

**INDEPENDENT LEGAL REPRESENTATION FOR
COMPLAINERS IN SEXUAL OFFENCE TRIALS**

**RESEARCH REPORT
for
RAPE CRISIS SCOTLAND**

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ISBN 978-0-9561486-1-2

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RESEARCH CONTEXT

Rape Crisis Scotland (RCS) is the national voluntary organisation which represents the rape crisis movement in Scotland. Part of the remit of RCS is to develop legal strategies to improve justice responses to sexual offences. As part of a wider consideration of possible improvements to the Scottish legal system's response to rape and sexual offences, RCS is therefore interested in exploring the concept of independent legal representation, with a view to considering whether or not this would have a positive impact on women's experience of the legal system.

RCS commissioned this research against a backdrop where there have been long standing concerns about the response of the Scottish legal system to complainers of sexual offences. Women in contact with rape crisis centres do not speak highly of their experience of the justice process. Particular difficulties arise in relation to their status as a witness of the crime perpetrated against them, and the role of the Crown Office in acting in the public interest: women consistently tell rape crisis that they feel throughout the process that there is no one representing their interests.

This report considers the features of Scottish criminal procedure and evidence that exacerbate the problems currently facing complainers and that shape the response the criminal justice system can currently make. It explores how independent legal representation operates in other jurisdictions and considers the feasibility of its introduction in Scotland.

ACKNOWLEDGEMENTS

I would like to thank all those academics, legal practitioners, campaigners and policy-makers from numerous jurisdictions who gave generously of their time and ideas by communicating with me in person, by email and telephone in connection with this Report. Their willingness to share their experience and reflections has greatly enriched this Report and my own understanding. I am, of course, wholly responsible for any misinterpretation of their ideas and other errors that appear here.

In particular, I would like to thank Betty Bott, Susan Boyd, Christine Boyle, Lydia Fiorini, Lise Gotell, Roseangela Gramoni, Conor Hanly, Ernestine Kohne-Hoegen, Andrew McIntyre, Kate Mulkerrins, Dee Smythe and Larry Wilson.

I also wish to acknowledge the research assistance I received from Nicola Guild who prepared datasets, found materials and tracked down references with great efficiency and cheerfulness.

Finally, a special thanks to my colleague Pamela Ferguson for commenting on earlier drafts, posing challenging questions and providing such reliable intellectual support, and to Sandy Brindley of Rape Crisis Scotland who had the original idea for this research and whose endless patience and good humour until its appearance made the process so straightforward.

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May 2010

CHAPTER ONE

BACKGROUND TO THE RESEARCH

INTRODUCTION

1.01 The prosecution of sexual offences is a cause of common concern across all English speaking countries and much of Europe. Conviction rates for rape are notoriously low in comparison with conviction rates for crime generally, and by the same token, attrition rates are correspondingly high.¹ According to a study published in 2003, Scotland's statistics compare unfavourably with those for England and Wales and with those of 28 other European countries, comprising the EU member states, aspirant states, and Switzerland and Norway.² At that date, only the Republic of Ireland had a lower conviction rate than Scotland. The Scottish Government's rape statistics show that in the year 2007-2008 the conviction rate as a proportion of all rapes *reported to the police* was 3.7%. As a proportion of all rape charges *indicted for prosecution* the conviction rate increases to 31%. The overall conviction rate for crimes that proceeded to trial in Scotland in 2007 was 89%.³

¹ For example, the attrition rate – the loss of reported cases from the system pre-trial – for England & Wales in 2005 was 80%: see. L. Kelly, J. Lovatt and L. Regan (2005) *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Office Research Study 293 at p. 40, Table 4.2. For discussion of the numerous points of attrition and contributing factors, see the Joint Report from HM Inspectorate of Constabulary and HM Crown Prosecution Inspectorate (2007) *Without Consent- A Report on the Joint Review of the Investigation and Prosecution of Rape Offences*, HMIC, London; M. Burman, L. Lovett & L. Kelly (2009) *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries*. Country briefing: Scotland, Child and Woman Abuse Studies Unit, London Metropolitan University.

² L. Regan and L. Kelly (2003) *Rape: Still a Forgotten Issue*, Briefing Document, Child and Woman Abuse Studies Unit, London Metropolitan University, at p. 10 and Chart 4. [http:// www.rcne.com](http://www.rcne.com) See the update at L. Lovett & L. Kelly, (2009) *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries*, Child and Woman Abuse Studies Unit, London Metropolitan University.

³ Scottish Statistical Bulletin: Crime and Justice Series: Criminal Proceedings in Scottish Courts, 2008-09. <http://www.scotland.gov.uk/Publications/2010/03/03114034/0> See too the statistical data discussed in F. McCallum and G. Ross (2008) *Rape*, SPICe Briefing, 08/32.

1.02 Obviously one must treat such statistical comparisons with care, as each country tends to adopt different rules for defining rape as well as different methods for measuring how the crime is reported, recorded and prosecuted. However, Scotland must also confront the fact that conviction rates have been *declining* during a 15 year period when the rates of reporting, recording and prosecuting have significantly *increased*.⁴

1.03 The Scottish government has introduced various victim-orientated policies to improve the experiences of complainers.⁵ *Towards a Just Conclusion* in 1998⁶ centred on supporting vulnerable and intimidated witnesses to enable them to give their best evidence. *Redressing the Balance* in 2000⁷ focussed on the evidential and procedural rules in sexual offence cases. Both fed into the *Scottish Strategy for Victims* published in 2001.⁸ The main legislation enacted has been the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (SOPESA) and the Vulnerable Witnesses (Scotland) Act 2004 (VWSA).

1.04 However, this new legislation has not achieved all it set out to do. The Scottish Government evaluation of SOPESA published in 2007 indicates that restrictions in the use of sexual history and other character evidence have not materialised as anticipated.⁹ The VWSA was not fully phased in until April 2008, and an evaluation of that published in July 2008 concluded that many aspects of its implementation remain incomplete, largely due to a lack of resources to support the necessary infrastructure for an effective nationwide witness support system.¹⁰

1.05 Despite the reform agenda, it is difficult to know to what extent, if at all, complainers feel better off. In part, this is because both these evaluations of recent legislation had to rely

⁴ n. 2.

⁵ All other English-speaking jurisdictions refer to the victim witness as the complainant.

⁶ <http://www.scotland.gov.uk/library/documents-w3/tajc-00.htm>

⁷ <http://www.scotland.gov.uk/consultations/justice/rtb-00.asp>

⁸ <http://www.scotland.gov.uk/Publications/2001/01/7963/File-1>

⁹ M. Burman, L. Jamieson, J. Nicholson, and O. Brooks (2007) *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, Edinburgh: Scottish Government Social Research.

¹⁰ P. Richards, S. Morris, and E. Richards (2008) *Turning up the Volume: The Vulnerable Witnesses (Scotland) Act 2004*, Edinburgh: Scottish Government Social Research.

on relatively small numbers of interviewees – not uncommon in this type of victim research. As Richards et al. noted, one of Scotland’s long-standing deficiencies in criminal justice is the relative dearth of published empirical data, especially qualitative data, from which to assess the impact of reforms on victims, witnesses and complainers.¹¹ Certainly, it is difficult to discern any positive impact from this legislative activity on rape conviction rates, given that the latter have progressively deteriorated since the 1970s.¹² However, while outcomes such as conviction rates or attrition rates are very important indicators, they are quantitative measures and are only one dimension of the overall picture. An equally critical measure is the difference in how complainers now *experience* the criminal justice response to rape both at the pre-trial stage of the investigation, and in the courtroom.

1.06 Despite a lack of qualitative data collected officially by government we do have data gathered by those in the frontline support services, such as Rape Crisis Scotland, Victim Support and Scottish Women’s Aid. That data, together with media reports and case law,¹³ suggest the experience for complainers in sexual offence trials has not dramatically altered in recent years.¹⁴ Those who report rape and other sexual offences are often highly critical of their treatment within the legal process, recounting experiences that veer from unpleasant and uncomfortable to degrading and humiliating.¹⁵ Over the years these criticisms have been meticulously documented by researchers and relate to all stages from the point of reporting to the trial.¹⁶ They include the attitude and inconsistency of response by the police, the unpleasantness of the medical examination procedures, the failure to search effectively for, or to preserve, evidence, the indignity of giving evidence about personal and intimate matters, and fear of the cross-examination techniques of defence counsel. In particular, many women who allege rape claim they still face a culture of disbelief from the police and feel they are

¹¹ n. 11 at para 4.11.

¹² n. 2 and the Scottish Bulletin Criminal Justice Series generally.

¹³ For example, *Cumming v HM Advocate* 2003 S.C.C.R. 261 and *Kinnin v HM Advocate* 2003 S.C.C.R. 295.

¹⁴ Evidence from other jurisdictions supports this perception, e.g. J. Harris and S. Grace (1999) *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s*, HORS 196, HMSO, Stern Review of Rape Reporting in England and Wales. Home Office, London (2010).

¹⁵ Kelly et al., n. 1.

¹⁶ See e.g. Z. Adler (1987) *Rape on Trial*, London: Routledge; B. Brown, M. Burman and L. Jamieson (1993) *Sex Crimes on Trial*, Edinburgh: Edinburgh University Press; S. Lees (1996) *Carnal Knowledge: Rape on Trial*, London: Hamish Hamilton; J. Temkin, (2nd ed., 2002) *Rape and the Legal Process*, Oxford: Oxford University Press; Victim Support (1996) *Women, Rape, and the Criminal Justice System*, London: Victim Support.

not taken seriously at many subsequent stages of an investigation and prosecution, culminating in what is often described as a shocking and humiliating experience during cross-examination in the witness box.¹⁷

1.07 Despite many attempts to address these issues through statutory reform, policy guidelines, and public education campaigns that aim to put victims at the heart of the criminal justice system, there remains a startling “disconnect” between the ambitions of legislators and policy makers and the reality of a sexual assault trial from the perspective of complainers. The negative impact of this disconnect is not just on the individual victims involved and their families, but on the confidence of the public at large.¹⁸ If those who complain of sexual offences, and those offering support to such complainers, lack confidence that they will receive fair treatment or that the criminal justice system will deliver justice, then the authority of the legal system is undermined. The Justice Secretary Kenny MacAskill recognised this in a speech in December 2007 following the publication of the Scottish Law Commission’s *Report on Rape and Other Sexual Offences*¹⁹:

There has been considerable public, professional and academic concern that the current law on rape is unsatisfactory, unclear, and too narrowly drawn. Equally, many other aspects of Scots law on sexual offences need modernising and require reform. Much of the current legislation derives from a time when attitudes were very different from those of contemporary society and is no longer fit for purpose. Scotland needs a robust, modern framework of laws in this area, fit for the 21st century – a clear legal framework that ensures rapists and sex offenders are brought to justice and that victims have confidence in the Justice system.²⁰

1.08 According to Rape Crisis Scotland, particular difficulties arise for complainers in relation to their status as a witness of the crime perpetrated against them, and the fact that

¹⁷ n.17.

¹⁸Media coverage of rape trials and child sexual abuse trials often reinforces that sense of damaged confidence: K. Soothill and D. Soothill (1993) ‘Prosecuting the victim? A study of the reporting of barristers’ comments in rape cases’, *Howard Journal* 32: 12-22; and K. Soothill, Keith, S. Walby and P. Bagguley (1990) ‘Judges, the media, and rape’, *Journal of Law and Society* 17: 211.

¹⁹ *Scot Law Com* 209 (2007).

²⁰ See <http://www.scotland.gov.uk/News/Releases/2007/12/18110613>

their interests are only one of several which the Crown has to consider whilst acting in the public interest. Women consistently report that they feel throughout the process as if there is no one representing their interests. The need for “a robust, modern framework of laws in this area, fit for the 21st century” prompted Rape Crisis Scotland to commission this research to explore whether or not the introduction of some form of independent legal representation, a routine entitlement for victims in Europe, could have a positive impact on the experiences of complainers in Scotland.

AIM AND OBJECTIVES OF THE RESEARCH

1.09 The primary aim of this project is to explore the feasibility, benefits and any disadvantages of introducing independent legal representation for complainers in sexual offence trials in Scotland. In furtherance of this aim, the principal objectives are:

- i. To provide information about the extent and types of independent legal representation in other English speaking jurisdictions and elsewhere in Europe
- ii. To consider any benefits and disadvantages experienced in other jurisdictions through the use of forms of independent legal representation
- iii. To consider how independent legal representation fits within an adversarial legal system
- iv. To consider whether such representation could be introduced in Scotland.

1.10 The following six chapters of this Report address these objectives as follows:

Chapter 2 outlines the international and European legal framework for complainant participation in the investigation and prosecution of sexual offences. It then briefly explains how Scots law responds to this framework and how this impacts on complainers. Chapter 3 details Independent Legal Representation (ILR) elsewhere in Europe. Chapter 4 explores how other countries which rely heavily on the common law provide for victims of rape. It considers the problems stemming from an absence of ILR and the arguments put forward by those who defend the adequacy of the present system. Chapter 5 then considers the status of the complainer in Scots law and the conflicts facing prosecutors in seeking to take account of the tripartite interests of complainer, accused and the public both in the decision to prosecute and in subsequent proceedings. Chapter 6 explores the potential benefits of ILR from the

perspective of the complainer and the different stages in the process at which these benefits might arise. Chapter 7 explores the case for introducing ILR into Scots law, as well as the objections which could be raised against such a reform. Chapter 8 concludes the Report.

