
[490] *Ibid* [50].

issue. The High Court found that the public prosecutor should have ensured that the victim knew about the application to lead sexual history evidence and should also have conveyed the victim's views about the application to the court, leading to an urgent change of prosecution policy and practice in relation to sexual history applications.[491] Although the jurisprudence relating to the general principles set out under section 1 of the 2014 Act is still at a very early stage, the existing authorities suggest that there may be huge potential for development of the victim's role in the criminal process where their human rights interests are engaged. As Keane and Convery have pointed out,[492] with the subsequent endorsement of Lady Dorrian,[493] there is now a compelling case to be made for victims to actively participate, with the benefit of independent legal representation, in applications to lead sexual history or character evidence in the future.

The general principles set out in the 2014 Act reinforce the view that victims now have a status within the criminal justice system that is distinct from that of a witness. For the first time, legislation now exists in Scotland which sets victims apart from witnesses and treats them as two distinct criminal justice actors. To this extent, the 2014 Act elevates the status of victims as a unique stakeholder. Furthermore, the 2014 Act may have wider implications for the *role* that victims play within the criminal process itself. While the judicial consideration of the 2014 Act is still at a very early stage, the judgments in *WF* and *RR* have already had practical consequences for the victim's role in criminal justice decision-making that impacts upon the victim's interest in the effective enforcement of their Convention Rights. The consequences of this development could be far reaching, particularly in view of the discussion in Chapter 3, which reminds us of the broad framework of obligations that the criminal justice authorities owe to victims of sexual crime and the wide potential for their rights-based interests to

[491] Rape Crisis Scotland, *Privacy Rights for Sexual Offence Complainers: A Report for the Victim Taskforce* (March 2021) p.28.
[492] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020).
[493] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 4.45.

be engaged at various stages of the criminal process, from the police investigation through to the determination of court proceedings.

4.2.4 Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 – Recorded Evidence

In 2013 Lord Carloway, the then Lord Justice Clerk, called for "clear-sky thinking"[494] to help bring trial procedures that were "rooted in the Victorian era"[495] into the modern age. As a result, he initiated and chaired the Evidence and Procedure Review, with a particular focus on improving the fairness, efficiency and effectiveness of trials.[496] One key aspect of the Review was its focus on child and vulnerable witnesses and, in particular, on the justice system's reliance on live parole evidence, which can often be harmful, inefficient and ill-suited to the victim's needs.[497] The Review, published in March 2015, researched what contribution might therefore be made by the greater use of pre-recorded evidence in Scottish criminal procedure and found that there would be significant benefits for victims, witnesses and for the criminal justice system as a whole, if the extended use of pre-recorded statements were to be taken forward. Ultimately, the Evidence and Procedure Review – Next Steps Report, published the following year, recommended that:

> "…there should be a systematic approach to the evidence of children or vulnerable witnesses in which it should be presumed that the evidence in chief of such a witness will be captured and presented at trial in pre-

[494] Lord Carloway, Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking, Criminal Law Conference, Murrayfield 9 May 2013 http://www.scotland-judiciary.org.uk/26/1045/Lord-Justice-Clerks-speech-at-the-Criminal-Law-Conference.
[495] Scottish Courts and Tribunal Service, *Evidence and Procedure Review Report* (March 2015) para 1.2.
[496] Scottish Courts and Tribunal Service, *Evidence and Procedure Review Report* (March 2015) para 1.4.
[497] *Ibid*, para 1.22.

recorded form; and that the subsequent cross-examination of that witness will also, on application, be recorded in advance of trial."[498]

These findings ultimately led to the introduction of a Bill to the Scottish Parliament in June 2018, which subsequently became the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. The main policy objective of this legislation was to improve how children and vulnerable witnesses participate in the criminal justice system by enabling the greater use of pre-recorded evidence.[499] Principally, the 2019 Act creates a new rule for children (under the age of 18) requiring that, where they are due to give evidence in the most serious cases, including sexual offences cases, they will be allowed to have their evidence pre-recorded in advance of trial using the special measures set out in section 271M (Evidence in Chief by Prior Statement) and section 271I (Evidence by Commissioner) of the Criminal Procedure (Scotland) Act 1995. At the time of writing, this rule applies only to child witnesses in High Court proceedings, but it is intended that it will be extended to Sheriff and Jury proceedings too. The 2019 Act also includes powers to extend the rule to vulnerable adult witnesses who might be required to give evidence in cases involving sexual offences, stalking, domestic abuse and human trafficking.[500] Clearly, the intention to extend the provisions of the 2019 Act to all victims in sexual offence cases would be congruous with the recommendations of Lady Dorrian's Review Group and remains under review.[501]

On the face of it, the 2019 Act focuses, like the 2002 and 2004 Acts before it, on the trial and the victim's role in providing information to the court as a witness. Fundamentally, however, the 2019 Act does more than merely alter the way in which victims discharge their duty to give evidence. Indeed, the measures contained within the 2019 Act challenge some of the core assumptions of the

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[498] Scottish Courts and Tribunals Service, *Evidence and Procedure Review – Next* Steps (26 February 2016) para 74.
[499] Justice Committee, *Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill* (24 January 2019, 1st Report (Session 5)) p1.
[500] See Scottish Government website, link to draft implementation plan < Pre-recording of evidence by witnesses - Victims and witnesses - gov.scot (www.gov.scot)> accessed on 15 August 2022.
[501] See section 2.2.5.

traditional criminal justice paradigm, namely the principle of orality and its focus on the adversarial confrontation which has long been known to be a key driver of secondary victimisation and trauma.[502] The extended use of pre-recorded evidence for children and, in due course, adult victims of sexual offending accordingly has the potential to significantly alter the way in which victims interact with the criminal process by shifting the focus away from the trial as the confrontational set-piece at the summit of the process.

To the extent that the principal rule set out in the 2019 Act is triggered in any given case, this legislation also removes prosecutorial discretion relating to the choice of special measure to be used by qualifying victims. Where the rule under the 2019 Act is triggered, prosecutors *must* now seek the relevant special measures to facilitate the use of pre-recorded evidence so that the child (or in due course, adult) involved does not require to attend the trial. At the heart of this new rule, therefore, is the explicit recognition that "taking the evidence of young and vulnerable witnesses requires special care and that subjecting them to the traditional adversarial form of examination and cross-examination is no longer acceptable."[503] The 2019 Act accordingly represents a potentially significant innovation, not just in the way that evidence might be adduced in sexual offence trials in the future, but also in the significance afforded to the interests of victims and witnesses and the erosion of the traditional focus on the adversarial principles of orality and personal confrontation.

4.2.5 Legislative Reform: Summary

The legislation discussed above can be usefully analysed as falling under two distinct legislative stages. The first stage, of which the 2002 and 2004 Acts are examples, were of course heavily influenced by the Strategy in the early years of devolution. Both pieces of legislation sought to improve the protection offered to victims and both are valuable pieces of legislation, despite the limitations of

[502] L Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2002) 11- 31.
[503] Scottish Courts and Tribunals Service, *Evidence and Procedure Review Report* (March 2015), para 2.1-2.3.

their application in practice. Both the 2002 and 2004 Acts however focus on discrete aspects of the criminal process and, in particular, on the victim's experience as a witness. Crucially, although they both seek to establish mechanisms that are intended to protect and support victims, both Acts reinforce the assumption that it is only the prosecution and the defence who should have a locus in the decision-making process which underpins these mechanisms. Indeed, although the victim's interests in their own dignity and privacy are at stake following an application to lead sexual history evidence, it is left entirely to the prosecutor to decide whether a defence application should be opposed and on what basis. Similarly, under the 2004 Act, is it ultimately for the prosecutor to decide which special measures to apply for on the victim's behalf and a victim who does not agree has no locus to intervene or otherwise make their voice heard other than through external complaint mechanisms and after all relevant decisions have been taken.

The 2002 and 2004 Acts can, in this way, be seen as legislative interventions which are embedded in the foundations of the traditional criminal justice paradigm and on the assumption that the criminal process should be understood as a contest between the state and the accused, leaving victims on the periphery of criminal justice decision-making. As legislative interventions which might usefully be categorised under the partnership approach, they seek to help and support victims, but without recognising that the victim has a legitimate interest in the internal operation of the criminal process itself. In this sense, the 2002 and 2004 Acts do not fundamentally alter the victim's role in the criminal process and largely reinforce the assumption that the victim is a witness, albeit one who should be treated sensitively and, where appropriate, offered additional protections and support by prosecutors and the courts.

The 2014 and 2019 Acts are different. The 2014 Act, for example, was influenced by wider international norms relating to the treatment of victims and was explicitly based on the implementation of European standards under

Directive 2012/29/EU.[504] Its foundations do not therefore rest exclusively on the domestic norms of our adversarial criminal justice system. In a similar vein, the 2019 Act is the product of "clear-sky thinking" triggered, amongst other things, by an explicit recognition that the traditional processes of the court room are not best suited to meeting the needs of children and vulnerable individuals.[505] Although the 2019 Act is once again strongly linked to the victim's role as a witness, it has wider implications for victims and has the potential to significantly alter the way in which they experience the criminal process.

Looking forward, the 2014 and 2019 Acts point to a potential new direction. In particular, the implications of the general principles set out in the 2014 Act are yet to be fully understood. What is clear, however, is that victims' interests are now formally integrated into the way that the criminal justice authorities should be taking their decisions at every stage of the criminal process and the possible implications of the *WF* and *RR* decisions could transform the way that victims participate when their rights-based interests are engaged. In this sense, the most recent legislative (and associated judicial) developments have the potential to place increasing strain on the legal, cultural and structural norms that arise from the traditional criminal justice paradigm and underpin the assumptions which currently require the exclusion of victims from the internal operation of criminal justice decision-making.

In the next section, I will look at published and unpublished prosecution policy and will consider how this adds to our understanding of the victim's role in Scotland's criminal justice system. I will start by discussing the Prosecution Code, before moving on to address various relevant Operational Instructions that inform and guide the actions of prosecutors in their interactions with victims. Section 4.3 will then conclude by considering the Victims' Right of Review scheme (VRR), before summarising how both published and unpublished

[504] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 < Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (legislation.gov.uk)>accessed 06 August 2022.
[505] Scottish Courts and Tribunals Service, *Evidence and Procedure Review Report* (March 2015), para 1.22.

prosecution policy contributes to our understanding of the space that victims occupy and the role that they exercise in the criminal process.

4.3 COPFS Policy Developments

4.3.1 *The Prosecution Code*

The Prosecution Code is the obvious starting point in any discussion concerning the status of victims in prosecution policy. First published in 2001 and updated in 2022 it remains the core policy document relating to prosecutorial decision-making, the criteria that should be applied in deciding whether to raise proceedings and the options available to prosecutors when dealing with reports of crime.[506] The Prosecution Code makes clear that the decision-making process when dealing with crime reports involves two stages: the legal assessment of the case in terms of the sufficiency and quality of the evidence; and an assessment of whether proceedings are required in the public interest. It is with respect to this second aspect of the prosecutorial test - the public interest aspect - where prosecutorial discretion is at its greatest and where the influence of victims is most likely to be felt.

In terms of the interaction of victims with this process, the Prosecution Code states that "the public interest often includes consideration of competing interests, including the interests of the victim, the accused and the wider community."[507] The Prosecution Code goes on to articulate a list of specific "factors" which are of relevance to the assessment of where the public interest lies in any given case. In terms of the role of victims in the criminal process, one of the factors listed here relates to "the impact of the offence on the victim and other witnesses."[508] Where the crime has resulted in significant physical or

[506] Crown Office and Procurator Fiscal Service, *Prosecution Code* (Crown Office, June 2022) <Prosecution Code | COPFS> accessed on 17 June 2022.
[507] Crown Office and Procurator Fiscal Service, *Prosecution Code* (Crown Office, June 2022) <Prosecution Code | COPFS> accessed on 17 June 2022, page 6.
[508] *Ibid*, page 3.

psychological injury to the victim for example, we can see that prosecution policy explicitly recognises that criminal proceedings would be more likely to be appropriate. On the face of it, this might seem to be a relatively straightforward proposition as it would presumably be expected that the public interest in prosecuting an assault which resulted in the hospitalisation or the near death of the victim would be objectively greater than, say, in an assault which required no medical intervention at all. In the case of sexual crime, however, where the psychological impact upon the victim is likely to be at the forefront, this will presumably require a more tailored and individualised assessment of the impact of the crime on the particular victim involved. As a matter of principle, this raises the sort of substantive and procedural questions highlighted by Ashworth in challenging the propriety of this approach, and in particular, his concern that the subjective impact of offending on the victim should not properly be allowed to drive decision-making in individual cases.[509] Regardless, however, we can see from the Prosecution Code that the individual impact of crime on any particular victim *is*, as a matter of policy at least, a relevant consideration in the decision-making process in Scotland. This will presumably require at least a degree of victim input into the decision-making process, particularly in cases of sexual crime, where the impact on the victim may not be immediately apparent without engaging with the victim.

In addition to considering the impact of the alleged offence on the victim, it is also noteworthy that the Prosecution Code requires that prosecutors take into account "any available information indicating the views of the alleged victim about whether prosecution or alternative action is appropriate."[510] While the Prosecution Code goes on to make it clear that any such views will not necessarily be decisive (on the basis that they would make up only one factor in the wider assessment of the public interest), it is nonetheless apparent that the victim's subjective opinion, attitude and views as to whether or not a

[509] A Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR 498.
[510] Crown Office and Procurator Fiscal Service, *Prosecution Code* (Crown Office, June 2022) <Prosecution Code | COPFS> accessed on 17 June 2022, page 6.

prosecution should go ahead are also deemed to be of relevance to the assessment of the public interest in prosecutorial decision-making in Scotland.

4.3.2 Operational Instruction 11 of 2014 - Victim Strategies

In 2014 COPFS introduced an internal policy instruction to all staff involved in the preparation and investigation of High Court level sexual offence cases to complete a Victim Strategy with respect to each victim in the case.[511] The stated purpose of this initiative was to improve contact with victims in sexual offence cases and to improve the victim's understanding of the investigative process, while realistically managing the victim's expectations. In practice the Victim Strategy includes an instruction by the Solemn Legal Manager[512] requiring the case preparer to hold an early meeting with the victim, consideration of the level of ongoing engagement required by the victim thereafter, the form and frequency of communication that would best meet the individual victim's needs, an initial assessment of vulnerability and the nature of the special measures that may ultimately be required. The Victim Strategy also involves VIA staff attached to High Court teams within COPFS who will engage with the victim and offer regular updates as the investigation progresses.

The implementation of the Victim Strategies since 2014 represents a significantly enhanced service for victims in sexual offence cases and feeds into wider obligations under the 2014 Act and in national policy initiatives to ensure that victims have access to appropriate information, that they are treated in a tailored and professional manner and that they are able to participate effectively at trial (by at least ensuring the appropriate use of special measures). In addition, however, it is noted that the purpose of the Victim Strategy also includes the need to establish the attitude of the victim to the ongoing case. This links in with the provisions of the Prosecution Code (discussed above) and Operational Instruction 6 of 2015 (discussed below) which emphasise

[511] Operational Instruction No.11 of 2014, unpublished COPFS Policy.
[512] This is usually a Procurator Fiscal Depute of the grade Principal Depute or above.

the relevance of the victim's views in terms of prosecutorial decision-making, and in particular the decision as to whether proceedings should be raised.

4.3.3 Operational Instruction 6 of 2015 – The Inclusion of Victims' Views

In 2015, a further operational instruction was issued by COPFS' Policy Division requiring prosecutors to include the views of the victim in the recommendations section of all precognition reports[513] concerning allegations of rape and other High Court level cases.[514] The Prosecution Code directs that information relating to the victim's views about the case is of relevance to the decision-making process. Furthermore, the implementation of Victim Strategies in rape cases since 2014 (see above) is intended to ensure that these views are canvassed and recorded at an early stage following planned and considered engagement with the victim. Against this background, this further policy decision might be seen to form part of the same lexicon of initiatives which aims to ensure not just that the views of the victim are canvassed and recorded but also that they are brought to the attention of decision-makers in the most serious sexual offence cases.

4.3.4 Victims' Right of Review

It is apparent that the views of victims require to be actively explored by prosecutors and brought to the decision-maker's attention prior to prosecutorial action being taken in High Court level sexual offence cases. In this way, the published and unpublished policy suggests that victims of the most serious sexual crimes participate in the decision-making process well before they are cited as prosecution witnesses or otherwise appear in court to give evidence. Additionally, through the Lord Advocate's Rules on the Victims' Right of Review (VRR), victims may also participate in the decision-making process after a

[513] See Glossary.
[514] Operational Instruction 6 of 2015, Unpublished COPFS Policy.

prosecutorial decision has been taken.[515] Indeed, as of July 2015, should the prosecutor decide that criminal proceedings will not be raised, the victim will be informed of their right to have this decision reviewed. Prior to the introduction of VRR, there was no formal mechanism for challenging the prosecutor's decision. In solemn level sexual offence cases, the VRR process will involve a review by a member of Crown Counsel who has not been involved in the original decision.[516] The opportunity to request a review under the VRR scheme appears to be a meaningful one. Indeed, of the 53 VRR applications that were raised in sexual offence cases between April 2018 and March 2019, 23% were successful – resulting, where still possible, in the decision not to prosecute being reversed.[517]

Beyond this direct opportunity to influence the outcome of prosecutorial decision-making by simply causing the prosecution service to look at the case again, the VRR rules state that victims will be provided with relevant information as to why a particular decision was taken in their case,[518] thus advancing transparency and, at least on paper, engaging victims further in the decision-making process, providing an opportunity for the victim to make any further representations that they may wish.[519] Equally, and in the eventuality that the reasons given for 'no action' reveals a misunderstanding of the law, irrationality, reliance on irrelevant considerations or the failure to properly apply prosecution policy, the VRR process provides victims with an opportunity to point this out and to directly challenge the original prosecutorial decision on this basis. Admittedly, for this level of scrutiny to be effective it is likely that

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[515] Crown Office and Procurator Fiscal Service, Lord Advocate's Rules: Review of a Decision Not to Prosecute – Section 4 of the Victims and Witnesses (Scotland) Act 2014 (July, 2015)< lord-advocates-rules-june-15-v2.pdf (copfs.gov.uk)> accessed 06 August 2022.

[516] Victims and Witnesses Manual, Chapter 9, Unpublished Prosecution Policy.

[517] Crown Office and Procurator Fiscal Service, Victims' Right to Review: Report 1 April 2018 – 31 March 2019 (April 2019) page 6<victim-right-to-review-annual-report-2018-19.pdf (copfs.gov.uk)>accessed 06 August 2022.

[518] Crown Office and Procurator Fiscal Service, Lord Advocate's Rules: Review of a Decision Not to Prosecute – Section 4 of the Victims and Witnesses (Scotland) Act 2014 (July 2015) p 3 – 4.

[519] The VRR Application Form contains a box which asks "Is there anything else you would like us to take into account when we are carrying out the review? For example, any new information you have, the impact this incident had on you including any physical or financial consequences etc." < Victims' Right to Review application form | COPFS> accessed 06 August 2022.

the victim would require access to legal advice, which is not currently available through existing legal aid provision.[520]

4.3.5 "Reluctant" Complainers

Published prosecution policy also recognises the victim's role in influencing decision-making where they may not want criminal proceedings to be raised. Indeed, in early 2018 COPFS published its revised policy "on dealing with reluctant complainers in cases of rape and other serious sexual offending."[521] At the outset, the revised policy highlights that in all cases the burden of decision-making must lie with the prosecution, albeit after "careful consideration of all the relevant circumstances." The Prosecution Code makes it clear that the impact of the crime on the victim and the victim's views are considered to be "relevant circumstances" for the purposes of this process and this position is reinforced in the 2018 policy, which goes on to state that "the complainer's views, welfare and interests are at the heart of the Crown's decision-making in these cases."

Although the 2018 policy reinforces the relevance of the victim's views, it nonetheless re-asserts the constitutional responsibility of the public prosecutor in Scotland to carry the burden of decision-making in sexual offence cases. At the core of the 2018 policy therefore is its rejection of "a rigid policy which would treat the reluctance of a complainer to testify as decisive."[522] In setting out this approach, the 2018 policy goes on to highlight four key factors that further illuminate the public prosecutor's approach to decision-making in sexual offence cases and, in particular, the role and status of victims in this process. First, the 2018 policy asserts that "the decision as to whether or not a case will be prosecuted…is one to be taken by the Crown in the public interest"; second, that "the attitude and views of the complainer *will always be a very significant*

[520] See sections 6.4.1, 7.3.1 and 8.4.1.
[521] Crown Office and Procurator Fiscal Service, Reluctant Complainers in Cases of Rape and Serious Sexual Offending Policy (12 March 2018) < Reluctant complainers in cases of rape and serious sexual offending policy | COPFS> accessed 06 August 2022.
[522] *Ibid*, 'Overview'.

factor in the decision [my emphasis]"; third, that "prosecutors must weigh up carefully all relevant factors bearing on the decision"; and fourth, the importance of engaging with and supporting the victim in exploring the reasons why they may be reluctant to proceed before a decision can be taken.

At the time of publication, this policy raised considerable controversy[523] and a powerful reaction from some victims' groups.[524] Nonetheless, it should be recognised that, in terms of the published policy position at least, it represents a substantive elevation of the language in favour of the victim's influence on the decision-making process. Indeed, while the Prosecution Code obliges the prosecutor simply to "take into account" the views of the victim, the 2018 Policy emphasises that, in sexual offence cases at least, the victim's views "will always be a very significant factor" and sits at "the heart" of prosecutorial decision-making in rape cases. It is, nonetheless, clear from the 2018 policy that a prosecution can go ahead against the victim's wishes, potentially compelling the victim to remain engaged in a process that is known to risk further trauma and harm. The application of the 2018 policy will be discussed in more detail in Chapter 6, when I consider the findings from the interviews with specialist sexual offence prosecutors.

4.3.6 COPFS Policy Developments: Summary

Ultimately, we can see from the foregoing review of published and unpublished COPFS policy documentation that victims of sexual crime do have a recognisable role in prosecutorial decision-making that is entirely distinct from their position as potential prosecution witnesses. Indeed, victims' views are not only considered relevant to prosecutorial decision making in sexual offence cases, but their views are also actively sought and brought to the decision-maker's attention. Furthermore, should a decision be taken that is contrary to the

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[523] Lucy Adams, 'Rape Victim Policy Change Criticised' (*BBC News*, 12 March 2018) < Rape victim policy change criticised - BBC News>accessed 06 August 2022.

[524] See, for example, Sandy Brindley, *A Letter to the Crown Office and Procurator Fiscal Service* (Rape Crisis Scotland, 12 March 2018)< A letter to the Crown Office and Procurator Fiscal Service | Rape Crisis Scotland> accessed 06 August 2022.

victim's wishes, expectations or interests, then they will have the opportunity to challenge this by either seeking a review under the VRR rules or by making their feelings known through the 2018 'reluctant complainer' policy. Ultimately therefore, when the role and status of victims of sexual crime are viewed through the prism of the published and unpublished prosecution policy, it is apparent that they do have various opportunities to participate in the decision-making process which would not necessarily be apparent from the review of the national policy initiatives and legislative reforms alone.

4.4 *Concluding observations – understanding the role of victims of sexual crime*

In the previous sections, I reviewed Scotland's national policy approach, key legislative reforms and relevant prosecutorial policy developments concerning victims, all with a view to understanding the role that victims of sexual crime play within Scotland's criminal justice system. The picture that emerges is of a steady and consistent assertion of the victim's importance within the justice system marked by increased awareness of the harm that the criminal process can cause to victims, particularly in sexual offence cases. This has broadly been translated into legislation designed to protect victims from the worst excesses of cross-examination,[525] while promoting access to appropriate information and support from the relevant criminal justice agencies.

While the practical and symbolic value of these support-based reforms should not be dismissed, it is apparent that the long-standing assumption that the criminal justice system is, at its core, a conflict between the state and the accused, despite decades of victim centred reform in Scotland, remains broadly intact. As John Scott QC observed during a conference speech in January 2020:

[525] See, for example, sections 4.2.1 and 4.2.2.

> "whatever the good intentions, it seems that the heart of this system, and the basic culture of the court and trials, has not changed."[526]

Opportunities for victims of sexual crime to participate effectively in the criminal process accordingly remain limited and difficult to access without specialised legal support. Importantly, they continue to be tied, for the most part at least, to the theoretical foundations of the traditional criminal justice paradigm and the partnership approach to victim related reforms.[527]

The limits of the traditional criminal justice paradigm may nonetheless be starting to strain. Prosecution policy explicitly considers that the individual, personal views of victims *are* of relevance to prosecutorial decision-making and indeed, in the context of sexual offence cases, it is stated prosecution policy that the attitudes and views of the victim "will always be a very significant factor"[528] in assessing the public interest test as part of the decision to raised or discontinue criminal proceedings.[529] Beyond this, the legislative developments under the Victims and Witnesses (Scotland) Act 2014, as prompted by the European Union's Victims' Rights Directive of 2012,[530] also emphasise the importance of the victim's private interest in the criminal process. Indeed, the 2012 Directive rejects the hegemony of the tradition criminal justice paradigm by recognising that crime is *both* "a wrong against society *as well as* a violation of the individual rights of victims"[531] [my emphasis] and this is reflected in the provisions of 2014 Act.

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[526] John Scott QC, *Next Steps Towards a Victim-Centred Justice System* (20 January 2020, Edinburgh).
[527] See section 2.3.2.
[528] Crown Office and Procurator Fiscal Service, Reluctant Complainers in Cases of Rape and Serious Sexual Offending Policy (12 March 2018)
[529] At least, that is, if a sufficiency of evidence is assessed to exist – it would be entirely improper for a prosecution to be raised if there is clearly insufficient evidence, regardless of a victim's views or wishes.
[530] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 < Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (legislation.gov.uk)>accessed 06 August 2022.
[531] *Ibid*, Recital 9 of Introductory Text.

The introduction of the Victims' Right of Review as part of the implementation of the 2014 Act,[532] for example, provides a direct mechanism for victims to participate in prosecutorial decision-making – not just through the act of requesting the review itself but by increasing transparency and by opening up the process so that victims will be told why no action is being taken in their case and so that scrutiny and challenge can at least potentially follow. Similarly, the general principles under ss.1 and 1A of the 2014 Act,[533] and the early case law which is starting to emanate from s.1(3)(d) in particular, are placing strain on the consistent application of the traditional paradigm, by moving victims, and crucially the vindication of their rights-based interests, into the formal criminal process. In short, these developments are not consistent with the application of the traditional criminal justice paradigm, which sees victims as having only an instrumental role in the criminal process.

While this chapter suggests that it is no longer accurate to perceive victims as the "forgotten players"[534] of the criminal process, they remain, to use Edwards' terminology, "ambiguous participants" with a "fundamentally equivocal" role in Scotland's criminal justice system.[535] While there is clear evidence of participatory opportunities, particularly in prosecutorial decision-making, much of the key legislative framework is still rooted in the traditional assumptions of the traditional criminal justice approach. In the context of sexual offences, this raises real challenges for the development of effective criminal justice policy to combat secondary victimisation and attrition, but also huge opportunities to display human rights leadership in the future. Ultimately, it seems that Scotland's justice system is at a crossroads, with a policy trajectory that seeks to support victims and promote their interests that is nonetheless hampered by the structural, cultural and legal barriers of the traditional criminal justice paradigm. In the next two chapters, I will discuss the empirical research that I conducted by interviewing specialist sexual offence prosecutors to explore how the policies and legislative interventions that are discussed above are applied in

[532] Introduced via the Victims and Witnesses (Scotland) Act 2014 s.4.
[533] Introduction the Victims and Witnesses (Scotland) Act 2014 s.1 and s.1A.
[534] I Edwards, "An ambiguous participant: the crime victim and criminal justice decision-making" (2004) 44 British Journal of Criminology 967 at 967.
[535] Ibid.

practice. It is intended that this will provide further insight into the role that victims of sexual crime currently play in Scotland's criminal justice system and inform the later discussion about the proposed implementation of a human rights-based approach to the criminal justice system and its potential to drive principled and effective reform in the future.

