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EDITORIAL

Welcome to the twenty second volume of the Scottish Journal of Criminal Justice Studies. This year's Journal contains articles by Hannah Graham and Gill McIvor on the highly topical issue of electronic monitoring, by Neil Hutton on the work of the recently incepted Scottish Sentencing Council, and by Bryony Cornforth Camden on the topic of the workings of the UK asylum system for women asylum seekers whose claims include rape, which earned her the 2015 SASO student essay prize.

The first article, by Graham and McIvor, draws on findings from a study of Scottish criminal justice practitioners' views of the use of electronic monitoring. With its specific focus on the use of electronic monitoring as a means of supporting young people to desist from crime, the article offers fascinating insights into the multi-faceted and contingent nature of this form of technology and the range of views held about its uses.

The article by Neil Hutton outlines the aims and objectives of the Scottish Sentencing Council and offers a glimpse into the areas on which it is likely to focus over the next few years. As Lord Carloway said, with its remit to improve consistency in sentencing and afford greater transparency in decision-making across Scotland, the Council represents 'a new era' for sentencing in Scotland.

The prize-winning essay by Edinburgh University MSc student Bryony Cornforth Camden is a considered analysis of the operation of the UK asylum system in its responses to allegations of rape by female asylum seekers. It offers a critical perspective on the use of credibility in

relation to claims of rape, and explores the applicability of a new approach which focuses on vulnerability and exploitation in an attempt to improve the system.

The Journal also includes the Chair's report for 2015/2015 and up to date listings and contact details of SASO Branch secretaries.

As always, the Journal is very keen to publish original articles on matters of interest to the Scottish criminal justice community. I would particularly like to encourage articles and/or commentaries from practitioners, and those with practice experience, which inform the realities of work in criminal justice. Contributors are asked to send articles (in word format) to the Editor (michele.burman@glasgow.ac.uk)

The influences of electronic monitoring in desistance processes: practitioner and decision-maker perspectives

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Professor Gill McIvor, Stirling University

Introduction

This article canvasses practitioner and decision-maker perspectives of the influences of electronic monitoring (EM) in processes of desistance from crime, with a particular focus on their views of its use with young people aged 16 to 25 years old. Presenting findings from a qualitative mixed methods study, we offer a bounded exploration of the views of different actors working in the Scottish criminal justice field, which are framed and analysed here through the lenses of desistance scholarship.

There are a relatively small number of studies involving monitored people which specifically examine whether electronic monitoring can be considered as a catalyst or vehicle for desistance. Hucklesby's (2008, 2009, 2013a, 2013b) research in England indicates that electronically monitored curfew orders can contribute to desistance and compliance by decreasing levels of anti-social capital and improving levels of pro-social capital. Some participants in her study spoke of how, while being electronically monitored, they 'grew up' and grew out of offending (Hucklesby, 2008), which is consistent with ontogenic understandings of desistance processes. Isolating the influences of EM and linking these to desistance processes is a complex empirical task. As we have observed elsewhere, 'whether EM can be said to actively 'support' or enable processes of desistance from crime and community reintegration, or whether it can be simply said that EM is used in ways that are comparatively less inhibitive of such processes (relative to more punitive sanctions such as incarceration) is the subject of ongoing debate (Lilly, 2006; Mair, 2006; Nellis, 2006, 2013, 2014; Deuchar, 2010, 2011; Geoghegan, 2012)' (in Graham and McIvor, 2015: 74).

Practitioner and decision-maker perspectives on the desistance of monitored people have not yet been covered in much breadth or depth in the extant Anglophone literature. Research involving practitioners and decision-makers tends to focus on the uses of electronic monitoring to reduce the risk of reoffending – a penological objective of reduction and prevention – rather than their broader understanding of its impact in socially situated human developmental processes of desistance from crime. Research and policy literatures on the former are not a

sufficient substitute for understanding the latter, as reducing the risk of reoffending and supporting monitored peoples' desistance are not unequivocally synonymous – in terms of the paradigmatic lenses and theories employed, nor the approaches used and practical ways in which actors make sense of such processes. As such, this article seeks to make a contribution towards redressing this gap in extant literatures.

Our use of the term 'desistance' in this article is based on McNeill's (2016a) conceptualisation: it is a dynamic process of human development – one that is situated in and profoundly affected by its social contexts – in which persons move away from offending and towards compliance with law and social norms. Complementary to this, we employ Nugent and Schinkel's (2016: 3) terminology of 'act desistance' for non-offending, 'identity desistance' for the internalisation of non-offending identity, and 'relational desistance' for recognition of change by others'

The study

This article focuses on one facet of empirical findings from the research conducted in Scotland – participant perspectives of the uses and effects of electronic monitoring for young adults in desistance processes. This sub-set of findings has emerged from the data, as it was not a pre-established focus or line of questioning in the data collection. The study focuses on adults more generally, not just young adults, as is the focus here. Overall, the Scottish jurisdictional findings and recommendations are much wider, and form part of a larger European comparative research project involving four other jurisdictions: England & Wales, Belgium, Germany and the Netherlands. This cross-national comparative study has been commissioned and funded by the European Commission¹, and detailed research reports, briefing papers and conference paper presentations produced from it are available online (see: Hucklesby, A., Beyens, K., Boone, M., Dünkel, F., McIvor, G., & Graham, H. 2016a, 2016b, 2016c, 2016d). It is the first of its kind in Europe to empirically and comparatively investigate the uses of electronic monitoring in such depth.

The Scottish sample encompassed 30 interviews conducted in 2015 with different criminal justice actors, and 53 hours of ethnographic observation of the tagging and monitoring process undertaken at the National Electronic Monitoring Centre outside Glasgow, and accompanying EM field officers into monitored people's homes at night. The Scottish interview sample includes sheriffs, criminal justice social workers, Scottish Prison Service staff, Police Scotland, a member of the Parole Board for Scotland, G4S electronic monitoring staff, Scottish Government Justice policymakers, and staff from a third sector representative organisation.

Research interviews were conducted with participants in places where EM is used regularly, as well as in places where it is not, to gain a greater understanding of why or why not? These places are not publicly identified to protect participant anonymity in a small jurisdiction. The primary data is supported by evidence from other secondary sources such as statistics, process mapping of the monitoring process for different EM modalities, policy review and Consultation submissions. The Scottish findings and recommendations were released in mid-2016 in the form of a 92-page report, [title], and a 12-page briefing paper summary (see McIvor and Graham, 2016a; McIvor and Graham, 2016b). Additionally, the research presented here is premised on a separate but related in-depth international evidence review (Graham and McIvor, 2015) conducted by the article authors and commissioned by the Scottish Government during the same period of time as this European study.

One of the limitations of this European study is that it was not commissioned or designed to include primary data collection seeking the perspectives of monitored people, hence why this article focuses on practitioner and decision-maker perspectives of working with monitored people in desistance processes. A key recommendation within this research project is that ‘more independent research is needed in the future’, including ensuring that future developments ‘are informed by the perspectives and lived experiences of monitored people, their families and victims’ (McIvor and Graham, 2016a: 3). Moreover, the Scottish practitioner and decision-maker interview sample is modest in size, so the findings presented here should be understood as delimited in their broader generalisability.

Background context

Discussions and findings in this article should be understood as occurring in a context where only one form of electronic monitoring technology has been used in Scotland from 2002 to 2016. Radio frequency electronic monitoring involves tagging and, in most cases, a curfew restriction to a single location for a set period of time, most commonly a home curfew of up to 12 hours per day. Radio frequency EM functions differently to other EM technologies, such as GPS tagging and tracking or ‘alcohol tags’, which have the capacity for transdermal alcohol monitoring through contact with skin and sweat (for an explanation and evidence review of the uses, impacts and costs of these technologies, see Graham and McIvor, 2015).