TERMINOLOGY

1.11 Until July 2009, with the enactment of the Sexual Offences (Scotland) Act the law of rape in Scotland had been classified as a common law offence. The definition of rape is now contained in section 1 which provides:

- (1) If a person (“A”), with A’s penis—
 - (a) without another person (“B”) consenting, and
 - (b) without any reasonable belief that B consents, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

This statutory definition adopts the recommendation of the Scottish Law Commission that rape law should be gender neutral as far as the victim is concerned though the perpetrator remains gendered as only men can commit rape.²¹ Section 9 defines consent as “free agreement” and s. 10 describes some of the circumstances when free agreement is deemed to be absent.²²

The issue of consent is of course one of the most contentious aspects of rape and the Act embraces the principle set out in the important decision in the *Lord Advocate’s Reference No.1 of 2001*,²³ which held that the crime of rape consisted of sexual intercourse with a woman *without her consent*. Prior to the *Reference*, the crime of rape consisted of sexual intercourse in circumstances where a woman’s will had been overcome. Notwithstanding the introduction of a statutory definition, the historic interpretations of consent contained in the case law will likely continue to be significant as how the Crown proves lack of consent

²¹ Though it is thought women could be guilty of rape on an art and part basis.

²² Scottish Law Commission (2007) *Report on Rape and Other Sexual Offences*, Scot Law Com 209.

²³ 2002 S.L.T. 466.

remains a matter for the law of evidence, and will not cease to be problematic.²⁴ Proof of consent lies at the heart of rape trials, and the evidential and procedural manner in which that proof is established and contested is the single greatest contributor to the distress caused to complainers.

1.12 Serious sexual offences involving penile penetration can of course be committed against men and children and until the 2009 Act these were characterised either as the common law offences of sodomy, indecent assault, or lewd or libidinous behaviour, or as statutory offences. Part 4 of the Act now classifies all such sexual offences against children, together with numerous others, as statutory offences.²⁵

1.13 The terms of reference for this Report focus on the complainer, the Scots law term for the victim witness. All other English-speaking jurisdictions refer to the victim as the complainant. For jurisdictional consistency, the terms complainer and complainant are both used throughout this Report according to the country under discussion. Technically, “complainer” is only appropriate once an official complaint has been made. Thus the term would not include, for example, those who choose not to make a report to the police but instead seek help from a rape crisis centre or sexual assault referral centre or similar. Nor would it include those who report a rape but who later withdraw it because they do not feel able to go through with it. Sometimes the term “victim” is used for consistency of meaning when comparisons are being made with other jurisdictions. Although “survivor” may be the preferred term, most of the literature and legal instruments refer to victim.

1.14 The Report was commissioned to explore the use of Independent Legal Representation in sexual offence trials generally but, inevitably, rape has become its focus. Rape is the most serious sexual crime under the law and the rape trial is the paradigm of the troubling and discriminatory nature of all sexual offence prosecutions. The focus on rape is not in any sense to diminish the experiences of survivors of other sexual assaults who may be affected just as deeply, physically, sexually and emotionally, as those who are raped. Sex crimes affect individuals in different ways, the circumstances of the crime vary, as do the levels of

²⁴ See, for example, *McKearney v HM Advocate*, 2004 J.C. 87.

²⁵ See ss. 14-29 in Part 4. Part 5 of the Act also concerns separate offences against children committed as an abuse of a position of trust.

resilience available to each survivor.²⁶ However, as the Crown Office Review in 2006 noted, “the investigation of sexual offences against men raises some quite separate issues from those in respect of offences against women, and further, where the victim is a child some of the issues are different again”.²⁷ This report does not consider these separate and different issues.

METHODOLOGY

1.16 The research was largely library-based using primary and secondary sources including legislation, law reports, and empirical studies from a wide range of jurisdictions. This research was supplemented by face to face, email, and telephone discussions with academics, practitioners and activists, several of whom work in jurisdictions where some form of independent legal representation is available to complainers.

²⁶ A. Burgess and L. Holmstrom (1974) ‘Rape Trauma Syndrome’, *American Journal of Psychiatry* 131: 981-986.

²⁷ Crown Office and Procurator Fiscal Service (2006) *Review of the Investigation and Prosecution of Sexual Offences in Scotland – Report and Recommendations* (Crown Office Review), at para 1.15.

CHAPTER TWO

THE LEGAL FRAMEWORK FOR VICTIMS OF CRIME

INTRODUCTION

2.01 In recent years there has been growing international recognition of the rights of victims to play a part in the justice process, to be consulted about the impact of the crime they have suffered, and to have access to civil remedies and compensation.²⁸ Legal recognition for these rights rests more in “soft” law as the framework tends to be statements of intent and aspiration rather than binding treaties or legal instruments. Recognition within human rights law is tenuous but there is a growing number of explicit protective provisions. However, certain emerging principles can be detected in the case law.

INTERNATIONAL AND EUROPEAN FRAMEWORK

2.02 The General Assembly of the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* on 29 November 1985. In the same year the Council of Europe passed Recommendation No. R (85)11 on *The Position of the Victim in the Framework of Criminal Law and Procedure*. In light of these position statements most European countries have revised their legislative framework for the treatment of victims and Scotland is no exception.

2.03 The Scottish response to Recommendation (85)11, in common with most jurisdictions, has concentrated on support measures for child witnesses who represent the paradigm vulnerable witness.²⁹ However, the response has been set within a broader context that recognises that the justice system can only function effectively if witnesses are treated with

²⁸ J. Doak (2005) ‘Victims Rights in Criminal Trials: Prospects for Participation’ *Journal of Law & Society* 32(2) 294-316.

²⁹ Reid Howie Associates (2002) *Vulnerable and intimidated witnesses: review of provisions in other jurisdictions*, Edinburgh: Scottish Executive.

dignity and respect. The *Vital Voices* policy statement³⁰ articulated the Scottish Executive's proposals for improvements to the treatment of witnesses and complainers and the subsequent Vulnerable Witnesses (Scotland) Act 2004 was designed to ensure compliance with Recommendation (85)11.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.04 The European Convention on Human Rights and Fundamental Freedoms

(ECHR) has several specific provisions of value to victims of crime and to witnesses and complainers.³¹ In particular, arts 3, 8 and 13 can be construed in ways that support the interests of witnesses. Article 3 of the ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment". Article 8 states: "Everyone has the right to respect for his private and family life, his home and his correspondence." Article 13 states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Each of these articles is capable of an interpretation that protects witnesses, for example, in rape and sexual assault cases where complainers often characterise cross-examination as "degrading".³²

2.05 Traditionally, nation states have treated the interests of witnesses, whether as victims or complainants, as subordinate to the rights of an accused. Thus, article 6, the right to a fair trial is the right of an accused to receive a fair trial, not the right of a victim to feel there has been a fair trial. Although the ECHR does not specifically constitute the welfare of a victim in terms of a formal "right", as already noted their interests are recognised in several articles. Moreover, a growing body of academic opinion argues that the ECHR does place positive obligations on the State to protect victims, in effect acknowledging that victims *do* have

³⁰ Scottish Executive (2003) *Vital Voices* at

<http://www.scotland.gov.uk/Publications/2003/02/16453/18641>

³¹ For full discussion see J. Doak (2008) *Victims' Rights, Human Rights and Criminal Justice*, Oxford: Hart Publishing.

³² L. Ellison (2001) *The Adversarial Process and the Vulnerable Witness*, Oxford: Oxford University Press; Burman et al., n. 10.

rights.³³ This argument is supported by Strasbourg case law. For example, in *MC v Bulgaria*³⁴ the European Court of Human Rights held that Bulgaria had a duty to the applicant to ensure that their rape law did not require her to demonstrate that she had physically resisted a rape, and held that the evidence of her non-consent ought to be sufficient for proof of the offence. The Court noted that “under Articles 3 and 8 of the Convention, Member States had a positive obligation “to enact criminal law provisions to effectively punish rape and to apply them in practice through effective investigation and prosecution.”³⁵ To the extent that Bulgarian rape law required a complainant to show that physical force was used against her and that she had actively resisted the rape, the Court ruled that there were breaches of MC’s rights under arts 3 and 8.

NATIONAL FRAMEWORK FOR COMPLAINERS’ RIGHTS

2.06 The Human Rights Act 1998 incorporated the ECHR into Scots law and this Act applied in Scotland from the point of devolution under the Scotland Act 1998. At a stroke, Scots law had to be ECHR compliant. In criminal matters, appeals citing a breach of Convention rights are heard beyond Scotland by the Judicial Committee of the Privy Council. What impact has this international and European framework had in relation to the investigation and prosecution of sexual offences? How, if at all, has it impacted on the legal status of the complainant in Scotland?

THE STATUS OF THE COMPLAINANT

2.07 Scots law has an adversarial (also described as accusatorial) system of law, with two parties in opposition to each other and the judge occupying the role of adjudicator. It is a

³³ See C. de Than (2003) ‘Positive Obligations Under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses?’ *Journal of Criminal Law* 67:165; F. Klug (2004) ‘Human rights and victims’ in *Reconcilable Rights? Analysing the tensions between victims and defendants*, ed. E. Cape, London: Legal Action Group; A. Mowbray (2004) *The Development of Positive Obligations under the European Convention of Human Rights by the European Court of Human Rights*, Oxford: Hart; P. Londono (2007) ‘Positive obligations, criminal procedure and rape cases’, *European Human Rights Law Review*, 2: 158 - 171.

³⁴ (2005) 40 EHRR 20.

³⁵ n. 35 at para 153.

general characteristic of adversarial systems that victims and witnesses have no standing in the process and no right to legal advice or representation during the trial. In Scots law the complainer in rape and sexual offences is a witness like any other and as such has no special status in the trial process. The exclusion of victims from meaningful participation in pre-trial and trial proceedings is not peculiar to Scotland, but Scots complainers fare less well than their counterparts in some other adversarial systems. For example, states in the US as well as Canada and the Republic of Ireland have introduced limited measures to support complainers largely through constitutional recognition of rights for the victims of crime.³⁶

2.08 In those European countries where the legal system is predominantly inquisitorial, with proceedings more directly controlled by a judge, virtually every country permits some form of independent legal representation for victims of sexual offences. There is no single definition of independent legal representation, and in some countries complainers can access a comprehensive service from the point of reporting at the police station through to representation in the courtroom and at an appeal. Even those countries with a more selective range of services generally permit the complainant some level of representation in court. The next chapter considers the different schemes that exist to advise, support, and represent complainers.

³⁶ Discussed in later chapters.

CHAPTER THREE

INDEPENDENT LEGAL REPRESENTATION IN CONTINENTAL EUROPE

INTRODUCTION

3.01 As detailed in the previous chapter, the recognition of victims' rights is a growing international trend, as are policies to increase victim participation in the criminal justice process. Many jurisdictions have accepted that meaningful victim participation entitles a complainant to some form of independent legal representation (ILR).

3.02 It is not the purpose of this Report to provide a detailed account of how each ILR scheme operates in other jurisdictions. Detailed accounts are already available. Two of the most valuable and comprehensive reports were published in 1998 and 2000 respectively, in the wake of Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure in the EU and each provides systematic evaluations of progress towards its implementation.

3.03 Firstly, *The Legal Process and Victims of Rape*, authored by Bacik, Maunsell and Gogan (from here on "the Irish study") was an EU funded research study of 15 European countries conducted by the Faculty of Law, Trinity College Dublin and the Dublin Rape Crisis Centre.³⁷ It is a wide-ranging comparative analysis of the legal procedures relating to rape in the (then) 15 member states of the EU.³⁸ Five of these states were in depth participants: Belgium, Denmark, France, Germany and the Republic of Ireland. Nine of the ten states responded to a questionnaire: Austria, England, Finland, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.³⁹ With the exception of England and Wales and the Republic of Ireland, *every* country gave complainants some form of entitlement to legal representation.⁴⁰

³⁷ I. Bacik, C. Maunsell and S. Gogan (1998) *The Legal Process and Victims of Rape*, Dublin: Dublin Rape Crisis Centre at <http://www.drcc.ie/report/rapevic.pdf>

³⁸ Scotland was not part of the study, not being a country with member status.

³⁹ Although one participant, Greece, failed to return the questionnaire in time.

⁴⁰ Bacik et al., n. 38 at p.17.

3.04 The Irish study found compelling evidence of the potential benefits of ILR. Their interviews with women who had received legal representation was that all felt more confident in giving evidence and less hostile towards defence counsel. Overall, the isolation felt by most rape complainants and the difficulties they encounter in accessing information about their case or making their views known in regard to decisions affecting the conduct of the investigation and prosecution were alleviated by having their own legal representation. The researchers' conclusions are repeated in full here:

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.

Participants also found it easier to obtain information on the investigation and trial process when they had a lawyer, but were less satisfied with the state prosecutor, perhaps because they had higher expectations of the prosecutor as a result of their positive experience with their own lawyer. Overall, the impact of the legal process on the family of the victim was also lessened where the victim was legally represented.

Where participants had a victim's lawyer, their lawyer was the main source of information concerning bail, trial process etc. Some problems were experienced in relation to state-funding of lawyers, since in some countries the qualification threshold for the means test is very high.