Chapter 5: Methodology - The Role of Victims of Sexual Crime in the Criminal Process: The Prosecutor's Perspective

5.0 Introduction

The analysis of the legislation and the published policy documentation set out in Chapter 4 helps to develop our understanding of the victim's role in the criminal process, but this only takes us so far. The next two chapters build upon the foundations laid in Chapter 4 by looking at the way in which victim centred policy is implemented by criminal justice professionals and how, in practice, this informs the victim's role and status within the criminal justice system. If we are to develop a deeper understanding of the role that victims play, it will be essential that we consider the direct insights of the decision-makers who are at the forefront of shaping our justice system's response to, and relationship with, the victims themselves. Ultimately this thesis addresses the gaps in our knowledge caused by the dearth of research focusing on the contribution of Scottish prosecutors to the implementation of victim-centred policy and builds upon our wider understanding of the justice system's response to victims of sexual crime. By developing a fuller understanding of the role that victims of sexual crime currently play within the criminal process, it is hoped that we will be better able to develop a principled framework for integrating victims needs into the criminal justice system, thereby informing effective future reform.

In this chapter, I briefly set out my methodology, my ethical approach and my rationale for choosing to derive my data from qualitative interviews of specialist sexual offence prosecutors. My methodological narrative includes the choice of semi-structured interviews, the sourcing of participants and my mode of analysis of the data that I gathered. I also reflect on my own role as a prosecutor and sexual offence specialist within COPFS' National High Court Sexual Offences Unit and the impact this had on my research. Thereafter, in Chapter 6, I set out my findings from the data that the interviews produced and draw conclusions about the present role and status of victims of sexual crime within Scotland's criminal justice system. In this way, I lay the foundations for later discussion concerning

how this role might be appropriately modified and what the status of victims of sexual crime ought to be within Scotland's criminal justice system.

5.1 Qualitative Interviews

The interview is, of course, a common method of researching issues relating to gender-based violence.[536] It is an effective tool in developing our understanding of the experiences and motivations of those operating within, and impacted by, the criminal justice system. The value of interviews with legal practitioners is well recognised in both criminological and legal inquiry and provides an opportunity to gain key insights into the operation of the criminal justice system, allowing researchers to make better sense of legal trends and observations.[537] This is precisely what I wanted this research project to achieve.

I decided to use semi-structured interviews to best capture the participants' experiences, interpretations and attitudes relating to the role of victims in the criminal process, while also affording the flexibility to explore previously unacknowledged themes in more detail or follow up complex answers.[538] The nature of the project also required a considerable depth of data, which surveys or highly structured interviews would be unlikely to produce due to their more rigid framework. Finally, I also rejected the use of focus groups at an early stage of my research design, primarily due to the risk that participants might not speak frankly in front of their colleagues and the likelihood that such sessions might only lead to the regurgitation of superficial policy positions already stated in published materials. In contrast, the use of semi-structured interviews afforded the participants with a greater degree of anonymity and the

[536] N Westmarland and H Bows, *Researching Gender, Violence and Abuse: Theory, Methods, Action* (Routledge, 2019).
[537] K Fitz-Gibbon, 'Overcoming Barriers in the Criminal Justice System: Examining the Value and Challenges of Interviewing Legal Practitioners' in K Lumsden and A Winter (eds), *Reflexivity in Criminological Research* (MacMillan, 2014) 247.
[538] T Skinner, Researching People in Power: Practice, Analysis and Action' in T Skinner, M Hester and E Malos (eds) *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing, 2005) 44.

opportunity to explore the detail of their personal and professional perspectives in a tailored and individualised way.

In addition to these more principled considerations, I was also conscious of practical considerations relating to resource and time constraints, particularly in view of the busy professional schedules of the senior prosecutors that I hoped to interview. Crucially, if I wanted to access and interview COPFS employees and Crown Counsel, then I also had to be mindful of COPFS' role as gatekeeper to the participants and take account of the approach that COPFS would be most likely to consider appropriate from the corporate perspective of a large and busy public sector institution with a highly structured hierarchy.

All these factors influenced my choice of the semi-structured interview as my chosen research vehicle as it meant that I could legitimately focus on a relatively small number of in-depth, tailored interviews from the small pool of specialist prosecutors who are responsible for decision-making in sexual offence cases and who operate within a highly centralised geographical area.[539] This approach had resource benefits for both myself and COPFS but, as I have discussed above, also fitted well with my wider research aims and the depth of data that I hoped to ingather.

5.2 Identifying Participants for Interview

I anticipated that gaining access to COPFS employees might be challenging, particularly given the sensitivity of my research topic and the prominence given to sexual offending, gender-based violence and the justice system's response to victims at the time that the research project commenced.[540] I started the PhD

[539] Following the creation of the National High Court Sexual Offences Unit in April 2016, the decision-making in High Court sexual offence cases is now centralised in teams of specialist Procurators Fiscal based in Edinburgh, Glasgow, Aberdeen and Dundee. Crown Counsel based in the National Sexual Crime Unit (NSCU) are also based in Edinburgh and Glasgow.

[540] I received authorisation for the College of Social Sciences Ethics Committee for the project to go ahead in the summer of 2019.

programme in early 2016 and finished interviewing participants in late 2020. During this period, there has been parliamentary scrutiny,[541] formal inspection,[542] high-profile policy changes,[543] a sea-change in the scale of reported sexual offence cases[544] and high profile focus on the prosecution service's efforts to improve.[545] To gain access to Procurators Fiscal who specialised in the prosecution of sexual offences, therefore, I required to seek formal permissions and to submit various written requests to relevant senior officials within COPFS, including the Procurator Fiscal for Sexual Offences, the Procurator Fiscal for High Court and the Head of Policy Division. In addition, access to Crown Counsel required that I seek and obtain the authorisation of the Deputy Crown Agent, the Senior Advocate Depute team and then the Law Officers themselves, all before approaching potential participants to establish whether they were personally prepared to engage with the project.

I was, however, struck at the outset by the supportive response that I received from senior leaders within COPFS. It was clear that my research was seen as a valuable development opportunity and my proposed project was enthusiastically supported and encouraged. In addition, I knew at the outset that my future participants would necessarily be prosecutors who specialised in High Court sexual offence work, an area of specialism that I have worked in exclusively since 2013. Almost all my pool of potential participants would therefore be senior professional colleagues whom I had worked with at some stage - sometimes very closely - over the last decade or so. The combination of my status as a COPFS insider and my pre-existing professional relationship with my pool of participants clearly raised some potential ethical issues[546] and possible

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[541] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017).
[542] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017).
[543] For example, the introduction of the 'Reluctant Complainer' policy in 2018 – see section 4.3.5.
[544] Since 2012/13, the number of reported sexual crimes has increased by 96% - see Scottish Government, *Recorded Crime in Scotland, 2021*-22 (2022) 24.
[545] 'Crown Office Signs Memorandum of Understanding with Rape Crisis Scotland' (*Scottish Legal News*, 19 December 2017) < Crown Office signs memorandum of understanding with Rape Crisis Scotland | Scottish Legal News> accessed 15 August 2022.
[546] See section 5.4 below.

conflict with my role as an independent researcher but it was also a key factor in securing access to participants and in making this research project possible.

Once the necessary authorisations were in place, I started a process of identifying participants for interview. I invited voluntary contributions by sending a "call for participants" to the relevant group email addresses for Crown Counsel and specialist Procurators Fiscal (something that I was only able to access because of my "insider" status) and received a steady trickle of responses. Subject to their schedules and court commitments, I thereafter arranged interviews with those who responded. In the main, I conducted these interviews between September and November 2019 within the Procurator Fiscal's Offices at Ballater Street and within the High Court of Justiciary building at Saltmarket, both Glasgow. I paused the interview process in December 2019 with the intention of recommencing in the New Year, in part due to the pressure of my own professional commitments, but also in recognition of the burden that the interview process might place on the participants during the busy Christmas period.[547]

It was my intention going into 2020 to focus on recruiting participants from the pool of Procurator Fiscal Deputes who worked as specialist sexual offence prosecutors within the National High Court Sexual Offences Team in Glasgow. My ongoing professional commitments as a full-time prosecutor however prevented me from re-commencing interviews over the course of January and February 2020. March 2020 then brought the first lockdown of the Coronavirus pandemic, and I was forced to suspend the project for much longer than I intended. By October 2020, however, I was able to return to the interviews, albeit now using Microsoft Teams to speak remotely with the participants.

Over the course of the remaining months of 2020, I interviewed five Procurators Fiscal, bringing my total group of participants to twelve: Seven Advocates Depute (or Crown Counsel) and five Procurators Fiscal. This group was made up

[547] All interviews during this period were conducted during office hours.

of four Solicitors, four Solicitor Advocates and four Advocates, an equal representation of the three branches of the legal profession that I admittedly had not planned. Of this group four of the seven Advocates Depute were Queen's Counsel. The male members of the group were in the minority, with ten out of the twelve participants being female. All the participants were experienced prosecutors who were accredited within COPFS as sexual offence specialists and at the time of their interviews were actively involved in the prosecution of sexual offence cases in the High Court or in the wider decision-making process.

5.3 Interview planning and approach

At the outset, it was my intention to use the interviews to explore the extent to which existing prosecution policy and victim related legislation informs the opportunities for victims of sexual crime to participate in prosecutorial decision-making. I also wanted to understand more about the conceptual underpinning of the victim's role in Scotland's justice system, how this was understood by prosecutors and whether this manifested itself in the decisions that they took, particularly with respect to victims of sexual crime. Ultimately, my approach to the study was to explore these issues in detail, using open questions in a semi-structured, conversational style.

In terms of my approach to the interviews themselves, I was asked by COPFS' Policy Division at the outset to give a list of proposed interview topics to participants in advance. Initially I felt a little uncomfortable with this request as I worried that advanced notice of the interview's focus might allow for participant preparation which might in turn alter the authentic nature of their responses. On reflection, I took the view that advanced sight of the interview topics was unlikely to materially alter the participants' responses - I did not wish to catch any of the participants out with unexpected questions and I was, at the end of the day, concerned only with exploring their professional views and experience of prosecutorial decision-making in the most effective way possible.

Ultimately, the nature of the participants' role (senior sexual offence prosecutors, all with busy schedules) combined with the timing of the interviews (always during office hours), meant that in reality they often had not had time to read the materials that I sent them in advance of the interview anyway. In one interview where it was apparent that the participant had read (and carefully thought about) the interview plan in advance, the participant reflected on how they had been able to consider the complex range of issues which underlay their professional experiences and, if anything, the advanced circulation of the interview plan is likely to have added to the authenticity of the data that I gathered in that particular interview, rather than having undermined it.

In terms of the content of the interviews, I hoped to cover each participant's broad experience of decision-making in sexual offence cases, their knowledge and use of relevant policy and their views on the victim's role in the criminal justice system throughout the life of a sexual offences prosecution. Ultimately, however, I made it clear to each participant that the pre-prepared interview plan was only a guide and I deliberately did not stick to it rigidly, prioritising the participant's freedom to explore topics and raise issues that they felt to be relevant within the framework of the broad questions that I pursued. My flexibility in this regard was another reason why I did not ultimately consider the advanced distribution of the interview plan to participants to be problematic.

The interviews themselves took place during office hours and, with respect to the pre-Covid phase of the project, within each participant's place of work – either in the Procurator Fiscal's Office in Glasgow or the High Court of Justiciary, Glasgow (it was convenient for some of the Advocates Depute, for example, to meet straight after court). I undertook to the participants that I would keep the interviews to no more than an hour in length and, by and large, I was able to control the length of the interviews to meet this self-imposed restriction. If anything, participants often expressed a willingness to talk for longer, but I felt it important to stick as closely as possible to the agreed interview length, not least as I wanted to encourage uptake and did not want word to get out that I was in any way wasting the participant's time or keeping

them engaged in the interview process for longer than I said I would. I was conscious too that the interviews were taking place during office hours and, by speaking to me, the participants were being kept from other aspects of their work. If it were possible to plan the interviews again, it would, I think, have been beneficial to remove this time constraint and allow the interviews to conclude naturally to minimise the risk of missing important insights while the participants were relaxed and willing to talk further.

To ensure informed consent, I provided a pre-prepared research information sheet and consent form to each participant in advance and discussed both documents at the outset of each interview. I started with a general chat, before discussing the purpose of the research, the reasons for wishing to record the interview, permission to record and the consent form. It was explained to each participant that they would be anonymous in the process, that they could see the transcript afterwards if they wished and that they could withdraw at any stage.

5.4 Ethical considerations

At the very beginning of my research design, the most obvious ethical concern that I identified related to participant anonymity and confidentiality. While it might reasonably have been assumed that at least some of the participants would be happy for their contribution to the research to be acknowledged,[548] I decided at an early stage that I would not seek to identify participants on the basis that anonymity would allow greater freedom to express frank views and professional experiences. While this approach risked limiting the impact of the data gathered by preventing me from highlighting the experience or professional reputation of a particular source, it became apparent at an early stage that COPFS would in any event require participant anonymity as a condition of their support for the project. In addition, any concerns that anonymity might impact

[548] K Richards, 'Interviewing Elites in Criminological Research: Negotiating Power and Access and Being Called "Kid"' in L Bartels and K Richards (eds) *Qualitative Criminology: Stories from the Field* (Federation Press, 2011) 73.

upon the credibility of the data was offset by the intrinsic experience and skill set of my chosen pool of participants, all of whom were sexual offence specialists who had a unique and unparalleled insight into the prosecution of sexual crime in Scotland's highest criminal court.

Given the small size of my target pool of participants, however, considerable care was required in not inadvertently identifying participants by, for example, referring to a specific case or to their precise job title. Care was also required so that I did not identify any victims or case sensitive material in the interviews. To this end, I omitted some valuable interview data when participants inevitably reflected on professional experiences which referred to their involvement in particular cases or to a particular professional role. Given the small number of interviews that I conducted, and the relatively small pool of prosecutors from which they were drawn, I also decided (albeit at a late stage in the drafting process) not to distinguish between Advocates Depute and Procurators Fiscal when referring to participants in Chapter 6. This adds to the anonymity of the quotes that are published in this thesis, while taking little, if anything, away from the weight of the data gathered.

As I approached the interviews, I also became more conscious of power dynamics and how this might influence my approach to the interviews and the interpretation of the data. Although the term "elite interviews" is of course a wide one, it is appropriate to acknowledge that I would be conducting interviews with participants who could be readily classified as forming an "elite" group. Not only were the participants "well informed or influential" in relation to the subject in question,[549] but they were also senior professionals who, in the case of Crown Counsel, were directly appointed deputes to the ministerial head of the department where I was not only conducting my research but working in a full-time professional capacity as well. To this extent, I began to reflect on the possibility that the research participants, and indeed COPFS as the institution which they represent, held significant potential power over me in terms of their ability to exert influence over the research findings, to hold up the publication

[549] JA Robinson, *Elite and Specialized Interviewing* (Northwestern University Press, 1970).

of my work or just to take control of the interview process. Although I did not at any point have any reasons to feel that these outcomes could become a reality, it is, as Skinner observes, this potential power to influence the research process (as well as the participants' standing and seniority per se) that makes such interviews elite.[550]

From an ethical perspective, I of course wanted to ensure that the interviews and my findings treated the participants fairly and faithfully reflected their views, while at the same time asserting my independence as a researcher. The sort of issues commonly discussed in the literature around elite interviews – such as difficulties getting participants to take the interviews seriously – did not arise and my research was at all times treated with interest, courtesy, and enthusiasm. At the same time, however, I was conscious of the need to maintain control of the process and not to become "star struck" in the face of some very senior colleagues who I perhaps knew well by reputation, but who would no doubt have considered me to be a junior colleague who, in the context of any other interaction in the office, would have been routinely subject to their instructions.

One potential friction point that did arise related to my repeated use of the word "victim" (as opposed to complainer)[551] in the framing of my questions. It seemed that this did not sit comfortably with many of the participants, and it was pointed out to me in several interviews, particularly by Crown Counsel, that they either found this term to be inappropriate or at least that they were not completely comfortable with its use in the context of prosecutorial decision-making prior to conviction. It may not have been connected, but I noted that I was asked by one participant at the end of the interview whether I had a particular agenda in pursuing my research, and I wonder whether my use of language in choosing the term "victim" rather than the traditional term "complainer" was perceived as displaying an underlying bias which may have put at least some of my participants on guard and, if so, could potentially have

[550] T Skinner, 'Researching People in Power: Practice, Analysis and Action' in T Skinner, M Hester and E Malos (eds) *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing, 2005) 44.
[551] See section 1.1.1.

influenced their answers. As the interviews progressed, I found myself adapting my language so that I rather clumsily referred to “the victim or complainer” rather than just, say, “the victim” when speaking to participants. Perhaps this is a subtle example of the influence that my elite participants were able to (inadvertently) wield over the interview process but, at the same time, it was also important to be aware of the power held by the researcher and the importance of maintaining a sense of neutrality so that the participants had confidence that their answers would be treated fairly and not distorted through the lens of a particular bias or perceived political agenda.

5.5 Reflecting on my Role as a Prosecutor and a Researcher

When reflecting on my concerns about the power dynamics of the interview process, I also became conscious of my ethical responsibility to present and analyse the views and experiences of the participants as appropriately as possible. This does not just mean rigorously and accurately recording their words, but also in reflecting the context, essence and sentiment of their experiences and capturing this sensitively and appropriately in the research findings. This line of thinking then led me to consider my own role in the research project and to reflect on my pre-existing biases and opinions about the treatment of victims in a field that I have myself worked in for many years; my dual role as a legal insider and independent researcher; and the impact of my pre-existing professional relationship with the majority of the project’s participants.

Prior to commencing this research project, I had worked for approximately 6 years in specialist sexual offence teams within COPFS as a Procurator Fiscal Depute and, since 2019, as a Senior Procurator Fiscal Depute. Indeed, I continued to work in these roles full-time while pursuing this research project. The professional expertise and experience that I have personally developed in the prosecution of sexual crime will undoubtedly have had an impact on my research, not least in terms of access to the participants themselves, but crucially also in terms of the in-depth understanding that I have been able to

gain concerning the structures and processes of COPFS and the wider criminal justice system. This professional background, however, also brings potential bias – on the one hand, there was a risk that I might be inclined to uncritically accept, or at least overly sympathise with, the views of the participants due to our shared professional experience. On the other hand, my awareness of, and frustration with, the justice system's marginalisation of victims formed a large part of my motivation for pursuing this research in the first place.

As Forbes highlights in the context of her dual role as a researcher and prosecutor while exploring the experience of domestic abuse victims in Scotland, it is important to acknowledge and reflect on the significance of my own role as both a researcher and sexual offence prosecutor and the element of autoethnography that comes with a professional background so "intricately woven" with the research topic.[552] Following Forbes' example, I sought to remain aware of the part I play in the criminal process, my specific perspective on the issues discussed and my professional experience and knowledge of prosecutorial practice that remains undocumented in academic literature or even in published prosecution policy. Clearly, there are analytical benefits in conducting research of this nature from the perspective of an independent researcher who nonetheless also has the knowledge base, access and depth of organisational understanding of an "insider". That said, it is all the more important to recognise that my particular perspective and professional relationships with the participants does not allow me to claim that my interpretation of the research findings will be devoid of all subjectivities. As Brooks points out, however, this need not undermine the legitimacy of the research findings, but a greater degree of reflexivity is required.[553] To this end, my professional background is explicitly acknowledged and the way in which this has influenced the research process - particularly in terms of the research topic and the interpretation of data - has been embraced, all in the hope of producing

[552] E Forbes, *Perception and Reality: An Exploration of Domestic Abuse Victims' Experiences of the Criminal Justice Process in Scotland* (Unpublished PhD Thesis, University of Glasgow, 2018).
[553] O Brooks, 'The Inter-play between Power and Reflexivity in Feminist Research on Young Women's Safety' in K Lumsden and A Winter (eds) *Reflexivity in Criminological Research* (Palgrave Macmillan, 2014) 90.

findings that may ultimately be characterised as more honest, ethical and balanced.[554]

5.6 Analysing the data

Before moving on to discuss the findings in Chapter 6, it is appropriate to discuss my approach to the coding process and explain how the data was analysed. During the interviews, I did take notes, but ultimately decided to prioritise listening and engaging with the participants. As a result, I relied primarily on the recordings of the interviews to produce a *verbatim* record of the discussion in the form of typed transcripts which could be reviewed later. I was greatly assisted in the preparation of the transcripts by a legally qualified audio-typist. The audio-typist's contribution was invaluable in ensuring, not just that the transcripts were entirely accurate, but also that they captured important nuances in the participants' demeanour, such as reflective pauses, sighs, or hesitation. This assisted in the analysis of the transcripts, particularly when it came to the identification of issues or themes that were of importance to the participants, or which they otherwise found difficult or challenging.

Due to my pre-existing professional relationship with the participants, I suspect that several were perhaps more open with me than they might otherwise have been with a researcher that they did not know. As a result, it was not uncommon for participants to indicate informally during the interview that something they were about to say was "off the record" or even, on one occasion, to whisper as if to prevent my recording device from picking up their words. The meticulous nature of the transcription also meant that these nuances were captured in the transcripts so that I did not inadvertently incorporate these exchanges into my data and thus compromise my ethical commitments.

[554] G Mason and J Stubbs, 'Feminist Approaches to Criminological Research' (Legal Studies Research Paper No 10/36, The University of Sydney, 2010) 12.

Once the transcripts had been prepared, I reviewed them line-by-line and highlighted important points as key themes emerged. In many ways these themes were easily identified and self-selecting as I had specifically asked the participants about topics which were apposite to the research aims, such as their professional experience of the victim's role and their approach to decision-making in areas that I knew to impact on victims' interests. Due to the small number of participants involved, I chose not to use coding software, preferring instead to manually code each transcript using a simple colour coding system. The first round of coding revealed twelve codes, such as 'the role of the victim', 'principles behind approach to victims' and 'the victim's influence'. After this initial process, I linked the different codes under umbrella headings, in terms to the stage of the criminal process and the type of decision to which they related. At this stage, it became easier to see how different codes interacted with each other, for example themes relating to the 'victim's role' tended to link in with observations about trauma and the participants' professional obligation to present the most compelling case, which correlated with the 'principles behind the victim's influence'.

Having organised the data into connected themes, the interactions with existing literature also became easier to see, for example Edwards' discussion about the typology of participation.[555] Here, Edwards highlights the ambiguity that can arise if insufficient attention is paid to the rationale for victim involvement in the justice system and delineates four different participatory roles for victims as a tool for analysing their relationship with decision-makers, namely: (i) control, where the victim's input is determinative, (ii) consultation, where opinions will be sought and weighed against other factors, (iii) information provision, where decision-makers seek and consider victim information, and (iv) expression, distinguished by the victim *wanting* to provide information or communicate feelings to the decision-maker. Drawing upon this framework, I returned to the coding process and organised the existing themes under the headings of 'control', 'consultation', 'information-provision' and 'expression'. As will be

[555] I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

seen in Chapter 6, this informed my approach to the presentation of the data and the key findings which emerged.

5.7 Conclusion

The aim of this research project was to develop a deeper understanding of the present role and status of victims of sexual crime in Scotland's criminal justice system. I did this by interviewing experienced prosecutors who specialise in the preparation and prosecution of sexual crime cases. My sample, chosen from a relatively small pool of Advocates Depute and Procurators Fiscal who work within the specialist High Court sexual offence teams, was made up of twelve participants - seven Advocates Depute and five Procurators Fiscal - who shared their unique, and until now, untapped perspective on the role of victims in the justice system and their influence on prosecutorial decision-making.

The importance of my own professional background has also been acknowledged. I am a Procurator Fiscal Depute who has specialised in the preparation of High Court sexual offence cases since 2013. In addition, I have worked closely, and had a pre-existing professional relationship, with many of the participants. This meant that my research has undoubtedly benefited from the privileges of an 'insider', such as wider access and more open and frank disclosures of sensitive information. Against this, however, is the risk that my findings could be influenced by my professional proximity to the participants and interviewer-effect remained a key consideration when conducting the interviews and analysing the significance of the participants' responses to my questions. While I have done my best to mitigate the consequences of potential bias from my findings, it is nonetheless important that my dual role as independent researcher and public prosecutor is acknowledged.

Chapter 6: Findings - The Role of Victims of Sexual Crime in the Criminal Process: The Prosecutor's Perspective

6.0 Introduction

This chapter builds on the themes developed in Chapters 4 and 5 and reflects on the role and status of victims of sexual crime as perceived by the specialist sexual offence prosecutors who are at the forefront of implementing victim-centred policy and legislation in their decisions and in their daily interactions with victims. I have already looked in Chapter 4 at the key pieces of victim-centred legislation and relevant published and unpublished prosecution policy, and I have argued that despite the strong legislative and policy focus on victims, the traditional structures of the adversarial criminal process remain largely intact, leaving victims of sexual crime in an equivocal and confusing position: on the one hand the policy position reveals various opportunities for victims of sexual crime to participate in criminal justice decision-making; while on the other, their interests continue to be marginalised by a justice system that is still structurally configured to recognise only the contest between the state and the accused in the proper enforcement of the state's laws.

In addition to the insights provided by legislative and policy developments, important research focusing on the lived experience of victims has also informed our understanding of victims' marginalisation from, and by, the criminal process,[556] thereby adding to the evidence that victims still play only a peripheral, instrumental role in the wider adjudication of their case. The picture, however, remains incomplete due to the dearth of research probing the professional experiences of specialist sexual offence prosecutors, whose approach to decision-making inevitably operates within the structural, cultural and legal framework of the criminal justice system itself. We cannot, therefore,

[556] See, for example, E Forbes, *Victims' Experiences of the Criminal Justice Response to Domestic Abuse: Beyond GlassWalls* (Emerald Publishing, 2021); O Hay, M Burman and L Bradley, Justice Journeys: Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault (Scottish Centre for Crime and Justice Research, 2019) <Justice Journeys Report, Aug 2019_FINAL (sccjr.ac.uk)> accessed 06 August 2022.

properly understand the role that victims of sexual crime play within this framework without considering the perspective of these key actors and the ways in which victims (and their interests, concerns and needs) interact with the decisions that prosecutors take and the tests that they apply.

The previous chapter set out my methodological approach to the interviews that I have conducted with twelve specialist sexual offence prosecutors from within COPFS' National Sexual Crimes Unit[557] and National High Court Sexual Offences team.[558] In the present chapter, I outline the main findings which emerged from these interviews, before exploring the implications of these findings for our understanding of the role and status of victims of sexual crime within Scotland's criminal justice system. Drawing from Edwards' typology of participation as a means of better understanding the relationship that victims might have with criminal justice decision-makers, I have set out my findings under the headings of 'control', 'consultation', 'information-provision' and 'expression'. The presentation of the findings focuses on the use of quotes to ensure that I accurately represent the participants' words. Where I have paraphrased the participants' words, I have put this in square brackets. The names of third parties and other distinctive information have, however, been removed from the quotes and, where reference is made to the Advocates Depute or Procurators Fiscal who participated in the interviews, I refer only to "participants" to reinforce and preserve anonymity.