The majority of electronically monitored orders in Scotland from 2002-2016 have been ‘stand-alone’, where offender supervision and support options are not a routine feature of the most commonly imposed EM orders: Restriction of Liberty Orders (EM as a stand-alone community sentence) or Home Detention Curfews (early release from prison with EM on a

HDC licence). Criminal justice social workers are not involved in supervising or supporting people on Restriction of Liberty Orders or Home Detention Curfews. Rich qualitative accounts of ‘assisted desistance’ in the integrated form of supervision and support for desistance are not readily forthcoming in this study because the legal infrastructure for EM in Scotland has not allowed for this in most cases to date.

The thematic findings in the following sections are structured around our choice to frame and analyse them against concepts and theories which are prominent in contemporary desistance scholarship. Firstly, the views of practitioners and decision-makers about electronically monitoring young adults are canvassed. Secondly, we explore a common narrative in research participant accounts using the notions of ‘situational self-binding’ and ‘knifing off’ to examine their perspectives of agentic and situational dimensions of desistance, using EM as a catalyst for change.

However, it is worth noting from the outset that while participants report monitored young people having and using agency, their accounts are not premised on an expectation of rational actors with high levels of motivation and self-control, and numerous opportunities and supports for change. Participants in this study offer more reflexive and pragmatic perspectives of the mixed realities, the pains and the gains, of what might be involved for monitored young people in these situations and processes. To reflect this, the concluding section of this article is reflexive in problematising essentialist arguments and dichotomous conceptualisations of electronic monitoring as a help *or* a hindrance to desistance.

Mixed views of electronically monitoring young people

One core tenet of desistance scholarship centres on ontogenic theories of the influence of age, life stage and maturation in offending and desistance from crime. Youth and young adulthood are highlighted as stages in the lifecourse when particular ‘turning points’ towards desistance and change can occur. In this study, participant perspectives and experiences of electronically monitoring young people are patently mixed. Some believe that electronic monitoring is a community sentence or condition well suited to use with young adults, and some oppose its use with young adults, especially where their behaviours and circumstances are seen to be too ‘chaotic’ or ‘impulsive.’ The rationales underpinning these mixed views are briefly explored further here.

For participants in this study who favour the use of EM with young adults, their perceptions accentuate its status in the sentencing tariff in Scotland as an alternative to custody. They also

tend to highlight its capacity to act as an externally imposed reason for self-discipline and establishing a positive daily routine in lifestyles that lack routine.

'If that group [young people] could be kept in the community or at home longer, I think all the research shows that the longer they stay out of custody the more chance they have of settling down' (Interview 11, G4S staff).

'I think it [EM] is probably most useful for young offenders who would otherwise be out on the streets causing trouble or committing thefts and that sort of thing' (Interview 20, sheriff).

The participant who offers the view above (Interview 11) that EM is suitable for young offenders goes on to warn that prospects of EM helping them in 'settling down' are contingent on household dynamics and the stability and safety of their social bonds. Where relationships are positive and supportive, being tagged with a home curfew may at the very least not hinder, or may even help desistance processes. Where relationships are strained or aggressive, a young person being tagged with a home curfew is likely to frustrate their prospects of both compliance and desistance.

'You've got to look at how well the relationship between the person in question and their parents is. I found a lot that when you have for example a younger offender, you invariably have a maybe a mother/stepfather relationship and in that situation where perhaps there's a bit of let's just say friction between the young person and the stepfather, it can be accentuated by the young person being at home for twelve hours per day' (Interview 11, G4S staff).

Here, ontogenic age-related explanations need to be understood as interactive with sociogenic explanations of the role of social bonds and a young person's capacity and opportunities for relational desistance. When compared to prison, electronic monitoring may seem like a preferable option for use with young people, but 'better than prison' does not necessarily mean closely associated with enabling desistance.

In a similar vein, a senior social work practitioner differentiates wholesale arguments for or against using EM with young people in Scotland from the deeper need to tease out concerns and questions of *how* and *why* it is used, and with *whom*. They draw attention to current responses by authorities to non-compliance and breach of electronically monitored orders, suggesting that if long-term desistance is the goal, then a more 'realistic', 'proportionate' and tailored approach needs to be taken to using EM with young adults, rather than the current

strict process of responding to violations with breach reporting by ‘taking people back to court five, six, seven times for the same order for it to be continued’ (Interview 3, criminal justice social worker). In saying this, they challenge attempts to individually responsabilise monitored young adults to comply and desist in ways which are ignorant or blind to their situational, relational and social context:

‘It’s no’ worth sending them to jail [if they breach] ... Sometimes you think well they’re nineteen or twenty years old, it doesnae matter what you do with him just now, he’s not going to change because he’s still in the same situation, he’s still with the same peers, he’s still got the same family, he’s still got the same history, you know. We just have to accept they do things and then maybe we wait till they’re twenty four, twenty five when they’ve maybe actually matured enough to understand...’ (Interview 3, criminal justice social worker).

Being given the opportunity of an ‘alternative’ to prison may entail mixed influences, gains and pains, for young adults, depending on what is or is not attained in this process. If young prisoners, for example a 16 or 17 year old from HMYOI Polmont or Cornton Vale prisons, are granted early release with a tag on Home Detention Curfew, there is a lot riding on their compliance. Interviews with Scottish Prison Service staff indicate prison staff perceive their approach as flexible in how they use EM with young prisoners, emphasising a clear recognition that young prisoners can have trouble complying with EM regimes; however, local and individual professional approaches are structured by overarching national policy and legislative features. If a young prisoner breaches their HDC and they are recalled to prison, current statutory exclusions (at the time of writing) enshrined in Scottish legislation mean they are *permanently ineligible* for HDC again. Breaching a Home Detention Curfew is a ‘failure’ that stays on their record and may heighten assessments of their risk well into their futures, irrespective of subsequent personal growth or situational change.

Some participants in this study use this type of example as a rationale of the costliness and consequences of breach and non-compliance to warn against using EM with young people because of a perceived incompatibility of the strictness of the regime for those who might be ‘*very immature*’ and ‘*don’t actually understand*’ (Interview 16, sheriff), and who ‘*don’t realise the consequences of what’ll happen if they don’t stick to it*’ (Interview 9, G4S staff). For other young people, the fear of failure can be a considerable burden or a source motivation in the process of being monitored.

Nugent and Schinkel (2016: 10) offer excellent insights into the ‘pain of goal failure’ and the challenge of ‘identity desistance’ for young people, which may in turn negatively affect their capacity to sustain any ‘act desistance’ they might have achieved. Especially in the early stages of desistance, some young people can miss the status that committing crime offers and can struggle with being ‘unable to recreate a pro-social identity of any similar standing’ (Nugent and Schinkel, 2016: 10). In a similar vein, a participant in this study observes that, for some young people serving community sentences in Scotland, being tagged carries a pro-criminal status as ‘*a badge of honour, “look how bad I’ve been,” da-da-da*’ (Interview 17, criminal justice social worker). Other young people manage to achieve act desistance and some level of relational desistance in the process of being electronically monitored, but may struggle with the pain of goal failure when there is a lack of opportunities and supports for identity desistance and becoming a person known for things other than crime and punishment. The next section highlights examples of how EM can be associated with positive influences for some young adults

Situational self-binding and ‘knifing off’ during electronic monitoring: using EM as a catalyst for change?