Finally, the victim's lawyer was the legal officer with the highest satisfaction rating among the sample...⁴¹

3.05 The second wide-ranging study in 2000 was carried out by Brienen and Hoegen who prepared a progress report on the responses to Recommendation (85) 11 from twenty-two different jurisdictions within Europe.⁴² In addition to these two reports, UK researchers,

⁴¹ Bacik et al., n. 38 at pp.17-18.

⁴² M.E.I. Brienen and E.H. Hoegen (2000) *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the*

Regan and Kelly, have prepared recent empirical studies for Rape Crisis Network Europe.⁴³ Rather than replicate or summarise any of this material, this Report seeks to give a broad overview of available forms of legal representation.

THE CIVIL TRADITION AND THE ADVERSARIAL TRADITION

3.06 In the field of criminal justice, comparisons between the three common law jurisdictions of the UK with mainland European countries with a civil tradition are often dismissed as inappropriate and unhelpful as one is not comparing like with like. In particular, some argue the predominantly inquisitorial procedure of most European countries does not permit ready comparison with adversarial systems such as those in Scotland, England and Wales or Northern Ireland.⁴⁴ However, there has not yet been a persuasive articulation why lessons from the Continental experience should not prove valuable in seeking remedies to the similar types of problem that face complainants of rape in other countries. A substantial body of academic opinion claims the divisions between adversarial and inquisitorial systems are exaggerated and artificial.⁴⁵ Close inspection suggests that most legal systems have a mixed heritage with features of each system identifiable within the other.⁴⁶

3.07 Generalised dismissals of inquisitorial models of criminal justice as incomparable with accusatorial ones deserve more probing for several reasons. First, as Summers argues, there is ample evidence that all judicial proceedings governed by article 6 of the ECHR are adversarial in nature.⁴⁷ The Nordic countries of Denmark, Iceland, Norway and Sweden illustrate this argument as all adopt elements of adversarialism within their criminal

Framework of Criminal Law and Procedure, Research Dissertation, Nijmegen, The Netherlands, Wolf Legal Productions.

⁴³ n. 2.

⁴⁴ For discussion see J. McEwan (2nd ed., 1998) *Evidence and the Adversarial Process*, Oxford: Hart Publishing and S. Summers (2007) *Fair Trials – the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing.

⁴⁵ See, for example, W. Pizzi and W. Perron (1996) ‘Crime Victims in German Courtrooms: A Comparative Perspective on American Problems’, *Stanford Law Journal* 32: 37; and n. 45.

⁴⁶ See W. Pizzi (1999) ‘Victims’ Rights: Rethinking Our ‘Adversary System’, *Utah Law Review*, 349; P Duff (2007) ‘Disclosure in Scottish criminal procedure: another step in an inquisitorial direction?’ *International Journal of Evidence and Proof* 11(3): 153; S. Summers (2007) n. 45.

⁴⁷ Summers, n. 45 especially pp. 103-128.

procedure. Thus the comparison is not necessarily between intrinsically polarised approaches.⁴⁸ In Denmark the scheme of legal representation has been so successful it has been extended to other victims of violent, but non-sexual, crimes.⁴⁹

3.08 Second, increasingly, EU countries are seeking approximation (sometimes referred as harmonisation) of laws to secure closer pan-European co-operation in various criminal procedures under the policy of mutual recognition. For example, there is a significant degree of approximation through the European arrest warrant and through moves to share evidence to achieve effective cross-border responses to organised crime. Steps towards this invariably require some degree of “smoothing over” of differences in procedures.⁵⁰ In practice accommodations are made, and the notion that legal systems are either purely accusatorial or inquisitorial is no longer tenable.

3.09 Third, if one takes a wider comparative lens and reflects upon the underpinning values of a European community, all of whose members subscribe to the values contained in the ECHR, one could argue that there is far more that unites than divides countries in their implementation of Recommendation (85)11. As Pizzi has claimed, scrutiny of the adversarial system “reveals no metaphysical constraint that demonstrates that criminal cases have two, and only two, sides.”⁵¹

3.10 This is also true of Scots law. Rights to appear before the Scottish courts have evolved over the centuries. Until the Criminal Evidence Act 1898 accused persons did not even have a right to give evidence on their own behalf. Today the rights of the accused permit them to choose whether to give evidence and, subject to certain constraints, to choose who will represent them or whether they will represent themselves. Rights of audience have therefore historically been fluid and responsive to changing social circumstances.

⁴⁸ A. Strandbakken (2003) ‘A fair trial for the suspect?’ in *Criminal Justice between Crime Control and Due Process*, Freiburg: Max-Planck Institute.

⁴⁹ Temkin, n. 17. Temkin’s book discusses the Danish scheme at length in Chap 5.

⁵⁰ For discussion see M. Mackarel (2007) ‘The European Arrest Warrant – The Early Years. Implementing and Using the Warrant’, *European Journal of Crime, Criminal Law and Criminal Justice*, 15, 37-65. For an illustration of practical implementation see The Council Framework Decision 2002/584/JHA, 2002 that governs cross-border arrest and surrender procedures.

⁵¹ W. Pizzi, n. 47 at p. 350.

MAIN FEATURES OF ILR IN OTHER EUROPEAN JURISDICTIONS

3.11 There are wide variations and nuances of difference across the European schemes. Rarely do two jurisdictions mean precisely the same when they refer to a “right” of a victim to be represented in court. The entitlement to ILR does therefore need to be understood in its jurisdictional context as often the entitlements afforded to complainants reflect procedural rights specific to a particular state, as in the *partie civile* status in Belgium and France. One must therefore be careful before making comparisons or generalisations. Instead the aim here is to describe the various schemes in sufficient detail to permit an appreciation of whether they could be imported into Scots law.

3.12 In broad terms, there are five distinct stages where ILR may be available:

- i. At the report stage
- ii. Post-report at the investigation stage
- iii. Post-decision to prosecute when pre-trial support and advice is offered
- iv. Representation during trial
- v. Post-trial representation

TYPICAL FEATURES OF ILR SCHEMES

3.13 At the report stage most countries have schemes that permit victims to get advice and support from a lawyer, and to be accompanied by a lawyer at the police station. These countries include Belgium, Spain, the Netherlands, Luxembourg, Finland and Austria. Other countries, including England and Wales and Scotland, might well permit a lawyer to accompany a victim to the police station to report a crime, but the lawyer’s role would be no more than that of a lay observer. Where legal representation is permitted, not every state funds it. Those that do, include Denmark, Finland, Luxembourg, the Netherlands and Spain. Denmark not only provides state-funded legal advice, it imposes a duty upon the police to inform the woman of her right to such advice. In contrast, some countries such as France and the Republic of Ireland fund the advice but, perversely, impose no duty on the police to explain its availability.

3.14 Once a complaint has been made many schemes envisage the lawyer acting as a liaison between the authorities and the complainant. This generally involves keeping her informed about key stages in the investigation and prosecution, as well as ensuring her views are represented in critical decisions concerning, for example, whether to plea bargain and which witnesses to contact. Even the provision of information and legal advice has a positive effect, as it is widely accepted that the more control one can exert over the processes that are impacting deeply on one's life the more one can reduce stress levels.⁵² The most common types of ILR are now described.

3.15 The *partie civile* procedure in **Belgium and France** gives the complainant a very strong platform for participation in the trial from the stage of reporting onwards. In particular, it gives her lawyer the right of access to the *dossier* of evidence⁵³ at the end of the pre-trial investigation, and also the right to be present in court throughout the trial, to speak on the [rape] victim's behalf in court, to call witnesses on behalf of the victim (subject to the judge's discretion); to object to questions put to the victim by the defence or prosecutor; to cross-examine the defendant; to make submissions to the court on the law, and to address the court... as to compensation.⁵⁴

3.16 Although **Denmark** was the first county to introduce ILR, their scheme does not supply as extensive a set of rights as that which operates in Belgium and France. The Danish complainant is entitled to legal advice at the report stage, access to the dossier once a prosecution has been instigated, and representation in court during her examination-in-chief and cross-examination. Danish legal representatives cannot call witnesses, but they can ask for protective measures for their client such as a screen to shield them from the accused.⁵⁵

3.17 In **Germany** the *nebenkläger* status for victims gives the victim's lawyer the role of a secondary prosecutor. The lawyer has access to all the papers which means that "the victim's lawyer generally has the same rights of participation at the trial as the prosecutor and defence

⁵² J. Averill (1973) 'Personal control over aversive stimuli and its relationship to stress', *Psychological Bulletin* 80: 286.

⁵³ The term used in the Continental inquisitorial process to describe the file of evidence comprising police statements and prosecution papers.

⁵⁴ Bacik et. al., n. 38, p. 182 at paras 4.1-4.3 (Belgium) and p. 218 at paras 4.1-4. (France).

⁵⁵ Bacik et al., n. 38, pp. 198-200 at paras 4.1-4.3.

lawyer”,⁵⁶ including asking questions of the accused and seeking to rebuff hostile questions towards their client.⁵⁷

3.18 The **Republic of Ireland** permits ILR at the report stage and has only recently introduced limited rights to legal representation if an application is made by the defence to introduce sexual history evidence.⁵⁸ However, if the judge grants the application the complainer’s lawyer has no further role.

3.19 All of the nine European member state respondents to the questionnaire in the Irish study, with the sole exception of England and Wales, permitted some form of legal representation for rape victims during the trial.⁵⁹ Explaining that “the rights of the victim’s lawyer differ somewhat between jurisdictions”, the researchers listed the most significant rights offered by countries:⁶⁰

[I]n six jurisdictions (Finland, Italy, Luxembourg, Portugal, Spain and Sweden), the victim’s lawyer possesses extensive rights of participation at trial, in many respects similar to the prosecution and defence counsel. In Portugal, the victim’s lawyer can even appeal an acquittal or a lenient sentence.

The victim’s lawyer may therefore exercise some or all of the following rights:

- the right of access to the evidence before the trial (including the right to inspect the prosecution files)
- the right to be present in court throughout the trial
- the right to speak on the victim’s behalf in court
- the right to object to questions put to the victim by the defence or prosecution
- the right to cross-examine the defendant
- the right to make submissions on the law

⁵⁶ Bacik et al., n. 38, p. 237 at para 4.4.

⁵⁷ Bacik et al., n. 38, pp. 237-238 at paras 4.1-4.4. For an American perspective of the German scheme see Pizzi, n. 46.

⁵⁸ Section 34 of the Sex Offences Act 2001 permits a woman to have her own legal representation to oppose an application to introduce sexual history evidence. Such an application can be made pre-trial or during the trial.

⁵⁹ Bacik et al., n. 38 derived from chapters 6, paras 7-10 and chapter 11, paras 4.1-4.3.

⁶⁰ Bacik et al., n. 38 at para 4.4, pp. 288-289.

- the right to suggest that certain witnesses are called on behalf of the victim
- the right to address the court as to the guilt or innocence of the defendant
- the right to address the court as to compensation for the victim
- the right to address the court as to sentence

The victim's lawyer has less extensive rights of participation in the Austrian and Dutch legal systems, and may only address the court on the victim's behalf in relation to compensation.

CHAPTER 4

INDEPENDENT LEGAL REPRESENTATION IN COMMON LAW JURISDICTIONS

INTRODUCTION

4.01 This section looks at practices and reforms in a number of common law jurisdictions to see what their experiences suggest for Scotland. The enquiry centres on practices in the English-speaking jurisdictions of Australia, Canada, England and Wales, New Zealand, the Republic of Ireland, South Africa, and the USA.

4.02 All of these common law jurisdictions have engaged in public debate over the scope of victims' participatory rights. For example, in Australia⁶¹ at state level and the US⁶² at federal level, the norm for victims is an entitlement to information, support, compensation, and the right to make a victim impact statement. However, these entitlements are usually provided through the prosecutor's office and do not extend to the provision of the services of a legal adviser. The Republic of Ireland Law Reform Commission⁶³ and the South African Law Reform Commission have each issued reports that addressed, but rejected, the option of ILR.⁶⁴ In England and Wales, ILR surfaced as a pre-election commitment in the Labour Party manifesto prior to the 2005 general election, but has never been considered in any

⁶¹ See e.g. the Victims of Crime Act 2001 for the state of South Australia:

<http://www.dpp.sa.gov.au/02/VICTIMSACT.pdf>

⁶² Crime Victims Rights Act 2004: http://www.usdoj.gov/usao/eousa/vr/cvra/18_USC_3771.html

⁶³ See the Consultation Paper on Rape (1987) IRLRC 4 which discusses the issue:

<http://www.bailii.org/ie/other/IELRC/1987/4.html>

and the subsequent report, *Rape and Allied Offences*, LRC 24-1988, Law Reform Commission, Dublin, Ireland, especially paras 40-42: <http://www.lawreform.ie/publications/reports.htm>

⁶⁴ South African Law Reform Commission (2002) Project 107 *Sexual Offences Report*, chap 6, especially pp.

