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Without Fear or Favour

A Voice for Rape Survivors in the Criminal Justice System

Conference Report

A joint Rape Crisis Scotland and Equality and Human Rights Commission Conference held in Glasgow on 26th March 2010

RAPE CRISIS SCOTLAND

Equality and Human Rights Commission | Scotland

Contents

Background

In March 2010 Rape Crisis Scotland and the Equality & Human Rights Commission organized a joint conference **"Without Fear or Favour : a voice for rape survivors in the criminal justice system?"** to address significant concerns about the ability of the Scottish criminal justice system to provide justice to rape survivors. These concerns had been increasing steadily in the course of the preceding decade, and by March 2010 the most recent figures available suggested that only 3.7% of reported rapes were resulting in a conviction, while the harrowing ordeal suffered by many rape survivors in court was well documented.

Without Fear or Favour provided a timely opportunity to consider whether a new and radical approach is required to improve access to justice following rape. Independent legal representation is a routine entitlement for victims in sexual offence cases in Europe. Currently in Scotland complainers of sexual offences do not have any direct legal representation – cases are prosecuted by the Crown in the public interest.

The conference considered whether or not having access to legal representation would make a difference to rape survivors' experiences of the Scottish criminal justice system. Speakers from Canada and Ireland related and discussed the way in which independent legal representation works in their own jurisdictions. Recent developments in the way sexual offences are prosecuted in Scotland (including the establishment of a dedicated National Sexual Crimes Unit) – and the impact these might have – were also considered. The conference debated whether or not there is a need for independent legal representation in Scotland and how this might work.

Conference Programme

Without fear or favour: a voice for rape survivors in the criminal justice system?

A FREE joint Rape Crisis Scotland and Equality & Human Rights Commission conference considering independent legal representation for sexual offence complainers.

Friday 26 March 2010

Radisson Blu Hotel
301 Argyle Street
Glasgow G2 8DL

RAPE CRISIS SCOTLAND

Equality and Human Rights Commission Scotland

Programme

Without fear or favour: a voice for rape survivors in the criminal justice system?

Morning session chaired by **Angela O'Hagan**, Equality & Human Rights Commission

9.00 – 9.30am	Registration and coffee
9.30 – 9.40am	Welcome, introduction and housekeeping
9.40 – 10.10am	**Setting the Scene** **Fiona Raitt**, Professor, University of Dundee
10.10 – 11.10am	**The experience in Canada** **Lise Gotell**, Associate Professor, Women's Studies Program, University of Alberta, Canada
11.10 – 11.30am	BREAK
11.30am – 12.30pm	**The Experience in Ireland** **Kate Mulkerrins**, Head of Prosecution Policy Unit, Office of the Director of Public Prosecutions, Ireland
12.30pm	LUNCH

Afternoon session chaired by **Sandy Brindley**, Rape Crisis Scotland

1.30 – 2.15pm	**How modern prosecutors can remain independent while supporting victims of sexual crime** **Derek Ogg**, Head of the National Sexual Crimes Unit
2.15 – 3.15pm	Table discussions • Key issues from speakers • What might work in Scotland • Key questions for panel discussion
3.15 – 3.30pm	BREAK
3.30 – 4.30pm	Panel discussion (including feedback from table discussions)
4.30pm	CLOSE

Friday 26 March 2010 • Radisson Blu Hotel • 301 Argyle Street • Glasgow • G2 8DL

Speaker biographies

Fiona Raitt is Professor of Law at the University of Dundee. She has thirteen years experience as a solicitor working with survivors of violence. Her current research and publications focus on the law of evidence, principally its application in the areas of gender, violence and child witnesses. She recently completed a report on Independent Legal Representation for complainers of sexual offences, a project commissioned by Rape Crisis Scotland.

Lise Gotell is a Professor in the Women's Studies Program at the University of Alberta in Edmonton, Canada. Her areas of expertise include equality law, violence against women policy and women's movement activism. Her research has explored the implications of innovative Canadian sexual assault law reforms, focusing specifically on raped women's experiences with the criminal justice system. She was worked extensively on the issue of defense access to complainants' personal records, including evaluating the utility of legislative protections for complainants enacted in Canada in 1997.

Kate Mulkerrins was appointed as Head of the Prosecution Policy Unit in the Office of the Director of Public Prosecutions (DPP) in January 2008.

Prior to this she was the legal coordinator of the Rape Crisis Network Ireland (2003-2007) a post funded by the Department of Justice, Equality & Law Reform. Kate chaired the Legal Issues Committee of the National Steering Committee on Violence Against Women until her appointment in the Office of the DPP. In 2001 she became a volunteer member of Galway Rape Crisis Centre where she ran monthly legal clinics assisting those navigating the criminal justice system.

She was called to the Bar of England and Wales in 1998 combining practice in the area of criminal defence in Furnival Chambers, London with teaching at the National University of Ireland, Galway, tutoring Criminal and Company Law and teaching legal science on the mature students access programme.

She has two daughters and divides her time between Dublin and her family home in Connemara.

Derek Ogg is Queen's Counsel at the Scottish Bar. He is the former Chair of the Faculty of Advocates Criminal Bar Association. He has been a specialist in criminal law since being called to the Bar in 1989 and has conducted some of Scotland's highest profile murder trials both as a prosecutor and, formerly, as defence counsel. In 2007 he joined Crown Office as a Senior prosecutor in the High Court full time. Last year he was promoted to Assistant Principal Advocate Depute, one of the three most senior full time prosecutors in the country.

He also then became Head of the newly created National Sex Crimes Unit, set up to investigate and prosecute all serious crime with a sexual connection wherever it occurred in Scotland. This Unit was set up by the Lord Advocate to nurture a fresh approach to sex crime prosecution and to introduce the benefits of specialism into that role following her wide ranging Review of prosecution policy and practice in this field.
Derek heads a Unit of ten Senior High Court prosecutors augmented by senior fiscal support in Crown Office in Edinburgh and works hand in hand with similar Area Units of procurators fiscal throughout the whole country.

In this role he has visited prosecutors specialising in this field in England, Republic of Ireland, the United States and South Africa. Derek in addition to managing and strategically planning the Unit's work also leads from the front successfully conducting trials over the whole range of the Unit's remit, including rape, child sex abuse , sexually motivated murder, internet abuse and grooming.

Why Independent Legal Representation?

Professor Fiona E. Raitt, University of Dundee

INTRODUCTION

With the exception of Scotland and England and Wales, every country in Europe gives complainers in rape cases some form of entitlement to independent legal representation. Two major European studies published in the late 1990s – one Dutch one Irish – examined the legal processes of rape trials in Europe.

I quote from the Irish one:

"A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower."

Scotland, as well as England &Wales, is different from the rest of Europe. We have an adversarial system where two parties slog it out like two boxers and the judge acts as a passive referee. In contrast, the Continental jurisdictions all have an inquisitorial system, where the judge plays a far more active role in the investigation and trial. That difference is often held up as the justification for a range of issues where the UK jurisdictions perform poorly in comparison with our European counterparts, including conviction rates and complainers' experience in the courtroom.

Let me dispel any misconception that the adversarial process is an insurmountable obstacle for independent legal representation. It is not. A very large number of states have legal systems with substantial adversarial features. These

include Italy, Germany, Belgium, Norway and Denmark. To varying degrees these countries offer rape complainers the opportunity for advice and advocacy pre-trial (in some cases at the police station) and during the trial, at appeal, and at parole boards. Moreover, as we will hear later, the Republic of Ireland, another jurisdiction that describes itself as adversarial, has had a form of independent legal representation since 2001. So the idea that the adversarial process prevents rape survivors from access to their own legal advice and representation is simply not accurate. It is a question of political will, and of convincing the legal establishment of its merits.

I do not have time in this presentation to describe precisely how other countries incorporate independent legal representation into their procedures. I also do not want to give the impression that involving more lawyers is the solution to all the problems that beset the prosecution of rape.

But I do want to argue that the role of the public prosecutor in the investigation and prosecution of rape cases is not a role that can provide the levels of support, advice and guidance that survivors of rape require. I want to argue that rape complainers have to contend with a uniquely intrusive and traumatic experience during a rape trial. Their interests cannot be satisfied by the public prosecutor, whose role is not to be the woman's lawyer, but to dispassionately consider her interests alongside other competing interests.

THE ROLE OF THE PROSECUTOR

The independence of the Scottish prosecutor is held in very high regard and rightly so. Their duty is to act in the public interest – a broad collection of interests which includes the interest of society at large in seeing perpetrators of crime brought to justice, as well as the right of the accused to a fair trial. The accused is entitled to a presumption of innocence until the Crown proves him guilty beyond reasonable doubt. That is a very high standard of proof. It is unrealistic to expect a prosecutor to keep that standard in their sight at all times whilst also affording rape survivors the degree of support that is compatible with a belief in their account. This dilemma is what professional codes for lawyers normally describe as a conflict of interest.

Look at it another way. The accused's right to fair trial is paramount in our legal process. The prosecutor is bound by that principle. Because the Crown has to take account of the accused's right to a fair trial, then when his interests are place in competition with the woman's interests, hers will always be trumped. An independent representative is not constrained in this way. Her sole consideration is the interests of her client.

As it currently stands, the status of a rape complainer is the same as that of any other witness. But women who have to contend with a rape trial are not just like any other witness. Legislation and policy decisions already acknowledge that. For example, in law, rape complainers are potentially vulnerable witnesses who may be entitled to special measures to assist them to give evidence. Their dignity and privacy are specific statutory considerations when judges rule on the admissibility of sexual history or other character evidence. In policy terms, here in Glasgow you have a SARC – a Sexual Assault and Referral Centre – in recognition of the special consideration rape survivors need.

I want to move now to a particular illustration of how the prosecutor's conflict takes practical effect. I am going to use an illustration from a Bill presently going through the Scottish Parliament.

The Criminal Justice & Licensing (Scotland) Bill 2009 contains new proposals that I believe will have a profoundly negative effect on complainers of rape and other serious sexual offences. These proposals concern the type of information about the complainer that the Crown, as prosecutor, will have to disclose to the defence.

The prosecutor's duty of disclosure of evidence to the defence in criminal prosecutions is a long-standing principle in Scots law. It is an essential element of a fair trial, in particular the principle of equality of arms whereby the greater resources of the state to investigate and prosecute crime entitle the accused to have access to the same evidential material that is available to the Crown. Traditionally the type of information disclosed to the defence includes police witness statements, forensic reports and previous convictions of any Crown witnesses. But it also can include

Why Independent Legal Representation?

information in the hands of a third party that might be relevant to the defence. Third parties such as health authorities, social work and education departments and the Reporter to the Children's Panel keep the type of records which might be disclosed. In addition, third parties also include practitioners outside the public sector such as private consultancy services offered by counsellors, psychologists and psychiatrists.

Recent court cases concerning the impact of human rights legislation led to a review of the disclosure practices of the Crown Office and, assuming the Bill becomes law, section 85 sets out the sweeping range of information that will have to be disclosed to the defence. It is "material of any kind (other than precognitions and victim statements) given to or obtained by the prosecutor in connection with the case against the accused". The precognition is the statement taken when the Crown re- interviews the woman to clarify or confirm the content of her police statement. The victim statement is the survivor's explanation to the court of how a crime has impacted on her.

During precognition it is very common for women to recall further or different details of the assault and for them to then amplify or adjust their original account. Also, the precognition process may reveal that the woman has one episode or a substantial history of mental illness that the precognition officer decides is relevant to the complainer's credibility or reliability. Although precognitions and impact statements themselves need not be disclosed, information contained in them can be disclosed.

The Crown's Disclosure Manual states that any discrepancies in the complainer's account or other information as "may bear on the witness's credibility and/ or reliability" will likely fall into the category of material information that must be revealed to the defence. Discrepancies will be valuable to the defence if they want to infer that a change in a woman's account of events indicates she is lying or embellishing her story, while evidence of a mental health history will be scrutinised for any suggestion she might be confused or liable to fantasise and thus not credible.

Fiona Raitt, University of Dundee

I am sure the significance in rape cases of a woman's credibility and reliability as a witness will be very well-known to everyone in this audience. Put crudely, the case turns on whether or not she is believed. The strategy of the defence is therefore to attack her credibility and reliability. For if they are able to undermine her credibility then it is a small step to invite the jury to have a reasonable doubt that she is wholly believable when she says she did not consent to sex.

WHAT INFORMATION WILL BE DISCLOSED?

The forensic reports generated after an assault will of course be disclosed. We are largely concerned here with historical records. Sensitive personal information such as mental health history could very possibly be characterised as "relevant information" for any potential it has to cast doubt on credibility and reliability. If the Crown is aware that the complainer has been in contact with health or social work services, or has received psychiatric or psychological treatment, including counselling, it will want to explore that with her and may be obliged to consider recovery of records to establish what, if any, bearing they have on her credibility.

Recovery of records are now valued for their strategic significance – an essential precautionary step to establish the strength of the prosecution case and to anticipate areas of weakness for cross-examination. Once recovered, these records must either be disclosed if that contain "material and relevant" information, or the Crown must obtain a non-disclosure court order.

Complainers who have a history of childhood sexual abuse or domestic violence often have a very comprehensive set of medical, including mental health, records. Such vulnerable women, whom Lise Gotell has described as "extensively documented" women – a chilling phrase in this context – will have backgrounds that are well-known to accused men if they happen to be their current or ex-partner, pimp, child abuser, drug-handler, or in some other position of power or exploitation.

The proposition is that if the Crown receives advance notice of potentially awkward evidence it is better placed to repel a defence challenge. This presumes that prosecutors will take

a robust stand to protect women's records. It presumes that all their staff are sufficiently well-informed that they recognise and reject lazy inferences drawn from rape myths. It presumes all staff are vigilant in challenging interpretations of what amounts to "relevant" information that must be disclosed. Unfortunately the research from other countries suggests "shared understandings" between prosecutorial and defence counsel are very common, leaving little scope for the complainer's distinct interests to be heard.

MENTAL HEALTH RECORDS

The use of mental health records raises issues on three major fronts: gender discrimination; errors of fact and errors of interpretation.

First, disclosure practices will reinforce the gender inequalities already embedded in rape trials. Statistically women are far more likely to be raped than men, and "women are disproportionately more likely to generate medical and therapeutic records due to the high rates of sexual assault against them." Second, on fact, a 2008 Audit Commission report uncovered a significant level of error in medical record-keeping. There is therefore a considerable risk of the factual historical evidence in medical records being incomplete and de-contextualised leading to misinterpretation in the way information is presented to juries.

Third, on interpretation, there is a high probability that the cross-examination process will distort or misinterpret information in records. The very mention of a mental illness, even one as common as depression, is potentially mischievous because it can so readily conjure up widely held misunderstandings and misconceptions of mental health and the ability to provide credible and reliable evidence.

WHEN MUST RECORDS BE DISCLOSED?

If the Crown decides that records meet the proposed statutory test of relevance or materiality they are obliged to disclose them to the defence. They may be able to limit the extent of the disclosure through redaction, i.e. they can black out sensitive information to preserve privacy, disclosing only the essential information to enable a fair trial.

In limited circumstances the Crown can apply to the court for an order of non-disclosure. The ground which might protect rape complainers is that disclosure would be likely "to cause serious prejudice to the public interest" It is good that this ground recognises the public interest in preserving the confidentiality of personal records. But the test of "serious prejudice" sets a very high bar. It is hard to see how the Crown can both argue forcefully to preserve the complainer's confidentiality, whilst also giving appropriate weight to the accused's right to a fair trial,when the argument is that his defence is compromised if he does not get access to her records. An independent lawyer would not face such a dilemma.