A consistent narrative across practitioner and decision-maker accounts in this study is a common perception of how some monitored young people use their tag and home curfew as a catalyst for change in the early stages of desistance. Data and findings from this study indicate that, in consenting to being physically bound with a tag and temporally and spatially bound by complying with a home curfew, some monitored people engage in ‘situational self-binding’ and use EM as a catalyst for reducing or ceasing particular behaviours and peer associations previously associated with their offending. This finding echoes and further develops empirical observations raised by others, for example, in research by Hucklesby (2008, 2009, 2013a, 2013b).

One participant highlights how EM can act as a ‘*constraint*’ which ‘*helps the person who is not quite ready to help themselves*’ (Interview 4, criminal justice social worker). They advocate practitioners in supervision and support roles being ‘imaginative’ in having motivational conversations with young people about the potential benefits and gains of self-control and being confined (for a time) to the family home (in household situations where this is a positive environment) and away from criminogenic environments and peer associations. Another participant suggests that, for young people aged 25 and under, some will internalise the

imposition of EM in a way where the penal control translates into newfound levels of self-control and agency, *'and that's how they've adhered to it, it's you know, and [they say] "the court's told me I have to do it and I'm doing it"'* (Interview 17, criminal justice social worker).

These participant accounts can be further explained using Bottoms' (2013, 2014) propositions of situational self-binding in agentic and socio-spatial dimensions of desistance. Drawing on data from the Sheffield Desistance Study, he argues that situational and environmental factors can act as influential mechanisms for offenders to achieve different types of compliance (instrumental, normative and situational) and, including but transcending compliance, they can act as a catalyst or opportunity for individual agency and self-control achieved by situational means in the early stages of desistance (Bottoms, 2013). Distinguishing this line of reasoning from sociogenic desistance theories is important because 'while our environments and activities are closely connected to our social bonds or ties (for example, bonds with intimate relationships and to families, work and faith communities), they deserve attention in their own right' (Graham and McNeill, 2016). In this study, participant accounts of monitored young adults choosing to conform themselves in response to imposed constraints and circumstances are important – separately but relatedly to accounts of how EM affects them in navigating social dynamics in the household or how they might also use the period of being electronically monitored to signal to significant others that they are desisting. Both are inter-related features of themes emerging from this study.

Numerous participants working in different parts of the Scottish criminal justice field offer observations of how some young people use electronic monitoring as a reason to reduce or cease contact with peers they have previously committed criminal and anti-social behaviour with, and among whom they are known as having status as an offender. Being at home 'on the tag', as it is commonly called, is used by some as a visible and socially legitimate constraint on particular peer associations and behavioural habit patterns.

'Especially young offenders when you think this is going to be a really hard reintroduction into the community ... as opposed to saying to his friends when they come to his door or his hostel or whatever "we're going out, you've got to come out" and young offenders have said "it's easier if I've got a tag", and that's very sensible I think. So it's not "I can't come and I'm scared, and I'm not one of your group any more", it's so they've got a bit of a status with having the tag [laughs] which in some ways is a protective element for them in terms of saying "because of this I can't come out and do this, I've got to be in my house

between these hours” and absolutely I think it is right’ (Interview 23, Parole Board for Scotland).

‘In terms of the change in their lives, we get a lot of comments along the lines of, you know, “it gave me time to think”, “I was not associating with my peer group” or they might not put it that way, “I was able to say to my pals “I can’t go out tonight””, “I wasn’t running with the pack at weekends I was, as a result of that, not coming to the attention of the police at weekends”, “it gave me a bit of stability in my life”’ (Interview 11, G4S staff).

Scottish Government policymakers echo this point more widely, because it is not unique to one electronic monitoring technology, nor to one demographic of monitored people. They observe that, overall, EM can *‘give people an excuse’ because ‘it is something they can point to and say, it’s visible’* (Interview 21, Scottish Government Justice). Nonetheless, participants in this research tend to offer this explanation mostly in relation to monitored young adults navigating not only their own act desistance, but identity desistance and relational desistance among their peers.

These participant accounts exemplify the sociological and criminological notion of ‘knifing off’, which has been harnessed by desistance scholars to understand how people change their routine activities and relationships in response to structurally induced turning points (see Laub and Sampson, 2003; Maruna and Roy, 2007). Knifing off is described as the process of how agentic responses to ‘new situations’ are created ‘that allow individuals to knife off the past, in part, by changing these routine activity patterns that led to trouble with the law’ (Maruna and Roy, 2007: 245). Bottoms (2013: 84) argues that the notion of situational self-binding is still preferential to that of knifing off, because of how it better encompasses the complexities and multiple factors in desistance processes, ‘typically involving several lifestyle changes, and with no guarantee of a successful outcome’; whereas knifing off can be critiqued as implying clear change and positive associations with a situation (e.g., electronic monitoring).

One person’s pain is another person’s gain? Contextualising the impacts of electronic monitoring on individuals, relationships and circumstances

There remains a crucial need to understand agentic activities and self-binding as situated in a particular relational and social context, which can yield different effects and outcomes depending on the people, circumstances, opportunities and supports (or lack thereof) involved. Some participants in this study perceive the experience of electronic monitoring as akin to a

‘triggering event’ (see Laub *et al.*, 1998) or a ‘turning point’ for *some* monitored people in the early stages of desistance. This aligns with a small body of international literature showing that, when used in ethical and effective ways, electronic monitoring can have a modest positive impact, in combination with other factors (for more, see Graham and McIvor, 2015).

A central finding here is that potential ‘gains’ and positive influences associated with electronic monitoring are far from mutually exclusive with potential ‘pains’ and negative influences for individuals and families. Maruna’s (2001: 25) cogent warning remains apt: ‘nothing inherent in a situation makes it a turning point.’ Nothing inherent in electronic monitoring makes it a catalyst for or a barrier to desistance. Context matters. Some young adults may use EM to ‘knife off’ and leave crime and criminogenic peer associations behind. Some may experience what Nugent and Schinkel (2016) describe as the pains of isolation and goal failure, where a level of act desistance is realised for the period of monitoring, but identity desistance and relational desistance may not necessarily follow, especially where there is a lack of material resources, positive social supports and opportunities.

One of the notable gaps in participant narratives in this study, and a gap in electronic monitoring literature and desistance scholarship more generally is the lack of attention given to monitored people who desist alone. By this, we mean monitored people who are not in a committed intimate partner relationship and who do not have extensive positive support networks, including those who live (and are curfewed to properties) alone. Most desistance processes are explained with reference to relationships and social bonds. It is fundamental that more knowledge is developed to better understand and support people whose lives are not characterised by the master statuses of ‘partner’ or ‘parent’, because their experiences cannot and should not be understood predominantly against a heteronormative, monogamous norm. Similarly, the gendered dimensions of desistance while being electronically monitored need to be better understood. Finally, practitioners and researchers need to remain cognisant of the potential for extreme cases of situational self-binding to desist alone, where individual motivation becomes preoccupied with and contingent on the presence of the tag and curfew to desist, in the absence of other supports and catalysts for change.

The findings in this article, on their own, do not necessarily represent a sound basis for wholesale arguments that greater numbers of young adults in Scotland should be given sentences involving electronic monitoring because it might help people in this age group stop offending and leave the peer groups with which they offended with. The realities are more complex and contingent than that. Any desire to ‘sentence for desistance’ (see McNeill, 2016b) needs to be tempered by a deep understanding of electronically monitored punishment and the

multi-faceted nature of its collateral consequences. It is a technology and a form of community sanction and measure that can be used in very different ways in pursuit of very different purposes – personal, professional and penological. Electronic monitoring can help, hinder or harm desistance processes depending on why, how and with whom it is used.