232-242: <http://www.doj.gov.za/salrc/reports.htm>

See too the Service Charter for Victims of Crime in South Africa:

<http://www.npa.gov.za/files/Victims%20charter.pdf>

detail. Canadian activists commissioned a model ILR scheme for their country in 2005 and campaign for its implementation.⁶⁵

NORTH AMERICA

4.03 The US and Canada adhere very closely to the principle of due process which emphasises the pursuit of procedural rules to achieve substantive justice.⁶⁶ As adversarial jurisdictions they have the rights of the defendant at the heart of their constitutions and the rights of the victim are far less visible or easy to enforce.⁶⁷ Both the US Constitution and the Canadian Charter of Rights and Freedoms provide entrenched constitutional rights to citizens, though these do not go as far as grant a general right to ILR. Both jurisdictions have focussed on developing integrated support agencies (health, legal, counselling etc) many of which have staff who act as legal advocates in dealing with the police and prosecution authorities.⁶⁸

THE USA

4.04 The powerful victims' rights lobby in the US has made considerable headway in carving out a set of entitlements for those affected by crime, especially through the federal Crime Victims Rights Act 2004.⁶⁹ Most states in the US have enacted victims' rights legislation and the campaign for a federal Victims Rights Amendment to the Constitution is long-established.⁷⁰ These rights are largely confined to pre-trial procedural rights such as the right to be kept informed of progress of the investigation, to be advised of plea negotiations, to be protected from intimidation etc.; and at the trial stage to give a victim impact statement before sentence. The appointment of specialist prosecutors for rape and domestic assault,

⁶⁵ The model was commissioned by the Sexual Assault Crisis Centre Windsor, Ontario, from Professor Larry Wilson of the University of Windsor. See L. Wilson (2005) 'Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services', *Windsor Yearbook of Access to Justice*, 23: 249-312.

⁶⁶ S. Verdun-Jones and A. Tijerino (2002) *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform*, Research and Statistics Division, Department of Justice Canada.

⁶⁷ S. Bandes (1999) 'Victim Standing' *Utah Law Review*, 331.

⁶⁸ The Barbra Schlifer Clinic in Toronto is an exemplar of what can be offered. It is widely regarded as one of the leading advocacy centres in Canada. See: <http://www.schliferclinic.com/schliferClinic.html>

⁶⁹ See http://www.usdoj.gov/usao/eousa/vr/cvra/18_USC_3771.html

⁷⁰ See website of National Victims' Constitutional Amendment Passage <http://www.nvcap.org> and for debates, see Special Issue on Law Reform, *Utah Law Review*, 1999, whole volume.

coupled with a strategic focus on case-building techniques, have had significant success in improving conviction rates and complainant satisfaction.⁷¹ Victim familiarisation programmes give the complainant insight into the cross-examination process and facilitate techniques to enable her to give her best evidence.

4.05 The purpose of case-building is to counteract the tendency to blame the complainant when discrepancies and divergences arise in her testimony. Prosecutors are encouraged to adopt a more pro-active approach to overcome the perceived “credibility gap” between the statements the complainant has given to the police and the testimony ultimately given in court. The emphasis is on seeking corroboration to strengthen the case rather than concede its apparent weaknesses. Otherwise the complainant becomes an easy target for defence counsel’s suggestions that she has exaggerated, is unreliable, or at worst made a false complaint. In the US “prosecutors are encouraged to adhere to a three-pronged strategy which aims to (a) elicit a complete account from the complainant; (b) address behaviour that may appear counter-intuitive to jurors; and (c) prepare complainants for the unfamiliar process of testifying in court.”⁷²

4.06 The case-building approach used in New York – known as the Manhattan model – was considered as a model for Scotland by the authors of the 2006 *Review of the Investigation and Prosecution of Sexual Offences in Scotland*, (Crown Office Review)⁷³ where they acknowledged the potential benefits to the complainant as:⁷⁴

- Establishing a relationship/rapport with the prosecutor/ prosecution staff
- Discussion of appropriate support mechanisms at court and determination of their suitability

⁷¹There is a National Programme to develop Sexual Assault Response Teams (SARTS) to ensure the collection and preservation of evidence at the earliest opportunity. See the work of the National Sexual Violence Resource Center at <http://nsvrc.org/>

⁷² L. Ellison (2007) ‘Promoting effective case-building in rape cases: a comparative perspective’ *Criminal Law Review* 691, citing R. Baldini, Project Attorney with the National Judicial Education Program, whose article “Witness Preparation” forms part of the training pack used by the New York State Coalition Against Sexual Assault. See <http://www.nyscasa.org>

⁷³ Crown Office Review, n. 28.

⁷⁴ Crown Office Review, n. 28 at para10.11.

- Familiarity with the court environment
- Knowledge of and confidence in the investigation process
- An understanding of the demeanour and personality of the prosecutor
- An understanding of the trial process and cross examination, including likely areas of contention/disputed facts
- An opportunity to feedback/discuss the impact and existence of any collateral evidence

Nonetheless, the Crown Office Review ultimately rejected the Manhattan model due to concerns that its introduction in Scotland would come “perilously close to coaching the witness”⁷⁵ This point is discussed in the next chapter.

CANADA

4.07 Although in Canada “there is no general right of participation for any third party”, there is “limited opportunity for participation by victims of sexual assault”.⁷⁶ While Canadian commentators may perceive their practices as “limited”, they are markedly more advanced than in Scotland. For example, there is a well-developed body of Canadian case law recognising the status of the victim of crime and granting her specific rights of representation in regard to any steps which jeopardise her constitutional equality and privacy rights.

4.08 As part of the protection of the Canadian complainant’s equality and privacy rights she has legal and constitutional standing to oppose applications for recovery of her personal records. Typically, this occurs when the defence apply for recovery of medical or counselling records, or any other private papers such as diaries. The prosecution authorities in both Canada (and the US) have similar extensive duties of disclosure to those in Scotland, but unlike Scotland, they have also developed a transparent regime to take account of the complainant’s constitutional rights.

4.09 However, it would be a mistake to see the solution to the absence of proper protection for complainants lying entirely in a strengthened or more transparent rights framework.⁷⁷

⁷⁵ Crown Office Review, n. 28 at para 10.2.

⁷⁶ Wilson, n. 66 at p. 262.

⁷⁷ A. McColgan (2000) *Women under the Law – the false promise of human rights*, Harlow: Longman.

Quite apart from the difficulties of access to these rights by less wealthy or privileged victims, the interpretation of rights rests with the judiciary who are at pains to emphasise the delicate line they tread in balancing interests.⁷⁸ Recent research with the English judiciary conducted by Temkin and Krahe concerning recovery of records in the hands of third parties (e.g. psychotherapeutic records) underlined the difficulties in designing an effective disclosure regime. Judges acknowledged they frequently departed from “the strict letter of the law”, on the basis that if they did not so “very little if anything would be disclosed”.⁷⁹

4.10 The underlying problem in the recovery of medical and personal records is the presumptive characterisation of these records as relevant for the defence. There is no need to rehearse all the issues relating to the use of character evidence in sexual offence trials,⁸⁰ but these issues also lie at the core of disclosure applications. Records may be of value to the defence to try to construct arguments that the complainant is not credible or reliable, in that, for example, she has a history of mental health problems, or has been receiving treatment for previous abuse, factors which lawyers may argue are relevant and seek to exploit.⁸¹ Certainly, as in Canada, if a complainant has her own lawyer she has the opportunity to mount a much more robust and individualised opposition to record production than is otherwise likely to occur if left to the prosecution. But even this benefit may be cancelled by the unpredictability surrounding applications for disclosure of records. In Canada it is believed this is a further deterrent for women reporting rape. It has been pointed out that entitlement to legal representation “will do little...to advance the goal of encouraging more victims of sexual and intimate assault to bring their accusations forward. No individual victim who has received counselling can know whether his or her records will ultimately be protected”.⁸²

4.11 The debate on complainants’ rights is complex and Scotland could learn much from the experience in Canada. The absence in the UK of entrenched constitutional rights and the

⁷⁸ J. Temkin [2003] ‘Sexual History Evidence- Beware the Backlash’ *Criminal Law Review* 217.

⁷⁹ J. Temkin and B. Krahe (2008) *Sexual Assault and the Justice Gap: A Question of Attitude*, Oxford: Hart Publishing at p. 154.

⁸⁰ See references at n. 17.

⁸¹ K. Busby “Third Party Records Since R v O’Connor” (1999-2000) 27 *Manitoba Law Journal* 355.

⁸² D. Martin (1996) ‘Rising Expectations: Slippery Slope or New Horizon?’ in J. Cameron (ed) *The Charter’s Impact on the Criminal Justice System*, Ontario: Carswell at p. 107.

limitations of the Human Rights Act 1998 in imposing positive obligations on the State to protect victims is a general weakness.⁸³ Commentators have also pointed out that the Act lacks a “right to non-discrimination”, and that this has a particularly negative impact on women.⁸⁴

4.12 At present in Scotland, the principal route by which a prosecutor can resist a call for production of the complainer’s medical or other personal records is by a claim of public interest immunity. This is a common law right of privilege which entitles a litigant to withhold otherwise relevant evidence on the ground that the evidence is confidential and that the public interest in retaining confidentiality for the records outweighs the interest of the party seeking to have them disclosed.⁸⁵ In criminal cases the right of disclosure and the claim of privilege go much wider than medical or personal records, and include any evidence in the hands of a third party that might be relevant to the defence. Interpretation and application of the common law principles is the province of the judiciary.

4.13 After two Privy Council decisions in 2005 greatly widened the scope of material that the Crown had to disclose to the defence, it became apparent that a statutory regime might need to be introduced in Scotland.⁸⁶ Lord Coulsfield was appointed to enquire into the practices in the criminal justice system surrounding disclosure and his report was produced in August 2007.⁸⁷ The Government subsequently published the Criminal Justice and Licensing (Scotland) Bill 2009 (the Bill), Part 6 of which (sections 85-116) sets out a statutory framework for disclosure and largely reflects the recommendations of the Coulsfield Review.

4.14 In terms of the impact on complainers, the significance of the Bill lies in three sets of provisions. First, section 85 describes the very broad range of material that potentially can be

⁸³ Doak, n. 32; Mowbray n. 34.

⁸⁴ McColgan, n. 78.

⁸⁵ *Parks v Tayside Regional Council* 1989 SLT 345. For a commentary on the position in England and Wales where there is statutory regulation of disclosure, see J. Temkin (2002) ‘Digging the Dirt: Disclosure of Records in Sexual Assault Cases’, *Cambridge Law Journal* 69(1): 126.

⁸⁶ *Holland v HMA* (2005) 1 S.C. (P.C.) 3, and *Sinclair v HMA* (2005) 1 S.C. (P.C.) 28. For a commentary on the implications of this see F. Raitt and P. Ferguson (2006) ‘Re-Configuring Scots Criminal Procedure - Seismic Shifts?’ *Edinburgh Law Review* 10: 102-112.

⁸⁷ *Review of the Law and Practice of Disclosure* (2007) Scottish Government.

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.”⁸⁸ Although precognitions and victim statements themselves need not be disclosed, information contained in them *can* be disclosed. Second, the Crown has a duty under section 89 to disclose any material described above in any of the following categories:

- (a) information that tends to exculpate the accused,
- (b) information that would be likely to be of material assistance to the proper preparation or presentation of the accused’s defence,
- (c) information that relates to a material line of the accused’s defence and which is likely to form part of the prosecution case.⁸⁹

Third, there are provisions in section 102 which permit the Crown to apply to the court for a non-disclosure order to withhold from the defence sensitive material if its disclosure satisfies any of the following criteria, i.e. it:

- (a) would be likely to cause serious injury, or death, to any person,
- (b) would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime, or
- (c) would be likely to cause serious prejudice to the public interest.⁹⁰

4.15 The difficulty for complainers is that there is no statutory provision that recognises their privacy interests. Instead their interests are bundled in with the “public interest”. As has long been established in Canada, privacy interests are of the utmost value to the individual, are distinct from the public interest, and should not simply be subsumed under the category of “public interest” in determining whether the criteria for non-disclosure has been met. Moreover, accurate identification, categorisation and protection of a complainer’s privacy interests rests entirely in the hands of the Crown, which inevitably sets up scope for tensions between competing interests.⁹¹

⁸⁸ Section 85(1) and (2)(a) and (b).

⁸⁹ Section 89(4)(a)-(c).

⁹⁰ Section 102(2)(a)-(c) and s. 102(3).

⁹¹ F. Raitt (2010) ‘Independent Legal Representation’, in *Re-Thinking Rape Law –International and Comparative Perspectives*, C. McGlynn and V. Munro (eds), London: Routledge Cavendish.

4.16 At the stage of deciding whether non-disclosure is justified, it is the judiciary who have the task of balancing the interests of the complainant, the public and the accused.⁹² Thus the gate-keeping role currently performed by the judiciary in determining the admissibility of sexual history and character evidence, will be replicated in this exercise, leaving decision-making very much to judicial discretion. The issue that will require careful reflection in Scotland is whether the Bill's provisions constitute adequate safeguards for the rape complainant and satisfy the requirements of articles 3 and 8 of the ECHR.

REPUBLIC OF IRELAND

4.17 The Irish Law Reform Commission had rejected ILR for complainants 10 years prior to the findings of the Irish study.⁹³ They argued that the problems facing complainants were not so great as to justify a radical shift in trial procedure. They considered ILR would conflict with the paramount objective of the trial, i.e. the ascertainment of the guilt or innocence of the accused. They expressed doubts about its constitutional propriety and claimed it would complicate hearings and alienate the jury, though no evidence was produced to support these objections.⁹⁴

4.18 However, since 2001 the Irish have operated a limited form of legal representation. Section 34 of the Sex Offences Act 2001 permits a woman to have her own lawyer to oppose applications for the introduction of sexual history evidence. Such an application can be made pre-trial or during the trial. But the legal representation starts and finishes at the application stage. Thus if the application is allowed by the judge the complainant has no further legal assistance. Rape crisis groups argue this is insufficient and continue to press for its scope to increase.⁹⁵ However, in their recent consideration of the balance between the rights of the

⁹² Section 106 (2).