Ultimately the judiciary has the onus of balancing these distinct and conflicting interests if they cannot be agreed between the Crown and the defence. One concern must be how often the Crown concedes the case and hands over records without a struggle. Who will know? The Crown is not obliged to ask for the consent of the woman. They might ask, but they do not have to, and anyway they can ignore her wishes. Possibly, the first she might become aware of it is when it is raised in court.

In England and Wales, if victims have received counselling to assist them to come to terms with what has happened, "the counsellor's notes will be unused material, which may fall to be disclosed." One would expect such records to be vigorously resisted, partly because there is a policy of encouraging complainers to obtain counselling as part of their recovery, and partly because a woman's private expressions of emotions in a therapeutic context have absolutely no relevance for the courtroom.

PRIVACY RIGHTS

There is no constitutional right to privacy. The Bill does not give any express rights to complainers and there is no guidance as to the degree of consideration or protection afforded to her privacy interests. The only legal entitlement to privacy stems from Article 8(1) of the European Convention on Human Rights which provides: "Everyone has the right to respect for his private and family life, his home and his correspondence." Article 8 is relatively under-developed in the case law of the European Court and we need human rights lawyers to turn their attention to its possibilities.

Why Independent Legal Representation?

Lord Coulsfield's Review of Disclosure practices in 2007 put victims on notice about the impact of the recommended new disclosure regime: "It is therefore fair to say that victims and witnesses have much to lose from an enhanced system of disclosure of information to the accused and his representatives". We have to respond to that warning.

CONCLUDING COMMENTS

The Crown's capacity to serve multiple interests where these are inherently in friction is not sustainable. I have used disclosure as an example of the prosecutor's conflict but disclosure is only one example where rape complainers have interests that would greatly benefit from independent pleading. There are many others. In a Report for Rape Crisis in 2009 on the feasibility of independent legal representation I identified 19 other points of friction and they were by no means exhaustive.

There are decisions from the European Court of Human Rights that show how victims' rights can be accommodated alongside the article 6 right of the accused to a fair trial. For example, the European Ccourt has held that the right to confrontation that is a normal part of a fair trial in adversarial proceedings is not absolute. This is why the special measures which vulnerable witnesses are eligible to apply for – such as in-court screens and giving evidence by CCTV link are permissible even though they prevent live "confrontation". Overall, provided the trial is fair, individual procedural components of the trial can be diluted.

For this reason I argue that forms of independent legal representation could be accommodated within Scots criminal procedure without breaching the European Convention on Human Rights.

I was asked to set the scene for the rest of the day and I hope this has not been too much of a whistle- stop tour. There is so much to say and so little time to say it in! Let me leave you with one final thought.

Independent legal representation could satisfy the legitimate demand for a visible and measurable protection of the interests of rape survivors. It could also transform the unenviable reputation Scotland has acquired in the ways that we prosecute sexual offences.

Complainants - the Canadian Experience

ILR for Sexual Assault Complainants: The Canadian Experience

Lise Gotell, University of Alberta,
lise.gotell@ualberta.ca

Sexual Assault Complainants and Privacy

- It is not enough to decide that no means no; we must also decide when we are willing to accept that a woman said no. What do we need to know about her and what will be kept as private?
- Sexual assault complainant comes close to complete surrender of privacy.

Lise Gotell, University of Alberta

ILR for Sexual Assault Complainants in Canada

- First recognized in *O'Connor* [1995].
- Like Ireland, there is no general right of representation.
- Complainants who are subject to applications for recovery of personal records have the right to legal representation
- Entitlement is laid out in the Criminal Code section on records production (s. 278).

Sexual Assault Law Reform in Canada

- Gender-neutral offence of sexual assault, defined by violence.
- Consent defined as "voluntary agreement."
- Situations that invalidate consent were specifically enumerated (including: when complainant is incapable of consenting, when consent is expressed by someone else, when consent is withdrawn, where there abuse of a position of authority).
- Defense of mistaken belief was limited by a requirement that the accused must have taken "reasonable steps" to ensure consent.
- Sexual history evidence and access to personal records restricted.

Complainants - the Canadian Experience

Attrition and the Justice Gap

- Assaults reported to survey interviewers = 460,000; 87,400 experienced a "sexual attack" (defined as forced sexual activity accompanied by threats or physical attack).
- Fewer than 1/10 report to police.
- Number reported to police = 21,449.
- Number of sexual assaults recorded as a crime = 13,200.
- Charges laid = 5,544.
- Prosecuted = 2,824.
- Convicted = 1,406, with just over half sentenced to prison.
- **Conviction rate = 6.5% of police reported sexual assaults; 0.3% of total incidence.**

ILR and Justice Gap

- Representation for complainants in rape and sexual assault trials holds the potential to ensure that their rights and interests are asserted and protected and that the legal protections that were enacted in the 1990s are fully and properly interpreted.

Opposition to ILR in Canada

- A criminal trial is about determining guilt and just punishment of the accused, not about personal redress for victims…It seems clear that a general right of representation for victims at trial would hopelessly burden and confuse and already overtaxed and under-resourced justice system. (Stuart 2003)

Access to Personal Records in Sexual Assault Trials

- New defense tactic arose in late 1980s after the introduction of rape shield legislation and specific consent standard.
- Defense counsel were advised to "**whack the complainant hard**" by seeking access to every imaginable personal record.
- A review of disclosure applications showed that they were being pursued in a single area of criminal law: sexual assault proceedings.

Complainants - the Canadian Experience

Rationales for Seeking Access

- Introduction of sexual history evidence through the back door: ex. medical evidence that complainant was not a virgin.
- Search for any inconsistencies.
- Theory of "False Memory Syndrome": that allegations are the product of fantasy or therapeutic manipulation.

Equality and Highly Documented Complainants

- The more records a complainant has, the more likely she is to be subject to defense applications: women with histories of sexual abuse, women with disabilities, aboriginal women, women with social service records and mental health histories.
- Highly documented complainants tend to be highly vulnerable.
- Highly vulnerable complainants are also likely to be subject to high rates of sexual assault.

Lise Gotell, University of Alberta

Value of ILR

- ILR for complainants is not about seeking redress or vengeance.
- ILR protects an array of rights/interests, including privacy and equality.
- ILR can help to guard distortions caused by discriminatory biases.
- ILR can help to prevent the "second rape" where complainants' privacy interests and dignity are sacrificed at the altar of a narrow conception of fair trial rights.

R v. Mills [1999]: A Fair Trial is Fair to All

- Full answer and defense does not mean the most favourable procedures imaginable, because fundamental justice "embraces more than the rights of the accused."
- Privacy and equality rights of complainants in sexual assault proceedings were recognized.
- Discriminatory biases in sexual assault trials distort the search for truth and justice.

Complainants - the Canadian Experience

Provisions Regulating Defense Access to Complainant Records (s. 278)

- Parliament was attempting to forestall what had become routine legal invasions into complainants' private records and encourage reporting.
- Discriminatory myths, implications for reporting rates and the equality and privacy rights of complainants are to be weighed against the legal rights of the accused.
- Applies to all records in which a complainant has a "reasonable expectation of privacy," including those in the possession of the Crown.

ILR and s. 278

- Right to appear and make submissions at records hearings that are held in camera.
- Complainant not a compellable witness, but has the right to cross-examine the defendant on written application (*R. v. Monkman* [2007]):

  The primary issue on this in-camera hearing under s. 278 is whether the third party records in question should be produced to the defense. *The principle protagonists are the Accused and the Complainant. It is the Complainant who risks losing her privacy and equality rights.*

Lise Gotell, University of Alberta

Impact of S. 278

- At least some records are disclosed in half of all applications.
- Requirement that there should be case specific information rising above mere assertion has reduced the likelihood of "fishing expeditions."
- Reluctance to consider how records could introduce discriminatory myths or undermine complainants' equality rights (especially when complainants do not have their own legal representation).

Likelihood that Complainants will have ILR

- Only some provinces, (Manitoba, Alberta, British Columbia, Ontario and Newfoundland), provide public funding for counsel (Guiboche).
- In Manitoba and British Columbia, complainants have a right to publicly funded legal representation; others require that the complainant qualify for legal aid.
- Complainant counsel tends to come from the defense bar.
- Earlier studies showed that complainants were represented in 40-50% of records hearings (Gotell 2008; Koshan 2002).
- It is becoming more common, but is still not standard.

Complainants - the Canadian Experience

Importance of ILR

- The Crown cannot and should not be expected to represent the privacy and equality interests of complainants and other third parties. ...if any third party has a legitimate submission to be made in relation to the "delicate balancing" that must be undertaken in such an application, I do not think it serves those interests or the administration of justice well to have them advanced on a self-represented basis. Otherwise, the quality of justice will be diminished and the very mischief that Parliament attempted to curb, the inappropriate disclosure of third party records, either to the judge or the accused, will continue (*R. v. J.G.C.* [2003] O.T.C. 508) .

Unrepresented complainants

- Lack of attention to the complainants' equality rights.
- Crown prosecutors inappropriately advise complainants to waive the protections of s.278 and consent to the production of their records.
- Overburdened prosecutors seek to avoid lengthy, complex pretrial proceedings.
- Complainants are being asked to waive constitutionally protected rights without legal representation.

Lise Gotell, University of Alberta

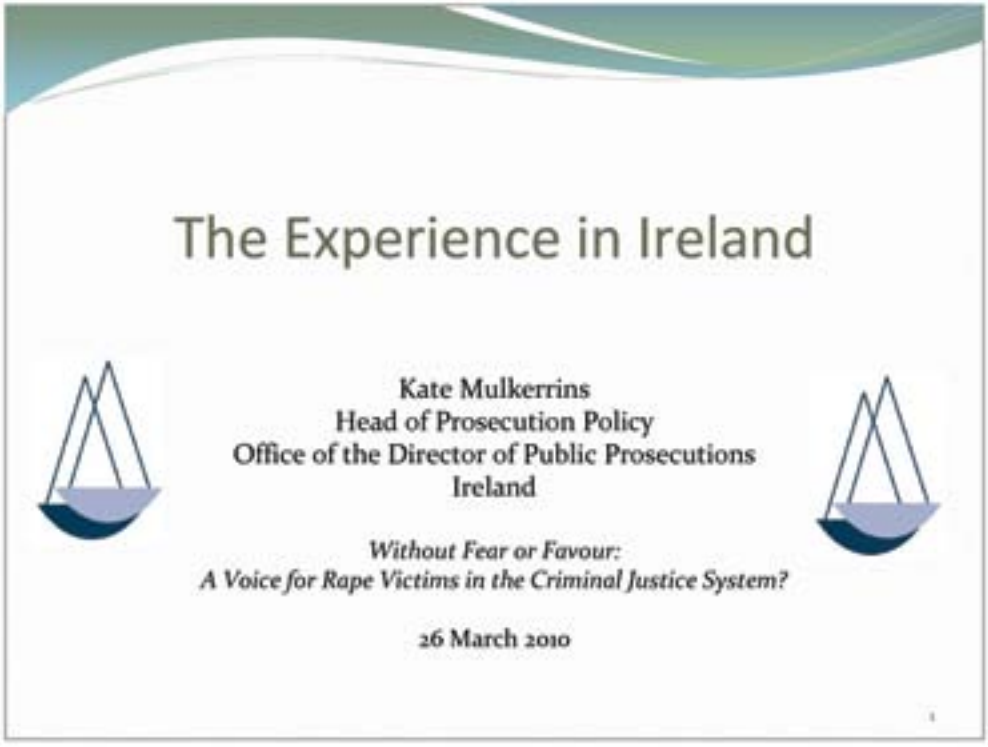
Broad Acceptance of ILR in Records Context

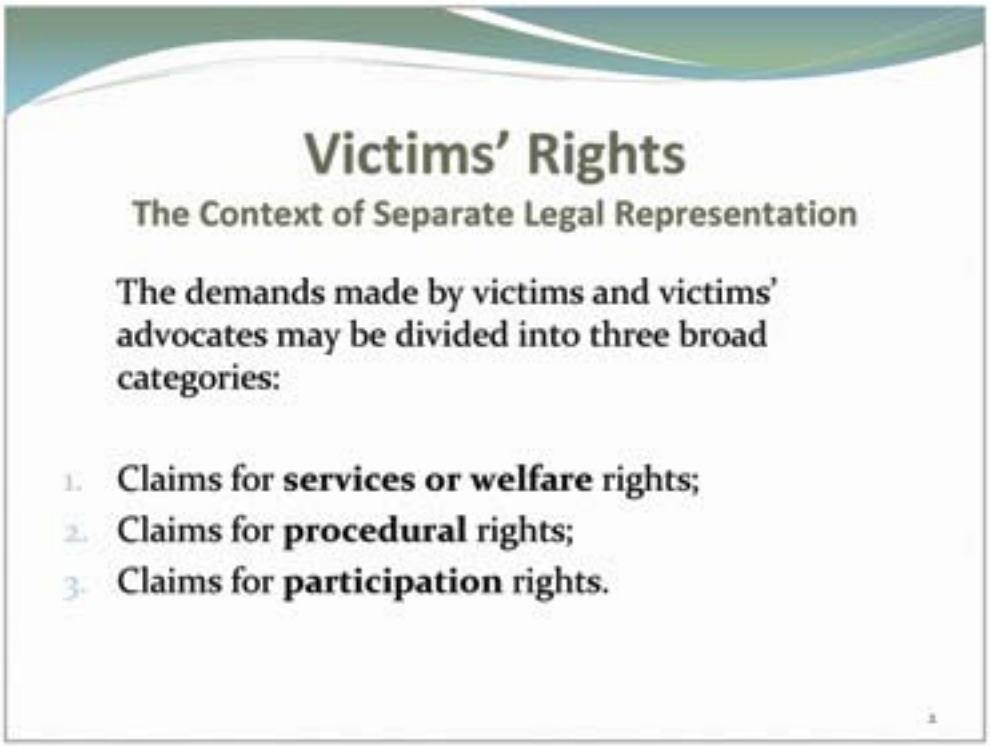
- Mohr (2002) found that most Crowns, judges and even defense lawyers see ILR as being important in s. 278 hearings.
- Crowns, in particular, emphasized the benefits of ILR.
- Crown attorneys said that when the complainant has ILR in records hearings, everyone takes the hearing more seriously.