Where electronic monitoring is used, proportionality and personalisation of its use are fundamentally important. One concept or theory from desistance scholarship cannot legitimately be given primacy to the exclusion of others in explaining the impact of EM because, as we have argued here, what positive effects might be illuminated by one theoretical argument or concept (for example, situational self-binding, knifing off) need to be cross-examined against others (for example, sociogenic understandings of the impact on familial social bonds). More research is needed to address knowledge gaps, especially in seeking to know more about the lived experiences and desistance processes of monitored people themselves.

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The Scottish Sentencing Council: A New Era

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Introduction

A key aspect of examining how offending behaviour is dealt with is to look at sentencing practice and policy. This is a primary focus of the newly established [Scottish Sentencing Council](#), launched in October 2015, with a remit to improve consistency in sentencing across the country and promote better awareness and understanding of sentencing. The Council's first business plan, setting out, among other things, what guidelines will be prepared, was recently launched.

History

The Council grew out of recommendations initially made by the Sentencing Commission, chaired by the late Lord Macfadyen. The Commission was an independent body tasked by the then Scottish Executive to examine several sentencing issues. Its final report in 2006, [The Scope to Improve Sentencing in Scotland](#), concluded that a "perceived" lack of consistency in sentencing was damaging public confidence in the justice system. The report called for a framework to be set up that could be seen by the public as promoting greater consistency throughout Scotland's courts.

Further support for action came from the Scottish Prisons Commission, which in 2008, called for a new body to "drive forward consistency and improve the effectiveness of sentencing". On the basis of those recommendations, the Scottish Government consulted on proposals to create a sentencing council and received primarily positive responses from the legal world and beyond.

The Criminal Justice and Licensing (Scotland) Bill subsequently brought to the Scottish Parliament was passed in 2010. Among the government's stated policy aims when introducing the legislation was a desire to help "ensure greater consistency, fairness and transparency in sentencing and thereby increasing public confidence in the integrity of the Scottish criminal justice system".

Objectives

The Council's role is now enshrined in the [Criminal Justice and Licensing \(Scotland\) Act 2010](#) as:

- promoting consistency in sentencing practice
- assisting the development of policy in relation to sentencing
- promoting greater awareness and understanding of sentencing policy and practice.

The Council also has powers to publish information, conduct research and provide general advice and guidance on sentencing matters.

Membership

Council members were appointed during the summer of 2015 and encompass a wide range of expertise and experience from across the Scottish criminal justice system. The Chair is the Lord Justice Clerk (Scotland's second most senior judge with particular responsibility for criminal law) by virtue of the office. This is currently The Rt. Hon. Lady Dorrian. In addition to the Chair, membership comprises:

- The Hon. Lord Turnbull, Lead Preliminary Hearings Judge and Administrative Judge for First Instance Criminal Cases
- Sheriff Principal Ian R. Abercrombie QC, Sheriff Principal of South Strathclyde, Dumfries and Galloway
- Sheriff Norman McFadyen, Sheriff of Lothian and Borders sitting in Edinburgh
- Allan Findlay, Summary Sheriff in Glasgow and Strathkelvin, sitting in Glasgow
- Gillian Thomson, Justice of the Peace in Tayside, Central and Fife, sitting in Stirling
- David Harvie, Crown Agent for Scotland, prosecutor member
- Stephen O'Rourke, advocate member, Terra Firma Chambers
- John Scott QC, solicitor member, Capital Defence Lawyers
- [Assistant Chief Constable John Hawkins], police constable member
- Sue Moody, victims expert, Chair of the Scottish Refugee Council
- Professor Neil Hutton, lay member, Professor of Law at the University of Strathclyde.

Membership includes representation from each court tier of the judiciary as well as prosecution and defence members, but also, importantly, includes lay voices. Collectively, the Council has a broad and deep understanding of the impact of sentencing on offenders, victims, families, communities and society. This will help to ensure that it is in a good position to consider the range of diverse issues relevant to the sentencing process.

Guidelines

Since 1996, the High Court of Justiciary in Scotland (Scotland's supreme court in criminal matters) has had the ability to issue guideline judgments in appeals where the Court can set out the appropriate sentence in cases similar to that before it. The recently established Sheriff Appeal Court has a similar power when deciding summary appeals. Relatively few of these opinions have been issued in Scotland to date but those that have, as well as other judgments giving helpful guidance on sentencing, are available on the Council's [website](#). Each is accompanied by an easy-to-read summary. All future guideline opinions will be similarly published on the Council website.

These judgments can only go so far to promote consistency, however. What areas the courts give guidance on will depend on what cases are before them. The Council will therefore provide, for the first time in Scotland, a mechanism for producing guidelines on a systematic basis.

When issuing guideline judgments in criminal appeals, the High Court and Sheriff Appeal Court can require the Council to prepare or review sentencing guidelines on any matter. The Council must comply with such a requirement, and, in doing so, must have regard to the reasons for it being made. The Scottish Ministers can also request the Council to prepare or review guidelines. Although the Council must consider such a request, it may decide not to act upon it. Should the Council decide not to prepare guidelines at the request of Ministers, it must provide reasons for its decision.

Those are the two statutory routes for initiating guidelines. The Council remains free to prepare guidelines on its own initiative or at the suggestion of others. When selecting topics for guidelines, the Council has decided to consider in particular the following matters:

- whether a statutory request for the preparation of a guideline has been made by the High Court, the Sheriff Appeal Court or the Scottish Ministers (no such requests have been made);
- public value, particularly where a guideline is expected to improve awareness or understanding and/or public confidence and to what extent;
- impact: particularly in relation to the volume of offenders, offences or disposals, and/or the extent to which a guideline might be expected to promote consistency;
- areas of particular difficulty or complexity, for example because of the nature of the subject matter or the applicable law;
- new legislation or developments in case law require a guideline to be reviewed;
- the resources required for the preparation of a guideline and the resources available; and

- other relevant factors, for example the interaction with other guidelines in contemplation, or whether there are plans for legislation which may have implications for a guideline's content.

The 2010 Act gives the Council significant flexibility in shaping guidelines which can be general or particular in nature; can deal with the principles and purposes of sentencing; with sentencing levels; or with sentences for particular types of offence, or even types of offender. The Council was established as an advisory body and all guidelines must be approved by the High Court before they can come into effect. Once given effect, all courts must have regard to applicable guidelines when sentencing an offender. If judges consider that there are good reasons to depart from a guideline, they must openly state what those reasons are. This requirement will enable the public to follow the sentencing process and see how guidelines operate in practice.

Business Plan

In publishing its first business plan, the Council has now determined its initial guideline topics and set a working time frame.

The foundations of the Council's work will be laid by first establishing the general principles and purposes of sentencing. Although some guidance on this is already available in the form of court decisions on appropriate sentences in particular cases, the fundamental principles and purposes of sentencing have never been expressly defined in any single piece of legislation or court judgment. This overarching guideline will help to explain the sentencing process generally and what factors are taken into account by a judge when determining a sentence.

In tandem, the Council will also focus on the more specific topic of youth offenders. This is a complex area where there is room to improve understanding and build public confidence. The Council must now decide whether this matter should complement the wider 'principle and purposes' guideline, or form a more integral part of it. In the process, the Council will also look at whether further characteristics particular to other types of offender should be dealt with in the same broad principles and purposes guideline.

These first guidelines will also help the Council to develop a methodology for the preparation of future guidelines and will over time form part of a comprehensive body of guidelines of general application.