6.1 Control

6.1.1 Limitations of control in the traditional paradigm

The first form of participation in Edwards' typology is one where the victim would have control over a particular decision, making their input determinative. The victim would be invited to supply their preference and the prosecutor would

[557] See Glossary.
[558] See Glossary.

then be obliged to apply it.[559] The sort of relationship that this form of participation implies is of course alien to the traditional approach to criminal justice and the associated assumption that the victim's role is an instrumental one as witness for the prosecution, with little or no influence over decision-making. More than this, the idea that a victim of crime, or indeed anyone else, could *require* a prosecutor in the Scottish system to raise or abandon criminal proceedings, is contrary to the constitutional status of the Lord Advocate and, by association, the responsibilities of her independent prosecutors.

On this basis, it was no surprise that the traditional perception of the victim as having limited influence over decision-making emerged strongly from the interviews. This came through particularly strongly in the context of the decision to raise proceedings in the early stages of the criminal process, where the focus is very much on an objective assessment of the evidence itself and the legal tests that prosecutors must apply. Indeed, one participant explained:

> "[The victim] can't build the case, they can't decide what investigations we're going to carry out, they can't tell us that we should go ahead or not go ahead…because we have a separate role as a public prosecutor, which looks at the evidence independently and makes a decision based on our tests and the requirements as to whether proceedings are in the public interest and that may not coincide with their wishes…"

Similarly, another participant emphasised the instrumental nature of the victim's role as a source of evidence:

> "The first consideration's probably sufficiency of evidence and, as you know, that's a technical, quantitative calculation, you know, it's not taking account, really, at that stage, I don't think, of the victim's overall presentation or circumstances, other than that they're usually a source of

[559] I Edwards, 'An Ambiguous Participant. The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 974.

> evidence to be counted along with everything else. I suppose that's the first and main consideration."

A third participant made the same point, emphasising the importance of legal tests and professional discretion over individual preferences or views:

> "If it's a case that has got no realistic prospect of conviction, for whatever reason, then the fact that [the victim] wants to give evidence, again, sorry, that's not going to be, that's not going to be the deciding factor, you know."

6.1.2 'Reluctant complainers'

Notwithstanding these robust indications of the victim's limited influence over the prosecutor's decisions, the interviews revealed that the position is nonetheless a nuanced one. One of the participants, for example, introduced the view that the victim's role in the decision-making process was not static and could become more, or less, influential depending upon the nature of the outcome that the victim desired:

> "The complainer will never have, I don't think, a central role in decision-making other than a negative one to the extent of withdrawing participation or indicating that they want to withdraw."

Indeed, a key finding which emerged from the interviews related to the fluid nature of the victim's role in the decision-making process, with their opportunity to participate, and their power to influence, varying depending upon the stage of the process and the nature of the decision being taken. The contrast with the traditional assumption that victims have only an instrumental role in the criminal process became particularly stark, for example, when the participants

reflected on the influence wielded by victims of sexual crime who did not support criminal proceedings. Here, it became clear that the victim's views and personal preferences certainly do matter to the point where it might *almost* be said that the victim was afforded a determinative or controlling influence in the decision not to raise criminal proceedings.

In this context, one of the participants observed that:

> "If I'm looking at a case…where it's been reported and there's a sufficiency but the complainer's very clear they don't want to go ahead…They've given a reason and they're clear that special measures won't make a difference and they understand that it can't be resurrected at a later stage. I would say, I would be looking for a pretty compelling reason not to accede to their wishes."

Similarly, another explained:

> "Where a witness has disengaged, they've got a significant role to play because they - we would only very rarely enforce a reluctant complainer to participate in a process."

In the same vein, a third participant emphasised that sexual offence prosecutors still retain discretion to proceed with a criminal case against the wishes of a victim, while acknowledging that this would be an unusual, and likely inappropriate, thing to do:

> "The mere fact that you, a rape complainer, disengage will not necessarily mean that we will simply ditch the proceedings at that point. I think we have left open the possibility that there might be some, I suppose – 'compulsion' sounds like the wrong word in this context - but you might be

> required to come to court anyway. I'm not aware of that ever having been done in practice and I find it difficult to envisage a situation in which it would be the appropriate thing to do."

Contrary to widely reported concerns that victims of sexual crime would be compelled to give evidence or face arrest following the publication of COPFS' 'reluctant complainer' policy in 2018,[560] we can see from the approach of the prosecutors themselves that the preferences of victims can be powerfully influential, at least in the context of the decision to end criminal proceedings where the victim has withdrawn their support. Linking this back to Edwards' typology of participation, we can see that there is something close to control, in aspects of the relationship that victims of sexual crime have with prosecutors and their opportunities to influence prosecutorial decision-making. While the extent and nature of this influence should not be over-stated, it is nonetheless important to acknowledge that where the victim wishes to withdraw from a sexual offence prosecution, the overwhelming experience of the participants was that those views are not treated as peripheral or marginal considerations and, more than this, it seems that the victim's input is, in this discrete context at least, capable of exerting something close to a decisive influence over the decisions that are taken.

Despite this unanimity of practice when dealing with victims of sexual crime who do not want criminal proceedings to go ahead, it is notable that the participants' views were not quite so aligned when it came to the principles or reasoning which underlay the influence that victims were said to exercise in this context. While some participants struggled to articulate why the victim's views should be so influential, others referred to the public interest (of which the victim's interests form part) and several drew on compassionate or moral reasons for acquiescing to the victim's wishes, showing broad awareness of the impact of trauma. It is noted that instrumental reasons – such as concerns that a victim who did not want to participate might make a poor witness – did not

[560] Lucy Adams, 'Rape Victim Policy Change Criticised' (*BBC News*, 12 March 2018) < Rape victim policy change criticised - BBC News>accessed 06 August 2022.

feature at this stage and most participants expressed concern for the victim's wellbeing, highlighting the particular sensitivity of sexual offence cases. One participant, for example, explained:

> "I think it's recognised as psychological damage of domestic abuse and sexual abuse, and we can't ignore the fact that our decisions might damage [the victim] further…so you can't divorce what they're going through or what the effect a prosecution will have on them from the decision-making."

Ultimately, however, it was clear that the balance of the public interest remains the overriding consideration, even in the application of the 'reluctant complainer' policy. In the final analysis, the primacy of the public interest test was well captured by one of the participants who explained:

> "Now, where we might have to [proceed with a prosecution against the victim's wishes] is in the public interest, if you've got a serial sexual offender and [the 'reluctant' victim's] evidence is critical to proving a Moorov[561]…there might be exceptional cases where we say, 'notwithstanding your, your very strongly held views and your unwillingness to participate, I'm sorry, you're going to have to."

6.1.3 Concluding thoughts on 'control'

The interviews with the twelve participants did not of course support the view that victims of sexual crime were able to control prosecutorial decision-making. Given the constitutional parameters within which Scotland's independent prosecution service operates, this was not an unexpected finding. What the

[561] The Moorov Doctrine effectively operates to allow one victim's testimony about a particular crime to corroborate another victim's testimony of a different crime; provided both crimes were sufficiently closely connected in time, character and circumstances.

interviews did reveal, however, was that in a particular context - namely where a victim expresses a strong wish for proceedings to go no further – victims of sexual crime wield considerable power to influence the decision in accordance with their wishes.

In this sense the interviews with the participants reinforce the published policy position discussed in Chapter 4. While the published policy position confirms that the "attitude and views of the complainer will always be a very significant factor", the clear sense from the participants was that the informed and considered wish of the victim for proceedings to be ended was something close to a decisive consideration. While the participants universally acknowledged that they retained the discretion to proceed with a prosecution if the public interest required it, the strong view emerged that such a course of action would be unlikely to be appropriate and almost hypothetical in the context of a victim who did not consent to the continuation of the criminal process, particularly if no other victims would be affected by the decision not to proceed. In this sense, and in this discrete context, it emerged that the victim's views, while not actually determinative, do not fall far short of being so in practice.

6.2 Consultation

6.2.1 The decision to raise criminal proceedings

According to Edwards' typology of participation, 'consultation' is defined as "the process of ascertaining and considering opinions about the appropriate… decision to be taken."[562] In this way, victims could participate by being asked their opinion about the appropriate course of action at a particular stage in the decision-making process. It does not necessarily follow that the victim's opinion

[562] I Edwards, 'An Ambiguous Participant. The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 975.

will be decisive, or will even influence the decision at all, but input will be sought and weighed in the balance with all other relevant factors.

As with 'Control', a consultative role for victims of sexual crime does not sit comfortably with the assumptions of the traditional criminal justice paradigm, which does not easily recognise the private, personal opinions of victims as having legitimacy or relevance in the decision-making process.[563] That said, the relevance of opinions and preferences expressed by victims did emerge from the interviews as an important consideration in the decisions taken by sexual offence prosecutors - at least when deciding whether to raise proceedings – once again reinforcing the policy position discussed in Chapter 4.

One of the participants, for example, expressed enthusiasm for information relating to the victim's preferences in the context of the decision to raise criminal proceedings:

> "In a good report to us you'll be told what the complainer's views are and that's something that I would absolutely always, you know, always factor into the decision-making. It's not determinative but I'm always heartened to read that the, you know, that the complainer is keen for proceedings to be taken, you know, is adamant that she wants to go to court, however it's expressed."

By contrast another participant did express reservations about the canvassing of the victim's preferences, explaining that it might raise expectations about the power of the victim's influence and thereby cause additional harm. Ultimately, however, the conclusion reached by this participant was that:

[563] See section 2.3.

> "…in most situations, it would appear that everybody would rather that you at least took their views into account and it's about, you know, it's about sensitivity and good communication…"

While the participants invariably confirmed that the decision to raise proceedings could never be dictated by the victim (not least because a technical sufficiency of evidence is required to raise proceedings in the first instance), several participants were nonetheless able to provide examples of the victim's input influencing the decision to prosecute and, in the final analysis at least, proving to be an important factor in the overall decision. Referring to a case where the complainer challenged the original decision not to prosecute and provided further information about the life-long impact of the alleged abuse on her mental health and wellbeing, a participant revealed that:

> "I've had at least one of the decisions that I have made overturned by a Law Officer [following the exercise of VRR[564]]…the complainer in that particular case has had a significant influence because of the damage [the abuse] has caused them in their later life…that is a case where a complainer has had a direct impact on the decision that has been made because of the effect [the abuse] has had on her in her adult life."

Similarly, another participant provided a broader insight into the potential influence that the views of victims of sexual crime can have, particularly where the decision is otherwise finely balanced:

> "Well, I think, if you're saying, 'God', you know, 'this is not a good case, but can I say that there's no realistic prospect of a conviction?' It might not be conscious, I just think if I saw that there was a complainer who was very

[564] See section 4.3.4.

> keen, I might be more likely to come down on that side of saying, 'go ahead, she's keen to do it'."

A useful finding from the interview process, therefore, is that 'consultation' forms a key part of the relationship between prosecutors and victims of sexual crime, at least during the initial decision-making process. In this way, the interviews build upon the analysis of the policy position set out in Chapter 4 and confirm that the views of victims are routinely sought, brought to the attention of specialist sexual offence prosecutors, and thereafter considered along with all other relevant factors prior to taking the decision to raise or discontinue proceedings. While it cannot be said that the views of any particular victim will always emerge from this process as a powerful or even a significant factor, participants nonetheless spoke of the potential for the victim's views to tip finely balanced decisions in favour of raising proceedings. This is a significant finding that sits uncomfortably with the assumptions of the traditional criminal justice paradigm and the limitations of the victim's associated role as a witness.

6.2.2 *Post-indictment decisions*

'Consultation' is not, however, capable of fully defining the role that victims of sexual crime have in the justice system and their relationship with prosecutors. Indeed, it is once again worth noting that the interviews revealed that the victim's role in the decision-making process is not a static one. While I have already discussed the variations in the victim's influence depending upon the nature of the decision being taken,[565] the interviews with the participants also revealed how the victim's role varied depending on the procedural stage of the criminal process that the case had reached. While the participants welcomed, considered, and at times were swayed by the input of victims at the early stages of the decision-making process (that is to say, during the decision to raise criminal proceedings after a police report had been received by the prosecutor), opportunities to participate diminished considerably after the indictment had

[565] See section 6.1.2.

been served - when proceedings had been formally raised and the prosecution case had reached the courts. This finding resonates with existing literature which suggests that while victim participation enhances the victim's perception of fairness,[566] victim satisfaction rates are known to diminish as they progress deeper into the criminal justice system.[567]

In the context of the decision to oppose the adjournment of trials, for example, it emerged that the participants, while acknowledging the distress that the unexpected adjournment of the trial could cause, did not place the same weight on the input of the victim as they did in pre-indictment decision-making. Consequently, the views of victims are not routinely canvassed prior to the prosecutor deciding whether a defence motion to adjourn should be opposed. In this vein, a participant explained that:

> "…one would know [the victim has] come to court thinking, 'I'm going to give evidence and then the case will be over, and I can move on to a different phase in my life' and, of course, if it was put off then that will kick that can down the road. So, you'd be aware that any delay, inevitably, will have an adverse effect on complainers. So, to a degree, you don't need to know their views because one is well aware of the impact of a delay in proceedings."

Interestingly, the participant's answer here seems to attach only instrumental value to the victim's views at this stage of the process – making the exercise of canvassing those views pointless as the nature of victim's input can be assumed anyway. This sits in contrast with the value attached to the victim's views in, for

[566] J Wemmers, 'Victim Participation and Therapeutic Jurisprudence' (2008) 3 Victims and Offenders 165; D Pugach and M Tamir, 'Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements' (2017) 28 Hastings Women's Law Journal 57.
[567] A Freiberg and A Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Palgrave MacMillan, 2021) 20.

example, the application of the 'reluctant complainer' policy,[568] where therapeutic considerations seemed to have had more prominence.

Another participant was more direct about the decision to adjourn, explaining that such decisions are largely based on objective legal criteria and so are not an area where the victim's views are seen to have any real weight or relevance:

> "In the main, the adjournments are because there is something that the defence need to do to properly prepare the case, or sometimes something we need to do to properly prepare the case and, on that basis, the complainer has little or no impact on that because we have to properly prepare the case. So, in terms of asking permission of the complainer, no, I wouldn't do that."

A third participant expressed frustration with the process and empathy with victims after drawing on experience of having to repeatedly update victims to advise them that adjournments had been granted by the court. In terms of the participation of the victims in that process, however, the same participant frankly confirmed:

> "No, you wouldn't ask a complainer [for their views] …not routinely, unless there was something I can't think of, but I never experienced asking [victims] their views on adjournment."

A broadly similar theme emerged in the context of the negotiation of pleas between prosecutors and the defence once the prosecution case had reached the courts.[569] Once again, there appeared to be a contrast in the role that the

[568] See section 6.1.2.

[569] It is competent for the prosecutor to accept a plea of not guilty to one of more of the charges if the accused pleads guilty to other charges on an indictment or summary complaint. A prosecutor might agree to this, in the public interest, for a number of reasons. Factors such as the strength of the evidence, the impact on sentencing and preventing the victim from having to go through the trial process might, for example, be considered.

victim played, and crucially the participants' perception of that role, compared with the participatory opportunities available prior to raising proceedings. One participant, for example, explained the position with reference to the unique role of the public prosecutor and highlighted the absence of a dialogue between the prosecutor and "witness" at this stage of the process:

> "…in terms of considering a plea, there would not be active discussion with a complainer…there's not dialogue between the prosecutor and the witness in the same way there would be dialogue between defence counsel and the accused, but I think part of that is because the role of public prosecutor is different from the legal representative of the accused."

The same theme emerged in the context of defence applications to lead sexual history evidence under s.275 of the Criminal Procedure (Scotland) Act 1995.[570] Once again, the "legal" nature of the decision to challenge the defence application was emphasised, leading to the assumption that the victim's views were not a matter of relevance in this context. An example of this view was expressed by a participant who explained:

> "[the victim's] views would not be sought because that's a legal question…I mean, quite often [applications to lead sexual history evidence] are not particularly contentious. It might just be the accused has a different impression of what happened on the night in question and wishes to elicit evidence of that and that's what the trial's about so there's no reason that that shouldn't be done. At the other end of the spectrum, if it's something that I see where it's, you know, clearly contrary to [the law which prohibits sexual history evidence], I don't need to pick up the phone to anybody to ascertain the complainer's views."

[570] See sections 4.2.1, 6.4.2 and 7.4.

The emphasis on the legal nature of the decision to oppose sexual history evidence applications was mirrored by a further participant:

> "I don't take into account [the victim's] views because there are some things that will, whether they like it or not, legally, it's admissible, so there's nothing we can do about it. We're not really asking [victims] about what they think about [sexual history] evidence being led or not led. So, no, I don't think the views of the complainer really are a problem. That's more of a legal problem."

The experience of the participants in this regard is entirely consistent with the statutory regime which Scotland's "rape shield" legislation sets out[571] and, as Keane and Convery have observed,[572] there is no legislative mechanism for notifying victims, let alone canvassing their views, when a sexual history application is made.[573] It is important to note, however, that the participants quoted above were explaining their experience of sexual history evidence applications prior to judgment of the High Court in the case of *RR v HM Advocate* in 2021,[574] which led to a significant change in the prosecution approach.[575] It is of importance to note that, prior to the judicial intervention in *RR* at least, the participants did not readily recognise the victim's locus in expressing a view about sexual history evidence applications. This sits in contrast to the apparent enthusiasm for victim input that we saw in pre-indictment decision-making.[576]

The one area of post-indictment decision-making, however, where the participants did universally accept that the victim should be consulted relates to the decision to use special measures in court - such as screens, the presence of a

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[571] See section 4.2.1.
[572] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020).
[573] Section 275(4)(a) and (b) of the 1995 Act requires the party making the application to send a copy to the other party (the defence must send a copy to the prosecution or vice versa).
[574] *RR v HM Advocate and LV* [2021] HCJAC 21. See discussion re RR at section 3.3.3.
[575] Rape Crisis Scotland, Privacy Rights for Sexual Offence Complainers: A Report of the Victims Taskforce (March 2021) p.28 <ILR---Report-for-Victims-Taskforce----Roundtable-Final-Report.pdf (rapecrisisscotland.org.uk)>accessed 06 August 2022.
[576] See section 6.2.1.

support person, or a CCTV link - to support the victim in giving evidence.[577] Here, the broad consensus was that the victim's input was extremely important in allowing the victim to give their best evidence at trial. One of the participants attempted to explain why the victim's views were seen to be of relevance in the context of special measures, as opposed to other post-indictment decisions:

> "I think the reason [victims] would have a wide influence on special measures is that it's something that uniquely affects them and given that it's within limits set by the legislature…these are measures that parliament has said should be available, after consultation."

Another participant explained the position in more pragmatic terms, emphasising the importance of supporting the victims so that they can give evidence and keep the case running:

> "We would go with what the complainer wanted because, ultimately, the complainer is saying "I would not be able to give evidence any other way" and, if that's what happened and they couldn't give their evidence, then the whole case falls…"

A third confirmed that they too saw the value of victim input in this decision, but with a greater emphasis on meeting the victim's needs in their own right:

> "Whatever [the victim] would prefer to have, that would be my recommendation for an application."

Notwithstanding the clarity of the position here, at least in terms of the importance of victim participation in the decision-making about special measures, the interviews once again revealed divergence in the participants'

[577] See section 4.2.2.

understanding as to why this should be the case. As can be seen from the quotes above, one participant felt that special measures are essentially a neutral consideration for the justice system and are therefore a matter that "uniquely affects" the victim; another emphasised the instrumental value of victim input to better support the prosecution case; while the third seemed to focus on therapeutic considerations, prioritising the victim's needs in their own right. For the most part, however, the participants' assumed that the purpose of using special measures was to allow the victim to give their "best evidence",[578] and thereby enhance the presentation of the prosecution case: the purpose of participation in this sense, was primarily therefore viewed as an instrumental one, echoing the partnership approach.[579] One of the participants expressed the position as follows:

> "…you think, well, what's going to be the way that enables [the victim] to give their evidence in the best way? But that's really a, I think, a matter of skill for us. Rather than expecting a member of the public, who's never been in court before to pick, you know, how are they meant to pick?"

This participant went on:

> "[victims] express a view, yeah. I feel quite strongly that it's really a matter for the Crown to select the appropriate special measure, to be honest."

A second participant expressed a similar concern and highlighted the importance of providing full information to the victim in this context:

> "…As [a prosecutor], what we're concerned with is how best to present the evidence to the jury and the tension with an individual complainer is if

[578] This is, after all, the language used in the Vulnerable Witnesses (Scotland) Act 2004 – see section 4.2.2.
[579] See section 2.3.2.

> they're saying "I can best give my evidence by CCTV link, but we think "hmm, you won't get the same impact on the jury"…Then we might, again, have [a Victim Information and Advice officer] speak…to the complainer and they explore why they think the CCTV link is best because sometimes we find that it's simply not been explained to them what is involved."

Similarly, a third participant reflected on the difficulties caused by the special measure decision, and the tension created by the prosecutor's interest in presenting the most compelling case on the one hand, and the interests of victims and victims' groups in promoting the victim's welfare on the other:

> "So, Rape Crisis, again using it as an example, and trying to empower their complainers, are very, pro recording of the complainers' evidence and, on one hand, it's great because you can do it [at an early stage], get it in the can and [the victim] can move on, but what we keep saying to them and to the groups is, you know, this is possibly to the detriment of the presentation of that evidence and, actually, is the fact that you're not going to get a conviction going to be of more harm than good?...the one thing that all the team of [High Court Prosecutors] are saying is "stop the bus!" The defence are all over this and the reason they're all over it is that they know that the jury are not as invested in the complainer and they can see the conviction rate going down."

Ultimately, the interviews revealed that the participatory opportunities for victims diminished once a prosecution case was indicted and reached the courts. In the post-indictment decisions where victim input was sought, it is noted that there was no single, underlying rationale applied for doing this. In decisions relating to special measures, a strong theme of instrumentalisation emerged, with participants often assuming that the purpose of using special measures was to achieve "best evidence" and thereby support the prosecution case. Some participants accordingly highlighted the tension that the choice of special measure can create with the prosecutor's professional judgment about the most effective way to present the evidence, and this might help to explain why

service delivery relating to special measures has been subject to criticism in adversarial systems[580] and why some special measures have not traditionally been widely used despite their potential value to victims.[581] In the main, the participants described a shift in the victim's place in the criminal justice process once proceedings had been raised and the prosecution case had reached court. At this stage, the prevailing view was that the victim's input was often of no relevance to decision-making due to the "legal" nature of the tests being applied. Although there was still some evidence of therapeutic considerations, or otherwise of considerations which prioritised the interests of the victim in their own right, in decision-making about special measures, this rationale for understanding victim participation was less marked and less frequently called upon during the post-indictment phase of prosecutorial decision-making.

6.2.3 Concluding thoughts on 'consultation'

One of the key findings that emerged from the interviews was that victims of sexual crime play a significant consultative role in the early stages of prosecutorial decision-making. Often, the victim's input at this early stage has little or no impact on the final decision, but their views are nonetheless routinely canvassed, considered and welcomed by decision-makers at this stage. In addition, the interviews revealed that there may be circumstances where the victim's input could sway the decision to take proceedings. This reinforces the policy position discussed in Chapter 4 and is consistent with the unpublished prosecution policy which requires that the victim's views be brought to the attention of Crown Counsel in the precognition reports that inform the decision to raise proceedings.

A further key finding, however, relates to the change of this role once the decision to raise proceedings has been taken. At this stage, the interviews

[580] For example, see R Majeed-Ariss et al, 'Could Do Better: Report on the Use of Special Measures in Sexual Offences Cases' (2019) 21 Criminology and Criminal Justice 1.
[581] For example, the limited use of evidence by Commissioner – see Scottish Courts and Tribunal Service, *Evidence and Procedure Review Report* (March 2015) para 2.14.

revealed that the victim's views are no longer looked for or routinely considered. Some participants suggested that this would not be necessary as they would be able to assume what the victim's views would be, while others indicated that the victim's input would be irrelevant at this stage, largely due to the technical or legal nature of the decisions being taken. This theme came out particularly strongly in the context of the participants' decisions to oppose (or as the case may be, not oppose) defence applications to lead sexual history evidence. Here, the victim's views were not routinely considered relevant to decisions that focused on the application of legal tests in the *public* interest. This finding speaks to the existing literature, which questions whether the constitutional position of independent prosecutors allows them to adequately represent the interests of victims within the wider criminal process.[582]

6.3 Information-Provision

6.3.1 Victims of sexual crime as "special witnesses"

For Edwards, 'information-provision' is a form of participation whereby the criminal justice authorities are obliged to seek and consider victim information (as opposed to the victim's views or opinions) and the victim is obliged to supply this information. This form of participation fits most comfortably with the traditional criminal justice paradigm as it implies that the victim's private interests should be placed outside the criminal process, while focusing on the victim's instrumental role in supplying information to the police via witness statements and then testifying in court as a prosecution witness. As was discussed in Chapter 4, we can see evidence of the justice system's focus on participation through the lens of 'information-provision' in the policy and

[582] F Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials*, (Rape Crisis Scotland, 2010), 7.10 – 7.12; E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020) p.18.

legislative initiatives designed to support victims in the performance of their role as witnesses.[583]

The theme that victims of sexual crime are viewed principally as witnesses in Scotland's justice system also featured heavily in the interviews, with the participants overwhelmingly articulating their sense that, for all the developments in victim related policy and legislation, the status of victims of sexual crime remains rooted in the performance of their role as a witness. One of the participants, for example, expressed the position in the following terms:

> "[Victims are] the principal witness in the case, they're someone who's made an allegation that is being taken seriously and has been investigated and that we consider there's enough evidence to substantiate it so we're going forward on that allegation and, I think, that is the extent of their role. They are a very important witness but that's the status that they have."

Evoking the constitutional status of the independent public prosecutor in Scotland's justice system, another participant explained:

> "I would still struggle to call [the victim] anything other than a witness because it cannot be that they as…It cannot be that they, as witnesses, [pause] make the decision. They're not our clients, they can't tell us to do anything and, in our current system, they can't be our clients because we have a system whereby, we are acting in the public interest, we're not acting for them."

Although the participants invariably expressed empathy and consideration for victims at a personal level, it was notable that the discussion about the victim's role often drew on metaphors which spoke to their objectification at a structural

[583] See sections 4.2.1 and 4.2.2.

level. In this sense, the quotes from different participants below show how victims were positioned as building blocks, tools, and ultimately, the means by which a conviction is achieved:

> "From my point of view as a court lawyer as it were, someone who wants to present the case effectively, your starting point is generally going to be an articulate, engaged and persuasive complainer…that's one of your key *building blocks* so you want it to be *a good building block* [my emphasis]."

> "I still think [victims have] got to be witnesses…I mean, they are true witnesses. They are true *tools* of the prosecution [my emphasis]."

> "[Victims] are extremely important witnesses…without them we cannot prosecute the case and without them being seen as credible and reliable, we won't get a conviction…and that is really their principal role."