General Right to Legal Representation for Sexual Assault Complainants

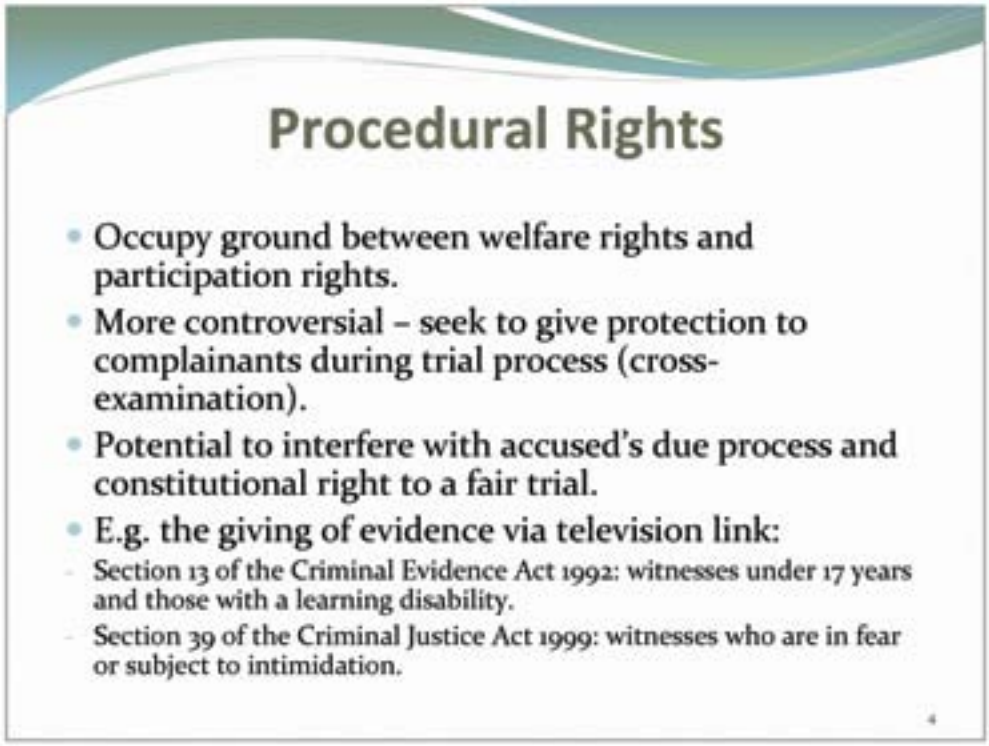
- Wilson (2005) develops a model for ILR: proposal for a permanent Office of Legal Counsel for Victims of Sexual Assault
- Shoemaker (2009) makes a constitutional argument for ILR, to mitigate against violations of complainant rights in sexual assault proceedings.

The Experience in Ireland





Kate Mulkerrins, Head of Prosecution Policy



The Experience in Ireland

Participation Rights

- Controversial and divisive issue within criminal justice debate.
- Conflict or "rub" between state/victim *v.* accused.
- Inequality of arms?

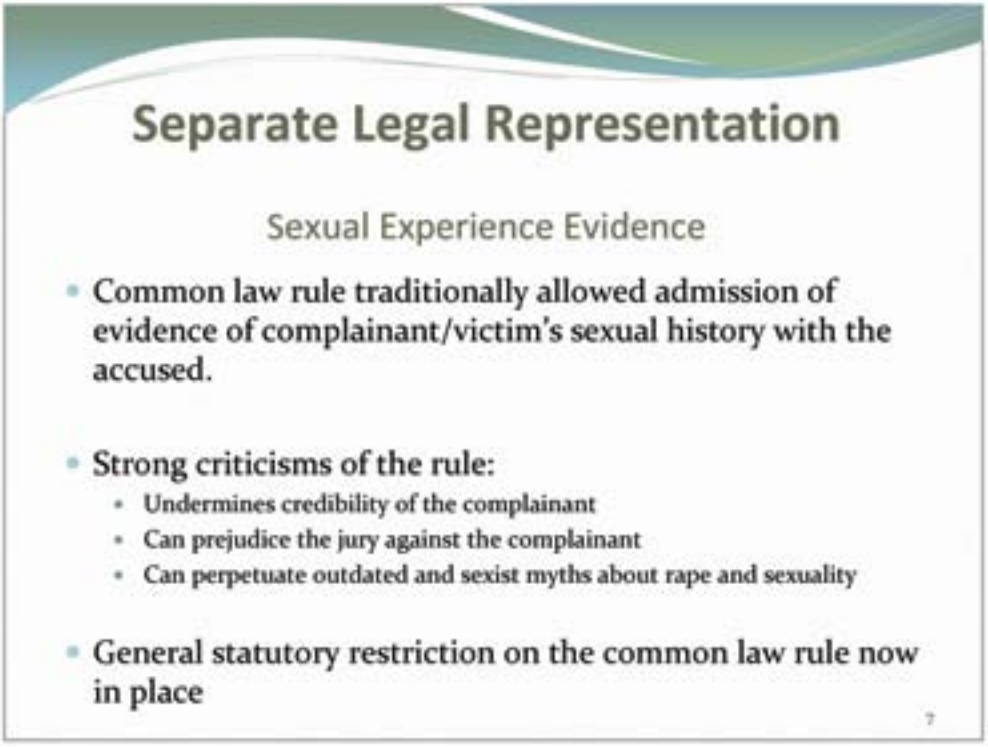
- Two important developments in Ireland:

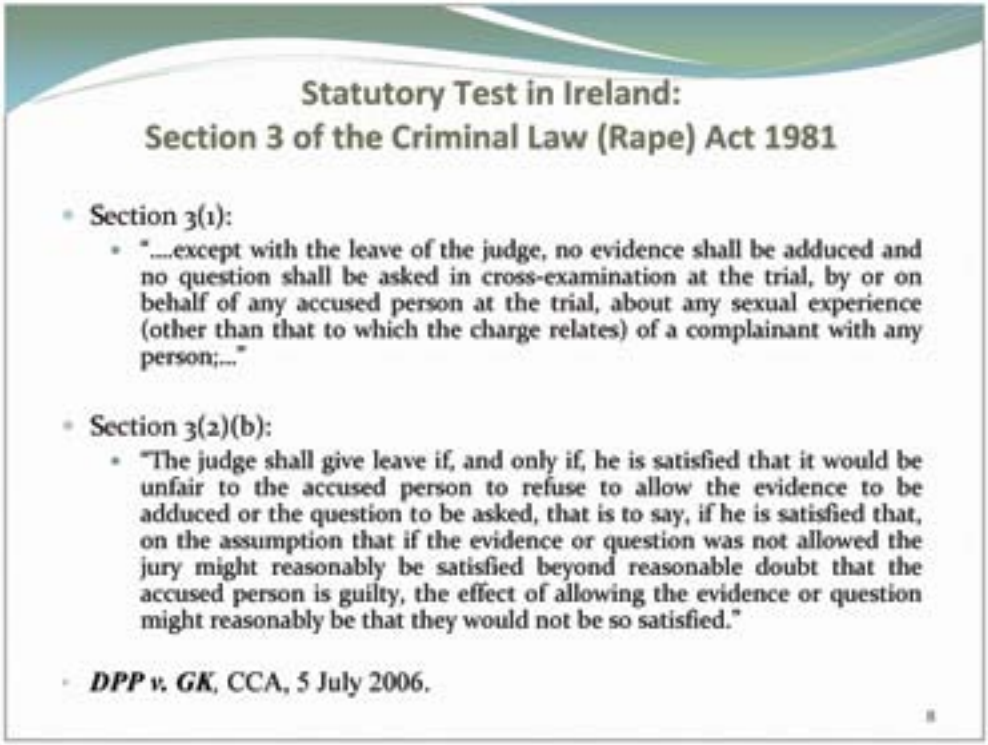
1. Victim Impact Statements
2. **Separate Legal Representation**

Victim Impact Statements

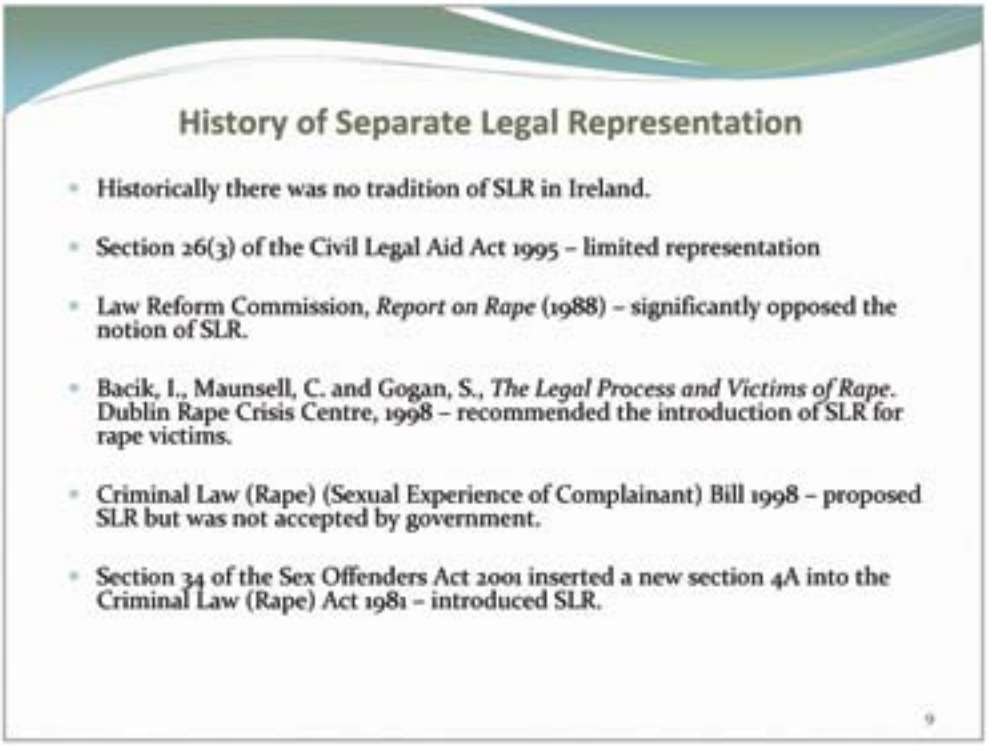
- Traditionally the prosecution had no direct role at sentencing stage.
- Section 5 of the Criminal Justice Act 1993: sentencing courts required to take into account the impact of violent or sexual crime upon victim.
- Criminal Procedure Bill 2009 will extend the VIS framework.
- VIS controversy: cathartic effect for victim but harsher/inconsistent sentencing of offender?

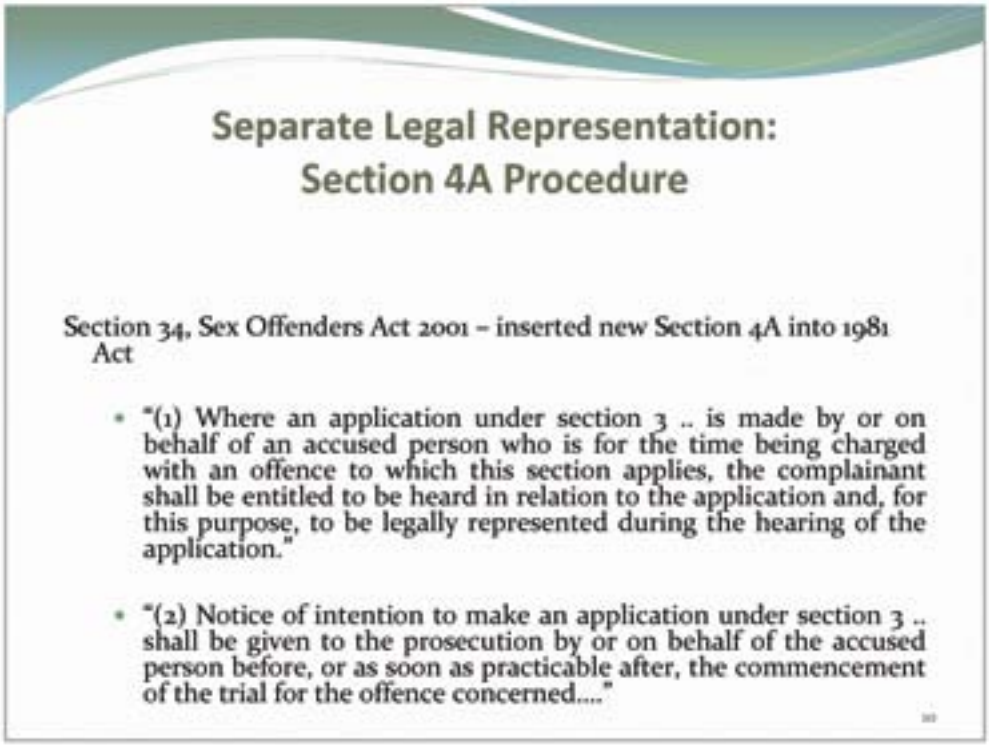
Kate Mulkerrins, Head of Prosecution Policy