The Council recognises that new guidelines will impact a range of people and organisations and has pledged to allow time for rigorous consultation. Views will be actively sought from interested groups and their input will be considered thoroughly. These initial guidelines will be submitted to the High Court for approval by autumn 2018. During this time, the Council will also begin work on offence-specific guidelines. It will start with two significant, complex offences, before turning to higher volume offences and crimes of violence.

The first offences to be addressed will be environmental and wildlife offences; and causing death by driving. These are serious matters, often involving complicated circumstances, which can lead to extremely difficult sentencing decisions. Environmental issues have particular resonance in Scotland relevant to our tourism and rural industries and are of significant importance to our economy. Guidelines on environmental offences will be particularly helpful in setting down an approach to how corporations should be sentenced which could be used to inform later guidelines in other areas such as health and safety. It is anticipated that the guidelines will be submitted to the High Court in 2019. It is anticipated that these guidelines will be submitted to the High Court in 2019.

The Council recognises the impact of a wide range of offences on the public and will deal with them as soon as it is feasible to do so. Members are already looking ahead to the next business plan (for the period 2018-21) where they intend to consider theft and property offences. But any future extension of the presumption against short-term sentences would need to be taken into account before a guideline on any high volume offence such as these could be prepared.

Meanwhile the Council will also begin researching the sentencing of sexual offences which has increasingly become an area of public concern in recent years. We also anticipate looking at family violence - once the Scottish Parliament has considered the proposed new offence of domestic abuse. Also on our radar is sentence discounting where an offender receives a reduced sentence for pleading guilty.

This next Business Plan however is still unwritten and the Council very much welcomes relevant views on what it should contain from interested organisations and individuals.

Assessing Guidelines

Changes in sentencing practice can have significant impact on various parts of the justice system and guidelines must be accompanied by an assessment of the costs and benefits of their implementation and likely effects on other bodies. It will be vital to ensure that these assessments are based on accurate and relevant information, in order that other organisations

are able to anticipate and prepare for change. It may be helpful to establish information sharing arrangements, whether in general terms or in respect of the development of individual guidelines, with other justice agencies to support this work.

As well as having direct resourcing implications for the criminal justice system, sentencing can have significant impact on offenders and their families, on victims and their families, on local communities and on society more generally. Research requires to be carried out to consider the effects or effectiveness of sentencing in this wider sense.

Research and Information

The Council is committed to making decisions on the basis of evidence. Although members have a range of expertise, it will be crucial to actively consult and seek external input to gain a wider spectrum of understanding. This will include input from other judicial office holders, legal practitioners, those working in the administration of criminal justice, academics, and, not least, individuals with direct experience of the criminal justice system. Work will also be carried out to broaden the field of knowledge around sentencing through the dissemination of research and information.

Some of this work will be conducted by the Council itself but it will also seek to work with other bodies and individuals, NGOs and academics. A research framework is currently being developed, with the principles of fairness, transparency and best procurement practice in mind. This will enable the Council to begin research projects swiftly on such matters as sentencing practice, and the effects and efficacy of different disposals.

Once guidelines are established, they will also be reviewed on a systematic basis and a separate framework will need to be developed for such evaluation.

A Research Committee will be tasked with developing and managing the Council's research framework, including assessing tenders, considering speculative proposals and disseminating research findings to appropriate audiences.

Lessons from elsewhere

There are already well-established sentencing bodies in other jurisdictions and the Council is finding these particularly useful as it develops the best approach for Scotland. An ongoing programme of engagement has included visits to England and Wales, the Republic of Ireland, Northern Ireland and most recently a [conference](#) on sentencing in the United States which brought together a range of representatives from numerous state sentencing commissions and

experts in the field. This enabled members to build links with colleagues and take away valuable information based experience.

The Council also benefited from a visit from Lord Justice Treacy, Chair of the Sentencing Council for England and Wales, and Professor Arie Freiberg, Chair of Australia's sentencing advisory councils in Victoria and Tasmania who [shared](#) their advice on the importance of transparency, accessibility and technology.

This engagement is helping to inform a methodology for the drafting and development of guidelines, which will set out what form and style is most appropriate for the Scottish context and provide a framework for their development. This will help ensure from the outset that a coherent body of guidelines can be developed over time. This work will be carried out alongside the development of individual guidelines as the nature of the guidelines to be developed is likely to inform decisions as to their style and structure (for example, whether a tabular or narrative or other style should be adopted).

As well as learning from others, it will be essential for the Council to obtain a comprehensive picture of the current practices in Scotland itself. Members have embarked on a series of visits and events designed to broaden understanding of different aspects of the sentencing process. One of the first visits was to HM Young Offenders' Institution, Polmont and HM Prison, Low Moss to find out more about what happens after offenders are sentenced to custody. Details of what was learned can read on the Council's [blog](#) page.

Openness and participation

At its inaugural meeting, the Council made a number of decisions demonstrating a clear commitment to transparency. Significantly, a commitment was given that all sentencing guidelines will be subject to full public consultation before being finalised.

Other agreed measures include:

- developing of the Council's website with [explanatory material](#) on the sentencing process, including a [jargon buster](#), case studies and sentencing scenarios;
- publishing easy-read and accessible documents, such as consultations, to explain sentencing and our work;
- publishing guideline judgments accompanied by simplified summaries; and
- providing public information, including responding in general terms to queries on sentencing matters.

A Communications Committee has been established to oversee much of this work. The Committee will also give consideration to specific projects aimed at improving awareness of sentencing among the general public and will actively seek to collaborate with others, where appropriate.

New era

The advent of the Sentencing Council marks the start of what the body's first (now former) Chair, Lord Carloway, termed "a new era for sentencing" in Scotland. This is a tall order, but one that the Council is determined to live up to. It is set to take the Scottish justice system into a new chapter of improved consistency and transparency, working to raise awareness and increase public confidence.

Biographical info

Neil Hutton is a member of the Scottish Sentencing Council. He was educated at the University of Edinburgh (MA 1976, PhD 1983) and has worked at the universities of Edinburgh, Dundee and Victoria University, New Zealand. He was appointed as a lecturer in the Law School at Strathclyde in 1990, became a Professor in 2001, and was Dean of the Faculty of Law, Arts and Social Sciences from 2005-2009.

He was a member of the team which designed a Sentencing Information System for the High Court between 1993 and 2002 and was a member of the Sentencing Commission for Scotland between 2003 and 2006. He has published widely on sentencing and punishment and has been invited to speak in a number of international jurisdictions including Singapore, China, Australia and the USA.

**SASO Student Essay Prize 2015: Moving away from the incredible:
improving the UK asylum system for women asylum seekers whose claims
include rape**

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Abstract

Many research projects have documented the problems with the UK asylum system, in particular, the use of credibility judgements in deciding whether to grant refugee status. This is particularly problematic for women making asylum claims which include rape as there is a heavy reliance on assessors' perceptions of the credibility of applicants' stories. Perceived credibility coincides with an organisational culture of disbelief within the UK asylum system, and often leads to women's claims being dismissed as incredible. In this article I propose an alternative approach to decision making in an attempt to make the asylum system more inclusive for women. This involves taking an approach which has been advocated for in domestic justice system reforms and applying it to the asylum system. The proposed approach focuses on vulnerability and exploitation rather than credibility. It promotes a shift from subjective judgements of assessors towards an analysis of vulnerability and potential for exploitation. By doing this, it reduces the impact of the underlying culture of disbelief.