Although the interviews universally confirmed that the primary role of victims of sexual crime continues to be that of a witness, it is important to acknowledge that this finding was widely augmented by a broad sense that victims had nonetheless acquired a special or distinct status within the parameters of the role that witnesses play. In this context, one of the participants mused:

> "My view is that they are not just witnesses [long pause] but they are witnesses."

Similarly, another explained:

> "You could class [victims] as a witness but they were not a witness, they were a victim of a crime and that was – in my opinion, that was always at the forefront of my mind…"

A third participant spoke of victims of sexual crime being "witnesses with enhanced needs" and, on developing this point, suggested that:

> "[victims] are witnesses but witnesses [pause] I suppose they have to be treated differently, and maybe this is wrong, but I think they have to be treated differently because we now recognise that the potential trauma to these people will affect the way they give evidence and we're trying to get the best evidence."

Ultimately, the participants viewed the primary status of victims of sexual crime as being that of a witness, albeit a witness who may require additional support and sensitive treatment. To this extent, their role is perceived as being fundamentally an instrumental one, with a focus on providing information to the criminal justice authorities when required to do so. Nonetheless, as the last quoted participant suggests, they are witnesses that "have to be treated differently."

This perhaps explains why certain decisions allow for increased consideration of victims' needs and additional opportunities to participate, while others do not. If victims of sexual crime are understood as "special witnesses", then additional participatory opportunities to help, support and inform them as they navigate the criminal process make sense, so long as this still takes place within the parameters of the victim's primary role as information provider. This finding has echoes in the partnership approach,[584] where the need to inform and support victims of sexual crime is recognised, so long as this takes place within the structural parameters of the traditional criminal justice paradigm. To this extent, the interview findings resonate with existing literature which highlights the challenges of grafting victims' rights onto adversarial justice systems. As Erez et al point out, the "add victims and stir" approach to the integration of victims does not challenge the foundations of traditional adversarial proceedings

[584] See section 2.3.2.

and leaves many victims frustrated and dissatisfied, despite an increasing recognition of their needs and improved opportunities to participate.[585]

6.3.2 The rationale for treating victims of sexual crime as "special witnesses"

A related theme which emerged from the participants' reflections concerned their understanding of the rationale which underlay their focus on victims during certain decisions and at particular stages of the criminal process. The participants did not articulate a single, underlying rationale informing their approach to victims, in terms of how, when or why the victim's needs, views or concerns should influence prosecutorial decisions and when they should not. That said, a range of views were expressed, including an awareness of the trauma caused by sexual offending and the need to factor this into the participants' thinking, at least where the framework surrounding prosecutorial decision-making allowed this to be so. One of the participants, already quoted above, explained the position as follows:

> "I think it's recognised as psychological damage of domestic abuse and sexual abuse and we can't ignore the fact that our decision might damage [the victim] further…so I think it's just a recognition of the trauma and the very complex effect of these offences on people. So, you can't divorce what they're going through or what the effect of a prosecution will have on them from the decision-making. Probably you should but I don't think you can. I think we've just become more humane."

Similarly, another empathised with the experiences of victims who encounter the criminal justice system, explaining that:

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[585] E Erez, J Jiany and K Laster, 'From Cinderella to Consumer: How Victims Go to the Ball' in J Tapley and P Davies (eds), *Victimology: Research, Policy and Activism* (Palgrave MacMillan, 2020) 321; E Erez, J Globokar and P Ibarra, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20 International Review of Victimology 169.

> "For me it's more I don't want to be distressing people who have been through enough."

A third participant expressed a similar sentiment and awareness of the impact of trauma, while still emphasising the fundamentally instrumental nature of the victim's role:

> "[Victims] are still just tools of our prosecution but just with a heightened awareness of treating them humanely because I think everybody recognises that to be a subject of domestic abuse or sexual abuse is very damaging so we're trying not to damage them further."

In addition to this awareness on the effects of trauma, some participants alluded to the focus on victims in sexual offence cases as a means of improving their performance as witnesses. The inference being, if victims are better supported and prepared then their ability to provide compelling evidence might improve. Over and above such instrumental considerations, however, one of the participants alluded to both uncertainty about the rationale for seeking to better support victims of sexual crime and a genuine desire to just do what is right:

> "It's really difficult – a lot of the things you're asking me about, we just do and so it's different – it's difficult to vocalise what we're doing and why we're doing it…I suppose, back to this explaining your reasons, in a modern world, we should be able to vocalise it but sometimes it's difficult, sometimes you just know that doing something is right and ought to be done."

With this challenge in mind, it is striking that one obvious avenue for incorporating the principled integration of victims into prosecutorial decision-making might be with reference to the terms of ss.1 and 1A of the Victims and

Witnesses (Scotland) Act 2014, which incorporates a statutory obligation on prosecutors to consider various general principles when taking decisions relating to victims. In this context, however, it emerged that some participants were broadly unaware of the 'general principles' set out in the 2014 Act and did not therefore consciously apply them in their decision-making and to their interactions with victims. One of the participants, for example, expressed uncertainty about the terms of the 2014 Act beyond its relevance to special measures, and, after being prompted as to what the 'general principles' under the 2014 Act were, frankly reflected:

> "I would think that it would influence the policies that were put in place, rather than being directly, you know, thinking about the principles under the 2014 Act. Certainly, for me, I've never…never come across anybody suggesting I should…never done so in an instruction from or Note to Law Officers and I don't think I ever received a Note – an instruction from the Law Officers that refers to it."

6.3.3 Concluding thoughts on 'information-provision'

Victims of sexual crime are still universally perceived by the participants to be witnesses in the criminal justice system, whose primary role is to provide information at key stages of the criminal process. Alongside this, however, the participants demonstrated a growing awareness of the difficulties that victims face and acknowledged that victims of sexual crime often have enhanced needs or require additional support as they navigate the criminal justice system. While the instrumentalisation of victims as information-providers permeated most discussions about the rationale for meeting these enhanced needs, participants were often still concerned with "doing what ought to be done", mitigating harm and being "humane". It is noteworthy that the interviews revealed a lack of familiarity with of the statutory obligations that prosecutors owe to victims under ss.1 and 1A of the Victims and Witnesses (Scotland) Act 2014 and there was no evidence of a consistent, underlying rationale which guided the participants' overall response to victims, other than the need to support their

participation as witnesses. In line with international studies, therefore, the interviews revealed the absence of a holistic or systemic approach to victims,[586] with participants clearly still perceiving the victim's role through the conceptual prism of the traditional criminal justice paradigm, albeit with enhanced needs "grafted" on. Although progress has been made, this finding reinforces the view that victim-centred reforms of previous decades "have not displaced traditional criminal justice approaches which, for both ideological and pragmatic reasons, have enduringly excluded victims."[587]

6.4 Expression

6.4.1 The Victim's Right of Review (VRR)

The last of Edwards' categories of relationship between decision-maker and victim is that of 'expression'. For Edwards, 'expression' is distinguished from 'information-provision' as there is no obligation on the victim to provide the information. Indeed, the information provided to the decision-maker via 'expression' is entirely of the victim's own choosing and is given on their own terms. For the decision-maker's part, they must provide the victim with this opportunity to emote, but are under no obligation to act on any views expressed - the relationship which follows is that of expressor and listener.[588] Only very limited evidence emerged from the interviews with the participants of the existence of an expressive role for victims of sexual crime in Scotland's justice system.[589] This was not unexpected, due to the framework of the traditional criminal justice paradigm which privileges procedural formality and objectivity,

[586] K Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave Studies in Victims and Victimology, 2019) 19.
[587] E Erez, J Jiang and K Laster, 'From Cinderella to Consumer: How Crime Victims Can Go to the Ball' in J Tapley and O Davies (eds), *Victimology* (2020) 323.
[588] I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967 at 976.
[589] J Chalmers, P Duff and F Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] Crim LR 360.

and thereby leaves little room for information that is legally irrelevant, emotional appeals or the venting of frustrations.

As might be expected, however, the participants did discuss the Victims' Right to Review scheme (VRR) as a key component of the participatory opportunities that victims of sexual crimes are able to access.[590] Indeed, several participants indicated that VRR reinforces the victim's consultative role by providing further opportunity to formally communicate strong views, particularly in the context of the impact that the offending has had upon them.[591] Other participants pointed out that VRR sometimes resulted in new evidence or lines of enquiry being brought to the attention of prosecutors, thus revealing opportunities for VRR to operate as a vehicle for 'information-provision,'[592] which might in turn change the evidential basis of the decision that is being reviewed. In addition, echoes of 'expression' can also be identified in the existing VRR process. Indeed, the VRR application form that is available on the COPFS website very broadly invites victims to express whatever comments, opinions or concerns that they wish when submitting their request for a review.[593] There is no guidance on the VRR application form, for example, about what is relevant, or to direct the victim to highlight a specific point or issue on which the review is sought; rather, the victim is simply invited to provide any information that they wish to be considered in support of their request to have the original decision reversed. To this extent at least, it might be argued that the VRR process could properly be characterised as having elements of 'consultation', 'information-provision' *and* 'expressive' participation, depending on the nature of the information that the victim provides and how it is ultimately treated.

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[590] See section 4.3.4.

[591] See for example, the section 5.2.1 above.

[592] The use of VRR as a vehicle for 'information-provision' is highlighted in COPFS' Victims Right to Review Annual Report 2019 – 2020, which confirms that "In a number of these cases, victims provided additional information and further inquiries were instructed during the review process. This included obtaining information which was not provided to COPFS when the case was first marked." See Victims Right to Review, Annual Report, 1 April 2019 – 31 March 2020, page 4.

[593] As well as asking for basic case details, the VRR form simply asks "Is there anything else that you would like us to take into account when we are carrying out the review?" – see Application form to request a review, found at Victims and Witnesses (copfs.gov.uk).

The difficulties with this particularly broad approach to VRR were captured by one of the participants, who expressed a degree of frustration at the lack of focus provided in some VRR applications:

> "Well, [victims are] the ones asking for VRR obviously and they write down why they consider the original decision to be wrong and that is passed to the depute who is considering the VRR and he would take anything they say into account…but some of the difficulty is that [the victim will] simply say that the decision was wrong…part of the difficulty is that sometimes what [victims] do is they say "this man's ruined my life. This decision needs to be reconsidered" and you think, "yeah, we know he's ruined your life but that doesn't alter the decision."

In practice, this reveals a structural difficulty with the VRR process as victims cannot be expected to provide focused submissions on why a particular decision could or should be reversed without access to the detail of the decision-making and, crucially, legal advice to interpret and navigate the process. Indeed, responding to the prosecutor's decision not to raise criminal proceedings with a VRR form that emphasises the impact of the crime ("this man's ruined my life"), is of little value (from the reviewing prosecutor's point of view) if the original decision was based on an insufficiency of evidence, or on qualitative deficiencies in the evidence. An unsupported victim who has no access to legal advice and who, in all likelihood, has had no previous involvement with the justice system is unlikely to appreciate the nuances of criminal justice decision-making and is unlikely, therefore, to participate effectively in the VRR process if it is used as a form of expression, to allow the victim to emote with "anything else" that they like.

We can see then that the interviews did reveal evidence of expressive participation, where victims sometimes used the wide terms of the VRR application to emote, or otherwise express broad objections to the original decision. The merits and demerits of expressive participation, and in particular the opportunity for victims to express themselves without influence, have been

well mined elsewhere,[594] and caution must be exercised to ensure that victims understand the nature of their role in this context and do not misunderstand the purpose for which any expressive input has been sought. In the context of VRR where there is presumably an expectation of at least potential influence, and due to the broad invitation to provide "anything else"[595] that the victim wishes to say, it seems likely that for many the VRR process could prove to be a source of frustration, not just for decision-makers like the participant quoted above, but crucially for victims of sexual crime who may wrongly believe that the expression of their feelings in the VRR application could have a substantive impact on the VRR process.

6.4.2 Sexual history evidence

We have already heard, in the context of post-indictment decision-making discussed above, that the interviews revealed evidence that participants did not routinely canvass the views of victims in the context of deciding whether to oppose defence applications to admit sexual history evidence. That said, it is important to note that by the time of the 8th interview (9 October 2020), there had been a significant development in the law relating to sexual history evidence, namely the delivery of the 5-bench judgment in *RR v HM Advocate*, following a petition to the *nobile officium*.[596] In the opinion delivered by Lord Justice-General Carloway, a full bench of the High Court made it clear that it is the "duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application."[597] At the time of interviews 8 – 12 therefore (8 October 2020 to 20 November 2020), this development in the processes around sexual history evidence was still relatively new and the COPFS

[594] A Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR 498; E Erez, 'Who's Afraid of the Big Bad Victim?' [1999] Crim LR 545; E Erez, 'Integrating Restorative Justice Principles Through Victim Statements' in E Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (LAG, 2004) 81; J Chalmers, P Duff and F Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] Crim LR 360.
[595] The one substantive question that the VRR application asks of the victims is: "Is there anything else that you would like us to take into account when carrying out the review?"
[596] *RR v HM Advocate and LV* [2021] HCJAC 21.
[597] *Ibid* [52].

policy response was still developing. The participants were, however, able to shed some light on the newly developing approach to sexual history evidence applications and, in particular, the role of victims of sexual crime in this process. Contrary to the position of participants in the interviews prior to the *RR* decision, the later interviews revealed the existence of an emerging role for victims of sexual crime in the decision to admit sexual history evidence under s.275 of the Criminal Procedure (Scotland) Act 1995.

Indeed, while discussing the new approach following the *RR* decision, one of the participants explained:

> "So, the new thing is, once the [sexual history] application has been lodged, we then have to go to get the complainer's views… And then what the court will say is, 'What's the Crown's attitude to this? What has the complainer got to say about it?... at the end of the day, the judge's ultimate test is one of relevancy but, I suppose, what's the difference between the Crown expressing the views or a third party - an intermediary, or intervenor - doing the same thing?... It is an avenue whereby [victims] are given a voice… And it may or may not have an influence [on the judge's decision] … But, at the end of the day, it's a legal test that has to be applied, isn't it?"

It is of interest that the participant here saw the prosecutor post-*RR* as facilitating the victim's "voice" in the adjudication of the sexual history application by canvassing the victim's view and passing this on to the court. There is no suggestion that the victim's view, once canvassed, should influence or inform the prosecutor's position on the sexual history application and the broad implication is that the victim's view is ultimately of little relevance to the application of the relevant "legal test". In this sense, the participant appears to be describing a form of expressive participation, where the victim can emote about the possibility of their sexual history, private life or character being discussed in court, with little expectation that this will have an impact on the decision-making process.

Similarly, another participant stated:

> "So, certainly now, the guidance that's come out is that where there's an application to bring out at trial anything that would have been struck out by [the legislation that prohibits sexual history evidence subject to a structured test to be applied by the judge] …we have to go to the complainer, and we have to put certain things to them. We have to make them aware that this is happening and we have to 'gain their views'…From my limited experience since this has started, in every case, the complainer has been extremely distressed by that and has urged us to ensure that that's not allowed to happen…I think I've only had three cases since this came in and that was the case in each of those and in each of those cases, [the application to admit sexual history evidence has] been granted."

When explaining the role of the victim's views in determining the outcome of the application to admit sexual history evidence, the same participant continued by saying:

> "So, from my experience thus far, the only time [the victim's views are] going to have any impact is where the complainer says, 'That's not true, that didn't happen'. But, in terms of it being [prohibited by the sexual history legislation], her view that, 'I don't want that to come out, that's humiliating', or, 'That's awful' or whatever, that's not made a difference thus far…it just has never made a difference so I think what I'm saying is that I'm cynical as to whether or not this is us just – in fact I feel very strongly that this is us just- that [when the RR decision] came out, instant knee jerk reaction, it wasn't to do with anyone saying, 'This isn't fair to the complainer', it's only happened when [the RR decision] came out, we suddenly got this guidance, to bring us into compliance with that new case law. I'm not su- I mean, nothing about the culture's changed…There was just a new rule, a new step had to be built into the process, that a case preparer had to make this phone call, run it by the complainer and then send an email back [to the Advocate Depute]."

Although the policy approach to seeking the victim's views in the context of applications to admit sexual history evidence was, at the time of writing, still at a very early stage, the interviews with the participants highlight ongoing uncertainty about the purpose of seeking the victim's input and the influence that this will have on the decision to admit the sexual history evidence. Interestingly, one of the participants expressed the view that the input of victims is to be canvassed by prosecutors as a means of giving victims "a voice", while ultimately echoing the position of earlier participants that the decision-making around sexual history applications was a "legal test" for the prosecutor and ultimately the court. Similarly, some cynicism was expressed about the need to canvass the victim's views on the application to admit sexual history evidence, on the basis that this was "a new step that had to be built into the process", rather than a substantive and important part of the prosecutor's decision-making in formulating the Crown's attitude to the defence application.

While it is acknowledged that the victim's role in the adjudication of sexual history evidence is still to be developed, both in terms of the policy and jurisprudence around this process, the early evidence from the participants suggests that 'expression' dominates the victim's participatory opportunities in this context, at least in terms of prosecutorial decision-making – the victim's views are being sought and communicated to the court, but there is no indication that they are in any way used to inform the prosecutor's position. On this basis, and at least at the time of writing, the consequence of the *RR* decision has been to provide victims of sexual crime with no more than an expressive role in this particular aspect of prosecutorial decision-making.

6.4.3 Concluding thoughts on 'expression'

Unlike 'consultation' and 'information-provision', the features of an 'expressive' role in prosecutorial decision-making did not feature heavily in the interviews with the participants. Given the traditional foundations of Scotland's adversarial criminal justice system, however, this was not an entirely unexpected finding. That said, opportunities for victims of sexual crime to express in prosecutorial

decision-making process were nonetheless identified during the interviews with the participants, particularly in the context of VRR and the Crown's response to applications to admit sexual history evidence.

Where an 'expressive' role - or at least something that might be equated with such a role - was identified, this was not explicit and, in the case of VRR for example, formed part of a range of participatory opportunities where the nature of the victim's role very much depended upon the information which they chose to provide in the VRR application itself. In the context of sexual history applications, the earlier interviews with participants supported the broad finding that victims of sexual crime had no role in the prosecutor's decision to oppose or acquiesce to defence applications to admit sexual history evidence. Later interviews, however, touched on the emerging nature of a participatory role for victims, but this remains unclear and there was limited understanding of the purpose for which the victim's views were being sought and the subsequent application of these views to the process of prosecutorial decision-making. The position was perhaps best summed up by the participant who suggested that the purpose of seeking the victim's views in this context was to provide an "avenue whereby [victims] are given a voice". On this basis, the current role for victims in the context of prosecutorial decision-making relating to sexual history evidence may best be described as an 'expressive' one. If that is correct, however, it follows that the victim's views have limited instrumental value in this context, which then raises the question as to why this information should be gathered and communicated to the court at all.

In terms of the developing domestic case law, it is becoming increasingly clear that victims of sexual crime do have a lawful interest in the adjudication of sexual history evidence applications: the rape shield legislation itself invokes the victim's dignity and privacy in the statutory test to admit the prohibited evidence;[598] the victim's Article 8 rights are "likely to be engaged";[599] and the general principles set out in the 2014 Act provide for the victim to be able to

[598] Criminal Procedure (Scotland) Act 1995 s.275(1)(c) and s.275(2)(b)(i).
[599] *RR v HM Advocate and LV* [2021] HCJAC 21 at [49].

participate effectively in the decision.[600] Against this background, it is notable that the new processes put in place by COPFS since the *RR* decision are still felt by criminal justice stakeholders to fall "short from ensuring full protection of privacy rights for complainers"[601] and calls for independent legal representation to guide and inform victim participation in this aspect of criminal justice decision-making are still very much live.[602]

This uncertainty around 'expressive' participation captured by the interviews around VRR and sexual history evidence is problematic. It is well established that procedural justice is a matter of considerable importance to victims of sexual crime and, where the input of victims is sought, there is a real risk that this could have negative consequences if the victim's expectations about the purpose of their input are not carefully managed.[603] This means that there must be as much internal clarity as possible about why the institutions of the criminal justice system seek victim input and the use to which it will be put. More than this, however, these observations relating to 'expression' in the context of VRR and sexual history evidence underpin wider findings relating to the fluctuating role that victims of sexual crime have in prosecutorial decision-making and the related absence of a clear, principled framework that guides the integration of victims and their interests into the criminal justice process and the decisions that are taken.

6.5 Summary of key findings: the role of victims of sexual crime

The interviews with the twelve participants provided a wealth of data relating to prosecutorial decision-making and the role of victims of sexual crime in Scotland's criminal justice system. Edwards' typology of participation provides a

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[600] Victims and Witnesses (Scotland) Act 2014 s.1(3)(d).
[601] Rape Crisis Scotland, *Privacy Rights for Sexual Offence Complainers: A Report for the Victim Taskforce* (March 2021).
[602] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020).
[603] Compare A Sanders, C Hoyle, R Morgan and E Cape, "Victim impact statements: don't work, can't work" [2001] Crim LR 447 with J Chalmers, P Duff and F Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] Crim LR 360.

useful tool for breaking this data down and better understanding the relationship that victims of sexual crime have with prosecutors and the various ways in which they interact with the decision-making process. As can be seen from the discussion above, the ways in which victims interact with, influence, and ultimately participate in, prosecutorial decision-making are diverse; ranging from there being no recognised role, to forms of expressive participation and consultation, right through to something close to a controlling influence in discrete decisions. The present research illuminates the participatory opportunities that victims of sexual crime can currently access in the Scottish criminal justice systems and helps us to understand participation as a diverse and important concept in the criminal justice system. By better understanding the current role of victims of sexual crime in the criminal justice system, and the participatory opportunities that are open to them as a result, we will be well placed in Chapter 7 to explore the role that victims ought to have within the criminal process, so that they can participate effectively and consistently in securing their legitimate interests.

Although the rich data which has been generated by the interviews has revealed a range of important themes about the nature of victim participation in the criminal process, three key, over-arching findings have emerged which provide a significant contribution to our understanding of the role that victims of sexual crime play in Scotland's criminal justice system. The key findings are:

(i) That victims of sexual crime are still perceived primarily as witnesses. Victims of sexual crime are primarily viewed by specialist sexual offences prosecutors as witnesses – their role is perceived to be primarily an instrumental one with a focus on information provision to support the prosecution case. At the same time, however, the interviews revealed an awareness of trauma and the need for appropriate support while victims of sexual crime navigate the criminal process. Although it was expressed in different ways, the participants universally considered victims of sexual crime to be witnesses, albeit witnesses with enhanced needs. This finding sits comfortably alongside existing research, which recognises the expansion of victim-centred initiatives since the late 20th century

to better support victims in common law jurisdictions, while nonetheless pointing out that "adversarialism and bipartisanship remain firmly ingrained in the mechanics of the common law criminal trial."[604]

In this sense, the first key finding supports the view that the current role of victims of sexual crime in Scotland's criminal justice system can best be understood through the prism of the partnership approach to victim-centred reform.[605] Here, efforts are made to better support and inform victims, but the rationale for doing this is principally linked to the better performance of the victim's instrumentalised role as information-provider. Any participatory opportunities that arise are still understood and implemented within the structural parameters of this traditional role. Increased participation and trauma-aware practices can accordingly be pursued to meet the victim's needs, but ultimately these practices are grafted onto a traditional approach to justice that remains structurally and culturally geared to instrumentalise victims and exclude them from proceedings. This explains why the interviews revealed an inconsistent and variable approach to participation in the early stage of decision-making, followed by a significant diminution of the victim's participatory opportunities once the prosecution case reached the courts.

(ii) That victim participation is inconsistent and variable. Notwithstanding their perceived role as witnesses, victims of sexual crime have access to a range of participatory opportunities in the way that they interact with prosecutorial decision-making. These participatory opportunities are not, however, static and vary depending upon both the nature of the decision that is being taken and the stage that the criminal process has reached. Broadly speaking, victims of sexual crime have a greater range of more influential participatory opportunities at the earlier stages of prosecutorial decision-making. Victims of sexual crime have the greatest influence when it comes to exerting their wish that criminal proceedings should not be instigated. Victims of sexual crime have the least

[604] J Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (2015) 21 International Review of Victimology 140.
[605] See section 2.3.2.

influence over prosecutorial decision-making once proceedings have been raised and the case has reached court.

(iii) That there is no principled framework which underpins the victim's role. While the participants showed considerable empathy for victims and a sophisticated understanding of the difficulties that victims face, there is no explicit and consciously applied framework which guides specialist sexual offence prosecutors when taking decisions which impact upon a victim's interests. The interviews nonetheless revealed a variety of rationales for interpreting the participants' interactions with victims and the participatory opportunities that should follow. The reasons given varied depending upon the nature of the decision involved and ranged from therapeutic considerations, to instrumental considerations, to the absence of any recognition that the victim's legitimate interests were engaged.

Although it was expressed in different ways, the most common rationale for providing victims with participatory opportunities were those based on the victim's instrumental role in the justice system and the need to secure their best evidence, but this was often mixed with an awareness of trauma and the need to support and listen to victims to prevent further harm. The result was a sense of confusion and ambiguity about the role of victims of sexual crime within the criminal justice system and tensions were revealed when the public interest in presenting the best prosecution case was seen to clash with the interests of the victim. It is notable that the participants placed little emphasis on the general principles set out in ss.1 and 1A of the Victims and Witnesses (Scotland) Act 2014 in terms of their relationship with victims of sexual crime.

The findings from the interviews with the twelve participants add important new depth to our understanding of the role and status of victims of sexual crime in the criminal justice process. Crucially, the findings build upon the conclusions set out in Chapter 4 and reinforce the view that the current position of victims is ambiguous and conceptually unsatisfactory. More than this, the findings from the interviews resonate with existing literature which points to the expansion of the

victim's status and involvement in the criminal justice system, but without displacing the structural, cultural and legal barriers to the proper integration of victim's interest into the formal criminal process and the core values of the traditional, bi-partisan system.[606] To this extent, the partnership approach remains the best way of understanding the role that victims play in the justice system and their relationship with the criminal justice authorities.

At the same time, however, there is evidence that the traditional criminal justice paradigm, and with it the partnership approach, may be starting to come under strain. The interviews did reveal some evidence of participatory opportunities that were perceived as being based on the victim's agency as a person, rather than on improving their ability to support the system.[607] Crucially, the decision of the High Court in *RR* has also raised the profile and significance of the general principles under ss.1 and 1A of the Victims and Witnesses (Scotland) Act 2014, thereby recognising the victim's legitimate interest in the decisions taken in the formal criminal process and the need for the victim to participate in a way that goes beyond their traditional role in the trial.

While the wider significance of *RR* and the general principles under the 2014 Act are still to be developed, there appears to be no reason in principle why "effective participation" under the 2014 Act should not have consequences beyond sexual history applications and impact on other areas of criminal justice decision-making where the victim's legitimate interests can be shown to be engaged. It might be questioned, for example, whether victims of sexual crime can currently participate in a meaningful and effective way in the VRR process without access to legal advice to help them to navigate the decision-making process and the focus of the information that should be included on the victim's VRR form. These sorts of participatory opportunities are not connected with the victim's role as a witness and create increasing tension with the traditional criminal justice paradigm, potentially heralding the beginnings of a reorientation

[606] See section 2.3.
[607] See, for example, section 6.1.2.

of the relationship between victims of sexual crime and the criminal justice authorities.