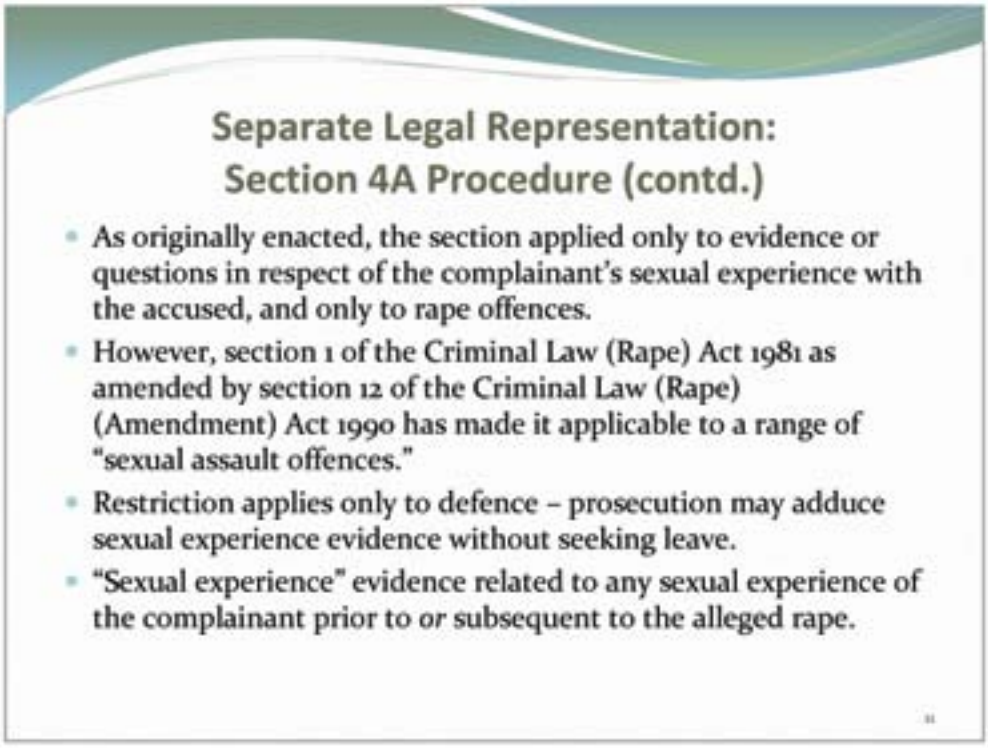


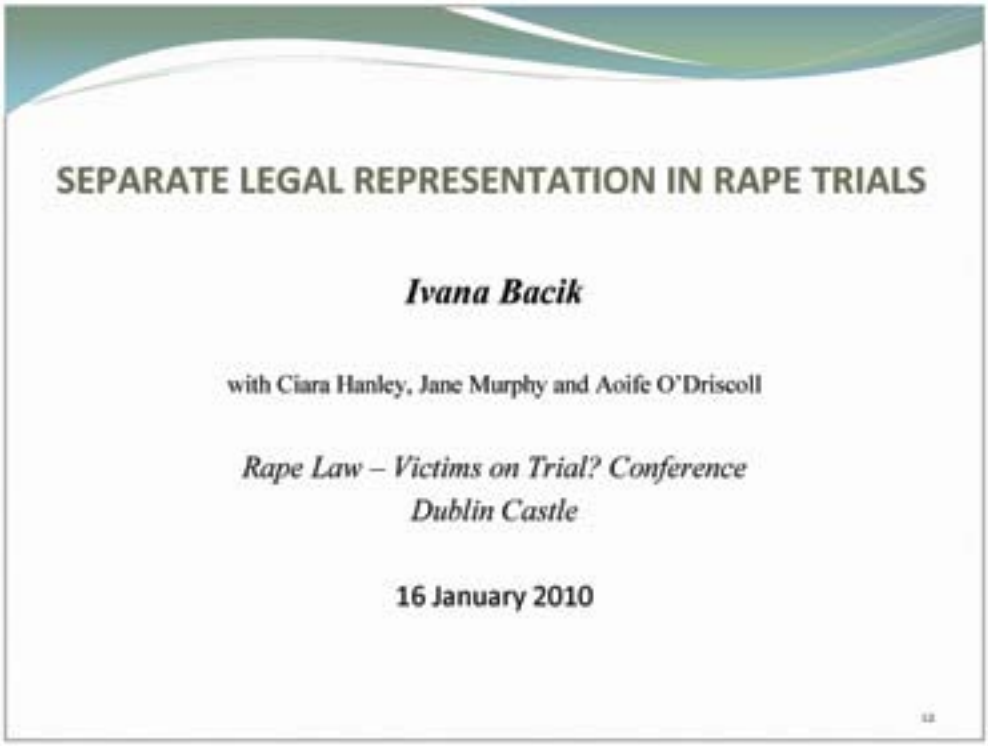
The Experience in Ireland





Kate Mulkerrins, Head of Prosecution Policy





The Experience in Ireland

Overview of our Research

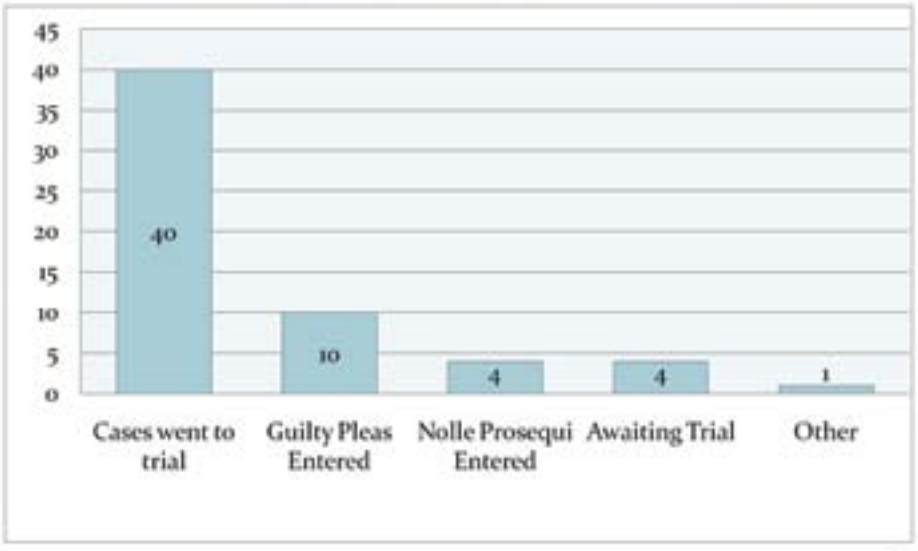
Our focus limited to cases which have gone to trial before the Central Criminal Court of:

- rape
- rape under Section 4
- aggravated sexual assault

- All cases took place since section 4A came into force
- We reviewed rape cases brought before the Central Criminal Court between 2003 and 2009

(in fact our research covers some cases which have not yet come to trial).

Overview of files reviewed (59 in Total)



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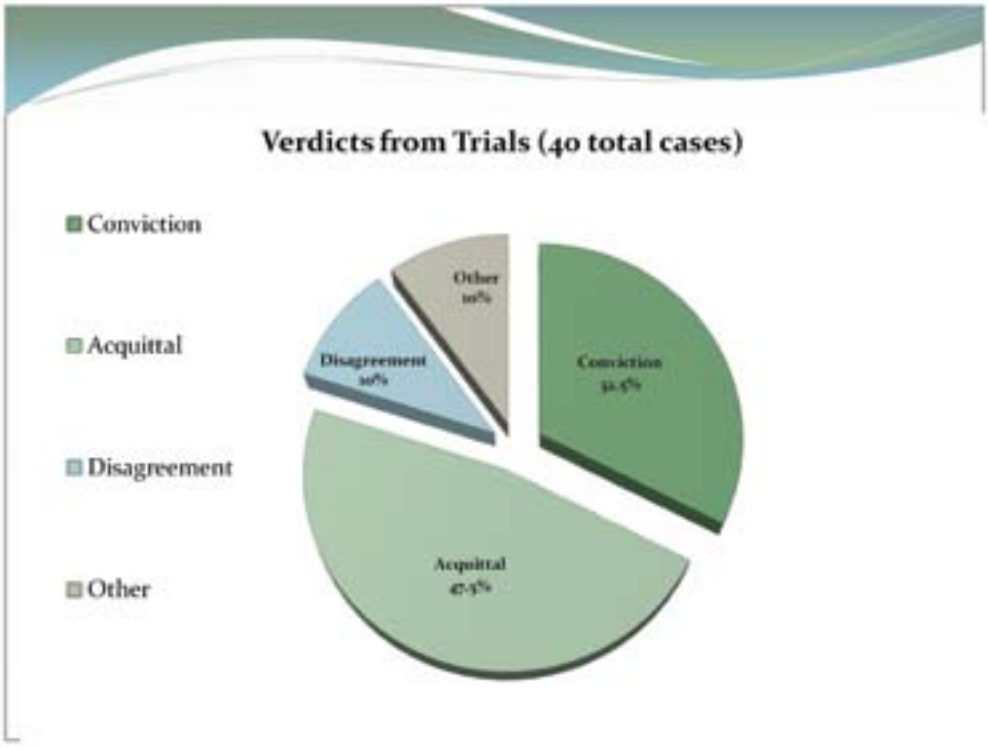
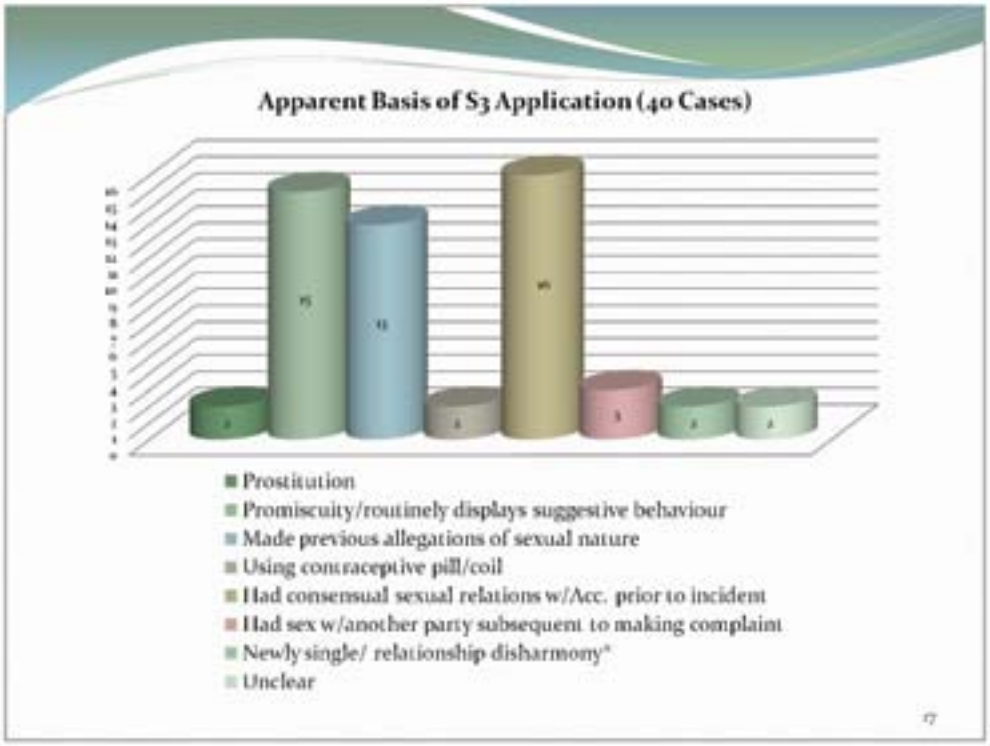
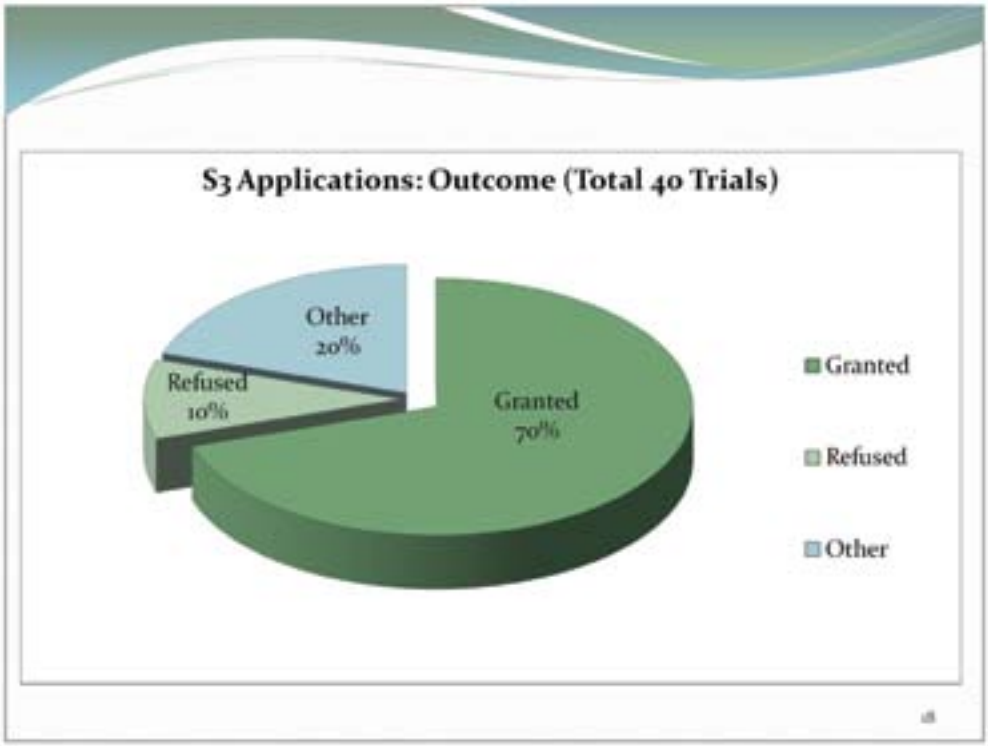


Section 4A Procedure

- A common feature in the majority of the 59 cases reviewed to date was that notice of intention to make an application under section 3 was issued to the prosecution by the defence before the commencement of the trial, in accordance with the procedure set out in section 4A
- It appears that late notice of intention to apply for leave and/or a delay in making the application on the part of the defence will not automatically preclude the possibility of the trial judge hearing the section 3 application
- It is particularly noteworthy that notice of intention was generally issued regardless of whether the intended section 3 application was actually made at trial.

The Experience in Ireland





Kate Mulkerrins, Head of Prosecution Policy

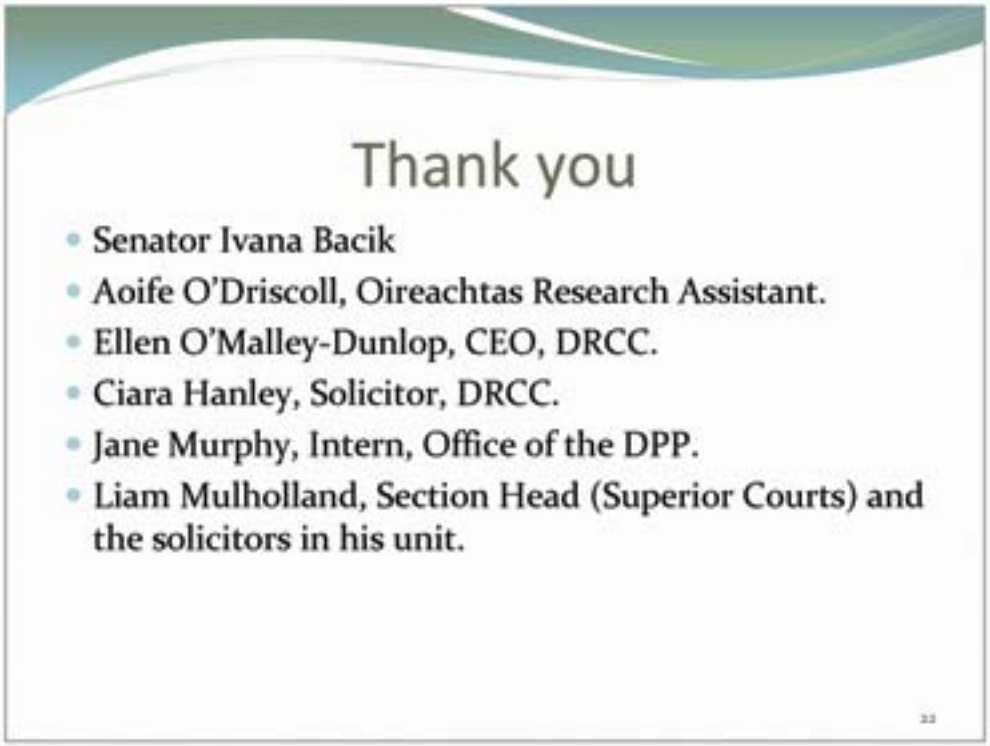
Role of Separate Legal Representative

- Limited information on file about arguments offered by SLR during Section 3 Application
- Observations about Role of SLR and Section 4A Procedure:
  - Notice procedure prevents "ambush" of complainant
  - Notice enables instructions to be provided to SLR as to complainant's view of section 3 application – not necessarily to oppose it
  - SLR will advise complainant as to likely outcome of section 3 application
  - SLR can assist Court in limiting scope of cross-examination, even where permission is given to adduce the sexual experience evidence
  - SLR's presence may have "moderating" effect upon conduct of case
  - SLR generally stays in court throughout cross-examination of complainant, even where formal role completed once section 3 application has been made

Concluding Observations

- SLR procedure is being used relatively frequently – 66 cases since 2003; in 21 per cent of sexual offence cases before the CCC in 2007 and 2008
- Concerns raised by our Study:
- Defence may be giving notice of intention to make a section 3 application even where there is little or no real prospect of them doing so. This should be explained to complainants to allay the fears they are likely to feel on receipt of such notice.
- It is impossible at this stage to ascertain the effect that the appointment of a separate legal representative has upon the outcome of the section 3 application. But detailed notes are now being kept on any ongoing or future rape/sexual offence trials on this particular aspect of the section 3 procedure.

The Experience in Ireland



Derek Ogg QC, Head of NSCU

CHAIR, Sandy Brindley: The low conviction for rape in Scotland, if you take it from the police reporting starting point, is much publicised, and there have been significant developments over the past few years in how rape is investigated and prosecuted in Scotland. So we have had the police reviewing their procedures and the Crown Office reviewing how they prosecute, and there's legal change coming in October in the new Sexual Offences Act. In the context of the changes in the past years, I'm particularly pleased to welcome Derek Ogg to speak to the conference this afternoon. Derek is Head of the new National Sexual Crimes Unit (NSCU) set up from the Review, and I'll let him tell you about the work of the units. So, thank you very much, Derek.