Introduction

To be granted refugee status, asylum seekers in the UK are required to demonstrate to a 'reasonable degree of likelihood' that they have a well-founded fear of persecution in their home state¹. Their reasons for leaving their country of origin must also fit within the definition of persecution outlined in the refugee convention – that they will be persecuted on the basis of race, religion, political opinion or membership of a particular social group (UN General Assembly, 1951). In the UK this decision making process is known as refugee status determination (RSD).

This article addresses the question of what sort of things could be done to improve the asylum system for women applicants who allege to have been raped as part of their asylum claim. This is an important question as rape is a common part of women's asylum claims² and it is estimated that 50% to 75% of refugee women have been raped (Pearce, 2003; Scottish Refugee Council and London School of Hygiene and Tropical Medicine, 2009). Refugee

advocacy agencies have drawn attention to many issues for women asylum applicants throughout the asylum process. These include procedural issues in the RSD process, issues with women's inclusion in the Refugee Convention grounds as a 'social group', and issues of whether rape fits the current conception of persecution.

In this article, I do not attempt to provide a comprehensive picture of the problems with the asylum system or a comprehensive compilation of recommendations for improving the asylum system. Rather, I focus on the use of 'credibility' in asylum claims as an official method used in the UK RSD process and as the first hurdle applicants face.

In the first section of this article, I discuss how credibility is used and the problems it poses for women asylum seekers with rape claims. In the second section, I propose a new approach to RSD, which involves focusing on vulnerability and the potential for exploitation rather than credibility. I argue that using this approach will lead to fairer RSD outcomes for women applicants because it avoids relying on a tool that is susceptible to bias.

How credibility is used in the RSD process

In the RSD process, UK Government officials³ (referred to here as assessors) assess the credibility of asylum seekers' stories. This is a crucial step as the assessors' judgement of the credibility of the claim largely determines whether refugee status will be granted (Asylum Aid, 2011). It is difficult to gain a clear picture of what assessing credibility means because of the many different and frequently changing guidelines produced by the UK Government; however there is consensus that it involves assessing 'external credibility' and 'internal credibility' (Baillot et al, 2014; Sweeney, 2009). External credibility is judged by comparing external evidence such as medical reports with other aspects of the applicant's claim. Internal credibility is judged by looking for consistency in the applicant's story.

The Office of the UN High Commissioner for Refugees (UNHCR) endorses the use of credibility in RSD to establish the facts in the absence of evidence (UNHCR, 2011). Because asylum seekers leave the country under threat of persecution, it is unlikely that they would have evidence of being persecuted or even basic documents such as passports. Credibility plays a particularly large role in asylum claims that include rape (Baillot et al, 2014). It is difficult to produce evidence of rape within countries and particularly difficult in the context of asylum seeking because of the amount of time that has often passed and the geographical distance from the country where the rape occurred (Baillot et al 2014; Stanko, 1982).

The problems with using credibility

The use of credibility has been called in to question for being inaccurate, unfair and overly reliant on assessors' personal views and beliefs. The decision making process for asylum claims has been under review for the past 10 years by the UK Government and the UNHCR (UNHCR, 2010). Although there have been efforts to improve the system, recent research has shown that problems with the use of credibility are ongoing: eighty seven per cent of women asylum seekers' claims were initially refused, and of these, most were refused because their claims were not seen as credible (Asylum Aid, 2011). Forty-two per cent of the refused claims were later granted refugee status in an appeal hearing with an immigration judge. The large inconsistencies in decision making show that there are ongoing problems with how credibility is used.

Applying credibility in a broad sense

The problems with credibility discussed throughout this section are largely due to the way credibility is used – which is in an overly broad way. The UNHCR guidelines endorses the use of credibility to assess individual statements that make up asylum seekers' claims and state that this should be done in the absence of evidence (UNHCR, 2011). However, in James Sweeney's review he found credibility was being used in a broad sense and often equated to the general strength of the case and as a substitute for proof (2009). Using credibility in a broad sense is problematic as it relies on assessors' individual views and beliefs in making judgements which are then used as the main basis for RSD decisions.

Judging applicants' demeanour

Claimants' physical, observable demeanour plays a large role in determining credibility (Asylum Aid, 2011; Oosterveld, 2012). Furthermore research by Baillot et al (2012; 2014), found that perceived demeanour played a strong role in determining refugee status for women whose claim included rape. Judging demeanour is used as a way of assessing internal consistency as assessors decide whether the applicant acts in a way that is consistent with their story. This involves the assessor imposing their conceptions of how a rape victim should appear. This is problematic as there is no set way for people who have been raped to act, an issue that has been well researched in rape cases heard in domestic courts (Jordan 2004; Stanko, 1982).

The UNHCR and the UK Government guidelines caution against focusing on asylum seekers' demeanour in assessing credibility (Baillot et al, 2014). Despite this, the research by Helen Baillot and her colleagues noted that many assessors stressed the importance of demeanour in making judgements about rape claims (2014). These findings suggest that in the absence of evidence or more objective ways of judging claims, demeanour becomes important to the assessors. It is easy to see how assessors may overestimate their ability to determine whether a rape claim is true, as this helps justify the life changing decisions they make on a daily basis. Therefore, it may not be enough to caution assessors against judging applicants' demeanour in assessing credibility. There needs to be another mechanism that assessors can use in its place.

Judging coherency and searching for inconsistencies

Applicants' ability to produce a coherent and consistent story is used to determine eligibility in women's asylum claims generally and in claims that include rape (Asylum Aid, 2011; Baillot et al., 2014; Oosterveld, 2012). Baillot et al's (2014) research showed that this is a problematic method to use with women making rape claims as they may have difficulty remembering events due to the effects of trauma or the length of time that passed since the rape (2012). Applicants' anxiety at being interviewed by an official and language difficulties can also play a part. Another issue with basing credibility on applicants' ability to tell their story as a coherent set of events is that more educated applicants are more likely to be believed.

In Baillot, Cowan and Munro's research into rape claims the researchers noted that, as with demeanour, the Government guidelines warn against overly relying on consistency in assessing credibility (2014). However, they found that many assessors took an adversarial approach and actively sought out inconsistencies. This indicates that there is an underlying culture of disbelief. This is discussed in a later section.

Assigning significance to the early reporting of rape

Research has found that when applicants did not report rape as a part of their claim in their initial interview⁴ their story was often deemed incredible when they did eventually report rape (Asylum Aid, 2011; Baillot et al., 2012; Oosterveld, 2012). There are a number of issues with basing credibility on the stage at which the rape is disclosed. Reporting rape is difficult and people risk being revictimised by the experience if it is not treated sensitively (Adler 1987, Jordan 2009). Baillot et al's research showed many ways in which the initial assessment environment for asylum seekers was not conducive to reporting rape (2012). These include a

lack of privacy from family or from others in the assessment centre, and the format of the interview which was made up of closed questions with responses being transcribed. Assessors also did not always ask about rape or pick up on cues such as silences. It was questionable whether applicants were aware that they needed to disclose that they had been raped in the initial assessment. Again, as with judging applicants' demeanour and coherency, the assessors' practice goes against what is specified in the guidelines (in this case the UNHCR guidelines). This indicates that practice is influenced by an underlying culture of disbelief (Baillot et al., 2014).

Use of Country of Origin reports

Country of Origin reports are reports prepared by the UK Government, NGOs and the UNHCR to provide information about the situation in asylum seekers' countries of origin (Independent Chief Inspector, 2011). The content of these reports and the way they are being used is linked to the problematic use of credibility.

In terms of content, the reports have been criticised for not containing accurate information on gender relations within countries (Asylum Aid, 2011, Oosterveld, 2012). A lack information on gender relations is a huge limitation in trying to establish credibility of rape claims. The reports are used to establish external credibility, yet the reports are unlikely to be able to corroborate stories in any meaningful way if information on gender relations is missing. A study by Oosterveld found that when reports lacked this information, the assessors would resort to more subjective ways of assessing credibility and consequently it was difficult for women to prove their claim (2012).