To the extent that such a reorientation is happening, the research findings suggest that it is not currently guided by any perceptible principle or theory of victim participation, capable of informing system-wide reform and policy development. As seems to be the wider international trend, there is currently no overarching strategy in place to guide this movement towards a new paradigm of victim participation.[608] A theoretical framework that provides a conceptually consistent way of understanding the relationship between victims, the state and the accused – and therefore is capable of integrating victims and their legitimate interests into the criminal process – is urgently required. In the meantime, while chapters 4 – 6 suggest that it is no longer accurate to talk of victims as the "forgotten players" of the criminal justice system, they remain, to use Edwards' terminology, "ambiguous participants" with a "fundamentally equivocal" role in Scotland's criminal justice system.[609] In the context of the criminal justice response to sexual crime, this ambiguity raises real challenges for the development of effective criminal justice policy to combat secondary victimisation and attrition, but also huge opportunities to drive profound improvement if a principled role could be identified. In Chapter 7, I will accordingly explore what role of victims of sexual crime ought to have in the justice system, with reference to a human rights-based approach to criminal justice decision-making.

[608] K Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave Studies in Victims and Victimology, 2019).
[609] I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

Chapter 7: A Human Rights-Based Approach: What Role Should Victims of Sexual Crime Have Within Scotland's Justice System?

7.0 Introduction

In Chapters 4 – 6, I discussed the role that victims of sexual crime play in Scotland's criminal justice system. By looking at victim focused legislation, policy and, crucially, the views and experiences of specialist sexual offences prosecutors, it is possible to see that victims of sexual crime now sit in a rather odd position in the criminal process: they are still primarily viewed by the system as witnesses but at the same time, they have acquired a range of participatory opportunities that do not sit comfortably within the usual parameters of this instrumental role. In short, victims' interests are now recognised, in certain discrete situations at least, as having some legitimacy in the criminal process, but there is no principled framework for consistently integrating victims into the traditional, adversarial system. In the absence of a principled framework for integrating victims' interests into the criminal process, and despite significant progress in the development of victim focused policy and legislation, victims of sexual crime continue to be marginalised and traumatised by a criminal justice system that remains incapable of fully realising their rights.[610]

Against this background, the traditional criminal justice paradigm remains largely intact but, in view of the trajectory of participatory opportunities discussed in Chapters 4 and 6, it no longer provides an entirely satisfactory way of understanding the victim's existing role. As various commentators have observed, and as the present research confirms, the merits of participatory opportunities for victims appear to be increasingly recognised, but the precise role that victims ought to play in criminal proceedings is still to be delineated.[611]

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[610] A Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017) 25; also see the overview of the evidence that this is continuing to happen set out in Chapter 2.

[611] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 243-244.

As a result, even where existing participatory opportunities can be identified – such as through the Victims' Right of Review scheme - victims are not well placed to take full advantage of participation due to the residual assumptions of the traditional approach and the associated lack of access to specialist legal knowledge and guidance.[612]

This uncertainty in terms of the space that victims occupy has an impact on the justice system's ability to meet their needs and the efficacy of the policy responses to the problems of attrition, secondary traumatisation and the wider 'justice gap' in sexual offences cases. If we are serious about confronting these long-standing problems,[613] we will require a fundamental shift away from a criminal justice system that is structured around the assumptions of the traditional paradigm – where the victim's status is seen through the prism of their instrumental, passive role as witness - towards a human rights-based approach, which sees victims of sexual crime as active agents with legitimate interests in a process that prioritises the realisation of rights.

In this chapter, I propose the explicit adoption of a human rights-based approach to the prosecution of sexual crime. I outline how this ought to look, both in principle and practice, and what this means for the role of victims of sexual crime and their relationship with the criminal justice authorities. I conclude that the criminal justice system, as presently structured, is ill equipped to respect, protect and promote the Convention rights of victims of sexual crime and that this manifests itself in the well documented challenges that the justice system faces in meeting victims' needs, managing attrition and mitigating secondary victimisation.[614] A "respected and acknowledged"[615] role for victims of sexual crime is required if these long-standing problems are to be addressed and a human rights-based approach provides a principled and consistent framework for

[612] See section 6.4.1.
[613] See section 2.2.
[614] See discussion in Chapter 2.
[615] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 176.

achieving this, while at the same time future-proofing[616] Scotland's justice system from the inevitable human rights-based challenges that are to come.

7.1 A human rights-based approach to the criminal justice system in principle

7.1.1 *Victims' access to human rights-based remedies*

As a result of Scotland's constitutional settlement since devolution, the ECHR has a central role to play as part of the normative structure of the criminal justice process.[617] Police, prosecutors and courts cannot, as public authorities, lawfully act in a way that is contrary to Convention rights[618] and the dual framework of the Human Rights Act and the Scotland Act affords Convention rights the status of higher law as against any legislation passed by the Scottish Parliament or any act of a member of the Scottish Government.[619] The benefits of incorporating human rights principles into organisational policies and practices are well recognised in Scotland and a broad commitment to human rights leadership is readily evidenced by the work of the First Minister's Advisory Group on Human Rights Leadership[620] and, more recently, the National Taskforce for Human Rights Leadership.[621] Scotland's national human rights institution, the Scottish Human Rights Commission,[622] also promotes a human rights-based approach to policy and practice which "emphasises the empowerment of rights holders to know and claim their rights, and the ability and accountability of duty

[616] The Carloway Review: Report and Recommendations (17 November 2011) 2 <The Carloway Review - Parliamentary Business : Scottish Parliament> accessed 03 August 2022.
[617] See section 1.3.1
[618] s.6(1) of the Human Rights Act 1998.
[619] A O'Neill, 'The Human Rights Act and the Scotland Act – the New Constitutional Matrix' in Lord Reed (ed), *A Practical Guide to Human Rights Law in Scotland* (W. Green/Sweet and Maxwell, 2001) 1.
[620] A Miller, *Recommendations for a new human rights framework to improve people's lives: Report to the First Minister* (First Minister's Advisory Group, 10 December 2018)< First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf (humanrightsleadership.scot)> accessed 06 August 2022.
[621] National Taskforce for Human Rights Leadership Report (March 2021) <National Taskforce for Human Rights Leadership Report (www.gov.scot)>accessed 06 August 2022.
[622] Scottish Commission for Human Rights Act 2006.

bearers to fulfil those rights."[623] At the heart of this approach lie the principles of participation, accountability, non-discrimination, empowerment of rights holders and legality (the 'PANEL' principles).[624] As a matter of principle then, human rights norms should be the focal point of public sector decision-making, and this should be reflected in the criminal justice system itself.

Notwithstanding the domestication of human rights in Scotland's post-devolution constitutional matrix, the criminal justice system is nonetheless still grounded in the pre-Human Rights Act/Scotland Act legal landscape of the traditional criminal justice paradigm. As I have discussed in Chapters 4 and 6, criminal justice is still conceived primarily as a matter between the state and the accused, with sexual crime understood principally as a violation of the state's criminal code, not as a violation of the victim's human rights. As a result, the criminal process continues to focus on the status of victims as a source of information for decisions and as a tool for improving the chances of conviction, rather than as people in whom the criminal justice system should be interested in their own right.[625]

This is not to say that the enforcement of human rights norms has not already had an important impact on the development of Scotland's justice system since devolution. Indeed, the incorporation of Convention rights mentioned above has so far improved the approach of Scotland's criminal justice system in several key areas, such as the disclosure of evidence by the prosecution[626] and the accused's right to receive legal advice prior to interview by the police.[627] Both of these have had a significant impact on the criminal justice system in Scotland, with

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[623] Scottish Human Rights Commission, *A Human Rights Framework for the Design and Implementation of the Proposed Acknowledgement and Accountability Forum and Other Remedies for Historic Child Abuse in Scotland* (February 2010) 14-15.
[624] Scottish Human Rights Commission, *Human Rights-Based Approach: A Self-Assessment Toolkit* (December 2018) <shrc_panel_self-assessment_tool_vfinal.pdf (scottishhumanrights.com)> accessed on 06 August 2022.
[625] J Shapland, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies' in A Crawford and J Goodey (eds), *Integrating Victim Perspective Within Criminal Justice* (Ashgate Publishing, 2000) 157.
[626] *Holland v HM Advocate* 2005 SCCR 417*, Sinclair v HM Advocate* 2005 SCCR 446.
[627] *Cadder v HM Advocate* [2010] UKSC 43.

the latter in particular coming as a "shock to the system,"[628] triggering years of consultation on law reform,[629] significant new legislation[630] and the abandonment of hundreds of live cases.[631] While COPFS initially resisted these right-based developments – arguing, for example, in *Cadder*,[632] that the guarantees otherwise available under the Scottish system were sufficient to secure a fair trial - few would now argue that Scotland's recognition of minimum human rights standards for the accused has not led to significant improvements in both substantive and procedural justice outcomes. That said, if we are to avoid similar systemic shocks in the future, a continued reliance on reactive reforms based on piecemeal human rights challenges is unlikely to be the answer. Rather than characterising the strengthening of rights-based protections for the accused as a threat to victims,[633] political discourse should place greater emphasis on the proactive realisation of rights for everyone engaged in the system; seeking out routes to reform that integrate rights-based norms into the justice system and recognising the need to develop a culture of human rights leadership across the institutions of criminal justice.

For victims of sexual crime, however, their structural marginalisation from the criminal process makes it harder for their rights to be fully realised as they do not routinely have access to legal advice and representation. Even where opportunities do exist for victims to participate in decision-making - for example through the Victims' Right to Review scheme - the complexity of the decisions involved, and the legal rules, policies and processes which underpin them, reduces the value of participation without access to professional support. The practical realisation of victims' rights-based interests under the obligation to

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[628] The Carloway Review: Report and Recommendations (17 November 2011) page 2 <The Carloway Review - Parliamentary Business : Scottish Parliament> accessed 03 August 2022.
[629] Reforming Scots Criminal Law and Practice: The Carloway Report Scottish Government Consultation Papers 2012; Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of Corroboration, Scottish Government Consultation Paper 2013; The Post-Corroboration Safeguards Review Consultation Document 2014; The Post-Corroboration Safeguards Review Final Report 2015.
[630] See, for example, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010; the Criminal Justice (Scotland) Act 2016.
[631] Including 5 rape cases see – 'Rape Allegations Among Cases Affected by Cadder Ruling' (*BBC News*, 9 February 2011< Rape allegations among cases affected by Cadder ruling - BBC News> accessed 06 August 2022.
[632] *Cadder v HM Advocate* [2010] UKSC 43.
[633] See section 2.3.1.

criminalise, investigate and protect is undermined by the victim's structural exclusion from key aspects of the process.

The continued influence the 'pre-Human Rights Act/Scotland Act' legal landscape on the justice system's approach to victims, is further encapsulated by the Lord Advocate's constitutional status within Scotland's justice system, from which flows the assumption that she enjoys near absolute discretion to decide whether a prosecution should proceed. The position here is usefully illustrated in the three-judge decision of the High Court of Justiciary in *HM Advocate v Cooney*.[634] This case involved allegations relating to the sexual abuse of a child by a schoolteacher on various occasions between 1977 and 1980. An investigation took place in the early 1990s when the disclosures of abuse first emerged but, after what appears to have been a limited investigation by the police, the Procurator Fiscal wrote to the accused's solicitor in December 1992 and advised them that no proceedings would be taken against their client. Although the accused was ultimately prosecuted and served with an indictment after the investigation was revisited nearly thirty years later, the accused's solicitor raised a plea in bar of trial, arguing that the Lord Advocate, through the Procurator Fiscal Depute, had renounced the right to prosecute the accused by virtue of the letter that the Depute had written in 1992. The court upheld the plea in bar of trial and the prosecution was ended, based on the prosecutor's earlier intimation that no proceedings would be taken and that this should be able to be relied upon. The prosecutor, however, appealed, arguing in part, that a more flexible approach should be adopted to the renunciation of the right to prosecute due to the impact on the victim's Convention rights.[635].

In delivering the court's judgment, Lady Dorrian, however, rejected the prosecution submissions, noting that:

[634] [2022] HCJAC 10.
[635] [2022] HCJAC 10 [8]

> "The right to make a decision renouncing the intention to prosecute – and the obligation to be held to it – are reciprocal elements stemming from the absolute discretion of the Lord Advocate to decide whether or not to prosecute. The notion that the Lord Advocate should be held to a clear and unequivocal statement that she will not prosecute a named individual for a particular criminal offence is a corollary of the absolute power of decision making in this area which vests in the Lord Advocate, and which prevents the court from making inquiry into, or interfering with, the exercise of her discretion on such matters."[636]

Although the court did consider the impact of the Lord Advocate's apparently unchallengeable discretion to renounce criminal proceedings on the Convention rights of victims, the judgment in *Cooney* can be read as reinforcing traditional assumptions about the victim's status in the justice system, with Lady Dorrian noting that:

> "…whilst the rights of complainers (and others) within our system has been the subject of significant development over recent years, these rights do not extend to allowing a challenge to be made to the decision of the Lord Advocate on whether or not to prosecute. A review of a decision may be requested, but the review is carried out by the Lord Advocate, and her decision cannot be the subject of challenge in or by the courts."[637]

Notwithstanding this apparently clear endorsement of the Lord Advocate's absolute discretionary powers, it is noted that the court in *Cooney* did not reject the principle that an "egregious or significant" error in the decision-making process, including the decision to renounce the right to prosecute, could amount to a violation of the victim's Convention rights under Articles 3 and 8 ECHR.[638] That being so, and given that the decisions of the courts and of prosecutors

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[636] [2022] HCJAC 10 [18].
[637] [2022] HCJAC 10 [34].
[638] [2022] HCJAC 10 [29] – [31].

which are incompatible with Convention rights would - in the post-Human Rights Act/Scotland Act legal landscape - fall to be unlawful,[639] the traditional notion that the Lord Advocate's constitutional status places her decisions beyond the reach of the law, and beyond the scrutiny of the courts, is of questionable sustainability. Indeed, the courts have already confirmed that the Lord Advocate's discretion in raising criminal proceedings does not take place in a legal vacuum and must be subject to legal norms;[640] and it is difficult - when perceived through the prism of the victim's rights-based interests, the principle of legality and the rule of law – to see why the traditional assumptions relating to the Lord Advocate's unregulated discretion should continue to hold sway, at least where that discretion can be shown to have been exercised in a way that is incompatible with Convention rights, or is otherwise unlawful, irrational or contrary to publicly stated policy.

This ongoing difficulty in recognising the victim's legitimate, rights-based interests within the criminal process, and in the exercise of criminal justice decision-making, remains tied to the instrumental nature of the victim's primary role.[641] As the justice system is presently structured therefore, victims of sexual crime are rarely in a position to raise human rights-based challenges where their Convention rights go unrealised in the criminal process.[642] This has an impact on the ability of victims to "participate effectively in the investigation and proceedings"[643] and calls into question not just compliance with ECHR norms, but with the statutory obligations that are placed on the criminal justice authorities as well.[644] To paraphrase Lord Carloway, a more conscious application of express and implied rights of the Convention is required if we are to effectively respect, promote and protect the human rights of *both* those accused of crime, and also those affected or potentially affected by crime as

[639] Human Rights Act 1998, section 6(1).
[640] *Whitehouse & Clark v The Chief Constable and Lord Advocate* [2019] CSIH 52.
[641] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 138.
[642] N Westmarland, *Rape and Human Rights: A Feminist Perspective* (unpublished PhD thesis, University of York, 2005) 196-205.
[643] Victims and Witnesses (Scotland) Act 2014 s.1(3)d).
[644] For example, the statutory obligation to consider the general principles under ss 1 and 1A of the Victims and Witnesses (Scotland) Act 2014.

well.[645] As a starting point, this means fundamentally re-evaluating long-standing assumptions about the nature of the criminal justice response to sexual crime and the roles, responsibilities and obligations of key actors in the criminal process, including the Lord Advocate herself.

7.1.2 Systemic challenges in meeting victims' needs

The link between the current role of victims in the criminal justice system and their marginalisation and re-traumatisation throughout the process has been well mined over the years. By the mid-1980s, for example, Shapland, Willmore and Duff had highlighted the need for a "respected and acknowledged role" for victims, pointing out that:

> "If [the victim] is a non-person in the eyes of the professional participants, at least as far as the day-to-day functioning of the system is concerned, he will not be informed or consulted as a matter of course."[646]

The findings from this early study still resonate in more recent research that has repeatedly highlighted the ongoing marginalisation of victims and the significant impact that this has on the victim's experience of secondary traumatisation and, ultimately, their perception of whether justice had been achieved, regardless of the substantive outcome of the case.[647]

Doak recognises a similar pattern in the context of the criminal justice system in England and Wales and points out that despite repeated recognition of the plight of victims by successive working groups, reform bodies and governments, a

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[645] The Carloway Review: Report and Recommendations (17 November 2011) page 1 - 3 <The Carloway Review - Parliamentary Business : Scottish Parliament> accessed 03 August 2022.
[646] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 181.
[647] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (Scottish Centre for Crime and Justice Research, 2019) < https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf> accessed 04 August 2022.

reluctance to accept the need for structural change to the traditional approach persists.[648] In Scotland, both COPFS and the Scottish Government have nonetheless begun to recognise the systemic nature of the challenges that victims face when engaging with the criminal process. Indeed, in response to the criticism of COPFS' treatment of victims heard during the Justice Committee's 2017 inquiry into the role and purpose of COPFS, the Crown Agent's written evidence noted that "the treatment of victims and witnesses is a system wide issue", while the then Cabinet Secretary for Justice referred to the ongoing "systemic challenges in our justice system."[649]

The characterisation of the marginalisation of victims as being a structural, or systemic, issue was also supported by the present research. Indeed, it is clear from the interviews with all twelve participants that the ongoing instrumentalisation of victims at key stages of the criminal process is not a failing of attitude, understanding or empathy on the part of individual criminal justice professionals, but rather is due to the structural make up of a criminal justice system that positions victims as building blocks in the prosecution case, tools and ultimately, the means by which a conviction is achieved.[650] The individual participants showed real empathy for victims of sexual crime and a genuine commitment to treating them with professionalism and respect, but, as far as the processes and procedures that make up the day to day functioning of the criminal justice system are concerned, the victim remains a "non-person."[651]

There is, in principle at least, little difficulty in ensuring that the justice system, as presently structured, is capable of properly respecting the rights of those accused of crime, due to their access to legal advice, representation and, crucially, due to the accused's status as a party to the proceedings with a recognised interest in the criminal process. This is evidenced by the success of

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[648] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 144-145 and 285-287.
[649] Justice Committee, *Role and Purpose of the Crown Office and Procurator Fiscal Service* (9th Report, 2017) paras 265 and 266.
[650] See section 6.3.1.
[651] J Shapland, "Victims, the Criminal Justice System and Compensation" (1984) 24 British Journal of Criminology 131 at 136.

rights-based challenges - discussed briefly above - that the justice system has rightly accommodated since Convention rights were incorporated into Scots law as part of the devolution settlement. None of the rights-based reforms secured on behalf of those accused of crime has undermined the legitimate interests of victims and, similarly, there is no reason to assume that recognising the rights-based interests of victims will undermine the interests of the accused. Indeed, the interests of those accused of crime and the interests of victims of crime are often aligned: both have an interest in consistent, transparent decision-making; both have an interest in a prompt and expeditious enquiry; and both have an interest in the maintenance of a robust criminal justice system that produces accurate outcomes that are widely perceived to be legitimate and procedurally fair. As Lady Dorrian points out, many reforms designed to improve the experience of victim will have a beneficial effect on the accused too.[652] Clearly, where conflict is identified, however, it is important that this is managed in a consistent, proportionate and principled way. The challenge then, is to identify a principled basis upon which proper respect for the rights and interests of both victims and those accused of crime can be secured together within the criminal process.

7.1.3 Sexual crime as both a public wrong and a human rights violation

If the systemic challenges of the justice system's response to victims are therefore to be addressed, and if a "respected and acknowledged role" for victims is finally to be carved out, then the structural foundations of the system's response to sexual crime require to be re-visited, particularly in light of Scotland's post-devolution constitutional settlement and the privileged position that this affords to the protection and realisation of Convention rights. Against this background, the proper respect for rights should be recognised as a central aim of the criminal process and, to use Campbell, Ashworth and Redmayne's phraseology, should be seen "not merely as a side-constraint on the pursuit of

[652] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) paras 1.33-1.36.

accuracy or 'rectitude' in convicting the guilty and acquitting the innocent, but an objective to be attained while pursuing that aim."[653]

The traditional criminal justice paradigm does not principally conceptualise the commission of sexual crime as a human rights issue, but rather as a public wrong characterised by the infringement of the state's criminal code.[654] For this reason, sexual crime continues to be understood as a violation of the public interest which must be vindicated by the state, thereby setting the stage for a showdown between the public prosecutor and the accused with the victim "pushed completely out of the arena."[655] It follows from this foundational understanding of crime as being fundamentally a wrong against the state, that the victim's main function must be that of a witness: a stakeholder in the offence perhaps, but ultimately an outsider[656] with no actual standing in the criminal process.[657] When the punishment of crime is conceptualised in this way, that is to say as a vindication of the state's interest in maintaining the public legal order, then it is possible to see how the marginalisation of victims follows as a structural consequence. Indeed, from this perspective, the victim's interest in the criminal process is of no greater significance than that of any other member of the public[658] and the principled accommodation of the victim's interests within the criminal process becomes fraught with difficulty because their role and status is not such that it affords their input with any legitimacy in, or relevance to, criminal justice decision-making. Participatory rights for victims, alongside the broader integration of what are perceived to be their private interests within the criminal process are therefore seen as illegitimate,

[653] L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th ed, Oxford University Press: 2019) 46.
[654] R A Duff, *Punishment, Communication and Community* (Oxford University Press, 2000) 62.
[655] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1.
[656] P Rock, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (Clarendon Press, 1993) 195.
[657] J Shapland and M Hall, 'Victims at Court: Necessary Accessories or Principal Players at the Centre Stage?' in A Bottoms and J Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2011) 163.
[658] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 British Journal of Criminology 585.

irrelevant, and even as a threat to the proper functioning of a fair and objective criminal process, focused on broader public interests.[659]

Although the present research confirms that victims are participating in criminal justice decision-making at some stages and to varying degrees, we can see that this structural tension in integrating their interests into the criminal process persists. Indeed, the participants in the present research still saw the victim's main role through the prism of the traditional paradigm and, on that basis, struggled to explain why and how the views, needs and concerns of victims should matter and why they should affect certain decisions but not others.[660] Several participants formulated victims' interests, for example, as forming part of the overall public interest; others made a moral case for integrating victim's needs into certain decisions; and sometimes participants simply did not see the relevance of the victim's interests to their decisions (even where they had previously seen the importance of considering the victim's interests in the context of another decision). Ultimately, this uncertainty is not attributable to inexperience or apathy on the part of the participants (all of the research participants were specialists in the prosecution of sexual crime, of considerable experience and demonstrably engaged and committed to supporting victims in their work), but rather to the structural positioning of victims within the traditional criminal justice paradigm as instruments, whose main function lies in facilitating the state's commitment to righting public wrongs through the enforcement of its laws.

As already noted, the commission of sexual crime is not just a grave violation of the criminal law, but it also amounts to a human rights violation.[661] Not only is this well-established in the jurisprudence of the ECtHR,[662] but this broader understanding of the relationship between crime and the scope of human rights

[659] J Doak, ''Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 294.
[660] See section 6.3.2.
[661] See Section 1.3.2; also see I Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations' [2008] European Human Rights Law Review 357.
[662] See Chapter 3.

protection, is also set out in the 2012 EU Directive on rights, support and protection of victims of crime, which has been articulated in Scots law through the provisions of the Victims and Witnesses (Scotland) Act 2014. At Recital 9, for example, the 2012 Directive acknowledges that:

> "Crime is a wrong against society *as well as a violation of the individual rights of victims*. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner [my emphasis]."[663]

The idea then that states have human rights-based obligations to both those accused of crime *and* victims of crime is neither new nor radical, and the position is evocatively illustrated in the imagery of the "sword" and "shield" function[664] of human rights in the application of criminal law mechanisms – evoking the defensive obligation to secure rights against the state in the public sphere, and the offensive obligation to mobilise the power of the state to respond to rights violations in the private sphere.[665]

Where the traditional criminal justice paradigm starts from a conception of crime as a simple violation of the state's laws, therefore, the human rights-based approach explicitly recognises that sexual crime also constitutes a violation of fundamental human rights. The former, as we have seen, positions victims at the margins of the criminal process with a limited instrumental role as witness to their own victimisation,[666] whereas the latter recognises that the victim is also the subject of a serious human rights violation with a legitimate, legal interest in the state's response. When seen through the prism of human

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[663] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 < Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (legislation.gov.uk)>accessed 06 August 2022.

[664] F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; more broadly, also see L Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020).

[665] See discussion in section 1.3.3.

[666] A status recently confirmed in the High Court in *RR v HM Advocate and LV* [2021] HCJAC 21 at [51] ("The complainer's status is still that of a witness to the facts libeled").

rights norms, the focus of the state's function in prosecuting crime falls, not just on the public interest in the violation of the criminal code, but crucially, also on the state's legal obligation to remedy a wrong that flows from the human rights of the individual victim concerned.

Where the traditional paradigm is capable of recognising just two actors, the state and the accused, Dearing envisages a 'rights paradigm' taking the shape of a pyramid –with the victim, the accused and the prosecutor at the corners of the base; and the court at the top, confronted by the various claims of the parties.[667] Within this structure, the state must respond to sexual crime, not solely because it is alleged that the accused has acted contrary to the relevant criminal law, but also because the state is obliged to undertake an effective investigation and prosecution in response to the victim's rights-based claim to the effective enforcement of criminal law mechanisms.[668] When sexual crime is conceptualised in this way, and considered alongside the state's procedural obligation to effectively respond to human rights violations, we can start to see how a principled framework for integrating the victim's legitimate, rights-based interests into the justice system might be understood and the consequences that this would have for the victim's role in the criminal process.

7.2 A human rights-based approach to prosecutorial decision-making in practice

Against this background, and in view of the embedded mechanisms for human rights protection in Scotland's constitutional settlement, Lord Carloway's call for the adoption of a human rights-based approach to criminal justice decision-making must be re-visited.[669] In practice, this means moving away from the traditional criminal justice paradigm, which is incapable of adequately recognising and empowering victims as rights bearers, and moving towards an

[667] A Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017) p.23.
[668] K Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill Publishing, 2017).
[669] The Carloway Review: Report and Recommendations (17 November 2011).

approach that seeks to respect, protect and fulfil the rights of *everyone* engaged in the system: namely, a human rights-based response to the prosecution of sexual crime.

As I discussed in Chapter 3, it is well established in the jurisprudence of the ECtHR that the state bears various duties to mobilise an effective criminal justice response to the investigation and prosecution of sexual crime. Indeed, I have identified a broad framework of obligations placed on the criminal justice authorities to criminalise violations of Convention rights; to investigate violations of Conventions rights; and to protect victims from Convention rights violations while they participate in the criminal process. From these procedural obligations to respond to what Kamber calls "human rights offences,"[670] flows the potential for victims of sexual crime to assert a wide-ranging interest in the proper application of the criminal process as their case progresses through the justice system, from the initial investigation to the conclusion of the case in court.