⁹³ *Rape and Allied Offences*, LRC 24-1988, Law Reform Commission, Dublin, Ireland, paras 40-42.

<http://www.lawreform.ie/publications/reports.htm>

⁹⁴ *Rape and Allied Offences*, n. 94 at para 42.

⁹⁵ Rape Crisis Network Ireland (2007) *Submission to Balance in the Criminal Law Review Group*. For an evaluation of these provisions in see C. Hanly, D. Healy and S. Scriver (2009) *Rape and Justice in Ireland*, Dublin: Liffey Press.

accused and those of the complainant, the Criminal Law Review Group did not consider the extension of ILR to be an option.⁹⁶

SOUTH AFRICA

4.19 The South African Law Reform Commission has also considered introducing legal representation for victims. In a 2002 Discussion Paper,⁹⁷ the Commission seemed only to consider the German *nebenkläger* status. It ultimately rejected this as inconsistent with the state's "constitutional imperatives" as prosecutor, and contented itself with recommending other measures to reform evidence and procedure. The Commission noted:

Legal representation plays an important role in enabling persons to enforce their rights, for rights have no meaning unless the people who have those rights are aware of them, their significance, and how to use them effectively...

It should be recognised that with regard to the investigation and prosecution of sexual offences, the interests of the complainants are different to those of the State. The question is whether allowing the victim to participate in the trial as an ancillary prosecutor is the best manner in which to solve the problems inherent in a sexual offence trial conducted within a largely adversarial system.⁹⁸

4.20 It is not surprising that the Commission ruled out *Nebenkläger* since it is patently incompatible with an adversarial system in common law jurisdictions, at least in the form that system is presently conceived. *Nebenkläger* installs a second prosecutor into the trial process which would radically alter the equality of arms principle underlying article 6 of the ECHR and fairness to the accused. The Commission may have turned naturally to consider that option given South Africa's origins as a state with a mixed civilian and common law background, but it is unfortunate they did not explore a more flexible arrangement. In their response to the Discussion Paper, academics from the University of Cape Town drew the

⁹⁶ Criminal Law Review Group (2007) *Balance in the Criminal Law Review Final Report*, Dublin.

http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report

⁹⁷ South African Law Reform Commission (2002) Discussion Paper 102, Project 107, *Sexual Offences: Process and Procedure*, SALRC, Pretoria, South Africa: <http://www.doi.gov.za/salrc/dpapers.htm> and see Report:

<http://www.doi.gov.za/salrc/reports.htm>

⁹⁸ Discussion Paper 102, n. 96, Executive Summary at pp. 26-27.

Commission's attention to alternative versions of ILR and countered the constitutional argument:

In relation to sexual offences cases victim's lawyers [sic] have the potential to fill a substantial gap created by the reality that existing role players fulfil pre-allocated roles within the process and that our criminal justice system suffers from chronic under-resourcing and often serious attitudinal problems. If narrowly and clearly circumscribed we believe that legal representation for the victim of sexual offences would withstand constitutional scrutiny. This is not least because providing support to the victim and assisting her in a way that ensures that she testifies cogently and coherently can only serve to benefit the process.⁹⁹

ENGLAND & WALES

4.21 It is not necessary to dwell for long on the position south of the Border. England and Wales have had similar experiences and problems in the investigation and prosecution of rape as are evident in Scotland, as many of the materials cited in this Report illustrate. However, English law has been prepared to be quite ambitious with numerous other reform initiatives including the introduction of specialist prosecutors, requiring judges who try rape trials to be ticketed i.e. specially trained to do so,¹⁰⁰ and permitting the use of intermediaries to assist vulnerable witnesses (usually children) to give evidence.¹⁰¹ Most recently, the UK government has funded a pilot programme of Independent Sexual Violence Advisors for England and Wales.¹⁰² These are professionally trained specialists who will become involved with victims from the earliest possible opportunity after an attack has been reported. Their purpose is to establish a rapport at the outset and remain as a supporter and adviser to complainants throughout the legal process.

⁹⁹ D. Smythe (2002) *Legal representation for victims of sexual offences*. Submission to the South African Law Commission, Project 107, the Sexual Offences Report: <http://www.ghjru.uct.ac.za/publications.htm>

¹⁰⁰ For discussion of the impact of these see Temkin and Krahe, n. 80 at p. 191 and pp. 196-197.

¹⁰¹ J. Plotnikoff and R. Woolfson (ed R. Marshall) (2007) *The 'Go-between': evaluation of intermediary pathfinder* project: <http://www.justice.gov.uk/publications/research120607a.htm> and full Report: http://lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf

¹⁰² For details of this scheme see <http://www.homeoffice.gov.uk/crime-victims/reducing-crime/sexual-offences/sexual-violence-advisors>

CHAPTER FIVE

THE STATUS OF THE COMPLAINER IN SCOTS LAW

INTRODUCTION

5.01 Since devolution in 1998, both the Scottish Executive and its successor the Scottish Government have initiated policies and law reforms designed to improve practice and make victims of sexual offences feel better informed and supported. Most recently the government has produced self-help information packs for those who have been raped or sexually assaulted,¹⁰³ and supported public education campaigns by Rape Crisis Scotland to challenge myths and stereotyping.¹⁰⁴ To date, Scotland has not shown signs of following England in proposed measures to educate juries about rape myths through jury information packs,¹⁰⁵ though Scotland has legislated for the use of expert evidence in tightly prescribed circumstances.¹⁰⁶ However, the Crown Office has taken a number of important initiatives to modernise the prosecution service, including the appointment and training of specialist Crown counsel, the expectation that prosecutors will now have pre-trial contact with complainers,¹⁰⁷ and the establishment of a National Sex Crimes Unit. Many of these reforms emanated from the fifty recommendations of the Crown Office Review in 2006, all of which are now implemented¹⁰⁸.

5.02 Currently, in the Scottish adversarial system there are no legal rights of representation for complainers. There are no rights of audience before the courts for lawyers in a criminal

¹⁰³ See <http://www.scotland.gov.uk/Publications/2008/04/16112631/0>

¹⁰⁴ See www.thisisnotaninvitationtorapeme.co.uk

¹⁰⁵ F. Gibb, 'Juries to be warned of Rape Victim "myth",' *The Times* 26 November 2007.

¹⁰⁶ Vulnerable Witnesses (Scotland) Act 2004, section 5.

¹⁰⁷ In England and Wales a complainant can request a meeting with the prosecutor. See the information at <http://www.cps.gov.uk/publications/prosecution/witnesseng.html>

See too the pilot report on the scheme: P. Roberts and C. Saunders (2007) *Pre-trial Witness Interviews*, at http://www.cps.gov.uk/victims_witnesses/interviews_report.html

¹⁰⁸ COPFS website, 29 June 2009. <http://www.copfs.gov.uk/Resource/Doc/13547/0000581.pdf>

trial, other than the prosecutor (on behalf of the Crown) and the defence (on behalf of the accused). The Crown prosecutor is “master of the instance” and has complete discretion as to whether to pursue a prosecution, plea bargain, or abandon the prosecution at any stage. The Crown prosecutes on behalf of the public interest, and only takes proceedings if it is in the public interest to do so. The Crown therefore necessarily has a much wider remit than the interests of the complainer.

EXISTING LEGAL SERVICES FOR COMPLAINERS IN SCOTLAND

5.03 At present, victims of a crime can consult a solicitor privately, for example, to pursue a claim for criminal injuries compensation,¹⁰⁹ or to explore the merits of a civil action for damages against the alleged perpetrator.¹¹⁰ For those victims who cannot afford to instruct a solicitor privately, there is limited scope under the Legal Advice and Assistance Scheme, or advice can be sought from the CAB or other legal advice centres. More often, survivors of sexual assaults will turn to the local rape crisis centre, Victim Support or similar organisation for information. All of these voluntary bodies provide excellent advice and support but they do not offer specialist legal advocacy or representation.

5.04 As matters presently stand, most complainers do not understand why the Advocate Depute, as Crown prosecutor, does not perform any kind of representative role for them. As Burman et al. explained in their study, “complainers expressed a belief that the role of the Advocate Depute was somehow to be ‘on their side’ or that the Advocate Depute was ‘their lawyer’”.¹¹¹ While this could be dismissed as a simple misconception about the role of the Crown, that fails to acknowledge the widespread and justified expectation of complainers that, at the very least, someone is charged with the exclusive duty to protect their rights to dignity and respect. This expectation is echoed repeatedly in the research literature where complainers consistently describe feeling that they are left to face the ordeal of court

¹⁰⁹ Though note that even the fact of an application for criminal injuries compensation has been used in Scotland in cross-examination to discredit complainers by inferring their allegation of rape is motivated by financial gain, e.g. *Cumming v HM Advocate* n. 14.

¹¹⁰ For the scope for such actions, even where the prescriptive period has expired, see the House of Lords ruling in *A v Hoare* [2008] UKHL 6.

¹¹¹ Burman et al., n. 10 at para 9.21.

proceedings alone.¹¹² The fifteen participants in the Irish study reported predominantly negative reactions including “feelings of loneliness, stress, humiliation or detachment” based upon lack of representation.¹¹³ It is those feelings that have to be countered. No-one doubts that a complainer may well have an unpleasant, uncomfortable and testing time in the witness box but she does not have to do so feeling alone, humiliated and detached throughout that process.

THE ROLE OF THE PROSECUTOR

5.05 The Crown Office Review published in 2006 was a root and branch appraisal instigated by the Lord Advocate, Elish Angiolini QC. The Review reiterated the role of the public prosecutor in this way:

Of fundamental importance is the duty of the prosecutor to act independently of any other person, a duty which is enshrined in the Scotland Act 1998. The prosecutor represents the wider public interest and not an individual victim of crime. In addition, the prosecutor has a duty to ensure that the accused is treated fairly in the criminal justice process. Prosecutions must be premised upon a thorough, fair and impartial investigation and analysis of the evidence.¹¹⁴

5.06 This statement reveals the awkward juxtaposition of the two distinct roles that the prosecutor is expected to fulfil. The emphasis in the quote above on the positive “duty to ensure that the accused is treated fairly in the criminal justice process” alongside the reminder that the prosecutor does not represent “an individual victim of crime” nicely captures the dilemma. While it is an entirely proper representation of the prosecutor’s responsibilities towards the accused it does beg the question of how the Crown can fully discharge their duty to ensure that the complainer is treated fairly whilst also ensuring that the complainer’s interests are not compromised.

¹¹²E.g. G. Chambers and A. Millar (1986) *Prosecuting Sexual Assault*, Edinburgh: Scottish Office Central Research Unit.

¹¹³Bacik et al., n. 38 at p.13.

¹¹⁴Crown Office Review, n. 28 at para 1.7.

5.07 In no sense does the Crown act “on behalf of” the complainer, nor does the Crown represent her interests beyond taking account of those interests within the broader duty to prosecute in the public interest. The Crown is not there to represent the complainer, in the way one would normally understand legal representation. The complainer is not a client. The advocate-depute is not her lawyer. The role of all witnesses, including the complainer, is to provide testimony upon which the Crown founds a prosecution if there is sufficient evidence. Moreover, some of the Crown duties, such as the duty of disclosure and the duty to ensure all relevant, admissible evidence is before the court even if it harms the Crown’s case, actively conflict with the interests of the complainer. Irrespective of how well-intentioned the Crown aspirations are, it is self-evident that these duties are not compatible with the privacy interests of complainers and the latter have to be compromised.

5.08 It was noted in Chapter 4 that the Crown Office Review authors rejected a pro-active approach to prosecutorial case-building where that involves any kind of direct contact with the complainer. They considered several important features of the Manhattan model to be contrary to the Scottish practice of an independent prosecution service and “inconsistent with the professional rules and code of conduct governing those advocates with rights of audience in the High Court”.¹¹⁵ That code, the *Guide to the Professional Conduct of Advocates*, states in its current edition¹¹⁶:

Interviewing witnesses

6.3.9.1. There is no general rule that an advocate may not discuss the case with a potential witness, but an advocate, when instructed by a solicitor, is entitled to insist that he accepts instructions on the basis that he, the advocate, will not do so.

6.3.9.2. Once a proof or trial has begun, an advocate must not interview any potential witness in relation to what has been said in court in the absence of that witness.

¹¹⁵ Crown Office Review, n. 28 at para 10.9.

¹¹⁶ *Guide to the Professional Conduct of Advocates* (2008, 5th ed.) Edinburgh: Faculty of Advocates at http://www.advocates.org.uk/downloads/guidetoconduct_5thedition.pdf

6.3.9.3. Under no circumstances should Counsel do or say anything which suggests to a witness that he should give evidence other than in accordance with the honest recollection or opinion of the witness. An advocate must avoid doing or saying anything which could have the effect of, or could be construed as, inducing the client or a skilled witness to “tailor” his evidence to suit the case.

These provisions do not preclude communication between an advocate and a complainer. The Crown Office Review recommended that trial prosecutors should introduce themselves to the complainer and answer any questions and this practice is apparently now in place.¹¹⁷ However, such contact comes very late in the process and perhaps too late to dispel a complainer’s anxieties.