DEREK *OGG*: Thank you very much.
I don't know if you watch Grumpy Old Men or Women on the television, who sound off about things that annoy them? This section might be headed up Grumpy Old Prosecutor. Two things have made me grumpy: one is the fact every time I go into my computer and put "NSCU", Microsoft Word changes it to "Scum". That's one thing; and another thing that makes me grumpy is the way in which statistics are used in this debate of attrition and conversion rates of reported rape- and always reported rape,- as opposed to sexual offences- to conviction rates. It can sometimes be demoralising when we see this brought out all the time. Baroness Stern – I am sure you have read her report or, if not, I can recommend it to you completed her report as part of the commission given to her by the Government Equalities Office. That was an independent review into how rape complaints are handled by public authorities in England and Wales. In her report, she was critical of that kind of headline about conversion rate from reported rape to conviction, and pointed out it was demoralising not just to prosecutors who had a better rate, but to women who were complaining of rape in the first place because it suggests that a woman who is raped only has a 3 in 100 chance of a prosecution resulting in conviction. That, in fact, isn't the case. Statistically, it's wrong to say it in that way.

It's perhaps worth looking at what she says. She talks about the much reported 6 per cent figure in England and Wales. She says:
"The way this conviction rate is calculated is unusual. Conviction rates are not published or even measured in this way for any other crime so it is very difficult to make a comparison. The term 'conviction rate' usually describes the percentage of all cases brought to court that end with the defendant being convicted. When dealing with rape the term has come to be used in a different way, and describes the percentage of all cases recorded by the police as rape that end up with someone being convicted of rape."
She goes on:
"We have looked closely at the information about convictions for rape and it is clear to us that the figure for convictions of people of all ages charged with rape (as the term is normally used in relation to crime) is 58 per cent. The confusion arises from mixing up the conviction rate with the process of attrition. 'Attrition' is the process by which a number of cases of rape initially reported do not proceed, perhaps because the complainant decides not to take the case any further, there is not enough evidence to prosecute, or the case is taken to court and the suspect is acquitted. The attrition rate figure has been the cause of considerable concern and attempts to review it behind many of the reforms that have been introduced in recent years. Our terms of reference also look at ways it can further be reduced."
She goes on to conclude that she feels the way this is presented it is clear to us the way the 6% conviction rape figure has been able to dominate the public discourse on rape without explanation, analysis and context, has been to the detriment of public understanding and other important

outcomes for women, for victims.

"Since this is an area of such public interest and debate, and many organisations have an interest in this information and what it means, we feel the presentation of statistics should be looked at again and we so recommend."

So that is an important statement made by an independent Commission chaired by Baroness Stern just published which I think is a cautionary tale about the use of single statistic reference points to drive debate, and it is particularly significant given the publication last week by the Scottish Police of the figures they had for 2008/9 in relation to cases which were prosecuted and the rate of conviction. In other words, what Baroness Stern called the conventional conviction rate percentages is intended to be a balance in ways of looking at statistics. Rape cases in Scotland, attempted rape cases in Scotland prosecuted in 2008/9 compared to the preceding year were 35% conviction rate. That was down from 40%. That drop of 5% represented in two cases. The problem with that is that I can tell you right now two cases of convictions for rape in the High Court during that statistical period that are not recorded in that statistic. I know of them and you know of them. One is Moira Jones and the other is Tobin. In Tobin's case and the Harcar case there were charges of rape which returned convictions but the headline charge was murder and so all that is counted statistically is the conviction on the headline charge.

So you see that in Scotland, we are comparing apples with pears with chairs. Reported rape is one statistic, covered in a certain way and by the police forces in response to certain trigger mechanisms, and that is a recorded statistic. The statistic for convictions is not recorded by the police; it is recorded by the court service in a particular way and only looks at the headline charge and the conviction or non-conviction on that headline charge, one per indictment.

That gives an example of how statistics can be both manipulated and mis-stated and misunderstood. I am not saying either that a 40% true conviction rate is something to be particularly proud of. But let's look at some of the other statistics of conviction rates as well. Indecent assault prosecutions - 69% conviction rate. All indecency crimes, all crimes with an element of indecency involved - 80% conviction rate. All crimes involving practices towards children - 81% conviction rate, that is indecent sexual crimes against children have an 81% conviction rate from prosecution. All other crimes involving indecency- 92% conviction rate. That is such things as indecent images on a computer, internet sex crime, offences of that nature.

I say that because it is important as if I was addressing a conference of prosecutors to say, do not be demoralised as prosecutors that you don't know how to get a conviction in a court of law when it is a sexual offence as opposed to when it is murder. We don't become bad prosecutors because the word rape is at the end of the indictment. There must be some other explanation of why there is a 40% conviction rate in rape cases as opposed to 69% conviction rate in indecent assault cases and I can give one off the top of my head. In Scotland the appeal court have told us that if woman alleges that she was raped and only she can give that evidence and there is no supporting corroborative evidence of penetration of the vagina by the penis, the definition of rape, then the Judge will take the case away from the jury on rape. He may leave it as in indecent assault but he will take the case away from the jury on rape. When we are preparing the case we know that is going to happen so why don't we just prosecute it as indecent assault, why prosecute as rape at all? That then creates a statistical stick to beat our back with. We know there is insufficient evidence to corroborate rape, why prosecute it as rape? We know the outcome will statistically show we failed to get a rape conviction.

The reason is the appeal court have told us if the witness is going to claim there was rape or alleged rape you must charge it on the indictment as part of the fair notice procedures. If we don't do that the defence can object to the evidence and have the trial stopped.

So even if there is only one source, even if

we know it will never prove as a rape but it may well prove as indecent assault, we still have to have it as rape and therefore set ourselves up for a statistical form with the appeal court has made for us. That, I suggest to you, may be one of the reasons why there is a distinction even between Scottish and English figures of recorded convictions from prosecutions for rape.
But so you can see the statistical analysis is important to the general debate and Baroness Stern encourages all of us in this debate to broaden our view of statistics from that headline recorded rape conviction figure to looking at where and why attrition occurs in the process.

Once a prosecution is mounted, we prosecutors and certainly in my unit, the National Sexual Crimes Unit- the first unit in Europe of specialist prosecutors who take cases from first to last, from the very beginning of the first custody report from the police to the prosecution of the case in court- we certainly are of the view that when we prosecute a case we do so with confidence that we have a good chance of getting a conviction. I hope as I speak to you this afternoon about how we support complainants, part of that is the confidence to say we have indecent assault cases and rape cases, we have good prospects of success when we prosecute a case but you are going to have to be the main witness. It is an important message of support, a morale raising message to give a witness. Baroness Stern observes it is in fact in danger of being demoralising to women coming forward at all if the sole focus is on the report to conviction statistic as opposed to prosecution statistic. I accept there may be criticisms at each step attrition takes place. There may be different criticisms to be made of why there is a Commission at this stage, different solutions required to be applied as to why the attrition rate is as high as it is and how to lower it, but that is for another time. My plea to you is that we look at the statistics with a broad lens rather than too narrow a one and I echo Baroness Stern in that.
So NSCU; as prosecutors we have in recent years, it must be said, adapted to the valid and perceptive criticisms for improvement in our working practices that come from, among others, Rape Crisis Scotland and we have, I hope you will agree, very constructive engagement with Rape Crisis in a real sense. I don't know where we would be without Rape Crisis. Your engagement in our policy review on the prosecution of sexual offences was of immeasurable importance in helping broaden our understanding of the effects our procedures and protocols have on the very victim we are trying to serve.
It seems in the past support for complainers has been of patchy quality and inconsistent coherence. The key question you are asking today is whether a solution is separate representation. I am no politician, radical policy shifts like that are for politicians to respond to. I am a paid prosecutor and contributing to such a debate in the policy sense isn't permitted but I can talk about our current systems and real improvements that I have seen introduced over the very recent past including, I hope, the NSCU though it is to acknowledge here we are just the tip of the iceberg. Area sexual offence teams in Scotland are at the heart, as are full-time prosecutors who work in the area the crimes take place and report up to us. Nowadays, as a result of the Lord Advocate's review and important changes made by the Vulnerable Witnesses Scotland Act we draw from strength and confidence of the Victim Information and Advice Unit (VIA), we have a framework - providing the will is there - to produce an environment where every complainant of sexual crime feels supported from first to last in the criminal justice process.

Are there ethical limits to the extent the prosecutor can support a complainer? That's an important question. If there are, it raises the question whether separate legal representation has its own locus and importance. Another question is: is supporting the same as believing? Does that matter? My talk is restricted to the work of the prosecutor in this overarching first to last support system. The police, who themselves have radically improved

support investigation techniques in recent times, can speak for themselves and it's important the independence of the police and prosecutor is respected in their various roles.

The first underpinning of support is an intangible one. It's about a belief that it matters at all. You may say, "What a strange thing you've just said". But I can tell you court lawyers, whether prosecutors or defenders, by instinct are process-led. They seldom have time or inclination to think about the people in the process, how they're coping with it. They seldom imagine their workplace could ever be hazardous to someone's emotional health. "After all", they think, "we manage to cope".

Court lawyers are also successful, confident, adversarial adults. They do not see themselves as victims. Ever. They enjoy the rough and tumble, as they see it, of debate and argument, and many enjoy nothing better than a cleverly constructed legal debate or hostile examination which exposes apparent weaknesses in their opponent's case. It is part of the psychological toolbox of core instincts of the normal trial lawyer, and an important thing about NSCU is that the skills necessary in the prosecution of sexual crime are not necessarily the ones in the toolbox that a lot of adversarial criminal lawyers are trained with. It's not necessarily a macho environment. It's not necessary for it to be an arena. If trial lawyers fear anything, it's a judge who is even more process-led than he or she is.

Judges, more often than not, want to press on with the case, get the evidence heard, and stick to the rules of the law and procedure, any deviation from which can result in an appeal. Judges impose order on the debate, but can do so in a way that helps keep the adversarial system coldly analytical and a clinical, intellectual environment. That's what judges do. They referee coldly, calmly and clinically, even in the most moving of cases. That is not a criticism, but an acknowledgement of an essential truth and safeguard that justice must be blind. It cannot be swayed by raw emotion or sympathy.

So there is the environment that many victims surrender the most intimate examination of their conduct and trauma to, and how can we square that?
We have to start by believing that supporting the complainer in this harsh, clinical and forensic terrain matters at all. At NSCU and sister units, we start with this premise. The complainer is the best weapon the state has in the prosecution of sexual crime. I'll say that again. The complainer is the best weapon the state has in the prosecution of sexual crime.

I didn't make those words up. Those are the words of a woman who is the Head of the Rape Crisis in Capetown in South Africa, and that is her mantra. I think it's a good one. The next bit of it is, "... and we have to nurture that".
Even if anyone is ever inclined, as a lawyer, as a prosecutor, to forget the sheer need for humanity and compassion, every trial lawyer should understand without a complainer being able to walk into court and give a clear and coherent account of her story, her case is undermined in tactical strength from the get go. To be blunt, support is not just about respect for the story, humanity for the hurt, understanding of the embarrassment, even. It's about trial tactics.

No good complainer, no good case. It's a no brainer, even to the most hardnosed and driven prosecutor. But in the past sometimes I think trial lawyers thought it was their job to wrangle the evidence into any shape by dint of eloquence or persuasiveness and convince the jury of the guilt of the accused, and the complainer was to be shoehorned into the rest of the case, fitting together with the circumstantial evidence. A dazzlingly good performance by the complainer was a great help, of course, but somewhat coincidental. The prosecutor made the case. Period.

Now, thank goodness, it's understood a trial

is not a show or a theatre, nor an arena, when it comes to sex crime cases, but a forum for enquiry. Getting that dazzling performance is nothing to do with brilliant advocacy at all, but to do with painstaking attention to detail, careful preparation and the relevant, timely and genuine support of the complainer from the very beginning of the case.
She carries the story, the evidence, with her each day of that process. She feels it and suffers from it. Some days, she feels it's all not worth the candle, and some days she wishes she hadn't bothered, and some days feels confused and lost in the system that barely remembers her name. The case is not called after her. It's called after the accused.

So our challenge in the prosecution system is also the same thing as our best strategy: to put ourselves for some moments into the shoes of the complainer and see the case as she sees it and empathise with those changing and important feelings she has about it. That doesn't mean we lose our objectivity because that very objectivity is another critical part of our toolbox which lets us ask the awkward questions and allows us to look at things the way a juror might see them and lets us test the strengths and weaknesses of an argument or case theory before it gets set upon by the defence or, even worse, by the judge.

We do tell the complainants in advance if there's a notice of consent being lodged by the defendants. We do tell our complainers in advance if there's a section 274 application to attack her character or release information or use evidence in the trial which refers to prior sexual conduct. We take that to the complainer at the time and keep her in the loop about it and ask her questions about it.

But uncritically buying into a belief in a story is not our role. We may well believe, but it's not our belief but a real support that is required in that unforgiving and unconvinced forum.

So where do we start? We start at the beginning. The beginning, again, requires a context which is only now genuinely being put in place. That context is to show we care about what is reported and want to support the reporter; that we'll try our best for her to enable that story to be told in a safe way that honours the experience. That means having trained personnel in place and available to make this a safe experience, even if it can never be anything other than a tough one. Each case that comes into our office is allocated to an AD for marking. That means every scrap of evidence, every statement, every piece of laboratory work is scrutinised in detail before we decide if a case is, or can be, grown up to be sufficient in evidence to put before a jury.

Sometimes complainants say they're less concerned about the verdict than the ability they have to reclaim the experience and tell the story in court. Here I have to say, unfortunately, the rules of evidential sufficiency radically interfere with that hope. If there's a lack of corroboration, the judge takes the case away. The judge takes the case away from the jury. There never is a decision, or even a consideration of the truth or otherwise, of the allegation. So, when people express that, "I want to go to court anyway and tell my story", I suspect they imagine that cathartic process to be something in reality it is not and can never be. A woman believing she faces that resolution of her fears by standing up in court is instead faced by the process of two lawyers discussing the sufficiency of evidence in court, empty of the public, and more often than not in the absence of the jury. No sooner has she spoken than it could be the case seems to collapse.

Is that supporting the complainant? Is that providing care and safety? Is that the victim having her day in court?
Let's go back to the prosecutor's marking. That detailed analysis often throws up a lot of new questions for the complainant to answer if she can. We'll authorise her to be seen to put the points to her. Sometimes difficult questions, and it can sound like

we don't accept her story, and that is not so. But we do no one favours by leaving mysteries or conundrums until the trial where they're exposed by the defence. If there are tough questions to be asked, we must ask.

But there are ways of doing that and we well understand that witnesses get things wrong because of embarrassment or shock or confusion or bad memory or traumatic loss of memory or the effect of drink or drugs. So we will approach this understandingly, but we won't shirk our duty to do that job.

That is a good example of how independence works to the advantage of the whole case. If there are real problems, we'll identify them early on and put them to the complainant, and it may be they cannot be resolved. In that case, it's our view it's better, far better, to kill the case there and then than to drag it and the distressed, unhealed complainer through a criminal justice process lasting up to a year before someone has the courage to face the legal facts of the case. The courts will not look favourably upon a prosecution process that fails to recognise the inevitable legal outcome from the outset. Nor should it and nor should the complainer.