The trajectory of the rights that victims have acquired in ECHR jurisprudence has practical consequences for the criminal justice systems across the United Kingdom, and the broad scope of these implications have been discussed elsewhere. Starmer, for example, argues that "victims' rights present a fundamental challenge to the basic criminal justice model"[671] and highlights how the obligation to put in place effective criminal law provisions to protect victims "brings human rights law into the heart of prosecution decision-making."[672] For Londono, the development of victim's rights has the potential to significantly "shift the dynamics" of adversarial criminal trials and she points out, in broad terms, that the fulfilment of the requirement to conduct an effective investigation may be put in doubt by the systemic failures of the criminal justice

[670] K Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill Publishing, 2017) 19
[671] K Starmer, 'Human Rights, Victims and the Prosecutions of Crime in the 21st Century' [2014] Crim LR 777.
[672] K Starmer, 'Human Rights and Victims: The Untold Story of the Human Rights Act' [2014] European Human Rights Law Review 215.

system to respond adequately to rape cases.[673] Although Londono critiques the criminal justice system in England and Wales, similar systemic issues have long been identified in Scotland's response to sexual crime - from problematic attitudes still held by criminal justice personnel,[674] to endemically high rates of attrition,[675] protracted delays[676] and reports of victims findings their contact with the criminal process to be severely re-traumatising.[677] Against this background, Londono's warning that criminal justice authorities must "re-double their efforts" if their response to sexual crime is to remain Convention rights compliant, is as applicable in Scotland today and it is in England and Wales.[678]

The risk that fundamental Convention rights may be imperilled by the status quo is accordingly acute. From the perspective of a human rights-based response to the prosecution of sexual crime in Scotland, this raises a variety of practical implications for the criminal justice authorities to consider. In what follows, I will discuss how a human rights-based approach - centred around the principles of participation, accountability, non-discrimination, empowerment and legality - might be capable of re-defining the role of victims and their relationship with the criminal justice authorities. I will provide examples of areas of prosecutorial decision-making that are likely to engage the rights-based interests of victims to illustrate the scope of the human rights-based approach and its impact on the role that victims should play within the criminal process.

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[673] P Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' [2007] European Human Rights Law Review 158.

[674] Survivor Reference Group, Police Responses in Scotland Report (Rape Crisis Scotland, 2021)<RCS reports and publications | Rape Crisis Scotland>accessed on 06 August 2022.

[675] For example, in 2018-19, 2,426 rapes/attempted rapes were reported to the police, but there were only 153 convictions (see Scottish Government, *Recorded Crime in Scotland 2019-20* (2020) table 1 and Scottish Government, *Criminal Proceedings*, 2018-19 (2020), table 4(b). Roughly 6% of reported cases, therefore, make it through the system to a conviction. This does not, of course, even include attrition at the point of deciding whether to report to the police.

[676] Scottish Courts and Tribunal Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) section 1.27.

[677] O Brooks-Hay, M Burman and L Bradley, *Justice Journeys: Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (Scottish Centre for Crime and Justice Research, 2019) section 3.5.3.

[678] P Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' [2007] European Human Rights Law Review 163.

These examples are not intended to be exhaustive, and it is suggested that the recognition of the victim's legitimate interest in these decisions need not undermine the accused's legitimate interest in the proper administration of justice. While it is acknowledged that it is too simplistic to argue that the victim's and the accused's rights will always converge, the reforms arising from the application of the human rights-based approach would improve the quality and transparency of decision-making, while ensuring that the legitimate interests of all rights-bears are appropriately integrated and respected inside the criminal process. In common with the victim-centred reforms proposed by Lady Dorrian's Review Group, the reforms which arise from the alignment of the victim's role with the human rights-based approach would be in "everyone's interests,"[679] improving the legitimacy of criminal justice decision-making while providing a principled framework for the assessment of competing claims.[680]

7.3 Challenging decisions not to prosecute

To explore how, in practice, the rights-based claims of victims of sexual crime might interact with prosecutorial decision-making, there is merit in looking closely at the decision to take no proceedings by the Procurator Fiscal. For a prosecution to take place in Scotland, there must be a technical sufficiency of evidence (that is to say, there must be at least two sources of evidence capable of establishing the essential elements of the alleged crime - the 'sufficiency test'),[681] the available evidence must be sufficiently reliable and credible (the 'no realistic prospects of a conviction test') and proceedings must be judged to be in the public interest (the 'public interest test').[682] There are accordingly three distinct avenues whereby a breach of the victim's Convention rights under

[679] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) section 1.35.
[680] See section 1.3.4; F Klug, 'Human Rights and Victims' in E Cape (ed) *Reconcilable Rights? Analysing the Tensions Between Victims and Defendants* (Legal Action Group, 2004) 119.
[681] See discussion relating to the 'corroboration requirement' at section 1.2.3.
[682] The Prosecution Code frames these tests as "legal and public interest considerations". Both the quantitative and the qualitive assessment of the evidence (that is to say, the 'sufficiency test' and the 'no realistic prospects of a conviction test') fall under 'legal considerations' within the Prosecution Code. In practice, they are considered separately in serious sexual offence cases. There is no publicly available published policy setting out how the 'no realistic prospects test' should be applied.

Article 3, 8 and 14 ECHR might arise in the decision-making process if an allegation relating to sexual offending is not prosecuted. I will look at each of these in turn.

7.3.1 Insufficient admissible evidence

The legal assessment of the evidence in any given case, and the judgment relating to whether there exists sufficient evidence to satisfy the corroboration requirement in Scots law is a matter for the public prosecutor alone.[683] As master of the instance, the Lord Advocate is considered to hold absolute discretion as to whether to prosecute in the Crown's name.[684] While the present research has found that victims of sexual crime exercise a broadly consultative role in the initial decision to raise proceedings, their views and attitude to any future criminal prosecution clearly have no bearing on the prosecutor's quantitative assessment of the evidence under the sufficiency test. As one participant put it:

> "Just because a complainer is desperately keen to give evidence, if, at the end of the day, there's not a sufficiency, well, her willingness to engage is neither here nor there – there's not a sufficiency."

The opportunity to ask COPFS to look at the evidence again through the Victim Right to Review scheme (VRR) is available,[685] but, in the absence of new evidential material, it might reasonably be anticipated, unless there has been an obvious mistake, that the reviewing prosecutor will be unlikely to change the assessment of whether there is a legal sufficiency when confronted with the

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[683] Crown Office and Procurator Fiscal Service, Prosecution Code, updated July 2021, p.5<COPFS Prosecution Code - August 2021.pdf> accessed at 06 August 2022; Also see S Moody and J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press, 1982) 30.
[684] P Arnell and L Sharp, 'Challenges to Prosecutorial Discretion' 2016 SLT (News) 113; HM Advocate v Cooney [2022] HCJAC 10 [18].
[685] See section 4.3.4.

same evidential picture.[686] As I discussed in Chapter 6,[687] in the absence of professional support and guidance, victims are not well placed to challenge prosecutorial decisions based on a technical, legal assessment of the evidence and this is also likely to reduce the effectiveness of VRR as a tool for effective scrutiny.[688] On any view, therefore, victims of sexual crime currently have a limited role in the decision to raise criminal proceedings where the legal sufficiency of the available evidence is in issue.[689]

When the investigation and prosecution of sexual crime is seen through the prism of the victim's rights-based claim to an effective investigation, however, a re-orientation of the victim's relationship with the criminal justice authorities must follow. As well as being an important witness, the victim must now also be understood to exercise agency as a rights-holder in the decision-making process. Rather than being viewed as "a problem to be managed", victims of sexual crime can be positioned as "integral parts of justice" [690] with a legitimate, legal basis to insist on the proper application of criminal law mechanisms to protect, respect and fulfil their rights.[691]

The assessment as to whether there is sufficient evidence to prosecute allegations of sexual crime is often finely balanced.[692] Indeed, Police Scotland only routinely report cases to COPFS where it is considered that a prima facie sufficiency of evidence is available or - where public safety considerations are in

[686] That said, of the 144 VRR applications received by COPFS between April and November 2017, the Inspectorate of Prosecution examined a sample of 55 cases and found that some 18% (10 cases) resulted in a successful review. Of these 10 successful reviews, half were successful because the reviewing prosecutor deemed the original assessment of sufficiency was incorrect. See Inspectorate of Prosecution in Scotland, Thematic Report on the Victims' Right to Review and Complaints Handling and Feedback Follow-up Report, May 2018, available at Victims' Right to Review: report, Complaints Handling and Feedback: follow-up - gov.scot (www.gov.scot).

[687] See section 6.4.1.

[688] M Iliadis and A Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58 British Journal of Criminology 550.

[689] See section 6.1.1.

[690] J Shapland, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate Publishing, 2000) 148.

[691] See Chapter 3.

[692] HM Inspectorate of Prosecution in Scotland, Follow-up Review of the Investigation and Prosecution of Sexual Crime (August 2020) p.15 <Investigation and prosecution of sexual crime: follow-up review - gov.scot (www.gov.scot)>accessed on 07 August 2022.

play - where there are active lines of investigation being pursued which are likely to result in a sufficiency of evidence.[693] Although police officers are not legally qualified, they are criminal justice professionals with a practical working knowledge of the rules of corroboration and there should therefore be at least some basis to consider that a sufficiency of evidence will be available in every case reported to COPFS. Notwithstanding this, in a sample of eighty-two sexual offence cases that had been reported to COPFS where the accused had yet to appear in court, the Inspectorate of Prosecution found that fourty (just under 50%) were nonetheless marked for no proceedings by the prosecutor on the basis that there was insufficient evidence.[694] Clearly, therefore, there is at least some scope for differences of opinion or interpretation to be applied in the legal application of the corroboration rule which underpins the sufficiency test in Scotland.

The position is reinforced further by developments in the law of corroboration itself, highlighting longstanding uncertainty and confusion in the application of the corroboration rule to the proof of sexual crime.[695] Indeed, it took the best part of a decade following the enactment of the Sexual Offences (Scotland) Act 2009 for it to be "conclusively settled" that the absence of reasonable belief in consent does not require to be separately corroborated in rape and other sexual offence cases.[696] Strikingly, the majority of Scotland's most senior judicial office holders have endorsed the view that the corroboration "rule does not have a settled application of a sort which is conducive to the effective and predictable operation of the criminal law"[697] and have indicated that "confusion over the

[693] See for example, Police Scotland and COPFS, Joint Protocol Between Police Scotland and the Crown Office and Procurator Fiscal Service: In Partnership Challenging Domestic Abuse (May, 2019) paras 29-32 <in-partnership-challenging-domestic-abuse-joint-protocol-copfs-ps-may-2019.pdf> accessed on 23.7.22.
[694] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 143.
[695] J Chalmers, 'Distress as Corroboration of Mens Rea' 2004 SLT (News) 141; Lord Hope of Craighead, 'Corroboration and Distress: Some Crumbs from Under the Master's Table' in J Chalmers, F Leverick and L Farmer (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 12.
[696] See *Graham v HM Advocate* [2017] HCJAC 71, *Maqsood v HM Advocate* [2018] HCJAC 74 and *Nyiam v HM Advocate* [2021] HCJAC 44 at [21].
[697] Senators of the College of Justice, Response to the Consultation on the Not Proven Verdict (12 July 2022) p.17 < https://www.judiciary.scot/home/media-information/media-hub-news/2022/07/12/senators'-consultation-response-on-not-proven-verdict> accessed on 08 August 2022.

requirements of the rule has continued to be present, even at appellate level."[698]

In short, while it is accurate to describe the corroboration rule in Scotland as requiring a technical, quantitative assessment of the evidence, it remains the case that its application is complex and there is ample potential for subjective judgments or plain legal errors to be made by the prosecutor (and, indeed, by the police at the stage of deciding whether there is sufficient evidence to report to COPFS) in assessing the legal sufficiency of the evidence.[699] On this basis, it must be recognised that under a human rights-based approach to prosecutorial decision-making – and contrary to the assumptions of the traditional criminal justice paradigm[700] - victims of sexual crime have a legitimate interest in participating in the enforcement of their Convention rights by scrutinising and, where appropriate, challenging the prosecutor's assessment of the evidence to ensure that the law is correctly and appropriately applied in practice.

The mechanisms of the Victims' Right to Review scheme (VRR) therefore become particularly important in this context as they provide victims of sexual crime with an opportunity to seek information about the investigation and the reasons which underpin the decision to take no action. As matters stand, however, the application of the VRR process might not be sufficiently transparent to allow victims of sexual crime to participate effectively in the scrutiny of decision-making that imperils the realisation of their right to an effective criminal justice response.[701]

As discussed in Chapter 6,[702] the interviews with specialist sexual offence prosecutors revealed evidence that victims of sexual crime often use the VRR process to resort to emotive appeals for a decision to be changed. This is, however, often fruitless, particularly where the decision not to prosecute has

[698] *Ibid*, p.17.
[699] See discussion relating to the 'corroboration rule' as section 1.2.3.
[700] See S Moody and J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press, 1982) 30.
[701] In terms of the obligation to criminalise and the obligation to investigate discussed in Chapter 3.
[702] See section 6.4.1.

been taken due to insufficient evidence, which is a technical, legal decision. Emotive appeals cannot, in this context, appropriately lead to the alteration of the decision. Instead, the most effective way of completing the victim's VRR form in this context would be with reference to legal authority and by engaging with the sufficiency test itself – that is to say, with the application of the corroboration rule to the known evidential picture. Unsupported victims cannot, however, be expected to know this and, even if they do appreciate the nuances of legal decision-making, are not likely to have sufficient knowledge and understanding of the corroboration rule and its application in practice. It is questionable, therefore, whether victims of sexual crime can participate effectively in the VRR process - and in the vindication of their rights-based interests - unless they are provided with sufficient appropriate information about the decision and have access to professional advice, allowing them to interpret this information and assess its merits. As matters stand, the prevailing assumptions of the traditional criminal justice paradigm mean that victims of sexual crime are not provided with access to publicly funded legal advice and access to appropriate relevant information is not always readily available.

In a sample of 12 letters sent to victims for the purpose of explaining the decision not to raise proceedings, the Inspectorate of Prosecution have, for example, noted that:[703]

> "In the majority [of letters], we found little, or no explanation was given to the victim."

Even where some explanation was given, the Inspectorate found that this related only to a broad account of the corroboration rule,

[703] HM Inspectorate of Prosecution in Scotland, *Thematic Report on the Victims' Right to Review and Complaints Handling and Feedback Follow-up Report* (May 2018) paras 76-85 < Supporting documents - Victims' Right to Review: report, Complaints Handling and Feedback: follow-up - gov.scot (www.gov.scot)> accessed 07 August 2022.

> "without any further explanation of why in the particular case it was considered there was insufficient evidence."

Although this sample of letters was very small, it highlights the challenges that victims face and, at the very least, the onus that is placed on them to proactively seek information and explanation. Careful consideration therefore requires to be given to the possibility that victims of sexual crime are not receiving enough information about the decision-making process to engage effectively in its scrutiny. In the context of the prosecution of sexual crime, where both fundamental Convention rights and public confidence in the criminal justice system are in issue, the absence of sufficiently detailed reasons for the failure to prosecute may itself amount to a violation of the victim's Convention rights.[704] Substantively, however, it also prevents victims of sexual crime from actively engaging with prosecutorial decision-making to question and, with appropriate legal advice, challenge the legal basis for the decision that has been reached.

Under a human rights-based approach to prosecutorial decision-making then, it is possible to establish a consistent, principled framework for reconceiving the victim's role in the criminal justice process, away from a passive provider of information and towards an active and engaged agent. Although the decision to prosecute remains a matter for the public prosecutor, a human rights-based approach recognises the victim's legitimate, legal interest in the decision-making process and would seek to support and facilitate the engagement of victims of sexual crime in achieving procedurally and substantively just outcomes. In the context of the decision not to prosecute due to insufficient evidence, this is likely to mean increased transparency, more effective scrutiny during the VRR process and access to legal advice to navigate the nuances of the corroboration rule and its application to the victim's evidence in any given case.

[704] *Finucane v United Kingdom* (2003) 37 EHRR 29 at [82].

7.3.2 No realistic prospect of a conviction

In addition to 'no action' decisions based on insufficient evidence, the prosecutor might still decide that no prosecution should follow if, even though there is a technical sufficiency of evidence, it is considered that there is no realistic prospect of a trial ending in a conviction. The work of the Inspectorate of Prosecution is once again of assistance in putting this into some context. Indeed, from a sample of 207 High Court sexual offences cases that were discontinued by the prosecutor after the accused had appeared on petition, the Inspectorate's Thematic Review of the Prosecution of Sexual Crimes tells us that 18% were not ultimately prosecuted because it was deemed that there was no realistic prospect of a conviction.[705] Thus, a significant minority of cases are not prosecuted - notwithstanding a legal sufficiency of evidence – because, in crude terms, the prosecutor considered the quality of the evidence to be too weak to justify putting it before the jury. As with decisions based on an insufficiency of evidence, the present research suggests that victims of sexual crime are unlikely to have any real influence on the decision-making in this context, notwithstanding the early canvassing of their views. One of the participants explained the position in the following terms:

> "In terms of positive influencing of cases going forward, [the victim's preferences] will always be, I think, subordinate to an overall view of the case because even…if somebody reviews and a different pair of eyes look at the case and says, "No, there is no realistic prospect" or "No, there is no sufficiency", the victim's strong desire for the cases to go ahead will not result in it going ahead. And, I suppose, I think that's right."

Similarly, another participant confirmed:

[705] HM Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017) para 4.

> "If it's a case that has got no realistic prospects of conviction, for whatever reason, then the fact that she wants to give evidence, again, sorry, that's not going to be, that's not going to be the deciding factor, you know."

Ultimately, the prevailing view of the specialist sexual offence prosecutors who participated in the research was that decisions relating to the assessment of quantity (is there a sufficiency of evidence?) and the quality (is there a realistic prospect of a conviction?) of the evidence are chiefly matters of professional experience and objective judgment which are unlikely to be influenced by the victim's personal preferences or opinions.[706] The current approach leaves little room for victims of sexual crime to participate in this stage of the decision-making process, other than by way of the expression of views which, in this particular context at least, are of limited consequence.

As with 'no action' decisions where there is judged to be insufficient evidence, victims do of course have access to the VRR process but, as the participants quoted above explained, emotive appeals to the harm caused by the culprit, or strong expressions of preference that a prosecution be progressed, remain, at best, marginal considerations when it comes to the reviewing prosecutor's role in assessing the strength, or quality, of the overall evidential picture. The victim's role here is essentially to provide information about the circumstances of their victimisation and their attitude towards the potential prosecution, before passively waiting for the prosecutor to complete a quantitative and qualitative assessment of the evidence that has been provided. Once this process has been exhausted, the victim has "no further right of review or appeal."[707]

Under a human rights-based approach to prosecutorial decision-making, however, the victim is re-positioned as an active, legal agent with a legitimate

[706] Unless the victim does not want to proceed – see section 6.1.2.

[707] Crown Office and Procurator Fiscal Service, *Lord Advocate's Rules: Review of a Decision Not To Prosecute – Section 4 of the Victims and Witnesses (Scotland) Act 2014* (July 2015) 6 <lord-advocates-rules-june-15-v2.pdf (copfs.gov.uk)>accessed 07 August 2022. Also see *HM Advocate v Cooney* [2022] HCJAC 10 [34].

rights-based claim to an effective criminal justice response to the prima facie violation of her Convention rights. On this basis, the victim's role does not just involve the provision of information and/or preferences, but rather involves active engagement with the decision-making process. In practice, this once again means that transparency and accountability are crucially important in empowering victims of sexual crime to participate effectively in the scrutiny of decision-making that imperils, or potentially imperils, the realisation of their Convention rights. As well as requiring that sufficiently clear information is provided to the victim about the reasons which underlie decisions about the quality of the evidence, this approach would also require that the details of the 'no realistic prospect' test, and how it is to be applied in practice, should be made publicly available. At present, the Prosecution Code makes no direct reference to this test, nor how its application might be effectively scrutinised.[708]

Effective scrutiny of prosecutorial decision-making is particularly important in the context of the application of the no realistic prospects test, as there is a clear risk that this sort of decision will involve subjective value judgments about the relative instrumental worth of individual witnesses, including victims themselves and the credibility and reliability of what they have told the police. This issue is particularly acute in the context of sexual offence cases, where the efficacy of the prosecutorial approach may be inappropriately undermined by the application of rape myths to the decision-making process at every stage. Indeed, as Temkin and Krahé observe, "there is probably no other criminal offence that is as intimately related to broad social attitudes and evaluations of the victim's conduct as sexual assault."[709] Considerable vigilance is therefore required to ensure that stereotypes about "real" rape, inappropriate personal beliefs and outdated assumptions about gender relationships are not allowed to infiltrate the prosecutor's assessment of the quality of the victim's evidence. Where such myths and stereotypes do materially influence the prosecutor's judgment, this might render the decision-making irrational and undermine the

[708] The Prosecution Code does refer to reliability or credibility, but there is no reference to the 'realistic prospect of a conviction' test nor to any other singular test relating to the quality of the evidence.
[709] J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 33.

victim's right to an effective, "context-sensitive" investigation capable of punishing all forms of rape.[710]

Under a human rights-based approach then, victims of sexual crime should be supported in understanding the basis of prosecutorial decision-making under the 'no realistic prospects' test and, where rape myths or other inappropriate social attitudes have been applied, victims should have access to legal mechanisms capable of challenging the decision as irrational, as contrary to the victim's Convention rights and, ultimately, as unlawful.[711] There are two main avenues whereby rape myths might improperly influence the prosecutorial assessment of the evidence and thereby risk violating the victim's Convention rights; the first involves the direct application of rape myths to the prosecutor's assessment of the quality of the evidence, while the second concerns the indirect projection of rape myths onto the decisions taken by others, usually, in this context, the jury.

In terms of the direct application of rape myths to prosecutorial decision-making, it is well established that rape myths are still widely held in society and it would therefore be complacent to assume that they are not held by some who work within the criminal justice system too.[712] Temkin and Krahé refer to research which demonstrates that some police officers hold beliefs "which endorse stereotypic beliefs about rape victims and also adhere to the real rape stereotype when judging the credibility of a complaint."[713] Up to date research on police responses to sexual violence in Scotland has also highlighted "widely held problematic attitudes around sexual violence across Police Scotland."[714] Prosecutorial decision-making must be looked at closely too. Indeed, although there is no research available about the acceptance of rape myths by Scottish

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[710] See, in particular, discussion relating to the obligation to investigate at section 3.3.1; also see *R v DPP* [2009] EWHC 106 (Admin) at [70].
[711] Human Rights Act 1998 s.6.
[712] G Bohner, F Eyssel, A Pina, F Siebler and G Tendayi Viki, Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator in M Hovarth and J Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing, 2009) 17.
[713] J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 51.
[714] Survivor Reference Group, *Police Responses in Scotland Report* (Rape Crisis Scotland, 2021) <SRG-Police-Responses-in-Scotland-Report---RGB-spreads.pdf (rapecrisisscotland.org.uk)>a ccessed 07 August 2022.

prosecutors, Dame Elish Angiolini's 2015 review of the investigation and prosecution of rape in London found:

> "Occasional evidence of inappropriate influence in decision-making because of the nature of certain evidence which it was felt by the lawyer weakened the prosecution case. Such evidence included delay by the complainant in reporting the allegation, the absence of florid distress after the event or the resumption of apparent consensual sexual relations in a marriage following the alleged rape or rapes in the context of prolonged domestic abuse."[715]

Notwithstanding the specialist status of the prosecutors who had worked on the case files involved, Angiolini nonetheless recommended that:

> "Urgent steps are taken to reinforce training of police and prosecutors about the recurrent myths and stereotypes surrounding complainant behaviour during and following an alleged rape."[716]

In view of the above, there is a real and ongoing risk that the quality of prosecutorial decision-making in sexual offence cases might be compromised by the irrational application of assumptions and stereotypes to the prosecutor's evaluation of the evidence and its quality. To take, for example, the "real" rape myth[717] – namely the belief that rape only occurs between strangers in public places and will invariably be accompanied by violence - we know that this is, if anything, an inversion of reality; as the majority of sexual offending is carried out in private and by people who are known to the victim.[718] Against this

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[715] Dame E Angiolini DBE QC, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (30 April 2015) para 629 <dame_elish_angiolini_rape_review_2015.pdf (cps.gov.uk)> accessed 07 August 2022.

[716] *Ibid*, Recommendation 36, p.156.

[717] F Leverick, 'What Do We Know About Rape Myths and Juror Decision Making?' (2020) 24 International Journal of Evidence and Proof 257.

[718] According to the World Health Organisation, most violence against women is intimate partner violence, with 27% of women aged 15-49 who have been in a relationship reporting that they have been subjected to some form of physical and/or sexual violence by their intimate partner – Key Facts: Violence Against

background, the uncritical assumption that the quality of the victim's evidence will be undermined if, for example, the victim does not describe a struggle or has not sustained injury, in fact compromises the legitimacy of the decision-making process itself. Where this sort of irrational assumption contributes to, or even drives, a decision to take 'no action' based on the view that the victim's evidence can no longer be relied upon, then the state's obligation to deploy criminal justice mechanisms to effectively investigate and prosecute sexual crime are likely to be fundamentally compromised, violating the victim's Convention rights and rendering the decision unlawful.

The second related, but distinct, avenue by which the prosecutorial assessment of the quality of the evidence might be compromised, lies in the indirect application of rape myths to the likely verdict of the jury. This goes directly to the application of the 'realistic prospects' test which, on one view at least, looks to predict whether the prosecution is likely to result in a conviction. In this context, prosecutors might be aware of rape myths and challenge them in their own thinking but will nonetheless continue to apply them in the context of the assumptions that they make about the jury's response to the available evidence. Indeed, as I have discussed above, rape myths are widely held in society and it is likely, therefore, that they will be held by juries too. Research supports this view, and by drawing together the available evidence from various jury studies, Leverick has highlighted the compelling link between rape myths and jury decision-making in sexual offence cases.[719] For example, in all four significant qualitative studies cited by Leverick, jurors were found to have expressed the belief that genuine victims of rape would suffer substantial defensive injuries (in other words, they assumed that a genuine victim would struggle or fight back against a sexual assault); that false allegations of rape are routinely made by women; and that uncontrollable sexual urges may prevent a male accused from realising that consent was not available.[720] Not only were jurors found to take these beliefs into the deliberation room, but Leverick concludes that there now

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Women (World Health Organisation, 9 March 2021) <Violence against women (who.int)> accessed on 16 August 2022.

[719] F Leverick, 'What Do We Know About Rape Myths and Juror Decision Making?' (2020) 24 International Journal of Evidence and Proof 255.

[720] *Ibid* at 269-271.

exists overwhelming quantitative and qualitative evidence that rape myths affect jury attitudes *and* verdict choices in concrete cases.[721]

In 2010, Baroness Stern's review of the handling of rape complaints in England and Wales cautioned prosecutors against feeling the pressure to prosecute more cases when "well trained and dedicated professionals" had identified the case as "weak" and opined that "scarce prosecution resources should be focused on prosecuting well the cases where the evidence is strong."[722] This characterisation of "weak" and "strong" cases is, however, problematic when faced with a human right-based approach, and particularly when combined with the available jury research.[723] Much depends upon how the evidential strength of a case is ultimately assessed. Indeed, given the likelihood that the jury's deliberations and verdicts may be influenced by the application of rape myths, there is a real risk that the application of the 'realistic prospect' test could result in "strong" cases being perceived to be those which conform to, for example, "real" rape stereotypes, whereas "weak" cases would involve facts and circumstances that challenge the social attitudes and gender stereotypes that at least a proportion of jurors hold. Against this background, prosecutorial decision-making about the quality of the evidence in sexual offence cases which simply attempts to predict which cases a jury will respond well to ("strong cases") and which cases a jury will struggle with ("weak cases"), risks violating the state's rights-based obligation to effectively respond to sexual crime.