5.09 In some respects the US Manhattan model is not so alien to the Scottish model. It is already COPFS practice to precognosce complainers prior to trial and the Crown Office Review recommended invigorating that process with a more purposeful approach to anticipating and countering credibility issues.¹¹⁸ However, as noted earlier, the manner in which US specialist prosecutors align themselves with the complainant’s interests to present the best possible case is not regarded with approval in Scotland. As a result, although impressed by the Manhattan model, the Crown Office Review felt obliged to reject it on the ground of its unsuitability for Scots law. Its authors remained confident that a blend of improved training and guidelines for prosecutors, coupled with a comprehensive support service from the Victim Information and Advice body (VIA) could deliver similar benefits.

5.10 One might then pose the question, “who does look after the complainer’s interests?” and in theory the answer is that witnesses, including the complainer, have their interests looked after by the Crown and, during the trial, by the judge. The latter in particular is there to oversee a fair trial and that includes preventing inappropriate treatment of witnesses.

¹¹⁷ Crown Office Review, n. 28, p. 24 at para (41).

¹¹⁸ This is not the practice everywhere in the UK, e.g. the Crown Prosecution Service in England & Wales does not become involved in interviewing witnesses, though some commentators have urged that they should do so, e.g. Ellison, n. 73.

5.11 How well advocate-deputes or judges discharge those responsibilities has been the focus of previous criticism in Scotland. In one of the earliest reviews of the Scottish prosecution of sexual offences, in 1986, Chambers and Millar noted:

Many women contrasted the fiscal's impartial position with the interventionist role of the defence agent or advocate. It has been argued that the prosecutor's impartiality left complainers open to attack and created an imbalance in the conduct of trials and in the way the evidence was presented.¹¹⁹

5.12 Six years later, in their evaluation of the first set of reforms introduced to regulate the use of sexual history evidence, Brown et al. found that neither judges nor advocate deputes were likely to intervene in cross-examination of the complainer, not least because they were unconvinced of the need for the reforms in the first place.¹²⁰ Brown et al. considered non-intervention arose from deeply shared cultural understandings as to what constituted 'relevant' sexual history evidence, such that there was little resistance by the lawyers on either side to its introduction. This is a phenomenon noted elsewhere. In Australia, Karmen has observed that when legal professionals are unconvinced of the need for law reform the status quo may be difficult to disturb because of the "latitude and discretion" afforded to such professionals to leave things as they are.¹²¹

5.13 With the advent of the Human Rights Act, and the specific incorporation of the duty on the trial judge in s. 8 of SOPESA,¹²² to ensure "appropriate protection of a complainer's dignity and privacy", one might assume a far greater level of judicial intervention would be the norm today, but that appears not to be the case. The Burman et al. 2007 evaluation study found "objections by the other party and / or interventions by the court occurred infrequently".¹²³ In the 32 observed trials where the court had approved applications to lead evidence under s. 275, approximately one half of those (14) introduced some evidence or

¹¹⁹ Chambers and Millar, n. 113 at p. 131.

¹²⁰ B. Brown, M. Burman and L. Jamieson (1992) *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials*, Edinburgh: Scottish Office Central Research Unit, at pp. 40-42.

¹²¹ A. Karmen (2nd ed., 1990) *Crime Victims – An Introduction to Victimology*, Brookes / Cole, at p.165.

¹²² Substituting a new s. 275 (2)(b)(i) of the Criminal Procedure (Scotland) Act 1995.

¹²³ Burman et al., n. 10 at para 7.8.

questioning during the trial which had not been explicitly agreed to by the court.¹²⁴ Those 14 applications – which the researchers regarded as breaches of the statute – led to only 7 objections, of which 5 were made by the Crown, one by the defence, and one intervention came from the bench.¹²⁵

5.14 In many respects this is not surprising. Prosecutors and judges have to balance other interests alongside those of the complainant – both have to consider the public interest and be vigilant in regard to the rights of the accused to a fair trial. That inevitably creates a predicament, because the complainant's interests cannot be given due attention when they have to be compromised within a framework of broader, often directly conflicting, interests. In addition, prosecutors sometimes apply for permission to lead sexual history or other character evidence where they perceive a strategic advantage in leading such evidence in the examination in chief rather than wait for the issue to be raised, less sympathetically, in cross-examination. This is the sort of tactical approach that may be lost on a complainant if it is not explained to her in advance, leaving her feeling confused and undermined. But prosecutors might well be reluctant to raise tactics with a complainant for fear it is perceived as “coaching”. For their part, judges may be loathe to intervene to prevent or restrict cross-examination in case it leads to grounds of appeal.¹²⁶ Arguably, it is this type of vacuum in complainant protection which ILR has the potential to fill.

5.15 The public prosecutor must function independently, and be seen to be free from favour, bias or prejudice, but it is precisely because of that requirement for independence that other jurisdictions throughout Europe have developed alternative mechanisms for representing complainants' legal interests. These countries have recognised that it is not feasible for prosecutors to take account adequately of complainants' interests alongside the interests of other parties.

5.16 One might question why rape complainants merit differential treatment from other complainants or witnesses. There are three obvious responses to that. In the first place there is the statutory duty imposed by s. 275 (2) (b) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, (SOPESA) which singles out the right of the complainant in

¹²⁴ Burman et al., n. 10 at para 7.55.

¹²⁵ Burman et al., n.10 at para 7.8.

¹²⁶ See for example, *Black v Ruxton* 1998 S.L.T. 1282.

sexual offences to protection of her dignity and privacy. Secondly, there is ample empirical evidence to justify a higher degree of support and protection from prosecutors or judges for sexual offence complainers than is generally available to witnesses. The needs of the victim of sexual assault are manifestly greater and more complex than those of complainers of non-sexual offences or of other non-victim witnesses. Many rape victims and complainers experience profound and sustained psychological trauma, with further damaging effects on their physical health, their relationships, and their ability to continue in employment.¹²⁷ Lastly, in justification of differential treatment, the quality of support a complainer receives impinges on the quality of her testimony. The less support available the less likely the complainer will achieve best evidence:

...if an individual is traumatised by their court appearance, then this can affect what they say in court, how they say it and consequently their credibility in the eyes of others, such as the judge or jury.¹²⁸

THE ROLE COPFS ASPIRES TO PERFORM

5.17 Notwithstanding the closely defined public interest role of prosecutors, COPFS has expressed a clear wish to modernise and, as discussed earlier, they have taken some very significant steps to improve how they discharge their responsibilities to complainers. The Crown Office Review expressed the commitment of COPFS “to providing a high quality service to victims of sexual offending”¹²⁹ largely through improvements in training, co-ordination of service and consistency of decision-making.

5.18 One such area for improvement is the desire to establish greater trust between precognoscers and complainers. As the Review authors noted, distrust at the precognition stage prevents a full exploration of apparent inconsistencies and weaknesses in a complainer’s statement. Although a reluctance to press these issues at the precognition stage

¹²⁷ Esselman, Tomz, A. Burgess and L. Holmstrom (1985) ‘Rape trauma syndrome and post-traumatic stress response’, in A. Burgess (ed.) *Research Handbook on Rape and Sexual Assault*, New York: Garland.

¹²⁸ Stafford & S. Asquith (1992) *The Witness in the Scottish Criminal Justice System*, Edinburgh: Scottish Office, Central Research Unit, cited in Bacik et al., n. 38 at p. 41.

¹²⁹ n. 28 at para 1.8.

is often out of a concern not to undermine the complainer, this can have detrimental consequences.

5.19 A general reluctance to focus on possible areas of weakness means that if allegations raised at cross-examination have not been explored earlier with a complainer she has no opportunity to provide the prosecutor with information to counter these allegations. This wrong-foots prosecutors and leaves them in court with “no basis on which to contradict evidence”.¹³⁰ It might also lead to a prosecution proceeding where the prosecutor has clear doubts exist over the complainer’s credibility and reliability, but she has not been warned of these.

5.20 One can fully appreciate the merits of developing a more frank and trusting relationship between complainer and precognoscer, but one can also anticipate problems with its realisation. Unless women start the report process assured that they will be believed then it would take a very trusting woman to be confident that the authorities, notably the police and COPFS, will be more receptive to her account by virtue of her candidness. Complainers have good reason to be wary of disclosing to precognoscers potentially “awkward” evidence, given that experience shows it might well be manipulated or misinterpreted and used against them in cross-examination. More fundamentally, it may be contrary to her interests to persuade her that it is worth disclosing everything in circumstances where the Crown have other interests to consider, not least their duty of disclosure to the defence of all material evidence they amass. The precognition relationship is therefore beset by the same conflicting responsibilities that prevent prosecutors from acting as advocates or representatives for the complainer. That makes the aspiration for greater trust most elusive. The worst of all worlds would be for women to believe that complete openness on their part would protect them from trauma or humiliation in the witness box.

5.21 These doubts are not in any sense to detract from the aspirations laid out in the Crown Office Review to continue to improve the service offered to complainers, aspirations that are regularly re-stated by the Lord Advocate and the Justice Minister. Undoubtedly, better liaison, information flow and improved levels of trust between the complainer and the precognoscer will make a positive difference to women’s experience. However, none of these

¹³⁰ Crown Office Review, n. 28 at paras 6.11 and 9.40.

shifts is able to resolve the fundamental conflict of interest that exists between the office of the public prosecutor and the private interests of the complainer. Ultimately, these conflicts become more prominent in the march towards the trial.

CHAPTER SIX

WHAT COULD ILR OFFER A COMPLAINER?

INTRODUCTION

6.01 The next two chapters consider what benefits ILR could bring to complainers and to the investigative and prosecutorial process in Scotland. This chapter outlines the various contexts and types of proceedings where ILR could potentially operate. Most complainers have a greater need for information and support than is presently provided by criminal justice agencies. If the desire was simply for information about forthcoming trial dates, or the outcome of a section 275 application,¹³¹ or indeed the outcome of the trial or a subsequent appeal, then certainly non-specialist personnel can usually provide this. But many complainers want and need much more than information.¹³² Many aspects of criminal procedure and prosecutorial decision-making are confusing and complex. Understanding and participating in this process is all part of coming to terms with the stress of past trauma and forthcoming potentially disappointing outcomes.¹³³ The list that follows is illustrative rather than exhaustive. The points during an investigation and prosecution at which complainers might wish access to impartial legal information, advice, assistance and/or representation arise at numerous stages.

PRIOR TO THE DECISION TO REPORT

6.02 Complainers need specialist advice to understand what is involved in:

- making the report and beyond
- the impact if they change their mind and seek to withdraw their complaint
- what they can expect / require of the police
- their options in regard to a medical examination
- the impact of a perceived delay in reporting

¹³¹ The process in which the defence apply to the court to introduce sexual history or sexual character evidence.

¹³² Chambers and Millar, n. 113.

¹³³ Averill n. 53.

- the inevitable focus on character
- requests to access personal records including historical medical records.¹³⁴

POST-REPORT AND PRIOR TO DECISION TO PROSECUTE

6.03 At this stage complainers need information and advice concerning:

- key stages of the investigation process, e.g. if the perpetrator has been apprehended if he was someone not known to the complainer, or when a report is passed to the Procurator Fiscal
- the question of whether a prosecution is to proceed and if not, why not
- the period following arrest, to allow them to influence decisions on bail/bail conditions
- any decision about accepting a partial plea or a plea to a lesser charge.

FROM REMAND OR BAIL TO TRIAL

6.04 At this stage complainers need guidance on:

- how to respond to defence requests to precognosce them
- options to apply for vulnerable witness status and special measures
- opposition to applications for medical records, school, care, counselling and other personal records
- opposition to applications under s. 275 for permission to ask questions on sexual history or character
- court familiarisation – visits and explanations of court procedure
- making an application to clear the court of the public while she is giving evidence
- making a victim impact statement
- criminal injuries compensation and other civil remedies such as an action for damages, or interdict.

6.05 Responsibility for passing on information and making applications to the court falls across a number of agencies and evaluation research suggests the flow of information is

¹³⁴ i.e. not merely the medical reports relating to any medical treatment following the attack, but, given the Canadian experience, potentially records going back many years. See *R v Mills* [1999] 3 S.C.R. 668.

highly variable.¹³⁵ Many complainers may not even know of their options, or what information is passed to the defence, let alone have their options discussed with them by a legal adviser. In the past at least, it appears that many complainers have felt that their wishes and views did not always reach Crown prosecutors and in some cases even appeared to be ignored.¹³⁶

IMPLEMENTING INDEPENDENT LEGAL REPRESENTATION

6.06 If ILR were to be implemented it would require primary legislation to introduce changes to procedural rules to accommodate the complainer's new rights. Much depends on the form of legal representation one seeks to introduce. At the stage of reporting a crime little difficulty arises if the complainer's lawyer's role is confined to one of advice-giving, information and support.

6.07 However, it is the expansion of that role to one where the complainer's lawyer has rights of access to the evidence – police witness statements, forensic reports, and the complainer's medical and other personal records – which some will perceive as more problematic. A predictable objection would be that such rights of access could in effect put the complainer's lawyer in a position of an “ancillary prosecutor”, a shadow to the Crown prosecutor, thus increasing the extent and weight of the cross-examination that the accused might face.