In terms of use, various studies have found that the Country of Origin reports are used inconsistently by assessors, and at times, used in a selective or ad hoc fashion to support a decision that has already been made about the applicant's credibility (Baillot et al., 2014; Independent Chief Inspector, 2011; Pettitt, 2009). This indicates that the Country of Origin reports are being treated as secondary to broad credibility judgements. It also indicates that the basis for credibility assessments discussed above (demeanour, coherency, and early disclosure) are taking precedence over the reports.

Influence of a culture of disbelief

The problems with credibility discussed so far have shown a gap between assessors' practices and what is stated in the UNHCR or UK Government guidelines. For example, judging how a woman applicant acts, trying to pick inconsistencies in their stories, and being

suspicious of non-disclosure despite being in an inhospitable interview setting. None of these practices align with the guidelines that specify claimants are given ‘the benefit of the doubt’ (UNHCR, 2011: 39) or the overall purpose of providing asylum as a part of the international human rights regime – to protect human rights. This gap between practices and guidelines indicates that assessors are guided by an underlying culture of disbelief, and this is expressed through credibility judgements.

An organisational culture of disbelief within the UK asylum system has been well documented by refugee advocacy groups (Pettitt, 2009; Truman 2009). The general explanation for this culture is the perceived anti-immigration attitudes of the public combined with political aims to reduce immigration (Souter, 2011). As well as a culture of disbelief in the asylum system, Bailot, Cowan and Munro’s research found evidence of a wider culture of disbelief about rape claims made by women (Baillot et al., 2014). This increases the challenge faced by rape victims seeking asylum.

Improving the asylum system by moving away from broad credibility judgements

So far this article has looked at the use of credibility as a crucial, yet flawed, step in the RSD process for women whose claims include rape. A considerable amount of research attempting to improve the UK asylum system has been carried out by government departments, refugee advocacy groups, and academics. In this section, I do not attempt to compile a comprehensive summary of all the recommendations for improving the system. Rather, I explore applying a new approach that focuses on vulnerability and exploitation in an attempt to improve the system for women applicants whose claims include rape. I discuss how this approach could be applied to the asylum system as a way of avoiding the pitfalls of credibility judgements. In proposing a new approach, I also draw on existing recommendations resulting from research discussed in earlier sections.

Focusing on vulnerability and exploitation

Betsy Stanko recently presented findings from ten years of research on Police response to rape allegations in the UK (Stanko, 2014). The findings highlighted a failure to provide justice for women, and especially those who were in vulnerable situations – such as those who were under the influence of alcohol or who had learning disabilities. Based on these findings she advocated for reforms to the way rape cases are dealt with in the criminal justice system. She argues that the questions of credibility and consent need to be replaced with an emphasis on

vulnerability and investigations into exploitation. In this approach victims' vulnerability can be treated as evidence of the likelihood of the rape having occurred, and the Police investigations would focus on whether the accused exploited the vulnerability, rather than on whether the victim consented. This means that the victim's account of consent and their credibility is no longer the basis of investigations and criminal trials.

There are clearly differences between how rape claims are dealt with in the asylum system and rape allegations in the domestic criminal justice system. The main difference is that the question of consent does not apply in asylum claims. However, there are fundamental similarities which make applying Stanko's approach useful in attempting to improve the asylum system.

In both the asylum and domestic criminal justice systems, evidence is rarely available and in the absence of evidence there is a reliance on judging the applicants' or victims' credibility. In asylum claims credibility is often equated to proof and determines the outcome of the case (Sweeney, 2009). The same can be said for domestic rape cases where the outcome of the case is often based on the perceived credibility of the victim (Jordan 2004; Stanko, 1982). Similar factors are drawn on to establish credibility in domestic rape cases: the woman or girl's demeanour and whether they act in a way that is consistent with how a rape victim is expected to act (Jordan 2004; Stanko, 1982). Credibility judgements in asylum claims and domestic rape cases are both also influenced by a culture of disbelief (Baillot et al., 2014; Jordan 2004; Stanko, 1982). In both instances, focusing on vulnerability and exploitation provides a way of moving away from potentially biased credibility judgements where there is a lack of evidence.

Applying a focus on vulnerability and exploitation to the RSD process

Applying this approach to the RSD process would first involve establishing vulnerability of the applicant in the situation where the alleged rape occurred. Once vulnerability is established, it can be used as evidence of the likelihood of the alleged rape occurring. This would heavily rely on Country of Origin reports and would require that the reports to have up to date information on gender relations. A likely criticism of this approach would be that it is almost impossible to get statistics that include gender in countries where there is conflict. The solution to this issue would be to use qualitative data and reports from individuals who have been in the country (Oosterveld, 2012). Arguably, this method is more suitable as in countries with high gender discrimination women may not be represented in official statistics. Qualitative data would also provide a more nuanced picture of the situation for women in the country.

Assessing vulnerability would also require officials to have an understanding of gender specific harms so that they are aware of the vulnerable situation women may be in, such as forms of gendered persecution. Having reports with information on gender relations and building officials' knowledge of gendered harms align with the conclusions from existing research into improving the asylum system for women (Asylum Aid, 2011; Oosterveld, 2012)

It may sound obvious to say we need to focus on vulnerability because all refugees are in a vulnerable situation whether their claims are real or invented. However, findings discussed in earlier sections show that vulnerability is not currently ascribed much importance. Findings discussed above show that the Country of Origin reports are treated as ad hoc and selectively; they are secondary to credibility judgements rather than making up the basis of the claim. Emphasising vulnerability as a legitimate factor in determining refugee status will discourage assessors from relying on broad credibility judgments as a proxy measure for proof.

Once vulnerability is established, applying this model would mean investigating whether the vulnerability had been exploited. Where there is no evidence, this would require assessing credibility but only of discrete statements such as 'there were militia operating in (x) area at (y) date'. This aligns with the use of credibility recommended in the UNHCR guidelines (UNHCR, 2011: 38). It also aligns with methods proposed by James Sweeney (2009) and Michael Kagan (2003). As discussed above, Sweeney found the broad use of credibility to be problematic. He argues for a 'narrow' use of credibility, applying it to discrete statements rather than to the overall plausibility of the applicant's story. Assessing the credibility of 'narrow' statements should provide a basis for telling whether there is reasonable likelihood that exploitation occurred. This is in line with Michael Kagan's objective credibility assessment method which promotes the use of objective judgements of likelihood as a way of deterring assessors from relying on their individual beliefs.

The benefit of using vulnerability and exploitation rather than credibility is that it shifts the attention from the claimant's personal credibility to situational factors. This avoids the problems with credibility noted above: focus on demeanour and coherency, and attributing significance to early reporting of rape. Shifting away from subjective judgements will also lessen the impact of the culture of disbelief; however, this is a pervasive issue that needs a wider cultural change. Finally, by providing alternatives to general credibility assessments, this approach takes away much of the burden of decision making from the assessor.

Conclusion

The problems with the use of credibility in the UK asylum system have been well documented. Despite efforts to improve the system, the problematic use of credibility has remained. The inertia of credibility judgements within the system shows that there needs to be a shift in the basis of decision making. Making vulnerability and exploitation central parts of the RSD process would avoid relying on subjective credibility judgements from assessors and would shift the burden of proof from applicants. Findings discussed above have shown how credibility in rape claims is affected by the culture of disbelief within the asylum system and by a wider culture of disbelief for women reporting rape. These are pervasive issues tied to politics and public opinion and require a wider cultural change to be resolved. However, focusing on vulnerability and exploitation within the asylum system will reduce the impact the culture of disbelief has on claims that include rape and, furthermore, shifting the discourse away from credibility may eventually lead to a change in the overall asylum system culture.