Other practical supports we do offer include the case long relationship with our VIA case officer. This officer keeps the victim informed of what is happening in the case and when, and hopefully lets the complainer feel in the loop and listened to. Arrangements for getting to and from court, for discussing special measures and contacting support and help agencies are all within that remit. We're conscious that, with the police rolling out the new SOLO, Sex Offences Liaison Officers, there'll be a consistent series of contacts with police officers and VIA from beginning to end, and all of this is real practical attempts to reduce secondary trauma from the process of being involved in the criminal justice system.

I have to say it is a process-led system. Time limits for keeping an accused in custody before trial are rightly strictly enforced by judges and hearings to be achieved by certain times according to certain strict procedures. How easy it is to lose the complainer in all of this as an individual, feeling person.

Our independence, however, can occasionally seem to bring us at odds with the complainer's own wishes, and this is especially so when we talk about disclosure of medical and social work records and that thorny and difficult area, as currently under review, the intention being in our office to bring the complainer more into that decision making process.

Paradoxes do occur, however, which have not been referred to today at all, and one example is where we seek special measures for vulnerable complainers, whether that is CCTV or appearing behind screens or a remote site to give her evidence from. It requires us, and the judges require us, to lodge detailed support for that application. It may surprise you to know it's not enough simply to say that the complainer is, has been, a victim of a horrendous rape and therefore is vulnerable. There has to be something over and above the crime itself that renders the victim vulnerable and significantly at risk of not being able to give evidence without these measures.

The judges recently have said that, if it were otherwise, Parliament would have said so. So if you want to get on to your MP and it might be what Parliament thought it was doing they are obviously vulnerable and deserving of special measures, because the court seem to interpret it in another way. But if we have to put detail in a vulnerable witness application to court, we have to disclose that application to the defence and in disclosing the application to the defence we are disclosing references to medical reports, psychiatric reports, psychiatric treatments and there is the defence's trick to say equality grounds we want to see what you have seen and the case of MacDonald, the new 2010 Act when it comes out says we have to disclose that. So there's a paradox,

in trying to support a complainer we in fact end up disclosing material to the defence that they use.

Let's also say this about disclosure in general, because this is the locus, it seems to me, the place where the big debate about separate legal representation is coming from, where as it is impossible for the prosecutor to simply act as the representative of interest there because she has too many different hats to wear and separate representation for the complainant is necessary.

First of all may I say off the record, I don't think that is a particularly controversial thing to say, I rather suspect it might be like Canada, reform such as that may get through without much controversy about it. Currently we have procedures that deal with disclosure issues which readily act to have separate representation within them. The health service are entitled to be represented at these disclosure hearings, the social work department that holds the records are entitled to be represented and I can't imagine what separate greater interest the health service or the social work department has than the complainer so I don't see it as being a hugely controversial issue in itself.

But an important thing to understand about disclosure - it is not all it is cracked up to be. When I disclose social work or medical records to the defence it is because I am under a legal duty to do so because it may materially assist their case or undermine the Crown case. That is the test the Judge has to apply no matter who is doing the representation, no matter how pro the complainer, solely focused on the complainer the representation is, the Judge still has to apply the MacDonald test: is this information that could materially assist the defence or undermine the Crown case? If it is, it must be disclosed. But disclosure isn't the same thing as conceding admissibility. It is then for them, the defence, to make an argument in court before we ever get to trial, that that disclosed material is relevant and admissible as evidence in this case.

So, for example, the ludicrous example given in the Canadian case where virginity in 1999 was regarded as a relevant matter for disclosure would never in Scotland be regarded as a relevant matter for admissibility in a criminal trial, far less disclosed. I can't recall a case where it ever has been. I certainly object to any suggestion at any stage in the criminal procedure that it could be. It doesn't fit in with the definition. How does a person's state of virginity materially assist the defence case, or undermine the Crown case? Similarly whether a person has had a past abortion, a prior history of self harm, a past history of prostitution. All of these are clear cases; I could state the case names, where we have successfully objected to the defence having that sort of material as admissible. We might learn about it from other disclosed records or obliquely from things disclosed in the records but it is not the same thing to make it a material case for its use in the trial. So that again is where specialist prosecutors add to the case, that with specialist prosecutors we know the cases, they are ready to hand, part of our toolbox and we make those arguments. We say to the Judge "a colleague last week in the court sitting in the seat you are sitting in refused to allow this," or "the appeal court, I was appearing in front of it three months ago, the case of such and such said it was nonsense." We bring the continuity and expertise to the argument and I can reassure you that, if Fiona had to go to a Canadian 1999 case to find a case where the virginity was regarded as material, it was because there is no such case where it has ever happened in Scotland, at least in recent times that I can remember. So even if we disclose because we have to disclose, we will put up arguments and barriers against admissibility.

Another thing which perhaps is different from the Irish legislation (our legislation very much mirrors the Irish legislation on this point) is that it applies to the

Crown too. The Crown can't obtain that information without the consent of the court - I cannot go delving into someone's sexual history, I require permission from the court to bring that as well. Judge might say well the prosecution may want to bring it out but I cannot for the life of me see the relevance of it. I find it hard to figure a conversation like that taking place in a court in which I appear or any of my specialist prosecutors appear because we would not be seeking to bring out irrelevant material but sometimes it is the case less experienced prosecutors could do that, they could say I feel I have to bring this out with the permission of the court. The Judge, the final gatekeeper says "I don't see the relevance". Relevance is the test. Relevance is the test of admissibility in every single piece of evidence brought. So that argument can be made.

Would it be better made if there was separate legal representation? It would certainly be an opportunity. If looking where you might insert or bolt-on separate legal representation in Scotland, one position to do that would be at that moment of 274/5 application. Remember, the general prohibition is on the evidence being allowed in at all. It is for the defence to make the argument and the Judge can restrict the terms of the inquiry. Again it can be argued that might be an opportunity for a separate legal representative to make that intervention.

My fear about that is - and I don't want to enter into a policy debate - my fear about that is you end up letting the prosecutor off the hook. I believe the prosecutor is there to support the witness, to make sure that witness's story is sold, unblemished and safe and as positive a way as possible. The prosecutor is to some extent let off the hook with separate legal representation. I would be worried a busy prosecutor ends up going to court saying "what is this, a section 274 application for prior sexual history, the complainant is separately legally represented fine I will just stand up and say I adopt everything said by my learned friend." That is the danger. If we do our job properly, the way specialist prosecutors should do their job, isn't it just duplication to have separate legal representation? Is there really something that stands in my way from making legitimate rational evidential relevancy arguments that are obvious to me?

So, that is part of the debate too. Do bear in mind we have section 274. Bear in mind another provision of 275, permission granting, the section that allows that material to come into evidence if the Judge thinks fit, even if allowed can be with accused previous bad character and previous convictions being admissible against him. That is a sling shot they are often not aware of until they come face to face with it. It is amazing how many 274 applications disappear when it becomes apparent the Crown will be arguing, all right, if you get this, if you get this granted, you will place your previous convictions before the court, as the Act allows us to do. So there are protections in place and that is a statutory support mechanism.

The other thing I would say about this, there seems to be an underlying assumption that disclosure of material leads to the defence establishing reasonable doubt based acquittals before a jury. I wonder if that really is borne out by the evidence. Because if you look at the conviction rate in indecent assault cases and particularly libidinous cases, trials involving child sexual abuse, look at the astonishingly high conviction rate we have there, the child sexual abuse cases are the ones we have the highest proportion of applications for prior records. The highest proportion. So they can't, given that conviction rate, even if the defence are having material disclosed to them, they cannot say this is resulting in a disproportionately equally high number of acquittals because the conviction rate is so high. So I would say that it is a questionable assumption, unless someone can produce research on it, that disclosure leads to successful exploitation of the material disclosed to

great reasonable doubt, in cases where had there not been disclosure, there would have otherwise been a conviction

So, can I end then, because I seem to have reached the end, by saying that in court, during the giving of evidence, old horror stories of cynical arrogant bullying questioning by the defence have become rarer in my certain knowledge. Both our specialist prosecutors and judges are much more sure to intervene and protect the witness from any inappropriate comment by the defence. Let us say it loud and clear: such conduct is inappropriate and it is unprofessional.
But in conclusion, I have to say my independent role is to support the complainer whatever happens. She is not just a witness, but a whole person, on a journey potentially beset with demons. All prosecutors have it inculcated in them they must nurture and support that witness, that person, and I can't take away the worst of the principal trauma of the rape but I can sure as hell help alleviate, even remove secondary trauma caused by unfeeling, insensitive ignorant or indifferent professionals in the process we call prosecution.

Now, it may be there is a half-way house between professional prosecutor providing that support which I hope she continues to do and something like what Baroness Stern commended in England and Wales, the independent advisor who is not a professional lawyer but someone who is attached to the complainer from the very outset of the case right through, becoming an advocate with a small step in the process. There may be a significant role for such a person in Scotland, maybe the police SOLO, at disclosure or 274 and 5. I see that as a possibility. Thank you very much for inviting me here today. It is always a privilege to come and talk and I have established I hope and our unit has good relations with Rape Crisis Scotland. Thank you.
{Applause}

CHAIR: Thank you very much. (Applause). We're running slightly over, but there are so many interesting issues covered in Derek's presentation. We'll maybe just take five minutes for any questions or comments. Do you have any questions or comments?

FROM THE FLOOR: I was just wondering if you could clarify your numbers in terms of convictions. I think you're right in saying we need to take a different approach to attrition, but I would take it in the opposite direction from the one you're suggesting. So I think you said that the conviction rate had fallen from 40 to 35 per cent on the basis of two cases. That would suggest to me you fell from 16 convictions to 14.
Now, if I'm right in that, that would suggest that potentially thousands of women in Scotland are being raped and nobody is being convicted for those rapes, and that many rapists are serial, multiple rapists, both on the same women and on other women, and I think it's very important that the justice system doesn't go down the track of thinking the cases we took to court we were very successful because, if I'm right and understood the figures correctly, if we've only got 14 convictions in a calculation of 5 million, that would seem to me not very many.

DEREK OGG: It's impossible to answer that on a statistical basis. I'm not a statistician. These are the police's own statistics and I commend Baroness Stern's comments on that form of statistical reports.

It's not to say that the low statistic is irrelevant. It's absolutely not irrelevant. I was repeating the criticisms Stern makes of solely concentrating on that one statistic, and points out that, when a case is taken to prosecution, the conversion rate of the prosecuting case to conviction is not 3.7 per cent in Scotland or 6 per cent in England, but it's important that that is understood.
Now, it could be, and I can sense behind part of your outrage about this correctly, I'm sure, that what if the prosecution are only choosing safe cases, cast iron cases to take to prosecution?

Well, I can tell you in NSCU that is not the case, and one of the rationales behind the unit is we take the tough case, the cases that in previous years would not have been taken to prosecution. We just do them, I think, a lot better and more expertly and with greater endeavour and resources.

Ultimately, the decision about whether to convict is a jury's decision and not the prosecutor's, but it's only fair not to interpret the statistics and saying prosecutors are failing in 97 or 96 per cent of cases because, where we bring influence to bear, we do not remotely fail to that extent.

CHAIR: If you don't mind, I'll maybe just draw this discussion to a close because of time, but I think both points are well made, both by Derek that there are lots of starting points for conviction rates and to be clear what we're talking about, but there's also a point about focusing only on cases that get to court; what about the 90 per cent of cases who don't get near court and are we saying to the vast majority of women that that is not a point that attrition rate is so high?

One thing for information, just to abuse my position as Chair briefly, I was interested, Derek, in your comments around sexual history evidence and your sense is very much that some of the concerns that have come out of previous presentations today wouldn't necessarily happen in Scottish courts today. It does seem the case from that evaluation these kinds of issues were still being brought up and I wondered if you wanted to say anything about the current practice compared to the evaluation that Michele worked on.

DEREK OGG: I think the battle is by no means won on this. We have at least a legislative framework in place. I couch everything I said today with the qualification, "the will is there".

That means that judges have to have the will to implement the will of Parliament when it creates the sections. Judges are patchy about this and idiosyncratic about this. This needs a lead if necessary from the Court of Appeal, more strenuously than that forum perhaps does give a lead.

But at least we have the mechanisms in place. We have specialist prosecutors, who are determined to try to enforce those sections, and hopefully we'll see a lessening of disclosure of material which is irrelevant and the use of material in trial, even if it is disclosed which is irrelevant, it's the question of whether on that day at that date at that time that man raped that woman.

Table discussions : a summary

Key issues raised by the conference

- One of the key issues raised was that of attrition. Several tables expressed concern that so few cases proceed to court, and felt the way in which victims are supported through the process is a key issue
- Attitudes of juries, judges and the public were a key issue for many of the tables, where it was felt that rape myths and prejudice was prevalent. Suggestions to tackle this included training for judges and leaflets for juries.
- Various concerns and questions were raised about court processes and systems. Tables felt that while there was some good practice in the criminal justice system, the approach was often inconsistent and further progress was needed. Tables wanted to know more about the National Sexual Crimes Unit and also wanted to examine the possibility of specialist courts as well as for ILR.
- Issues around privacy and disclosure were a key topic. There was particular concern around the use of information in child sexual abuse cases and for vulnerable complainers, and the use of therapeutic notes. It was suggested that advocacy is needed for the victim to protect them from feeling on trial, but it had been difficult to develop a Crown Office policy on disclosure due to a lack of consensus.
- The conference raised the issue of how statistics are used. Tables felt it was very important to measure conviction rates but that the way in which they are collected and used needs to be examined. There was a general theme that poor or manipulated statistics could stop women from coming forward or receiving adequate support.
- It was felt that there needed

Table discussions : a summary

to be better support for victims at all stages of the process, and that this could in part be achieved by better multi-agency working and links between court, support services and victims. It was suggested that more resource was needed to do this.

- Tables generally wanted to know more about ILR in terms of how it would work, how it would be delivered and funded and what tools would be used to evaluate its success. Tables generally seemed keen for further in depth discussion.

What changes are needed in Scotland? What might work here?

- Several of the tables felt that specialist courts and police units would work in Scotland, although there was some query around whether this would be justified by the number of cases which are taken to court. This would need to be complemented by specific training for those involved
- Training in general was seen as a change which was needed for those working with victims, alongside education for juries, better application of existing legislation for vulnerable witnesses and more measures in place at parole stage where perpetrators are released from prison.
- The tables felt that better provision for voluntary sector bodies like Sexual Assault Referral Centres, alongside better communication between agencies, would improve the situation in Scotland.
- Tables felt that the complainers should be at the centre of any process. This would include interpreting a "fair trial" more broadly than for the accused, having someone who is focussed on the complainer and looking at the South African model as an example of good practice.
- Tables expressed that ILR would be an appropriate and timely support mechanism for victims, before and during the trial. It was suggested that ILR should be funded through legal aid and should be available from the point of reporting. However, it was also expressed that ILR is not a complete solution.

Key questions for the panel

- How do we ensure consistency across Scotland in the way relevancy tests are applied?
- Questions about court processes and evidence including victim impact statements, how the disclosure of records helps the prosecution and could we consider specialist courts and judges?
- Various questions about the National Sexual Crimes Unit, including how it works, what criteria there is for referrals and what experience is likely in the court.
- Questions around the Criminal Justice and Licensing Bill and Scottish Privacy Law
- Questions around how ILR would work, what stage of the process it would be implemented at, who would the representatives be, what are the risks and how do we make it happen?
- Questions around how to change the culture, including applying pressure on courts to set precedents, and attacking rape myths.
- How do we improve the process? Would the panel support ILR, how do we ensure support through whole process for victim and how do we improve the conversion rate?