6.08 Certainly, if the prosecutorial challenge to the accused was such that the balance between the parties would be tipped unfairly against him, then that would be a breach of article 6. However, the appointment of an independent lawyer need only impinge on the accused's ability to exercise his rights if he elects to give evidence, and, in addition, a right of cross-examination is granted to the complainer's lawyer. That would represent one model of ILR, but there are many other models that may be more suitable for Scots criminal procedure. The accused has a substantial set of rights that are unaffected by ILR. For example, in Scots law the accused is not obliged to give evidence in court, and in fact rarely does so in rape trials. He does not therefore need to subject himself to any cross-examination, let alone two

¹³⁵ Burman et al., n. 10; Richards et al., n. 11.

¹³⁶ Chambers and Millar, n. 113

periods of it. In such circumstances it is hard to see what additional harm the accused faces by the appointment of a lawyer for the complainant who is merely charged with fulfilling those aspects of the role the Crown prosecutor cannot.

6.09 In jurisdictions which have introduced ILR, there are various ways in which the powers of the legal representative are constrained. For example, in some jurisdictions the complainant's lawyer has access to prosecution papers but must not disclose these to the complainant.¹³⁷ It is clearly possible to make a significant difference to the experiences of complainants and to prosecution outcomes even with limited powers of representation and intervention. For example, a representative can achieve quite a lot even if confined to interventions during any cross-examination stage of the complainant, and/or to objections to the production of records or the introduction of sexual history evidence.

6.10 In Scotland, if information gained by the complainant's lawyer was used solely to anticipate the defence cross-examination, and not to brief or coach the complainant in any way, then it is arguably no less than she is already entitled to, but fails to receive. The appointment of their own lawyer would give complainants an important sense of continuity. One legally qualified source would replace the current fragmented arrangements whereby a host of bodies, statutory and voluntary, deliver advice and support but where the risk of information not being collected or communicated to the correct party at the right time is significant.¹³⁸

6.11 Much of the evidence to which the legal representative would wish permission to access may well be within the complainant's gift to grant. She would be able to consent to the release of her police statement to her lawyer,¹³⁹ and to consent to access to her medical or other personal records. The complainant will very often be the best source of the type of information that an independent representative would want to know without the need to access information in the hands of third parties.

¹³⁷ Temkin, 2002, n. 17.

¹³⁸ A point noted in *Without Consent* (2007), n.1 at pp. 17-18.

¹³⁹ Section 62 of the Criminal Justice and Licensing (Scotland) Bill 2009, currently being debated in the Scottish Parliament, proposes that a witness in a trial would be able to use their police statement while giving evidence in court to avoid the witness testimony being reduced to a memory test.

6.12 Where a complainer wished her lawyer to accompany her during precognition, to make submissions in plea negotiations, or to oppose bail applications, adjournments and sexual history applications, she would again be the best source of information from which an adviser could devise grounds for these interventions. A lawyer would not necessarily require access to information in the hands of the Crown, though there would be bound to be some occasions when the lawyer was disadvantaged if such access was denied.

6.13 At the pre-trial stage, if the role of the complainer's lawyer was limited to one where there were rights to object to the production of personal records or to the introduction of sexual history or character evidence, then the tension with equality of arms is minimised. Arguably, there is no tension at all in that the lawyer would only be performing that dimension of the role which Crown prosecutors are constrained from discharging due to the other interests they must protect.

6.14 Restricting the role of an independent lawyer would also limit the extent to which it could give the defence additional grounds for appeal. Successful interventions by the complainer's lawyer could of course be appealable.

CHAPTER SEVEN

IS THERE A CASE FOR ILR IN SCOTLAND?

INTRODUCTION

7.01 Although ILR is commonplace throughout Europe, it has not received detailed consideration within Scotland. This chapter considers the conceptual difficulties that one could anticipate in regard to a proposal to introduce ILR in Scotland. It is frequently asserted that the adversarial system cannot accommodate any form of third party representation.¹⁴⁰ In Scotland, one could anticipate this concern crystallising in three substantive objections of principle:

1. ILR breaches the right of an accused to a fair trial
2. ILR is unnecessary as the Crown has responsibility for the complainer's interests
3. ILR is unnecessary as the trial judge can intervene to protect the complainer's interests.

7.02 Further procedural objections to ILR concerning, for example, the extended length of proceedings, complexities over disclosure rights and the additional cost to public funds of ILR are also often raised. However, these are incidental to the substantive objections, and could be overcome if the latter were satisfied. Any serious proposal to introduce ILR in Scotland must therefore address the substantive objections.

DOES ILR BREACH THE RIGHT TO A FAIR TRIAL?

7.03 As discussed above, opposition to ILR often stems from a concern that if a complainer had separate representation that would disrupt the principle of equality of arms and the right of an accused to a fair trial as he would face “two” prosecutors. That concern would be understandable if a model similar to the German or Norwegian *Nebenkläger* regime was

¹⁴⁰ See for example, objections raised in responses to the Consultation Papers published by the Irish Criminal Law Review Group and the South African Law Commission and discussed in their final reports at, respectively, ns. 94 and 98.

being proposed. However, that is not the sole model available. As discussed in Chapter 3, there are many variations on the theme of ILR and few countries adopt a model where the independent lawyer performs a duplicate prosecutorial function. If the scope of the complainer's representation was limited to filling the gaps in protection identified in previous chapters then, given the level of safeguards to ensure a fair trial for the accused, it is hard to see what material prejudice is presented.

7.04 The safeguards surrounding the right to a fair trial, of which Scotland is rightly proud, far exceed those available in some other ECHR compliant jurisdictions. They include the presumption of innocence, the burden of proof on the Crown, the right against self-incrimination, the need for corroboration, the rule against hearsay evidence, the rule against privilege, the 110 day and 140 day rules,¹⁴¹ as well as extensive rights to legal aid. As noted earlier, reflecting the presumption of innocence, Scots law does not require an accused to go into the witness box, or indeed say anything at all to the police during the pre-trial investigation. ILR for complainers would not displace any of these substantive safeguards.

7.05 There is no provision in the ECHR that specifically prevents ILR being introduced in Scotland. As the Strasbourg court has observed on many occasions, states have an obligation under the Convention to ensure a fair trial. How they discharge that obligation varies and the whole range of safeguards in place to protect accused persons has to be assessed, not merely one single component of the trial procedure. Notably, other countries with legal systems that are at least partially adversarial, e.g. Denmark, Norway and Ireland, have incorporated aspects of ILR into their law without difficulty.

7.06 Scots law considers itself a flexible, hybrid legal system and it has already accommodated a range of distinctive procedures that amount to forms of third party intervention or representation, sometimes from persons who are not even legally qualified. When a legal system has that number of exceptions to the general exclusionary principle it suggests the principle is neither impermeable nor absolute. Thus, to illustrate, the principle of "two parties only" has been relaxed in the following circumstances where there is scope at common law or by statutory authority to appoint a third party representative:

¹⁴¹ See s. 65 of the Criminal Procedure (Scotland) Act as amended by the Criminal Procedure Amendment (Scotland) Act 2004.

- i. a safeguarder to a child in the Children’s Hearings system
- ii. an “appropriate adult” to accompany vulnerable people being interviewed at police stations
- iii. an *amicus curiae* for civil court cases
- iv. a McKenzie friend, chosen by party litigants in civil court cases
- v. a public protection advocate to represent victims’ views at Parole Boards
- vi. solicitors or counsel in sexual offence trials to conduct those parts of the trial prohibited to accused persons who seek to represent themselves

The conditions under which most of these appointments operate are tightly regulated. Nonetheless, their existence demonstrates accommodations can be made and there is therefore a foundation upon which it would be possible to introduce some form of ILR. Given the existence elsewhere in the democratic world of wide variations in ILR schemes, it ought to be possible to devise one that fits with Scottish procedure. To argue from principle alone that the appointment of a lawyer to represent a complainer would never permit a fair trial is not supported by Strasbourg jurisprudence.

7.07 Other jurisdictions with adversarial systems have noted when rejecting proposals for ILR that questions of constitutional propriety may arise if the complainer’s lawyer had full rights of audience.¹⁴² But ILR can bring many benefits with significantly less than full rights of audience. At the trial stage, representation could, as in the Republic of Ireland for example, be limited to a right to object to oppose defence applications to admit sexual character evidence. Granting rights to complainers does alter their legal status, but that need not compromise the substantive rights of the accused. It is not a zero sum game, where additional rights for complainers can only be gained at the expense of a fair trial for the accused.

7.08 There is a significant margin of appreciation given to states to construct their own rules of evidence and procedure, and provided the overall regime is fair the European Court of

¹⁴² See, for example, the debates in Canada, South Africa and Ireland detailed in Chapter 4.

Human Rights will not rule against it.¹⁴³ Scotland is not considering ILR from a position where an accused person is disadvantaged in terms of procedural and evidential safeguards in comparison with his counterparts elsewhere in Europe. On the other hand, Scotland has the lowest conviction rate for rape in Europe and, to echo the words of the Lord Advocate, Eilish Angiolini, “we operate within one of the most restrictive legal frameworks in the world”.¹⁴⁴

IS ILR UNNECESSARY AS THE CROWN FULFILS THIS ROLE?

7.09 Much is made in Scotland of the duty of the Crown prosecutor to take the complainant’s interests into account, thereby rendering ILR superfluous. It might be argued that a rape complainant is no different from any other witness in criminal proceedings. To permit her to have independent representation would give her an unprecedented advantage over other witnesses and other types of proceedings and would be contrary to the traditions of the adversarial process.

7.10 The argument that the interests of complainants are adequately protected by the prosecutor is not a view shared by complainants.¹⁴⁵ Neither is it satisfactory to conflate the needs of complainants with those of any other witnesses. As detailed earlier, rape complainants are a special case with multiple and distinctive complex needs.

7.11 The Crown acknowledges the complainant’s interests constitute but one of several competing sets of interests for which they have responsibility. Prosecutors cannot commence proceedings unless they are satisfied it is in the public interest to do so. In assessing the public interest prosecutors must take account of both the interests of the complainant and the interests of the accused. Even if one took the debatable view that the complainant’s interests can be entirely aligned with the public interest, one cannot conceivably argue that a complainant’s interests are aligned with those of an accused. As the Crown Office Review

¹⁴³ *Doorson v The Netherlands* (1996) E.H.R.R. 330; *Brandstetter v Austria* (1993) 15 EHRR 378; *Z v Finland* (1998) 25 EHRR 371.

¹⁴⁴ Comment made during her speech in the Scottish Parliament whilst introducing the debate on 5 March 2008 on the Sexual Offences (Scotland) Bill at Col 6664:

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0306-02.htm#Col6662>

¹⁴⁵ Chambers and Millar (1986) n. 113. See too, G. Chambers and A. Millar (1983) *Investigating Sexual Assault*, Edinburgh: Scottish Office Central Research Unit.

emphasised, “The prosecutor represents the wider public interest and not an individual victim of crime.”¹⁴⁶ The “protection” thus offered a complainer is therefore very limited and at the discretion of the prosecutor. Prosecutors cannot press the complainer’s interests above the interests of others. They cannot take instructions directly from a complainer. There is no lawyer-client relationship between a prosecutor and a complainer – and thus none of the characteristics of that relationship based upon trust, confidentiality and legitimate partisanship.

7.12 The Crown’s role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. Her interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge. This falls a long way short of what a complainant in other countries is entitled to from a legal representative. It also falls a long way short of what complainers say they need in order to give their best evidence with confidence and without fear or humiliation.¹⁴⁷ The traditional duties expected of prosecutors in accommodating multiple roles belong to an era where there was little demand for transparency, clarity of function, or recognition of victims’ rights. In today’s world, it is arguably not possible to perform the role of public prosecutor as well as promote the best interests of the complainer as these interests are fundamentally in competition and not easily reconciled. The conflict facing the Crown is placed in sharpest relief in two situations that arise frequently in a sexual offences prosecution: recovery of personal records and introduction of sexual history evidence.

DISCLOSURE OF RECORDS

7.13 It is a long-standing principle in Scots law that the Crown is obliged to disclose to the defence relevant material in their hands as a result of the investigation process. The equality of arms principle, a component of the right to a fair trial, entitles the defence to have access to the same documentation that is available to the Crown. This is so even if the Crown has no intention of relying upon it as evidence. The defence will always wish to examine these documents for any exculpatory benefit they may have for the accused.

¹⁴⁶ n. 28 at para 1.7.

¹⁴⁷ Chambers and Millar, n. 113.

7.14 Most jurisdictions have a statutory framework setting out the criteria that have to be met before the courts will order disclosure. Most regulate the flow of information, some of which would otherwise be considered personal and confidential to the complainant, by limiting the documents that require to be disclosed to those that are “material” to the preparation of the defence or some similar standard. However, what constitutes “material” may need to be vigorously disputed in order to protect the complainant’s privacy. The experience of other jurisdictions demonstrates that a very robust framework for disclosure has to be put in place to sift applications for disclosure as defence counsel tend to pursue a range of strategies, many of which are effectively “fishing expeditions”.¹⁴⁸

7.15 Most regimes differentiate between the disclosure of records which are already in the hands of the prosecution, such as police statements, forensic reports and previous convictions; and those in the hands of third parties such as counselling records, psychiatric records and social work records. The former category is generally uncontroversial. In sexual offence trials in particular, the latter category is much more problematic.