Notes

1. UK Immigration Appeal Tribunal (10 June 1994) 'Political asylum; standard of proof'. *UKIAT*, 11038. Available at: <<http://www.asylumlawdatabase.eu/en/case-law/uk-immigration-appeal-tribunal-10-june-1994-kaja-political-asylum-standard-proof-zaire-1994>> [Accessed: 3 December 2014].
2. There are no measures of the proportion of asylum applications that include rape. This estimate is taken from a large scale qualitative research project carried out by Baillot, Cowan and Munro (2012 and 2014).
3. The operational body that carries out the RSD process has undergone considerable change in the past five years. It was set up as the UK Border Agency in 2008 and disestablished in 2013, with functions divided into the visa system and immigration law, both housed within the Home Office. See: <http://www.ein.org.uk/news/house-commons-library-organisational-reforms-immigration-system-2006>.
4. At the time of Baillot, Cowan and Munro's research, applicants underwent a screening interview and then a substantive interview (2012). Some of the officials they interviewed thought non-disclosure of rape in the screening interview showed a lack of credibility while others accepted the non-disclosure at the screening interview but not at the substantive interview.

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Scottish Association for the Study of Offending

Chair's Report, 2014-2015

David Strang, Chair SASO Council

Introduction

I am pleased to present my annual report for 2014-15 as Chair of the Scottish Association for the Study of Offending. The Association has continued to thrive this year, with a full programme of Branch events across the country. I am grateful to all of you who have contributed to the success of SASO this year.

Annual Conference

We returned, once again, to the Dunblane Hydro Hotel for another very successful conference in November 2014. Our theme was "Crime, Justice and Community". The conference was well attended by a wide range of people and we enjoyed some excellent keynote addresses on the subject of community justice.

Our conference chair was The Hon Lady Rae, who had until recently been the Chair of the Glasgow Branch of SASO. Lady Rae guided us skilfully through the two days of the conference.

Our opening keynote speaker was Sir Harry Burns, former Chief Medical Officer for Scotland, now Professor of Global Public Health, University of Strathclyde: *Is crime a health issue?* He was followed by Professor Mike Nellis, Centre for Law, Crime and Justice, University of Strathclyde Law School: *The concept of community justice*. The afternoon concluded with an address from Justina Murray, Chief Officer, South West Scotland, Community Justice Authority: *A conversation about community justice*.

Before the conference dinner, a reception was kindly hosted by the eight Community Justice Authorities. Councillor Margaret Kennedy welcomed the delegates to the dinner and wished SASO a successful conference. The award of the SASO annual student essay prize was made to this year's winner, Zoe Russell, from Stirling University, for her essay entitled *How might an understanding of 'community' and 'place' help us prevent crime?* After dinner we were entertained by the Solicitor General for Scotland, Lesley Thomson QC.

On Saturday morning, an international perspective was brought to the conference by Hans Dominicus, Ministry of Justice, Belgium: *Houses of Justice – a Belgian approach to community justice*. This was followed by Andy Bruce, Deputy Director for Community

Justice, Scottish Government: *What is the Government's role in delivering community justice?*, and Christine Scullion, Director of Development, The Robertson Trust: *An independent funder's journey towards taking an evidence based approach*. The final session of the morning was the practitioners' panel on the subject of community justice, comprising Sheriff Lindsay Wood, Sharon Stirrat of the Shine Women's Mentoring Service and Ian Davidson, Scottish Prison Service.

After lunch, an interactive session was led by Catherine Dyer, the Crown Agent, which looked at some of the dilemmas facing those making prosecution decisions. Our final keynote address was delivered by The Rt Hon Henry McLeish, who examined the future of criminal and social justice, following the independence referendum of September 2014.

As in previous years, there were a number of exhibitions by third sector organisations and Community Justice Authorities. I am grateful to all our speakers and contributors, and to all those who worked so hard to plan and deliver such a successful conference.

During the conference, we paid tribute to Alan Finlayson OBE, who had died in January 2014. Alan had been an enthusiastic and active supporter of SASO, as well as Scotland's first Reporter to the Children's Panel and subsequently a Sheriff.

Branches

While the national conference is our single largest event, throughout the year our local branches provide a wide variety of lectures, debates and day conferences. These provide excellent opportunities for SASO members and others from a wide range of backgrounds to meet and to discuss issues of relevance to justice in Scotland. The Glasgow Branch, chaired by Sheriff Daniel Scullion, had another busy year with a full programme of debates, lectures and a day conference. Their programme began with a debate on police stop and search powers, and concluded with a day conference on the protection of vulnerable individuals from exploitation.

The Edinburgh Branch, chaired by Sheriff David Mackie, met regularly throughout the year and heard presentations on prisons, judicial training, circles of support, adolescent brain development, orders for lifelong restriction and from Sir Harry Burns, former Chief Medical Officer for Scotland. Likewise, the Dumfries and Galloway Branch met six times throughout the year and studied such topics as social work programmes, violence reduction through mentors, anti-social behaviour orders, community payback and victims' experiences. After 12 years as Branch Chair, Bill Milven has decided to step down from this office. I am grateful to Bill for his committed leadership of the Dumfries and Galloway Branch for over a

decade. I am pleased that Miller Caldwell has agreed to assume the duties of Chair of the Branch.

The renewed Aberdeen Branch – with Orkney, Shetland and Inverness – under the Chairmanship of Sheriff Graeme Napier held a number of successful events and is seeking to extend its reach through the use of video linking to venues outwith Aberdeen. The Fife Branch, too, continued to meet regularly throughout the year. It is hoped that the Dundee Branch will be re-established this year now that a new Chair and Secretary have been identified. I am grateful to Niall Campbell, Honorary Vice President of SASO, for the work he does to support Branches across Scotland.

Council

I am very grateful for the continuing support of the Council of SASO to oversee the Association and to consider its future development.

I am able to report that the finances of the Association are on a more stable footing, with Council having taken a number of measures to reduce our costs and to increase our income. Membership subscriptions have been doubled to £30 (and to £15 for reduced rates). A number of life members have generously made additional donations to SASO. We are grateful for a grant from the Scottish Government in support of our annual conference. The cost of the conference have been examined closely and trimmed where possible. Council is pursuing the possibility of seeking corporate membership or sponsorship from relevant justice bodies in Scotland. I would like to thank our Honorary Treasurer, Bill Milven, for all his work throughout the year, and our administrator Irene Cameron for her invaluable support.

After 13 years as Honorary Secretary of SASO, Margaret Small has intimated that she wishes to retire from this post. On behalf of the Association, I would like to place on record my gratitude to Margaret for her support and service as our Honorary Secretary.

Journal

Volume 21 of the Scottish Journal of Criminal Justice Studies was published by SASO in October 2015. I am very grateful to Professor Michele Burman for her excellent work in editing the Journal and to the Editorial Board for their advice and support.

Conclusion

SASO is a unique organisation which brings together such a wide range of people with interests in the criminal justice system in Scotland. I am grateful to all who have contributed to the success of SASO and I look forward to another successful year ahead.

David Strang, Chair SASO Council

November 2015

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SASO has around 350 members. Those wishing to join should contact the Administrator, Irene Cameron, Association Management Solutions, PO Box 7225, Pitlochry, PH16 9AH.
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