Panel discussion : Q&A

CHAIR: The first question I want to start with for the panel is a broad one, how do we attack the rape myths in our culture and our court?

DEREK OGG: One of the things we did with the support of the Lord Advocate was to talk to newspapers like The Sun, the Daily Record in Scotland, the News of the World, any main newspapers. The readership is people who end up on my juries. If I cannot take forward messages about rape myths in the media, I am losing them before I get them even empanelled in a jury and the Lord Advocate took the view it was a good approach. We deliberately courted the popular red top newspapers to engage them in getting simple messages across where possible. Sometimes the legal profession is guilty at turning its nose up at the popular press and only talking amongst ourselves in papers like the Times and so on.

LISE GOTELL: I think we need to be doing some really good education with kids in school, the younger the better and not just around rape, we have a good programme in Canada called the 'no means no' programme, run by the women's education in action. They train university students and work with 11 to 14 year olds around the area of consent. I think that teaching how to communicate with each other about sex and boundaries is where we need to start and we need to tackle rape myths with children. Starting even with High School kids, 16 to 18 year olds, it is too late already.

KATE MULKERRINS: I am going to be provocative because I have been so good all day Derek I want to ask you this: is there any sort of difficulty in having a message within a red top newspaper that carries on page 3 some interesting portrayals of women that maybe feed into the rape myths?

DEREK OGG: Yes, but you need to try to address that very same audience because that is the audience that we are getting tomorrow. All very well to say let's speak to children, I agree with that. Those children have no prospect of being a juror for another

Panel discussion : Q&A

ten years so what do we do right here, right now with a public who end up on a jury in Scotland, the jury that decides whether there was rape? Now, it is the very people who are reading those red tops that are currently carrying the prejudices into the jury box. If we can't tackle them on their own ground, we are not going to win the battle just talking, agreeing amongst ourselves what rape is. We are not going to be on the juries in any numbers to make any difference.

FROM THE FLOOR: I feel compelled to say while I agree with all of those suggestions, we know the core problem around rape myths is the inequality between women and men in our society and if we don't address the myths that women are now equal we are never going to succeed with rape myths or any of the other myths.

FROM THE FLOOR: I was quite struck from all the speakers today about the word 'independence' and what it means in the criminal justice discourse and what it means to the larger public. I know the word independence is used by every Sheriff and judge I have ever had a conversation with about the reason why they don't have to listen to the rest of us about what happens in a court room. I am struck that the notion of an independent legal representative uses the word independence in a very different way, which is about the rights and support of somebody in the system who has no representation otherwise. I was quite struck Derek by your use of the word 'independence 'in terms of the perceived role of the prosecution. I just wondered if any of the Panel or the audience for that matter, would reflect with me on what does independence really mean and the difference between the abstraction and the actuality of the experience for women in the criminal justice system and what are the upsides and downsides from a prosecutor's perspective of the need to be independent.

DEREK OGG: I have a slightly different view from a lot of my colleagues on that. Independence allows me to have the freedom to believe the complainer. It does not mean that I am independent in the sense that I am undecided about who is right between the complainer and the accused. That is not what I mean by independence. My independence means that I have a separate role to carry out that I must be allowed to carry out according to the law and my judgment on it. But I have the freedom in that independence to listen to whoever I want to listen to, whatever sources I wish to listen to and to believe who I wish to believe in that complainer in that case. I take that belief into court with me. I am entitled, as an independent person, an independent prosecutor, to believe my complainer.

FIONA RAITT: I suppose I should make a confession as a lawyer and a solicitor myself I don't actually think lawyers are necessarily the best people to present interests of complainers in all sorts of cases, but the difficulty is that if you want the rights or the interests (and we are here in a sense to talk about the rights-based interests of complainers in the justice system) if you want them represented, to an approximately equivalent level before the highest courts in the land would you need somebody with the equivalent rights of audience in the highest courts in the land. That's one of you. Though I personally think it is entirely possible to have very skilled people, there are very skilled advocates in the feminist movement, in the movement that says we know how to represent the rights of women because we know all

about inequality and disproportionate treatment, it would be possible to have people sufficiently skilled to do the job - you could have a solicitor or a good advocate - but it would not be permittable under the current rules. I used my talk to represent what is normally meant in the discourse which is independent of prosecution, and independent of other factors that might impinge on your ability to represent a woman in a way that puts forward your views without fear or favour. I am not sure if that is actually just then feeding into the legal culture which perhaps is not the best way to give her her own representation and in some ways the notion of an independent advisor is a great idea provided they have the same rights and authority as others in the system.

KATE MULKERRINS: I have very little to add save to say I think we all use interchangeably at different points in our presentations today separate or independent, both outlined as Fiona has said what has potential to be at odds with the prosecution, certainly the context. I deliberately chose to use the word separate for this reason. As I said in my speech, in our jurisdiction most of the rights that have relatively recently been afforded to complainants have been subsumed by the Director of Public Prosecutions, rightly or wrongly, and that the Director in representing the people has subsumed those rights. But I don't think the symbolic importance of acknowledging the separateness or the need for separation is predicated upon the idea that independence is only achievable by a lawyer. It is the recognition that the locus of the complainant in particular circumstances can be unique. That's why I think for instance in victim impact statements without representation, there is a recognition of that unique locus.

CHAIR: Thank you. I wonder if I could turn now to ask a question specifically about medical records, which has featured quite heavily during our discussions today as potentially a point of conflict in relation to prosecution. It does seem medical records are uniquely relevant for sexual offences in a way they are not for any other crime. I wonder if the Panel could say whether or not they think that is discrimination or whether they think there is another explanation?

LISE GOTELL: Well, I can say that as I was talking about earlier, in Canada when we had this onslaught of applications for personal records. The National Association of Women in the Law did a study of all the applications over a period in the early 90s and out of 140 applications for complainants files 120 were in cases of sexual assault. So the conclusion was that this is something that happens in a single area of criminal law. I think it does raise equality concerns, it absolutely does, because this sort of strategy that is used disproportionately against women who are complaining of sexual assault.

KATE MULKERRINS: Unlike the position in Canada, I can't say with a degree of certainty because I am not aware of any specific research that could pin point with such accuracy. We all know anecdotally sexual offence trials, particularly childhood allegations, where historical or contemporaneous produce in order to amount to a claim for disclosure. If jurisdictions that have sought statutory regimes for disclosure are no nearer, it seems to me with the question of third party disclosure and that seems the unique issue in sexual crimes because of people's recourse,

understandably, to a whole range of agencies. So I would be slow to suggest that the inequality is predicated upon the offence per se but the features of that offence which could conceivably I suppose be present in other offences in different ways. For instance, child neglect. We would have similar issues in our cases of child neglect where that family may well have been seen by teams of social workers, teams of medical personnel or other interventions and the same issues arise in relation to disclosure. We have not as yet in our courts had a sufficient exploration of the extent of privacy or the rights of privacy in such circumstances. We are still in the developmental stage. I am aware the situation in England and Wales and their statutory regime enforced since 96 has not seen to remedy that issue either. So I think it is a common problem. I am really grateful to this morning's presentations for a view into the different approaches, certainly in Canada, because we have relevancy hearings clearly in Ireland where these issues are aired day in and day out and consistency is a key issue. We probably have one bit of good fortune in a relatively small jurisdiction as I said earlier with a single police force and a single prosecutor's office and in addition a single court of jurisdiction for rape, the central criminal court and that has promoted consistency. Whether we like the position or not is another matter but it has promoted a consistency in the decision making process.

CHAIR: That's a comment that has come up in a lot of discussions: how do we ensure consistency in decision making, particularly when it comes to considering what is relevant and what is not in a trial?

DEREK OGG: Just exactly the question. In 30 years in practice, I've never known an application for records in a case other than a sexual case except one, and it will come as no surprise to know that was a case when a man murdered his wife, who had the temerity to stand up to him after a lifetime of abuse, and he went down the disclosure route to show there was something wrong with her to provoke him. That was the only case apart from a sex offences case that I've ever seen an application.

CHAIR: It does seem that, as well as potentially a gender discrimination issue, given that women are disproportionately affected, there's a disability discrimination question as well, because frequently it's looking through medical records for any mental health history and something as common as antidepressants, but it's a potentially a disability discrimination issue with a link between lack of credibility, disability and looking at medical records for it.

FIONA RAITT: This is a comment by way to Derek and also to answer the question that has just arisen: I'm aware of a case from my practice some years ago where there was an interest in a woman's history, including the history of whether or not she had an abortion close to the time of making a complaint of rape. The reason for that is, as some of you may know, and whether or not you think it exists or not, there's something called "post trauma abortion syndrome", otherwise known as "postnatal depression". The word "syndrome" has the magic quality of something official about it, and if it's not in the DSN, no doubt it will be soon. The problem is these are records and it wouldn't matter a toss if someone had a break in or a burglary or was the victim of a fraud, but a sex offence or sexual assault, there's a suggestion there may be something in her history

we should be concerned about, perhaps for the best of reasons, like will she be able to give her best evidence. But as soon as you put the focus on her history, you make her feel intimidated and question her ability to give good, confident, credible evidence, and that is part of the difficulty about calling up the medical records that you might not think at first glance should be relevant; and whether they get into court or not, they just might.

FROM THE FLOOR: I was struck this morning that there was quite a bit of discussion about rights, and in particular reference to the Article 8 right to privacy and the Article 6 right to a fair trial.

I was just wondering about the extent to which the Scottish system considers and takes into account the woman's right to privacy in relation to these hearings about disclosure and the like, given that the courts are obliged to comply with the Human Rights Act.

So it's really a question about the extent to which those rights are taken into account in these hearings.

DEREK OGG: The one thing that has not been said when people talk about Article rights in terms of the Convention is that Strasbourg court itself has said that Article 6 - in the primacy of rights in the hierarchy of rights, to use the Strasbourg word - trumps any other article, the right to a fair trial. I'm not saying that is correct, but it's important you should know that's what the prevailing human rights law from Strasbourg says, that Article 6 trumps everything else.

So Article 8 is a relevant argument to make. We need to make it better and I don't think it's even made often enough in those terms, but also the right to access to justice as someone who has been wronged, never mind the right to privacy. What about the right to the state vindicating the harm done to you? That's a right that is never argued in courts. So I think we need to challenge the point about the primacy or the hierarchy of rights that places 6 in every case at the top.

That is the law at the moment and as it will be applied by judges in Scotland, and I would venture in Ireland too because it's complied in the same Convention.

FIONA RAITT: You have just made a brilliant point. You have just said that that rarely is the argument made that the woman has the right to have her position vindicated. Who would make that point at the moment? The Crown. So you could ask: why is the Crown not making that case on a consistent basis, even though we know you have other interests to take into account? Somebody has to plead that case and, if the Crown can't or won't, it should perhaps be an Independent Legal Adviser.

LISE GOTELL: We have a different approach in Canada. No Charter right trumps another and we should achieve a balance of rights. That is why the concept of fair trial rights are not seen as antithetical. So the courts need to strike a balance.

When I think about Scotland, and I think Derek was trying to say earlier that good prosecutorial practice can minimise the effect of disclosure applications for Scottish complainers, but that ignores that, when the Crown accesses records, a violation of rights has already occurred. That has already occurred. A violation of the complainant's privacy rights has already occurred.

In Canada, we have a two stage test. The first stage, which is like the relevance in the interests of justice, occurs in the absence of anybody seeing the record. Not even the judge sees

it. Only after the judge rules that the records should be produced in the interests of justice will he examine it or she examine the records. So the first stage of the test occurs without anybody, even the prosecution, seeing the record.

So I think the process in Scotland already incurs on complainant's privacy rights.

DEREK OGG: I think that's a good point. Curiously that petition, which is directed against the accused, has been used as the warrant to recover medical records of the complainer.

I take the view that legally that's an incorrect analysis and the petition doesn't authorise that, and we ask all our prosecutors to request the permission of the complainer for the Crown to recover records.

The complainer may say no and that may then present us with considerable difficulties, but at the moment we don't consider it our inviolable right to be the gatekeeper. That is still the person whose records they are.

LISE GOTELL: What about Fiona's point earlier that, if the complainer doesn't give her permission, then the case may not go forward? Will that influence your decision about whether to carry the case forward if a complainer says, "No, you can't look at my therapeutic records"?

DEREK OGG: Not necessarily. In a sense, I don't know what is in the records, which is why I'm asking to see them. So I can't know there's anything in the records that would prevent me prosecuting the case to a fair trial against the accused.

In those circumstances, I would indicate to the defence we're not seeking recovery of those records. The complainer has not consented for us to do that. The defence can then make an application to the court for a warrant to recover the records. We might oppose that and say, "We can't think of any reason. This is just a fishing expedition. A fishing expedition and you cannot get it. It's as simple as that". Or we may take a neutral position and say, "The complainer said no to us and the defence are asking and if they've got a good reason, it's for the judge to decide if there's a good reason".

The circumstances then is a Commissioner will be appointed and the Commissioner will read the records and decide, based on representations in private, what is relevant and what should be redacted and that Commissioner will hear submissions from the holder of the records. So the social worker may say, "We don't wish to disclose the following chapter ..." and the Commissioner will say, "I agree to the defence. You're not getting them".

FIONA RAITT: A quick follow up. To take that example, if the Crown felt we have no particular interest in opposing this because we don't see it as necessary, you're neutral and do nothing, would an independent adviser not feel the woman doesn't want her records accessed, so someone should make the case for that position being put to the judge?

DEREK OGG: When I say we're neutral, that's what we'd state. We see no disclosure reason in terms of either McDonald or what will become of the 2010 Act. We see no duty upon us to obtain this information for disclosure purposes. We know of no reason why these should be disclosed. That would be our position.

FIONA RAITT: Would you follow it up by saying it's a breach of her privacy to permit this? This is a qualitatively different argument.

DEREK OGG: For me, it's implicit it's a

breach of privacy. Otherwise, we would not be complying with her statement she did not wish to disclose.

CHAIR: Just for the sake of information for people here, it might assist if you just tell us what the process is for seeking someone's medical records. Would it, with a sexual offence case, be something specific that would make you seek the records?

DEREK *OGG*: Yes. If there was a statement by an accused person, we're bound and have a statutory duty to investigate any defence stated by the defence. So, if the defence has said there was consenting sex and for some reason the complainer became immediately distressed or uncharacteristically distressed or that there was a change in her behaviour which was irrational or whatever, and the complainer said in her statement to us that on that day she had seen a community psychiatric nurse about the fact she wasn't taking her antipsychotic medication, for example, we would have a duty in those circumstances to pursue the statement made by the accused in his defence in his statement that there was irrational conduct by the party which was sudden and inexplicable and she appeared to be talking to other people at the time, or whatever. We'd have a duty if they said she was on antipsychotic medication and wasn't taking it and was seen by the nurse that day to make enquiries of the psychiatric nurse if that happened and, if it had, to seek recovery of the records.

FROM THE FLOOR: I must admit I was a bit confused at the end of this day. It struck me there was a contrast between what this morning's speakers were saying in their presentations and Derek was saying this afternoon. I'm wondering if that was a bit about reality and representation or truth and representation, and I'm wondering what your thoughts on that are in terms of, if Derek was coming from a legal perspective, that is a representation, but actually the reality was what was coming from the academics and the research? That is the first question.