To put it another way, a human rights-based approach to prosecutorial decision-making would require that rape myths are actively challenged by prosecutors and not indirectly reinforced by allowing assumptions and stereotypes which we know to be objectively wrong, but which are nonetheless prevalent in society, to influence the prosecutor's application of the 'realistic prospects' test. Instead of accommodating such prejudices by applying a predictive or 'bookmakers'

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[721] *Ibid* at 273.
[722] Home Office, *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office, 2010) p.94 <The Stern Review (unwomen.org)> accessed 07 August 2022.
[723] J Chalmers, F Leverick and V E Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.

approach to the qualitative assessment of the case, the application of the 'realistic prospects' test should involve an examination of the actual merits of the evidence and an objective analysis of its internal and external consistency.[724] Crucially, a proper approach to any qualitative evidential test must not 'read-in' unwarranted or irrational assumptions about how a jury might believe a victim of sexual crime should be expected to behave before, at the time of, and in the aftermath of the incident in question.[725]

Given that there is evidence that some jurors do nonetheless hold inappropriate views about rape,[726] it must be acknowledge that there is, at least on the face of it, a risk that this approach could lead to a reduction in conviction rates as more "weak cases" are exposed to the criminal justice process without success. There is a corresponding risk that this will compound trauma and cause unnecessary further harm to victims as more cases end with acquittals. One reaction to this potential criticism is to note that excessive concern with conviction rates might miss the nuances of victims' justice needs and the imperative of adopting a more "multifaceted way of thinking about victim-survivor's perceptions of justice."[727] In this sense, considerations relating to procedural justice – privileging the victim's dignity and agency as a person inside the process – might be of greater importance to meeting the ultimate ends of justice than the substantive outcome of the trial. Ultimately, however, the human rights-based approach is intended to underpin a package of profound cultural, structural and legal change, rather than piece-meal, isolated reform. It is suggested that the introduction of trauma-informed practices within the justice system (in accordance with the obligation to protect) and a greater emphasis on strategies to challenge rape myths in prosecutorial case preparation and presentation (in accordance with the obligation to investigate) would - when combined with ongoing efforts to improve public education to reduce rape myth acceptance in

[724] *R (FB) v DPP* EWHC 106 (Admin); [2009] 1 Cr App R 38 [50].
[725] D Birch and J Price, 'Prosecuting Sexual Offences in England and Wales' in R Radcliffe et al (eds) *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (OUP, 2016) para 2.05.
[726] J Chalmers, F Leverick and V E Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.
[727] C McGlynn and N Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2019) 28 Social and Legal Studies 179.

society - operate to mitigate the temptation to apply assumptions about rape myths to the appropriate assessment of jury decision-making.

With these considerations in mind, a human rights-based approach would provide opportunities to improve the quality of prosecutorial decision-making, by recognising the victim's role in securing their rights-based interests in the effective application of the criminal law. To this end, the PANEL principles which underlie the human rights-based approach would require that the victim is empowered to effectively participate in decision-making and, where necessary, seek legal recourse where the decisions of the duty bearer (in this case, the prosecutor) risk the violation of their Convention rights. There are two related, but distinct factors that the human rights-based approach accordingly brings into sharper focus (i) the acceptance that decision-making must take place within the parameters of the prosecutor's lawful obligations, including the rational application of policy and rights-based obligations owed to victims, and (ii) that the victim should have an opportunity to participate effectively in decisions in order to vindicate their rights-based interests.

7.3.4 The public interest

The final aspect of the decision to raise criminal proceedings concerns the assessment of the public interest. Even if there is sufficient evidence in law to justify a prosecution and there is deemed to be a realistic prospect of a conviction being achieved, criminal proceedings will still not be raised unless the prosecutor considers it to be in the public interest to do so. Unlike the qualitative evidential test discussed above, the various factors which are of relevance to the application of the public interest test are publicly available and are set out in the Prosecution Code.[728] As I have highlighted in Chapters 4 and 6, the views and interests of victims of sexual crime have the most influence in this aspect of the decision-making process and, where the assessment of the public

[728] COPFS, Prosecution Code (July 2021) <COPFS Prosection Code - August 2021.pdf> accessed 07 August 2022.

interest is in issue, the victim's input is explicitly deemed to be of relevance and should be taken into account in the application of the test.[729] Victims of sexual crime do have opportunities to participate in this aspect of the decision-making process and, what is more, are able to influence outcomes, at least to the extent that the public interest test is in issue.

This emphasis on the victim's input, albeit only in this discrete aspect of prosecutorial decision-making, does not of course align comfortably with the assumptions of the traditional criminal justice paradigm and, in the absence of a principled basis for integrating victims' interests into the justice system, it is possible to see how the legitimacy of this approach might be questioned.[730] That said, the extent to which victims of sexual crime do actually influence outcomes in favour of prosecutorial action should not be overstated. Indeed, the victim's interests in this context are reduced to one of many factors that make up the wider public interest test in raising a prosecution. Where the victim's interests and the wider public interest do not converge, it is clear that it is the public interest that must always prevail.[731] Although victims can potentially influence outcomes in this context, their role is still ultimately restricted to the provision of information - information which may or may not be taken into account when considering the overall weight attached to a wide range of competing considerations.

A human rights-based approach to prosecutorial decision-making would, however, require that victims of sexual crime are afforded an active and engaged role in the decision-making process, with meaningful opportunities to challenge and scrutinise decision-making that is contrary to the proper respect for their Convention rights. As such, the application of the public interest test would also be subject to challenge by victims of sexual crime if it were not applied appropriately, or at least, if the test were applied in such a way that it

[729] See section 4.3.1.
[730] See, example, the expression of concern by the Faculty of Advocates "about the apparent influence of complainers on the independence of prosecutorial decisions" in Faculty of Advocates, *Written Submission to Justice Committee Inquiry into the Role and Purpose of COPFS* (25 October 2016) <FoA.pdf (parliament.scot)> accessed 07 August 2022.
[731] See section 6.1.2.

might compromise the victim's rights-based interest in an effective investigation and prosecution.[732] While it remains the duty of the prosecutor alone to take their decisions in accordance with the relevant prosecutorial tests, the victim's role in this context is no longer a passive, marginal or instrumental one, but rather that of an active and engaged participant who has a definable legal interest in the outcome.

Although it has been suggested that the ECtHR's approach to the effective investigation of violations of Article 3 ECHR might require prosecutorial action in all cases where there is sufficient evidence,[733] it is clear from the jurisprudence of the ECtHR that the obligations that arise are matters of process and not outcome: the criminal investigation does not need to result in prosecutorial action, but an effective investigation must be capable of achieving that end.[734] A human rights-based approach to prosecutorial decision-making would not, therefore, remove the prosecutor's discretion in the application of the public interest test, but rather, it would enhance decision-making by providing for the integration of human rights principles into the decision-making framework. Where the public interest test has not been appropriately applied, however, there should be opportunities for victims of sexual crime to scrutinise and challenge decision-making that imperils the realisation of their right to an effective investigation.

For a brief example of how a human rights-based approach might support and enhance decision-making, it is helpful to consider the application of the public interest test in the context of non-recent institutional child abuse cases. This is particularly important as there is growing awareness of the systematic nature of child abuse in residential care settings and the sheer scale of the problem is being publicly highlighted by the important work of the Scottish Child Abuse Inquiry.[735] Against this background, institutional abuse cases represent one of

[732] In terms of the obligation to investigate – see section 3.3.
[733] J Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 Legal Studies 15.
[734] *Assenov v Bulgaria* 1998-VIII; 28 EHRR 652, para 102.
[735] At the time of writing, the Scottish Child Abuse Inquiry has published six Interim Reports setting out its finding from 6 different case studies. All of these reports have found that children were emotionally,

the most fraught areas of public interest analysis for prosecutors, due to the fine balance of competing public interest factors that are typically at play. There is accordingly a risk that the Convention rights of victims might not be realised if prosecutorial tests are not rigorously applied.

The Prosecution Code, for example, confirms that the age of an allegation is a relevant factor in the assessment of the public interest test and states:

> "A significant delay since the date of an offence may indicate that a prosecution will no longer be in the public interest. However, other factors will also be relevant, particularly the nature of the offence; the more serious an offence the more likely that a prosecution will remain appropriate."[736]

While the Prosecution Code confirms that factors other than delay will remain relevant to the assessment of the public interest test, it does nonetheless start from the premise that a "significant delay" is likely to diminish the public interest in taking prosecutorial action. What is more, there is no other publicly available guidance to explain how other factors should be weighed against delay in the overall process. From the perspective of adult victims of child sexual abuse, there is accordingly a risk that the public interest test could be applied in a way that privileges delay over other public interest factors – such as the impact of the crime on the victim -- thereby potentially undermining the victim's rights-based claim to an effective investigation and prosecution.[737] This is particularly problematic in the context of child sexual abuse, where delayed disclosure is now recognised as unremarkable, and even typical.[738] The very nature of child abuse therefore builds in an inevitable – or, at least, entirely expected - delay into the interventions of the criminal justice authorities. As a

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physically and sexually abused while residing in residential care institutions <Case Study Findings — Scottish Child Abuse Inquiry> accessed 07 August 2022.

[736] Crown Office and Procurator Fiscal Service, *Prosecution Code* (Crown Office, June 2022) <Prosecution Code | COPFS> accessed on 17 June 2022.

[737] Under the obligation to criminalise and investigate – see section 3.3.

[738] P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press, 2006).

result, the application of the Prosecution Code which is not "context-sensitive"[739] and which does not explicitly recognise and understand the dynamics of sexual abuse could discriminate against victims of sexual crime, and adult victims of childhood sexual abuse in particular, contributing to a systemic failure to deploy the machinery of the criminal justice system to effectively protect children and other vulnerable individuals.[740]

By viewing the public interest test through the prism of a human rights-based approach, therefore, important lessons can be learnt about the prioritisation of interests through the application of the ECtHR's "vulnerability-related reasoning" and the associated focus on a "context sensitive" approach to the dynamics of abuse.[741] Although I have touched upon the ECtHR's approach to vulnerability in Chapter 3, it is worth reiterating that ECHR jurisprudence repeatedly emphasises that "children and other vulnerable individuals, in particular, are entitled to effective protection" and the ECtHR has criticised domestic authorities that "were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors."[742] A context sensitive approach to prosecutorial decision-making, which understands the dynamics of abuse and is mindful of the "special psychological factors involved", would accordingly recognise these insights in the application of prosecutorial tests and this would help to guide and inform the appropriate weight to be attached to the various public interest factors set out in the Prosecution Code.

Under a human rights-based approach then, victims of sexual crime should be provided with meaningful opportunities to understand, scrutinise and, where appropriate, challenge prosecutorial decision-making that might imperil their Convention rights. Where it is apparent that a "context sensitive" approach to the dynamics of sexual crime has not been incorporated into the application of

[739] See discussion in section 3.3.1.
[740] In terms of the obligation to criminalise and the obligation to investigation; see also *CAS and CS v Romania* (2015) 61 EHRR 18.
[741] C Heri, 'Shaping Coercive Obligations Through Vulnerability' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under ECHR* (Hart Publishing, 2020) 95.
[742] *CAS and CS v Romania* (2015) 61 EHRR 18 at [81].

prosecutorial tests, then the risk to the efficacy of the investigation becomes particularly acute. There are real opportunities therefore for a human rights-based approach, not just to re-align the victim's relationship with the criminal justice authorities, but also to improve the substantive and procedural quality of prosecutorial decision-making in sexual offences cases as well.

7.4 The decision to challenge sexual history evidence

The impact of a human rights-based approach on criminal justice decision-making would not, of course, be limited to the decision to raise criminal proceedings and it must be acknowledged that the rights-based interests of victims are engaged throughout the whole criminal process.[743] The questionable efficacy of the criminal justice approach to the use of sexual history and bad character evidence is an important example and merits further consideration.[744] Indeed, while the legal framework that restricts the use of sexual history and bad character evidence is acknowledged to be compatible with ECHR standards relating to Article 6, concern has nonetheless been expressed about the protection afforded to the dignity and privacy of victims in practice.[745] In particular, prosecutors are perceived to be reticent in objecting to the introduction of sexual history and bad character evidence and, as a consequence, there have been recent calls for a review of how and when sexual history evidence is introduced, as well as for greater scrutiny of the prosecutor's role in challenging the introduction of evidence which touches upon such intimate, sensitive and important aspects of the victim's private life.[746] At the same time, and on a related note, there is growing recognition that the victim's Article 8 rights are likely to be engaged by applications to lead sexual history

[743] *Ali and Ayse Duran v Turkey* 2008 App 42942/02 at [61].
[744] See sections 4.2.1 and 6.4.2.
[745] See, for example, Rape Crisis Scotland, Privacy Rights for Sexual Offences Complainers: A Report for the Victims Taskforce (March 2021) <ILR---Report-for-Victims-Taskforce----Roundtable-Final-Report.pdf (rapecrisisscotland.org.uk)> accessed on 12 August 2022.
[746] S Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offence Trials* (Equality and Human Rights Commission, August 2020) 4.

evidence, leading to calls for victims to have access to independent legal representation to ensure that their interests are adequately represented.[747]

In terms of the present research, the interviews with specialist sexual offences prosecutors shed light on the opportunities open to victims of sexual crime to participate in decision-making where sexual history applications are lodged. At the outset, however, it should be noted that seven of the twelve research interviews took place before the Full Bench judgment of the High Court in *RR v HM Advocate*.[748] As discussed in Chapters 4 and 6, this case involved a petition to the *nobile officium* on behalf of a victim in an ongoing prosecution and resulted in significant changes to prosecutorial policy and practice relating to sexual history applications.[749] As a result, I will draw a distinction between data which is derived from interviews that took place prior to the *RR* decision and data that was derived afterwards. Caution will also be required in the analysis of the data that was obtained after the *RR* decision, as the approach that this case triggered was still very new at the time of the interviews and had very little time to bed-in and develop. It will be useful, however, to comment on the developing picture in this challenging area of criminal justice decision-making before going on to discuss how a human rights-based approach could assist in providing a principled basis for appropriately integrating victims' rights-based interests into the criminal process.

The present research suggests that prior to *RR*, victims of sexual crime did not routinely participate at any stage of the adjudication of a sexual history application. In terms of the prosecutor's decision whether to oppose a sexual history application, for example, the prevailing view of the research participants was that this was a legal decision and so the input of the victim was not deemed to be of direct relevance to the prosecutor's position.[750] The position here is

[747] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020); Scottish Courts and Tribunals Service, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group (March 2021) para 6.17.
[748] *RR v HM Advocate and LV* [2021] HCJAC 21.
[749] See discussion at section 6.4.1.
[750] See section 6.2.2.

reinforced by the facts of the *RR* case itself. Indeed, the petitioner in *RR* (the victim of sexual crime for the purposes of engaging her Article 3, 8 and 14 rights) was only advised about the sexual history application after it had been lodged, considered and granted by the court at first instance. While this might instinctively appear to be a series of significant omissions, it is in fact consistent with the provisions of the statutory framework relating to sexual history applications, which does not provide for victims to be notified when applications are lodged[751] and, in the context of applications made when the victim would otherwise be present in court, explicitly excludes the victim from the process.[752] The fact that the sexual history application in *RR* was decided in the victim's absence, without her knowledge and without her input on the impact on her dignity and privacy, was not a failing of an individual official, or even an individual institution; but rather a structural consequence of the traditional criminal justice paradigm, which recognises the relevance of formal input from only two parties. Indeed, the very fact that the petitioner in *RR* had to seek a remedy through a petition to the *nobile officium* – a unique power which operates to provide an equitable legal remedy where no other process exists – itself highlights the structural exclusion of victims of sexual crime from this crucial aspect of criminal justice decision-making.

On this basis, and even though the test for admitting sexual history and bad character evidence requires that the court should have regard to the "appropriate protection of the complainer's dignity and privacy",[753] there was no formal mechanism prior to *RR* for bringing information about the potential impact of the sexual history application on the victim's dignity and privacy to the attention of decision-makers. As a result, prosecutors and courts were routinely applying the statutory test for the admission of sexual history and bad character evidence without meaningful insight into the consequences for the victim and the particular sensitivities arising from the proposed line of questioning. Procedurally, the absence of this information is clearly problematic, particularly in terms of the application of the relevant statutory

[751] Criminal Procedure (Scotland) Act 1995 s.275(4).
[752] Criminal Procedure (Scotland) Act 1995 s.275B(2).
[753] Criminal Procedure (Scotland) Act 1995 s.275(2)(b)(i).

test.[754] Substantively, the failure of both prosecutors and first instance judges to adequately consider the impact of the sexual history application on the victim's dignity and privacy has been critically highlighted in a string of recent appeal judgments, including *LL v HM Advocate*, *HM Advocate v G(J)*, *RN v HM Advocate* and *MacDonald v HM Advocate*.[755]

In the aftermath of *RR*, the High Court has gone some way to rectifying the long-standing exclusion of victims of sexual crime from the decision-making processes triggered by sexual history applications. Indeed, it was argued in *RR* that the lack of notice given to the victim and the lack of any mechanism to allow them to participate in the decision-making process had breached both the victim's Article 8 rights and the principles set out under s.1 of the Victims and Witnesses (Scotland) Act 2014.[756] Although the High Court did not find that victims must be convened as a party in the criminal process, it did conclude that in order to respect the victim's Article 8 rights and the provisions of the 2014 Act, victims of sexual crime must be informed when a sexual history application is lodged and the court must be given information about the victim's position both on the facts and the victim's attitude to the proposed line of questioning. The court found that it was the duty of the prosecutor to ascertain the victim's position in this regard and to present that position to the court, irrespective of the prosecutor's own position with respect to the application. In response to this decision, COPFS has updated its internal policies and now contacts victims of sexual crime to notify them of the content of a sexual history application; to invite the victim to comment on the accuracy of its content; and to invite the victim to set out any objections to the application itself. The victim's input is then conveyed to the court by the prosecutor so that the judge is aware of the victim's attitude prior to the adjudication of the application.[757]

[754] Contrast this position with *WF Petitioner* [2016] CSOH 27 [39].
[755] [2018] HCJAC 35; [2019] HCJ 71; [2020] HCJAC 3; and [2020] HCJAC 21.
[756] In particular, the principle that the victim should be able to participate effectively in the process.
[757] Scottish Courts and Tribunals Service, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group (March 2021) para 4.42; Rape Crisis Scotland, *Privacy Rights for Sexual Offence Complainers: A Report for the Victims Taskforce* (March 2021) para 41.

While the Victims Taskforce has acknowledged that this change of process is a welcome improvement, concern has been expressed as to whether the privacy rights of victims are adequately protected, even under these new processes.[758] The victim, for example, still has no opportunity to address the decision-maker directly and does not have access to legal advice or guidance prior to conveying their views to the prosecutor. Indeed, given the complexity of the legal framework governing the admission of sexual history and bad character evidence, the prospect of a call from the prosecutor to ask the victim if they have any objection, does raise the question as to how the victim is to participate effectively in this process without access to specialist legal advice. Crucially, the prosecutor's approach to decision-making in the context of sexual history applications is also likely to remain unchanged. Indeed, while the prosecutor has taken on the role of an intermediary, responsible for passing on the victim's views to the court, there was no suggestion in the post-*RR* interviews that were conducted as part of this study, that the victim's input would influence the prosecutor's attitude to the application itself.[759]

Ultimately, the opportunities for victims of sexual crime to participate in the adjudication of sexual history applications have been improved since *RR*. That said, the baseline was undoubtedly low as, prior to this case, there were simply no formal mechanisms for victims to provide input into the decision-making process at all. While it is too early to say how the participatory opportunities created by the *RR* decision will develop, the early signs from the present research suggest that, at best, it has created a form of expressive participation for victims in this area of decision-making.[760] Victims of sexual crime are now "given a voice" in the adjudication of sexual history applications and there is a clear expectation that the victim's position on the application will now be canvassed by prosecutors and communicated to the court. That said, it is not yet clear how this input will be treated, and whether it will influence the decision-making process. The concerns of the second participant quoted in section 6.4.2 above should not, for example, be ignored. Without access to legal advice,

[758] *Ibid*, para 29.
[759] See section 6.4.2.
[760] *Ibid.*

adequate representation and, crucially, explicit acknowledgment of the victim's rights-based interest in the overall process, there is a risk that the new post-*RR* procedures will remain just another "step built into the process" that once again requires victims to provide information without engaging, in a principled way, with the integration of their legitimate interests into the decision-making process.

In contrast, the adoption of a human right-based approach provides a clear opportunity to develop a principled framework for integrating victims' rights-based interests into the criminal process and the decisions taken around the introduction of sexual history evidence. A human rights-based approach requires that victims of sexual crime be recognised as rights-holders and are empowered to take on an active and engaged role in the decision-making process, with meaningful opportunities to challenge, scrutinise and participate in decisions that impact upon their rights-based interests. In practice then, this would mean that victims of sexual crime would have access to legal advice and assistance in the event of a sexual history application being lodged and meaningful participation in the criminal process would be facilitated so that victims may oppose applications where their legal interests are engaged and appeal decisions that fail to appropriately apply statutory tests and secure their Convention rights. Crucially, access to legal advice at the outset would mean that victims of sexual crime would both understand their rights and the obligations that duty bearers - namely the prosecution service and the courts - owe them. In this context, victims of sexual crime would have the capacity to respond appropriately to the sexual history application and develop, through their agent, focused and legally relevant submissions capable of assisting the court in accommodating and, where necessary, reconciling the rights-based interests of all concerned.

In the context of sexual history evidence at least, this is by no means a radical proposition, with recent researcher papers,[761] policy groups[762] and official reports[763] all calling for the introduction of independent legal representation for victims in this context. The report of Lady Dorrian's Review Group, in particular, confirms that there "is a compelling case for the introduction of ILR"[764] for victims of sexual crime and points out that this reform would not adversely affect the Article 6 rights of the accused; would improve the quality and focus of sexual history applications; and reinforce the legitimacy of decision-making.[765] More than this, independent legal representation would ensure that victims of sexual crime are able to participate effectively in the criminal process in a way that is commensurate with their status under a human rights-based approach, not as mere "witnesses to the facts libelled",[766] but as rights-bearing agents, with a legitimate rights-based interest in the procedural and substantive outcome of criminal justice decision-making.

7.5 Concluding observation on the implementation a human rights-based approach

In view of Scotland's constitutionally embedded commitment to human rights norms and the ambitious agenda of human rights leadership pursued by government institutions and civil society, it seems particularly anomalous that the criminal justice response to sexual crime remains so ill-suited to respecting, protecting and promoting the rights of everyone engaged in the process. We now have a substantial body of research confirming that the criminal justice response to sexual crime requires urgent reform and that the criminal process causes

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[761] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020); S Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials* (Equality and Human Rights Commission Research Report, August 2020).
[762] Rape Crisis Scotland, Privacy Rights for Sexual Offence Complainers: A Report of the Victims Taskforce (March 2021).
[763] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021).
[764] *Ibid*, para 4.45
[765] *Ibid*, para 4.44.
[766] *RR v HM Advocate and LV* [2021] HCJAC 21 [51].

victims harm.[767] This has an impact on the legitimacy of the criminal justice system and, furthermore, there is a risk that the criminal process, as presently structured, perpetuates the systemic violation of fundamental human rights.

Significant progress can be made by pursuing a shift away from the traditional approach to criminal justice and moving towards an approach which empowers all rights holders to participate in securing their Convention rights. For victims of sexual crime, this means recognition of their legally enforceable, rights-based interests, particularly in the efficacy of the criminal justice response to their allegations (the obligations to criminalise and investigate) and in the protection of their Convention rights once engaged in the system (the obligation to protect). As a result, there must be a re-alignment of their relationship with the criminal justice authorities, and their role in the wider criminal process.

In this chapter, I have accordingly explored the foundational principles of a human rights-based approach to the justice system and considered examples of what decision-making within such a system might look like in practice. A human rights-based approach to the prosecution of sexual crime would require a re-alignment of the cultural and structural assumptions that instrumentalise victims, marginalise them and place them in a space that is at the periphery of, and very often external to, the criminal process. Access to procedural justice is at the heart of the problem, and a human rights-based approach to the prosecution of sexual crime provides a principled and legitimate framework for facilitating this without fundamentally altering Scotland's entire system of adversarial justice and public prosecution. If we are to begin the process of profound change required to tackle attrition in sexual offences cases, promote confidence in the criminal justice system and reduce secondary trauma, victims of sexual crime must have a "respected and acknowledged"[768] role in the criminal process – a role that rejects their instrumentalisation as information providers and promotes their agency and personhood as right bearers. A human

[767] See discussion at Chapter 2.
[768] J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 176.

rights-based approach to the prosecution of sexual crime provides a principled means of achieving this.

In terms of its limitations, it is acknowledged that the implementation of the human rights-based approach is not likely, at least in the short term, to increase conviction rates at trial. It could, as is noted at section 7.3.2 above, even reduce conviction rates as more "weak cases" (or at least cases which do not conform to the tropes of rape myth acceptance) are prosecuted. The key benefit of the human rights-based approach will be on improving the justice system's ability to secure procedural justice, but it would improve the substantive quality of decision-making too by promoting transparency and accountability. Crucially, the implementation of the human rights-based approach would support the justice system in meeting its lawful duty to act in compliance with Convention rights under the obligation to criminalise, the obligation to investigate and the obligation to protect. While the provision of publicly funded legal assistance and representation would almost certainly require to be extended[769] to support victims of sexual crime in securing their legal interests, the possible financial cost would be mitigated by improved Convention rights compliance; future-proofing the justice system from rights-based challenges as the trajectory of Scotland's domestic jurisprudence extends beyond the *RR* decision. Ultimately, it is proposed that the human rights-based approach should form the foundation of a future programme of wide-ranging reform, providing a principled framework for conceptualising the victim's role and supporting the implementation of a person-centred, trauma-informed response to the prosecution of sexual crime in the future.

[769] It has already been proposed that publicly funded legal assistance should be made available to victims to support their participation in the adjudication of sexual history applications – see Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 4.35.

Chapter 8: Conclusion: Towards a Human Rights-Based Approach to the Prosecution of Sexual Crime

8.0 Introduction

This thesis has explored how victims of sexual crime participate in criminal justice decision-making in Scotland and advocates for the realignment of their role around human rights norms. Drawing upon a review of victim-centred legislation since devolution, published and unpublished prosecution policy, and in-depth interviews with specialist sexual offence prosecutors, it explores the role that victims play in the criminal process and links this to the entrenched, systemic problems that have for far too long beset the criminal justice system's response to sexual crime. It argues that the jurisprudence of the ECtHR now places clear obligations on domestic authorities to regulate the actions of individuals who commit human rights violations in the private sphere, and that this manifests itself in a framework of rights-based duties that provide victims of sexual crime with a legitimate interest in criminal justice decision-making. By re-aligning the victim's role away from that of a tool in the prosecutor's case and towards that of an engaged rights-bearer, I argue that much could be done to improve victims' experiences of the criminal process, thereby easing the impact of secondary traumatisation, reducing attrition, and improving access to both substantively and procedurally just outcomes. Ultimately, this thesis aims to provide a principled framework on which future reform and policy-development could be based to improve the experience of victims of sexual crime as they navigate the criminal process, while simultaneously 'future-proofing' the justice system from the sort of disruption that followed the failure to respond to the trajectory of ECHR jurisprudence in the past.[770]

[770] *Cadder v HM Advocate* [2010] UKSC 43; 'Man Who Changed Scots Legal System Peter Cadder Free' (BBC News, 17 May 2012) <Man who changed Scots legal system Peter Cadder free - BBC News> accessed 07 August 2022.