And the second question is coming back to the victim impact statements, which I quite like and I think, working with women who may not for various reasons be able to articulate or stand up in court for all the reasons we know but may be able to write something down and that may be a cathartic experience they're looking for. I was interested in what Derek said about giving your statement is not cathartic and that is not what the justice system was about. I'm sorry, I may have completely misrepresented what had you said there.

I just wonder what Derek's position is on victim impact statements and this discussion about the criminal justice system, what it is about because there has to be justice, there has to be recourse and there has to be remedy and I would argue that can be cathartic.

DEREK *OGG*: I have to say I am sorry you picked me up completely wrongly if you thought I was saying a complainer giving a statement in court isn't cathartic; I profoundly believe it is and a lot of people say very patronising things about complainers, that we are saving her from the trauma of giving evidence in court by not proceeding with the case. I think particularly of cases where complainers have mental health problems and so on, difficult cases where I think it is vitally important to enfranchise those victims. We have to identify ways of getting their stories into court.

I do think giving evidence can be a cathartic experience. I had a case recently where the woman said "I want

to give evidence in court even though there is insufficient evidence I would still like you to go ahead with the case so I can tell my story in court." I said, "do you realise what you are asking for?" That would not be the cathartic process, no-one is going to make judgment on that, no-one is going to consider the truth of it, it is going to get taken away legalistically in a legal process of legal insufficiency and I think that is short changing the woman. If you know that is what is going to happen, if you know that is the cliff that case is going to fall off, then I think there is a responsibility to the witness to at least let them know that's how it is going to end. I think that there are very strong indicators that it is a fantastic thing for a woman to walk into court and confront this trauma and tell her story and access justice, whatever the verdict. Women are adults, perfectly capable of understanding that proof beyond reasonable doubt means that sometimes their story may not result in a conviction. Not patronising any witness on that basis, they know that. They say "I will go in there and still tell my story," and I totally believe it is a cathartic experience in the vast majority of cases.

FROM THE FLOOR: In terms of the victim impact statement, I think it was mentioned earlier on that there was quite a low level of victim impact statements in Scotland. Would you be encouraging their use?

DEREK *OGG*: Absolutely. The thing I worry about is whether - and this is a guess off the record - I worry whether judges pay much attention to it, to be honest with you. My sense is that judges think it is an intrusion into their special field of figuring out what the appropriate sentence is. The rationale behind victim impact statements needs no support from me: it is the will of Parliament. Therefore, the Judge is going to need to get the programme and I am here to tell you I don't think a lot of them do.

FIONA RAITT: I use the term cathartic specifically in relation to victim impact statements because whilst of course there is an opportunity I know of no single case where the material contained would be subject to cross examination, I know of no cases where they were, specifically victim impacts statement are not in evidence in chief which of course is open to cross-examination, robust cross-examination. But the Irish experience would seem to suggest, though difficult because of the components of any sentence, comprised as I said earlier of the feature of the offence and the features of the offender but our legislation is really specific in saying the Judge must have regard to. If we are talking about educating our wider public, educating our jurors and educating our judges, surely the best placed person to give the best account of the impact upon them is the complainant, the verified victim at that stage. They are no longer a complainant, it has been established they are the victim. For that and that alone surely there is compelling evidence certainly in Ireland that judges have taken that into account as a component, one of the factors they take into consideration in the construction of a proportionate and appropriate sentence.

CHAIR: Thank you very much. One of the questions that has come up quite a bit from discussions is what the power of independent legal representation should be. We have discussed it very much today in the context of medical records and sexual history evidence. Would you support independent legal representatives being involved from the

start of the process, like some countries in Europe?

FIONA RAITT: I think I would have to say yes I would provided I thought it would work, there is no point adding in yet more lawyers into the system if it is simply creating more complex procedures and more hoops and vacuums for people to fall into. I suppose from the work I did for Rape Crisis last year, looking at the different peak points, information alone could be valuable. I have friends who work in victim support and in the VIA so I am not in any way saying what they do isn't sufficient but in some senses a one stop shop with legal knowledge and indeed all the accrued experience and background that often goes with the work many of you are doing would be the ideal combination for me because you would be able to advise your client if you do A, this is what is likely to happen and if you do B here are the advantages and draw backs. That sort of debate rarely occurs. Women are often left to ask the question and they don't really know the questions to ask. They don't know the significance of what might be in their medical records, what may be asked. That sort of basic information at the earliest stage so informed decisions can be taken, whether to report or not, would for me be a much more valuable process than we have at the moment. Before we even get anywhere near stages like bail applications or anything else of that sort.

DEREK *OGG*: One of the dangers is it will be that it is expensive. For that reason it will end up getting done on the cheap and it will not be good quality. That is one fear I would have about it. Another fear I would have would be that it would be interpreted as partisan and therefore letting the rest of the system off the hook. In other words, it would privatise care and support for the complainer which I think is the responsibility of society and the prosecutors and judges and of police officers and of social workers. The danger is everyone will say "she has her own legal representative, they will take care of that." It is exactly contrary to the kind of ethos I am trying to promote within the services, at least for our part and elsewhere for other public agencies' parts.

LISE GOTELL: I would say there is no reason why if there was broader right of independent legal representation, the prosecution should somehow be let off the hook. Surely if you are supposed to uphold the public interest the rights of complainants have to be in that. The idea though, this is something you did in your talk, that the prosecution's duty is one of care and support, like the use of a therapeutic discourse, what is missing is a sense the complainant has rights. It is not just she needs to be treated, patted and cared for as a wounded little person but she has rights that need to be defended. It is not like I jump on the broader right of independent legal representation bandwagon whole hog, like Fiona I have cautions about it, but I think it is something to be explored further. I worry a little bit about your need to take care of the victims- we need to pay attention to legitimate rights of complainants.

DEREK *OGG*: We have an approach to care and support and respect for the process that she has gone through which is I think fundamental to getting your witness into court, to be able to tell the story. Fundamental. That you would suggest that the National Sexual Crimes Unit of Scotland set up by the Lord Advocate doesn't respect the rights of the complainer astonishes me.

LISE GOTELL: You're misrepresenting what I am saying. When you spoke today

you did not talk about the rights of complainers you talked about your duty to care and support the victim, which is different from advocating legitimate rights. I found it striking you did not speak in terms of rights.

FROM THE FLOOR: Just one comment. I was really interested, Derek, in what you said about it being expensive. I remember having this conversation 12 years ago with a fiscal in Lanarkshire who said we can't have specialised prosecution units for sexual violence in Scotland because it would be too expensive. So the amount of expense is a non-starter when it comes to something like this, I suggest, and I don't take on your suggestion because it would be expensive it would necessarily lead to poor quality of representation. I say, think outside the box, open up.

DEREK OGG: I am not suggesting for a minute that's a legitimate reason not to have it. I am saying let's get real, it would be expensive and what the people who spend taxpayers money would say is that we are going to do it on the cheap because they don't value it enough. If it is done on the cheap, it won't get done well. That's real politics. I don't like it any more than you do. M unit is under-resourced, it is expensive to run my unit. It should be much more expensive to run my unit because we need more prosecutors and more resources. I am just saying let's get real about it. My fear, I said, not justification for it not happening, my fear, because it is expensive it will end up getting done on the cheap rather than the expense that should be spent on it.

FROM THE FLOOR: A lot of people in the criminal justice system are already off the hook, right from police prosecutors to social workers and those who provide therapeutic support and the only way I can see to get them back on the hook is by actually building and developing a social movement amongst women themselves, amongst survivors and organisations that represent them and those are the organisations we can trust really to have the interests of women victims and children at heart. But I think today we are talking about very specific points within that, what could improve it. I honestly don't know if independent legal representation would do that. I think it might help. One of the things I am wondering about is whether people are talking about extending that to when offenders come out of prison. There is an area where there is loads that can be done and has been done and is still being done by social workers, for example, who did work at times to find out what's happening to victims and can actually work together with people who provide therapeutic support. It doesn't happen often and it doesn't happen consistently but is this independent legal representation or prosecutors off the hook, is that something you want to extend it to as well?

FIONA RAITT: Very often women don't have the right information, they are not kept informed, there are representations made at the Parole Board about appropriate conditions or whether there should be parole. Maybe some discussions need to be had with the survivor to say, "do you want to stay in the area?" I know from my own work with domestic abuse the advice to give the client it is you have to get out of the country, that or you are dead. Sometimes we said that and it was choking but that was the reality of the experience. Maybe there are circumstances where women need that advice. It doesn't need to be an independent legal representative

Panel discussion : Q&A

I suspect but it certainly needs to be someone who has access to the system and the authority to get the information demand the information and a right to the information and a right to pass it on to the person they are representing.

KATE MULKERRINS: The point I finished on, in order to promote change, the first thing you need to do is evaluate: is it working? Is the separate legal representation that exists in Ireland or Canada effective and achieving what it set out to do? In our jurisdiction, until we were asked to look at that question, and we were not looking at the effectiveness and across the range of law reform, that is a feature. We reform our law and we're happy without revisiting on a regular basis. Has that actually remedied the problem that it was designed to do so? Fiona's point I didn't add to because I felt she covered it so well. The question isn't whether it has to be legal representation, but what representation or what is required, who is best placed to do that?

On information, I agree with you. I think every single piece of research I've ever read says being informed and being kept informed is the key to keeping people within the system. If we're talking about expense, attrition is the most expensive part of the entire criminal justice system in wasted resources of investigation and prosecution. Attrition is what costs.

CHAIR: Thank you very much. I'll maybe just quickly ask the Panel for any final reflections you'd like to make before we close.

FIONA RAITT: Just one very small point. In England, ABE, Achieved Best Evidence, is what witnesses are always asked to try to do. What they need to do. If we thought that there was some method that would allow women to achieve best evidence, most of us would sign up for that.

DEREK *OGG*: We can all sign up for that.

CHAIR: Okay. I see the rest of the Panel nodding in agreement. It just leaves for me to thank, first of all, the speakers, the Panel, which is Kate Mulkerrins from Ireland, Lise Gotell from Canada, Derek Ogg and Fiona Raitt. Please put your hands together in appreciation.

I would also like to thank you all for coming along and contributing so effectively to the day. We've got a huge amount of information about how we take forward the issues for today. Apologies for anyone who has put a question up, but I hope we have managed to cover most of the key questions that you wanted to.

I want to thank the Equality and Human Rights Commission for working in partnership with us in this conference and for funding the conference. I think there's something important symbolically about them working on this issue and saying clearly this is a human rights issue and this is how we need to be framing this discussion because for too long I think human rights have been seen exclusively in terms of the accused's human rights and it's time we started looking at complainers' human rights because a lot of people would be shocked if they sat through a rape trial.

Thank you very much to all of the staff who have helped with the microphones and with registration and so on. Thanks to the palantypists for the hard work. (Applause).

(End of conference)

Key issues & suggestions

The following are key issues identified and suggestions/comments made during the evaluation process

- Statistics and perceptions need to be better explained.
- We need research done on a number of issues, perhaps most importantly on the effectiveness of ILRs.
- Make it happen before I retire please.
- The need for support of different kinds at specific points in CJ system, legal, advocacy, therapeutic and for social worker.
- General right of ILR? Deficiencies of NSCU.
- Attrition a huge issues-bigger than disclosure and the independent legal representation should not be prioritised in isolation from an early stage advocacy role that is designed to improve conversion rate from complaint to prosecution.
- The importance of advocacy for rape survivors to help them cope in the court system.
- Implications for rape crisis services of criminal justice licensing bill in relation to disclosure of records. Will we be compelled to disclose survivor records? As a network should we be lobbying/ formulating response to potential implications of Bill for complainants eg. Being used to discredit.
- We clearly need to be challenging our legal process as it is not protecting women.
- The extension of ILR in Ireland to possibly include request for medical records etc
- What is the next step?
- That it is a hugely complicated issue. I have more questions then when it began!
- The potential extension of ILR to disclosure issue.
- Misconceptions about disclosure. The need to look at ILR in more detail.
- Need to put criminal justice response in broader context of rape prevention and challenging rape myths.
- Moving forward from a strength based perspective. Very optimistic Derek Ogg is involved.
- The moving away from gender-violence/abuse, under the 'umbrella' of equality. Also the notion of the abolishing of Human Rights.
- The need for independent support for women re. legal issues. Collaborative work is essential to maintain momentum of change.
- I think we need to ensure that 'gender' based crime is not diluted within 'equality' banner and ILR support I think is necessary.
- Ongoing concern re. lack of understanding amongst some in senior positions within Justice System of expertise held by those working with women and that they have much to learn from women (including us)!
- The ILR, the information that may be requested from the court cases. The issues surrounding previous sexual experiences of the victims.
- Sexual crimes and how the statistics are portrayed and manipulated.
- Possibilities and models for change in a legal system that is failing women.
- Lack of knowledge in relation to the legal system when rape is reported.
- The pros and cons for the complainer-from this piece of legislation.
- How to bring it back to the workplace and how if changes happen do they impact on our service.
- Victim impact statements and their invisibility in casework with perpetrators of sexual offences – in criminal justices work we are forced to rely far too heavily on offenders' self-reports.
- Awareness of lack of victims rights in the court process.
- Increase my knowledge of Scottish system. Need more info on Derek Ogg's organisation-how it works and how referrals are made etc.
- Need for better communication between court and support services.
- The touting of the law conviction rate when the real figure is more positive-

Key issues & suggestions

we can use this to encourage women.
- The implications of new disclosure aspects of Criminal Justice and Licensing Bill.
- It's been a timely and useful refresher of legal issues and developments.
- Inequality of gender is still so bad.
- Issue of right to fair trail v rights of victims.
- It was very useful to have an international/comparative perspective – the conference usefully highlighted the benefit of learning between jurisdictions.
- The impact of the victim ie testimony within the judicial system.
- Facts and figures.
- Threat that disclosure of records might pose to our policy of encouraging women to seek services/advocacy/ counselling etc if records could be disclosed that might undo all this work. Also NHS routine enquiry when disclosure recorded-problem then to if women are raped at some point in future.
- It expands my knowledge about the issue and this will have an impact on my approach to work.

Suggestions & comments

- I'd like to know more about independent legal rep. and whether it works.
- Well done women.
- Need to involve users of the services of the professional services represented here.
- It was fabulous having food labelled!
- More comparative work.
- Event looking at attrition and improving conversion rates from complaint to prosecution.
- Excellent event – Thank you.
- Thank you for organising this conference.
- Thank you.
- It would be good to hear where the debate goes in terms of concrete reform proposals.
- Rape prevention-what works.
- Continual updates of change reflecting reviews of needs of women in society in particular the legal issues and criminal justice.
- Overall an excellent event. Very well organised and staffed. Well done to all at RCS and EHRC.
- To ask speakers to use less jargon as some of the talks contained information that I had no knowledge of, so therefore at times went over my head.
- An enjoyable and informative day that will promote discussion in my own organisation.
- This is an excellent forum for discussion of current policy and procedure and offers opportunities for making new alliances and strengthening existing ones. More of the same please!
- I came in place of colleague who was ill. Really enjoyed the day. Happy with current planning.
- Basics of how Scottish system works (or does not work). Anecdotal-positive and negative examples. Enjoyed it though – well done! P.S. Finish earlier on a Friday afternoon or you always end up with 2/3 of the room missing-which is a shame.
- Would be good if during the group discussions panel members were at the tables.
- Please make sure speakers use microphones. It's an equalities issue!
- Look forward to receiving the report and notes from the speakers. This will be particularly useful.
- More of the same.
- These kind of events gives sense to practice and help keep focus. Very good!

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