8.1 Reflecting on the research aims and key findings

The empirical research that is discussed in Chapters 5 and 6 provides a new insight into the role that victims of sexual crime play in Scotland's justice system. By interviewing specialist sexual offence prosecutors – key decision-makers who shape the justice system's relationship with the victims themselves - this thesis begins to bridge the gap in our knowledge concerning the prosecutor's perception of victims and how this influences the victim's role in the criminal process.

I conducted twelve in-depth interviews with specialist sexual offence prosecutors over the course of 2019 and 2020, using an open, semi-structured style in order to gain a detailed understanding of how prosecutors approach decision-making relating to victims of sexual crime; the opportunities that are available to victims to participate in the criminal process; how this influences the decisions that are taken; and the underlying principles and values that govern the prosecutor's approach. Although the interviews produced a wealth of data, a key limitation of the research was the relatively small pool of prosecutors that I was able to interview and the exclusive focus on decision-makers who specialise in the prosecution of sexual crime in the High Court. This means that the research does not directly reflect the experience of prosecutors in Scotland's Sheriff Courts, nor does it capture the wider dynamics of gender-based violence prosecutions and the range of different policy approaches that relate to victims in domestic abuse, stalking, and other gendered crimes. While further research into the prosecutorial response to victims would be of great value, the present research has transferrable application across crime-types and jurisdictions, highlighting the absence of a broad conceptual underpinning to guide the role that victims play within the traditional criminal justice paradigm and the structural focus on their status as witnesses in the criminal process: information-providers, marginalised and instrumentalised to advance the public interest in the prosecution of crime.

8.2 Analysis of findings

In Chapter 4, I analysed the legislative and policy approach to victims since devolution and I pointed out that there is cause for optimism, with the Victims and Witnesses (Scotland) Act 2014 providing real potential for change. The analysis of the legislative and policy framework set out in Chapter 4 must, however, be read alongside Chapter 6 and the analysis of the interviews with specialist sexual offence prosecutors, the decision-makers who apply victim-centred policies and legislation in practice. In Chapter 6, I used Edwards' typology of participation to organise the data that I extracted from the interviews and break down the different participatory opportunities that victims of sexual crime are afforded in the criminal process. Using the headings of 'control', 'consultation', 'expression' and 'information-provision', I explained the range of different participatory opportunities that victims are given. I concluded that victims of sexual crime are left in an uncertain middle-ground where, on the one hand, they are afforded various opportunities to participate in, and even sometimes influence, prosecutorial decisions, while on the other, their interests continue to be marginalised by a justice system that is structured around the bi-partisan conflict between the state and the accused. While individual prosecutors showed empathy for victims and recognised the impact of their decisions, there was often uncertainty and inconsistency in terms of how this should feed into formal decision-making. At a system level, the approach to victims of sexual crime continues to be dominated by what I call the partnership approach. Here, the criminal justice authorities recognise the harm that the system causes and seek to work in partnership with victims to improve their experience, but always still within the structural parameters of the traditional approach to criminal justice.

Ultimately, I presented three key findings in Chapter 6. First, for all the progressive legislative and policy development since devolution, victims of sexual crime are still treated as objects, not subjects in the criminal process. They are principally viewed as witnesses, whose role is to support the public interest in pursuing the prosecution case. Second, although victims of sexual

crime are offered a range of participatory opportunities, these opportunities vary considerably depending on the nature of the decision being taken and the stage of the criminal process that the case is at. Third, there is no principled framework for understanding the victim's role or for explaining why victims should participate in some decisions and not others – policies have been developed which afford victims various participatory opportunities, but decision-makers do not necessarily understand why this should be the case and how this interacts with their primary understanding of the victim's instrumentalised role as a witness for the prosecution.

These findings are consistent with the existing literature on the victim's role in the adversarial criminal process and help to explain why, despite ambitious policy and legislative developments, research relating to the lived experience of victims continues to tell us that victims feel marginalised and re-traumatised by a system that neither meets their needs nor their expectations of justice. The thesis's central claim, therefore, is that this uncertainty in terms of the space that victims occupy in the criminal process has an impact on the justice system's ability to meet their needs and the efficacy of the policy response to the well documented systemic challenges of attrition, secondary traumatisation and access to both substantively and procedurally just outcomes in sexual offence cases. If we are committed to confronting the systemic challenges that are outlined in Chapter 2, it is argued that we will require a conceptual shift in the victim's role, away from a criminal justice system that is structured around the assumptions of the traditional criminal justice paradigm – where the victim's status is seen through the prism of their instrumental, passive role as witness – towards a human rights-based approach, which recognises victims of sexual crime as active agents with legitimate interests in a process that prioritises the realisation of rights.

8.3 Realigning the victim's role: a human rights-based approach

In Chapter 3, I reviewed the ECHR jurisprudence relating to the rights-based interests of victims in the criminal process and I argued that, despite the dearth

of relevant domestic case law, the Convention rights of victims are now legitimately engaged by the decisions taken by police officers, prosecutors and judges during the course of criminal proceedings. I set out a framework of rights-based duties that are owed to victims of sexual crime and demonstrated that victims have a legitimate interest in an effective, state-based response to their allegations. From the obligation to criminalise and the obligation to investigate - where domestic authorities must maintain an adequate framework of laws and deploy these in practice to effectively punish all forms of sexual abuse - to the obligation to protect - where domestic authorities must take reasonable steps to intervene in preventing further harm - the rights-based interests of victims of sexual crime are engaged at various stages throughout the whole criminal process. If these rights-based interests are to be effectively vindicated in practice, then the criminal justice system must be capable of accommodating victim participation and consistently integrating victims' interests into criminal justice decision-making.

In Chapter 7, I drew upon Kamber's account of human rights offences to argue that a human rights-based approach to the prosecution of sexual crime would allow victims to assert a wide-ranging interest in the proper application of criminal justice machinery and in the effective investigation and prosecution of their allegations. With reference to Scotland's constitutionally embedded commitment to human rights protection, and the PANEL principles advocated by the Scottish Human Rights Commission, I pointed out that there is a substantial risk that the current approach to criminal justice, and the associated marginalisation of victims, perpetuates the systemic violation of fundamental human rights. Significant progress can be made by pursing a shift away from the traditional paradigm and moving towards an approach which empowers all rights-holders to participate in securing their Convention rights.

Chapter 7 went on to consider practical examples of prosecutorial decision-making where a rights-based approach would have a significant impact on the victim's relationship with the criminal justice authorities, re-positioning the victim from a passive provider of information to an active agent with a

legitimate interest in the vindication of their rights-based claims. I accordingly argued that a human rights-based approach to the prosecution of sexual crime provides a principled framework for re-orientating the role that victims play in the criminal process and, crucially, provides a principled conceptual underpinning for the integration of their interests into criminal justice decision-making so that future reform can effectively challenge attrition, promote confidence in the criminal justice system, reduce secondary trauma and, ultimately, improve access to justice.

If, ultimately, human rights are to be found "in small places… where every man, woman and child seeks equal justice",[771] then we must ensure that the day to day functioning of the criminal justice system is not left behind in the journey towards "real and sustainable" human rights leadership.[772] More than this, the explicit adoption and implementation of a human rights-based approach would provide victims of sexual crime with a new role in the criminal justice system: a role that would empower victims to participate, secure their rights-based interests and ensure that their voices are heard in the criminal justice process. Substantively, the appropriate engagement of victims in the criminal process would improve decision-making and reinforce the legitimacy of the criminal justice system's response to sexual crime. Procedural justice is, however, at the heart of a human rights-based approach, which emphasises the victim's agency as a person – as a rights bearer - over the traditional paradigm's focus on their instrumental value as a tool in the prosecutor's case. For Forbes,[773] empathy is the key to an effective criminal justice response to gender-based violence and, indeed, we know that victims of sexual crime are more likely to engage with the criminal process if treated fairly and less likely to be re-traumatised if their encounters with criminal justice personnel are positive.[774] If the Scottish Government's vision of reform based on a "trauma-informed" and "person-

[771] Eleanor Roosevelt, The Great Question: Address to the UN Commission on Human Rights (New York, 27 March 1958).
[772] First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a New Human Rights Framework to Improve People's Lives: Report to the First Minister* (10 December 2018) p.50.
[773] E Forbes, *Victims' Experiences of the Criminal Justice Response to Domestic Abuse: Beyond GlassWalls* (Emerald Publishing, 2022) p180.
[774] I Elliot, S Thomas and J Ogloff, 'Procedural Justice in Victim-Police Interactions and Victims' Recovery from Victimisation Experiences' (2014) 24 Policing and Society 588.

centred" approach to justice is to be realised,[775] then the re-location of victims and their legitimate interests *within* the criminal process is an essential pre-condition. The human rights-based approach discussed in this thesis provides a principled and conceptually consistent platform for achieving this.

8.4 Implementing the human rights-based approach

8.4.1 Realising the obligation to criminalise

The obligation to criminalise requires that the criminal justice system in Scotland is capable of supporting the effective criminalisation of sexual crime and in Chapter 3, I set out its four broad requirements: (i) that the justice system has an effective framework of laws to facilitate the prosecution of sexual crime; (ii) that the criminal law and procedure does not contain any "arbitrary", "restrictive" or "rigid" features, such that it is incapable of effectively deterring sexual crime; (iii) that the criminal justice framework must comply with modern international standards, providing effective protection against discrimination, including gender-based violence; and (iv) that the criminal justice framework must be capable of accurately reflecting the nature and scope of the rights violation that the victim has suffered, including charges which capture the harm caused and proportionate sentencing outcomes on conviction.

While the Sexual Offences (Scotland) Act 2009 represented a significant improvement in Scotland's criminal justice framework[776] and is likely, therefore, to support strands (i) and (iv) of the obligation to criminalise, this thesis has outlined substantial concerns with respect to strands (ii) and (iii). In Chapter 2, I highlighted the failures of the justice system to respond effectively to sexual crime: a conviction rate against reported cases of approximately 3%, high rates of attrition and a process that is acknowledged to cause and compound trauma.

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[775] Scottish Government, *The Vision for Justice in Scotland* (February 2022) < The Vision for Justice in Scotland 2022 (www.gov.scot)>accessed 07 August 2022.
[776] See section 1.2.2.

Against this background, Scotland's unique corroboration rule permeates the whole system, impacting decision-making from the initial police investigation, right through to the conclusion of the case in court. Indeed the CEDAW committee has expressed concern about the corroboration rule, highlighting its particular impact on the prosecution of sexual offence cases. More recently, the majority of Scotland's highest judicial office holders have publicly condemned the corroboration requirement as a rule that is not "conducive to the effective and predictable operation of the criminal law";[777] and a rule that "hinders rather than promotes justice",[778] all while acting "as a barrier to accessing justice, particularly in the cases of many women and child victims of both sexual abuse and more general domestic abuse."[779]

In view of the above, and in light of the ECtHR jurisprudence in *MC* and *Opuz* in particular, the corroboration requirement does not sit comfortably with the obligation to criminalise, underlining systemic deficiencies in the existing criminal justice framework and hindering its ability to effectively challenge sexual offending, and gender-based violence more broadly.

8.4.2 Realising the obligation to investigate

The obligation to investigate requires the effective mobilisation of the machinery of the state to deter and punish sexual crime. It extends to the operational decisions of law enforcement officials and prosecutors, as well as to systemic issues inherent in the criminal justice framework (the corroboration requirement could, on this basis, also be problematised under the obligation to investigate). In Chapter 3, I narrated the three broad components of the obligation to investigate, namely: (i) the requirement to conduct an adequate and thorough investigation; (ii) the requirement that the investigation be

[777] Senators of the College of Justice, Response to the Consultation on the Not Proven Verdict (12 July 2022) p.17.
[778] *Ibid*, p.18
[779] *Ibid*, p.17

conducted promptly and with reasonable expedition; and (iii) the requirement to conduct an accessible investigation.

As discussed in Chapter 3, Scotland's response to sexual crime raises concerns across all three strands of the obligation to investigation, but the recommendations set out in the report of Lady Dorrian's Review Group present cause for optimism, particularly with respect to strands (i) and (ii), where an increased focus on specialism and trauma informed practice could yield significant improvement in terms of "context sensitive" decision-making and increased capacity to expedite cases through the system.[780]

In terms of strand (iii), however, there is a substantial risk that the influence of the traditional criminal justice paradigm - principally positioning victims as witnesses in the justice system – undermines compliance with the obligation to conduct an accessible and transparent enquiry by normalising the assumption that victims have no legitimate interest in criminal justice decision-making. The interview findings set out in Chapter 6, for example, reveal evidence that the Victims Right of Review scheme (VRR) is often used by victims as a form of expressive participation, allowing victims the freedom to emote, but not necessarily engaging them in the substance of the review process itself.[781] The VRR form that is submitted by the victim is therefore unlikely to provide input that is of relevance to the reviewing prosecutor's decision, undermining the victim's ability to participate effectively in the review.

The duties placed on the criminal justice authorities are compounded further by the corroboration requirement (which, as has been discussed, risks compromising the victims' Article 3, 8 and 14 rights under the obligation to criminalise too). The application of the corroboration rule is surrounded by a technical, complex and confusing body of law and, if applied incorrectly by the prosecutor, risks

[780] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021), see Recommendations at p.11 – 19.
[781] See the COPFS VRR application form <Victims' Right to Review application form | COPFS> accessed on 07 August 2022.

imperilling the victim's rights-based interest in an effective investigation. The VRR scheme should, therefore, provide an opportunity for victims to understand, scrutinise and challenge prosecutorial decision-making, so that the victim can "safeguard his or her legitimate interests"[782] in the vindication of their right to an effective investigation. It would, of course, also improve the quality of decision-making by facilitating the input of relevant and legally focused submissions into the review process.

In view of the above, the current approach to VRR does not sit comfortably with strand (iii) of the obligation to investigate and risks undermining the victim's Article 3 and 8 rights. As the jurisprudence deriving from the *RR* judgment develops, the absence of support for victims as they engage with the VRR process may also prove to be incompatible with the principle, under s.1(3)(d) of the 2014 Act, that victims should be able to participate effectively in proceedings. It is accordingly proposed that access to publicly funded legal representation - to guide and support victims of sexual crime in the realisation of their Convention rights - should be extended to all areas of the criminal process where the victim's rights-based interests are engaged. The VRR process is one example where this could make a significant contribution to the realisation of Convention rights.

Similarly, under this strand, the implementation of a human rights-based approach might also prompt a greater focus on transparency in the publication of prosecution policy, allowing the public to better understand how prosecutorial decisions are taken and further facilitating the victim's participation in the VRR process. There is, for example, currently no publicly accessible prosecution policy on the 'no realistic prospects of a conviction' test. In the absence of such a policy, it is not clear how victims of sexual crime are to participate effectively in securing their legal interests where their case is ended due to the prosecutor's assessment of the quality of the evidence. Under a human rights-based approach, there should be an increased focus on ensuring openness and transparency in decision-making, allowing victims to actively

[782] *Jordan v UK* (2003) 37 EHRR 2 at [109].

engage in challenging decisions that do not conform to accepted and publicly available standards (for example, such a policy would presumably make it clear that prosecutors should not apply rape myths to the qualitative assessment of the evidence). The publication of the 'no realistic prospects of a conviction' test, together with information setting out how the test is applied in practice, would be an important starting point in recognising the victim's legitimate interest in the effective application of the criminal law. Once again, this approach would reinforce the quality of decision-making and support prosecutors in challenging rape myths in the application of relevant tests and processes.

8.4.3 Realising the obligation to protect

The obligation to protect requires that the criminal justice system should protect individuals from violation of their Convention rights as they engage with the criminal justice system. In view of the various reports and research studies outlined in Chapter 2, this is an area where the criminal justice response to sexual crime clearly fails and is in need of urgent reform if it is to claim that it routinely promotes, protects, and respects the Convention rights of victims of sexual crime. Once again, the recommendations of Lady Dorrian's Review Group give cause for optimism, and there is huge potential for specialisation and trauma-informed practice to complement the human rights-based approach in securing the obligation to protect. As things stand, however, the available insight into the lived experience of victims who have engaged with the criminal justice system, suggests that the criminal process not only fails to protect victims from trauma, but it actively causes and compounds trauma as well, potentially violating the victim's Article 3 and 8 rights.

The most high-profile example of the challenges that the justice system faces in protecting victims from violations of their Convention rights arise in the context of sexual history evidence applications. The case for independent legal representation for victims to support them in securing their rights-based interests during the adjudication of sexual history applications have been

powerfully made elsewhere.[783] A human rights-based approach would provide a principled basis to underpin victims' claims to independent legal representation in this process and that recommendation is repeated here. In addition, the realignment of the victim's role with human rights norms would support wider access to legal representation whenever the victim's rights-based interests are engaged. As well as access to legal guidance to support and advise victims of sexual crime as they navigate the VRR process, this might also include representation in court to challenge aggressive and intimidating cross-examination practices;[784] to object to evidence that strays beyond the terms of any sexual history application already granted by the court;[785] or to represent the victim in securing access to the most appropriate special measures. Legal representation would also support victims in accessing information about their case and in explaining complex legal rules and processes, adding to the victim's sense of procedural justice, and reducing the risk of secondary trauma.

Careful consideration would require to be given to the possibility that the intervention of the victim's agent might undermine the accused's right to a fair trial, but this would clearly depend on the nature of the right-based interests involved and the stage of the criminal process where intervention is proposed. As is discussed in section 1.3.4, however, the rights-based interests of victims and those accused of crime are rarely in direct conflict and, as Lady Dorrian observes in the context of sexual history applications, legal representation for victims would improve the quality of decision-making, focus minds on the issues involved and reduce trauma by supporting the victim's sense of collaboration and empowerment inside the criminal process, all without adversely affecting the Article 6 rights of the accused.[786]

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[783] E Keane and T Convery, *Proposals for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (University of Edinburgh, 2020).
[784] See, for example, *Dreghorn* v HM Advocate [2015] HCJAC 69 and *Donegan* v HM Advocate [2019] HCJAC 10.
[785] *MacDonald* v HM Advocate [2020] HCJAC 21.
[786] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (March 2021) para 4.44.

8.5 Concluding thoughts

Having considered, in broad terms, what the realisation of the obligation to criminalise, to investigate and to protect might mean for Scotland's criminal justice response to sexual crime, it is possible to draw together the following recommendations to complement and support the call for "transformational change" that forms the basis of the wide-ranging reforms already being considered by the Scottish Government:[787]

- The abolition of the corroboration requirement to reduce barriers to effective criminal justice decision-making in sexual offence cases.
- The development and publication of publicly available prosecution policy relating to the 'realistic prospects of a conviction' test, with particular reference to the interactions between prosecutorial decision-making and rape myth acceptance in sexual offence cases.
- Policy level recognition by the relevant criminal justice authorities that victims of sexual crime have a legitimate, rights-based interest in criminal justice decision-making, underpinned by the General Principles set out in ss.1 and 1A of the Victims and Witnesses (Scotland) Act 2014. This would include, for example, recognition that victims of sexual crime should be able to understand, and engage in, the decisions that affect them and should be advised to seek independent legal advice if they are to "participate effectively" in securing their interests within the criminal process (for example, prior to submitting a VRR application).
- Access to publicly funded legal advice to support victims of sexual crime in navigating the criminal process; to engage with the criminal justice authorities on the victim's behalf; and to advocate for the victim's legitimate interests throughout the life of the police investigation through to the conclusion of the case in court.

[787] See section 4.0; Also see the Not Proven Verdict and Related Reforms Consultation Analysis, publish 12 July 2022 (available at https://www.gov.scot/publications/not-proven-verdict-related-reforms-consultation-analysis/); and the Improving Victims' Experiences of the Justice System: Consultation, published 12 May 2022 (available at https://consult.gov.scot/justice/victimsconsultation/)

- The facilitation of publicly funded independent legal representation for victims of sexual crime where the court is satisfied that the victim's legitimate rights-based interests are engaged and can be accommodated without undermining the accused's right to a fair trial.
- Criminal justice reform providing access to judicial review of the Lord Advocate's decisions so that prosecutorial decision-making can be effectively scrutinised and challenged by victims and allowing for judicial intervention where prosecutorial decisions can be shown to be incompatible with Convention rights, irrational or otherwise unlawful.

While it is clear from these recommendations that the implementation of a human rights-based approach to criminal justice decision-making would mean a process of long-term cultural, legal, and structural change, this thesis advocates for a conceptual re-alignment of the victim's role within the criminal justice system as the fulcrum of future reform. The central claim of this thesis is ultimately that a human rights-based approach should be implemented to secure a principled and valued role for victims within the criminal process, and thereby drive improvements in criminal justice decision-making, reduce the secondary-traumatisation of victims and improve access to both procedural and substantive justice outcomes. The adoption of a human rights-based approach would also assist in future-proofing Scotland's criminal justice system from the next wave of rights-based litigation, as victims seek to challenge the current structural barriers to the realisation of their human rights within the criminal justice context.[788] There is no doubt that the adoption and implementation of a human rights-based approach would represent a radical departure from current practice, requiring transformational change in terms of the cultural and structural assumptions of the traditional approach to criminal justice and the victim's role in the process. But these are necessary changes. As Lord Hope put it in anticipation of the shockwaves that would be caused by the last substantial rights-based challenge to Scotland's legal order, "the issue is one of law… It

[788] *RR v HM Advocate and LV* [2021] HCJAC 21.

must be faced up to, whatever the consequences."[789] It also happens to be the right thing to do.

[789] *Cadder v HM Advocate* [2010] UKSC 43 at [4].

APPENDICES

APPENDIX 1: INTERVIEW PLAN

Introduction

- Who I am; what the research is about; why it might be important and the potential benefits
- Consent: explain consent form and option to withdraw at any time
- Recording: explain why I'd like to record the interview and what will happen to data
- Questions: anything that the participant would like to ask/clarify
- Return to consent: confirm if participant wishes to consent

Role of Participant in CJS

- Explore participant's role within COPFS
- Broad nature of decisions made in present role and impact on victims
- Overview of relevant policies and practices which influence the participant's relationship with victims

Role of Victims

- Overview of participant's experience/perception of victims' current role/status in the justice system
- Professional experience of victims' influence on the participant's role and the impact, if any, on decision-making

Decision-making (General)

- The main concerns, interests or factors which the participant considers to be at play when taking decisions in sexual offences cases

- The role of the victim in this process - what happens where the victim's interests clash with other public interest or the rights of the accused?

- The impact of the 2014 Act on the relationship between prosecutors and victims

Decision-Making (Specific Benchmarks)

- Victim Strategies in High Court sexual offences cases – implications for relationship between victims and prosecutors?

- Operational Instruction to narrate the victim's views when making recommendations for Crown Counsel – what happens to this information/how is it treated/do the victim's views influence recommendations

- Victims' Right to Review – how, if at all, does VRR impact upon the victim's involvement in the process?

- Reluctant Complainers in rape cases – what role do the victim's views play here and what weight is attached to the victim's interests in practice

- Special Measures – how are special measures chosen in rape cases? To what extent can/should the victim insist that an application is made for a particular special measure?

- Adjournments/Pleas – To what extent are the victim's interest of relevance in practice?

Closing

- Any clarification required

- Opportunity for participant to raise other relevant points

- Opportunity for participant to ask questions/seek clarification

APPENDIX 2: INFORMATION SHEET

University of Glasgow

College of Social Sciences

Participant Information Sheet

Study title and Researcher Details

TITLE: A human rights-based approach to the criminal process: the role of rape victims in criminal justice decision-making

RESEARCHER: Peter Reid is a part-time PhD student with the University of Glasgow. He is also a Senior Procurator Fiscal Depute within the National High Court Sexual Offences and the Scottish Child Abuse Inquiry Review Teams. He completed a Master's Degree with Distinction in Human Rights Law in 2012 and has spent the last 6 years specialising in the investigation and prosecution of sexual crime. His supervisors at the University of Glasgow are Professors Fiona Leverick and James Chalmers. Although Peter's PhD research is being carried out in a personal capacity, he receives sponsorship from COPFS to complete this project.

You are invited to take part in a research study. You have been chosen to participate in this study because of your expertise and experience in our criminal justice system's response to rape. Before you decide, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Please ask me if there is anything that is not clear or if you would like more information.

Thank you.

What is the purpose of this study?

The purpose of this study is to improve our understanding of the role that rape victims play in Scotland's criminal justice system. Specifically, I want to understand the nature of their relationship with criminal justice decision-makers and the extent to which they participate in and influence the criminal justice process. More widely, my research seeks to develop a principled basis for understanding the role of rape victims and seeks to develop a human rights-based approach to underpin future victim-based policy developments and criminal justice reforms.

What will the interviews involve?

Participation in this research is entirely voluntary and it is anticipated that interviews will take up no more than 60 minutes of your time. I will arrange a mutually convenient time to come and speak to you at your place of work or, if you prefer, the interview can be conducted over the telephone. You will be asked about your professional experiences of, and opinions on, the role of rape victims in Scotland's criminal justice system, the opportunities that they have to participate in the process and their role, if any, in criminal justice decision-making.

I do hope to audio-record the interview, as this is the most accurate way to record what you say but we will talk about this before the interview starts and I will only record the interview if you are happy for me to do so.

Confidentiality and security of information

All information about you will be confidential. Once I have completed my research, I am happy to send you a copy or a summary so that you can see how I used the information you gave me. If you say anything that I would like to quote directly, I will contact you first to ask if that's okay. I will not use your real name and will refer only to your professional role in any published material.

All my written notes will be kept in a secure, locked cabinet. If you give permission for the interview to be recorded, it will be kept in a password encrypted, personal computer.

Can I withdraw from the study if I change my mind?

Participation in the research is completely voluntary. You are at liberty to withdraw without prejudice or negative consequences.

Who do I contact if I require further information?

If you require any information about the project or interview, please don't hesitate to contact me via email or telephone:

Email: Peter.Reid@copfs.gov.uk or p.reid.1@research.gla.ac.uk
Tel:

My supervisors are Professor Fiona Leverick (Fiona.Leverick@gla.ac.uk) and Professor James Chalmers (James.Chalmers@gla.ac.uk)

Who do I contact if I wish to make a complaint on ethical grounds?

This study has been approved by the College of Social Sciences Research Ethics Committee. Should you wish to make a complaint about the conduct of the interviewer please contact Dr Muir Houston, University of Glasgow, Social Sciences Ethics Officer on **Muir.Houston@glasgow.ac.uk**

APPENDIX 3: CONSENT FORM

University of Glasgow
College of Social Sciences

CONSENT FORM

Title of Project: A human rights-based approach to the criminal process: the role of rape victims in criminal justice decision-making'

Name of Researcher: Peter Reid (Supervisors: Professor Fiona Leverick and Professor James Chalmers)

I confirm that I have read and understood the Participant Information Sheet for the above study and have had the opportunity to ask questions.

I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.

I confirm that:

- I understand that statements from this interview may be used, referencing my professional role, but not my name or any other personal information, in publications of this research project.
- The identity of the individuals interviewed will be anonymised.
- The material will be treated as confidential and kept in secure storage at all times.

I would like to audio record the interview. The recording of the interview is only made for the purpose of data collection.

I agree/do not agree (delete as applicable) to the interview being audio-recorded.

I agree / do not agree (delete as applicable) to take part in the above study.

Name of Participant …… Signature ……..

Date ……

Name of Researcher …… Signature ……..

Date ……

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