7.16 Lord Coulsfield’s *Review of the Law and Practice of Disclosure*¹⁴⁹ identified one of the categories of evidence that should be disclosed to the defence as “Information which may cast doubt on the credibility or reliability of the Crown witnesses”.¹⁵⁰ This currently includes previous convictions perceived to be of value to credibility in a rape allegation, e.g. crimes of dishonesty such as benefit fraud or shop-lifting. If the provisions contained in the Criminal Justice and Licensing (Scotland) Bill 2009 are enacted the type of records that will be liable to be disclosed will extend to the complainant’s medical, mental health and counselling records. Such records would already be in the Crown’s possession if they considered them necessary in order to make the decision to prosecute. Or, if the Crown were aware of their existence but thought they had no bearing on the case and thus had not recovered them, the records would be in the hands of third parties e.g. the medical profession, local authorities, counsellors and therapists.

¹⁴⁸ Temkin, n. 79.

¹⁴⁹ n. 88.

¹⁵⁰ n. 88 at para 16 of Executive Summary.

7.17 Current Crown Office practice is published,¹⁵¹ and the proposed Code of Practice in the Criminal Justice and Licensing (Scotland) Bill 2009 will no doubt enhance this.¹⁵² but it seems very likely that if the Crown were aware the complainer had been in contact with social work services, or had received psychiatric or psychological treatment, including counselling, they might seek to recover these records to establish what, if any, bearing they had on her credibility and reliability. This would be seen as an essential precautionary step in the process of establishing the strength of the prosecution case and of anticipating potential areas of weakness for defence cross-examination. If the Crown decided these records met the common law test of relevance or materiality¹⁵³ – a test likely to become embodied in statute – they would either be obliged to disclose them to the defence, or apply to the court for permission to withhold them on the grounds of public interest immunity (PII). To make a successful PII claim the Crown has to show that the public interest in the complainer retaining confidentiality of her records outweighs the right of the accused to obtain disclosure in order to conduct his defence properly and receive a fair trial.¹⁵⁴ It is a balancing act to determine which party is caused more prejudice, bearing in mind the probative value of any information in the records.

7.18 The Coulsfield Review acknowledged that “[i]t 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”.¹⁵⁵ The Review notes that “the accused’s right to a fair trial must ultimately take precedence over any other person’s right to privacy”.¹⁵⁶ While that is so, it is possible to honour privacy interests without prejudicing a fair trial. The balancing of these separate interests remains a nuanced, interpretative exercise. Article 6 rights can accommodate the interests of witnesses in certain circumstances.¹⁵⁷ The Supreme Court of

¹⁵¹ Crown Office Disclosure Manual (April 2010 version)

<http://www.copfs.gov.uk/Resource/Doc/7/0000624.pdf>

¹⁵² Section 114 of the Criminal Justice and Licensing (Scotland) Bill 2009 requires the Lord Advocate to issue a Code of Practice providing guidance on disclosure.

¹⁵³ The test was laid down in *McLeod v HMA (No.2)* (1998) J.C. 67.

¹⁵⁴ For detailed discussion of the procedure see F. Davidson (2007) *Evidence*, Edinburgh: SULI, W.Green.

¹⁵⁵ Coulsfield, n. 88 at para 6.3.

¹⁵⁶ Coulsfield, n. 88 at para 6.4.

¹⁵⁷ *Doorson v The Netherlands*, n. 142.

Canada has regularly affirmed that trial procedures have to be fair, but not "the most favourable procedures that could possibly be imagined".¹⁵⁸ The statutory framework proposed in the Criminal Justice and Licensing (Scotland) Bill recognises it will be a balancing act. In effect this leaves it to judicial discretion and the development of the common law. Given the criticisms that have been levelled at the courts in admitting sexual history evidence into the courtroom, there may be concerns that regulation of disclosure of records will follow a similar pattern, whereby a consensus emerges as to what constitutes "material" records with the consequence that the boundaries are rarely challenged. One way of averting this difficulty is to acknowledge the discreet privacy rights of the complainant and permit her an independent legal representative to protect her interests.

7.19 Despite the prosecution's general duty to disclose, there was an indication in Burman et al.'s study that some Advocate Deputes would be resolute about opposing "fishing expeditions". One explained it in this way:

I refuse absolutely to use the Crown's powers to seize social work or medical records, unless I actually need them to prove the case, and insist that they [the defence] make an Application to the court to recover these records so that the process is intimated to the complainer *who can vindicate her position*, and make the Judge take a decision.¹⁵⁹

However, how a complainer is supposed to "vindicate her position" without legal advice and assistance is not made clear. Advocate Deputes cannot provide that guidance as they are not acting in an advisory capacity for the complainer and most likely will only meet the complainer when they introduce themselves at the start of the trial. Instead, prosecutors can only refer applications for records back to the precognoscer at the local Procurator Fiscal's office to pursue with the complainer. The Crown cannot argue exclusively for the complainer's interests in confidentiality whereas an independent legal representative would have no such constraints.

¹⁵⁸ *R v Lyons* [1987] 2 SCR 309, per La Forest J., at p. 362, cited with approval in *R v Mills* [1999] 3 SCR 668 at para 72.

¹⁵⁹ n. 10 at para 4.65, emphasis added.

7.20 Issues of precisely this nature have been the subject of complex legal arguments in Canada where the Canadian Charter of Rights and Freedoms gives citizens constitutionally embedded rights of equality and privacy.¹⁶⁰ Being a rape complainant whose records might be recovered is automatically an equality issue because “[w]omen are disproportionately more likely to generate medical and therapeutic records due to the high rates of sexual assault against them.¹⁶¹ It is a privacy issue for complainants in sexual offences because “[t]he values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one’s individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like, relationship.”¹⁶² Canada recognises the distinctive needs of rape complainants and permits them to instruct their own independent counsel to look after their interests in applications by the defence for recovery of medical and therapeutic records and other confidential papers.¹⁶³

7.21 In contrast to the protections given by the Canadian Charter, the Scottish complainer has to rely on rather bland expressions of privacy interests in statute. There is no definition in case law or in statute as to what constitutes a complainer’s privacy rights. The ECHR article 8 rights provide:

Article 8

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for

¹⁶⁰ For full discussion see S. McDonald and A. Wobick (2004) *Bill C-46: Records Applications Post-Mills, A Caselaw Review*, Ottawa: Department of Justice, Canada.

¹⁶¹ J. Roberts, cited in McDonald and Wobick, n. 161 at para 3.5.

¹⁶² *R v Mills* [1999] 3 S.C.R. 688 at para 89.

¹⁶³ For the nature of the legal arguments raised in such applications see *R v Shearing* [2002] 3 S.C.R 33. That case concerned the admissibility in evidence of the complainant’s diary which had fallen into the hands of the defendant.

the protection of health or morals, or for the protection of the rights and freedoms of others.

As noted earlier, the spirit of article 8 is given some recognition in s. 275 (2) (b) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (SOPESA), which requires judges to regulate the admissibility of “sexual or other behaviour evidence” in such a way that ensures the complainant’s “dignity and privacy”. However, this is a vague and fluid provision which gives judges wide discretion – it does not give complainants enforceable rights. The failure to identify in more detail the conditions which would constitute adequate protection of dignity or privacy, or to detail factors that judges should take into account in applying the section is problematic. Complainants have no equality rights to invoke of the type held by Canadian citizens. It is therefore difficult to articulate precisely what protection a complainant can expect.

7.22 This illustrates one of the major problems of complainants not having a right to ILR. A complainant has no-one to advance the case for her rights and how they are to be balanced against the rights of the accused. The boundaries of the law are therefore hardly ever tested, and legitimate claims to the protections of the ECHR are barely progressed. The ECHR may be a living instrument capable of reflecting shifting social values but only if a party has the financial means and legal resources to pursue their cause.

EXPERT PSYCHOLOGICAL AND PSYCHIATRIC REPORTS

7.23 As a general rule opinion evidence from experts as to the credibility of a complainant is not permitted if it is evidence which is well within the knowledge and experience of the trier of fact.¹⁶⁴ As Lord Justice Lawton said in *R v Turner*, “Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.”¹⁶⁵ The *Turner* rule, as it has become known, has been criticised for revealing a narrow and uninformed view of the behavioural sciences. It presupposes human behaviour is common sense and transparent to jurors, a belief that is much contested by researchers who claim that “‘ordinary, reasonable men and women’ have

¹⁶⁴ *R v Turner* [1975] Q.B. 834.

¹⁶⁵ *Turner* n. 165 at 841.

a systematically biased understanding of normal human behaviour.¹⁶⁶ This argument resonates with critics of juror reliance upon rape mythology and stereotyping in sexual offence trials.¹⁶⁷

7.24 The Scottish Parliament has enacted a significant, if limited, relaxation of the common law rule in *Turner* of the admissibility of expert evidence. Section 5 of the Vulnerable Witnesses (Scotland) Act 2004,¹⁶⁸ provides:

Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purpose of rebutting any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from the behaviour or statement.

The provision is not intended to be used to bolster a complainer's credibility generally – it can only be invoked to rebut evidence already led and which, without further explanation, might lead a jury to an uninformed conclusion. But, as the Crown Office Review accepted:

In practice, however, this may be a tenuous distinction and it is for the prosecution to predict what adverse inferences might be drawn and be in a position to offer to a jury an explanation about how a victim of a sexual offence might respond.¹⁶⁹

The problem with this is that in order to predict adverse inferences, and be prepared to respond, the prudent approach might be for the Crown to seek a pre-trial psychological and / or psychiatric report. As soon as that is available, current and proposed disclosure practices dictate that, if deemed material, it either has to be produced to the defence, or an application

¹⁶⁶ A. Colman and R. Mackay (1993) 'Legal Issues surrounding the admissibility of expert psychiatric and psychological testimony', *Issues in Criminological and Legal Psychology* 20: 46 at 48-49.

See too D. Sheldon (1992) 'The admissibility of psychiatric and psychological evidence', *Scots Law Times*, 301.

¹⁶⁷ E. Finch and V. Munro [2004] 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited', *Criminal Law Review* 789; J. Temkin and B. Krahé, n. 80; L. Ellison and V. Munro (2009) 'Exploring Mock Jurors' Assessments of Complainant Credibility', 49 *British Journal of Criminology* 202.

¹⁶⁸ Inserting a new s. 275C into the Criminal Procedure (Scotland) Act 1995.

¹⁶⁹ n. 28 at para 8.54.

made to withhold it on the grounds of PII, an application which the defence may well successfully contest. Prosecutors may ask the complainant for permission to recover her records, but they are not necessarily obligated to do so. Even if she gives consent she may not appreciate that, thereafter, she has no control over their subsequent wider circulation. She cannot require the Crown to oppose a defence application for disclosure, nor can she influence the nature or strength of any opposition to disclosure. To expect her to co-operate in an exercise where her privacy rights might be heavily compromised, without access to independent legal advice, is a very serious step.

7.25 The use of expert evidence is fraught with difficulties for complainants with much scope to be counter-productive. The experience in other jurisdictions suggests it is a strategy to be treated with the greatest of care.¹⁷⁰ It clearly has the potential to be used by the defence to undermine the credibility or the reliability of the complainant. Where a prosecutor has ordered a report and found it meets the materiality test, he or she has no locus to oppose disclosure to the defence or its subsequent use by them other than by claiming PII. This presents an obvious conflict for the Crown, one that could be circumvented by the appointment of an ILR. Under the new statutory regime proposed in the Bill, discussed in Chapter 4, the onus is on the Crown to argue for non-disclosure based upon the statutory grounds set out in sections 102-104, but as matters presently stand they can only do so through their overarching matrix of responsibilities for competing sets of interests: those of the public, accused and complainant. For all the reasons canvassed at length earlier, this is not a tenable position for the Crown.

CHARACTER EVIDENCE AND SEXUAL HISTORY EVIDENCE

7.26 Fear on the part of complainants of not being believed, or of attacks on their credibility during cross-examination, is a renowned disincentive to the reporting of rape.¹⁷¹ The Scottish Law Commission recently observed that, “It is a striking feature of sexual offence trials, and rape trials in particular, that there is often a sense of the victim being on trial as much as the

¹⁷⁰ L. Gotell (2006) ‘When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records’, *Atlanta Law Review* 43(3): 743-778. For review, see L. Ellison (2005) ‘Closing the credibility gap: the prosecutorial use of expert witness testimony in sexual assault cases’, *International Journal of Evidence and Proof* 9(4): 239.

¹⁷¹ Regan and Kelly, n. 2 at p. 14.

accused.”¹⁷² Specific concerns relate to the use of sexual history or general character evidence. Evidence of a complainant’s sexual history or character¹⁷³ is used in court to raise questions about a woman’s credibility and reliability. In particular, defence counsel seek to introduce such evidence to infer, for example, that the woman has a motive to make a false allegation, has a propensity to lie, or was too drunk to recall accurately whether or not she consented to sex. For example, in *R v NR*¹⁷⁴ medical records were disclosed to the accused revealing when the complainant lost her virginity. These were deemed relevant by the judge as they “had a bearing on the complainant’s credibility”. . . “in the sense that she has both a motive and a propensity to fabricate”.

7.27 Statutory regulation of sexual history and sexual character evidence was first introduced in Scotland in 1985 and the legislation has been amended on several occasions in response to complaints that it was still failing to protect women from gratuitous attacks on their character. The most recent reforms are contained in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, (SOPESA). One of the two principal declared policy objectives underlying this latest legislation is “to strengthen the existing provisions restricting the extent to which evidence can be led regarding the character and sexual history of the complainant.”¹⁷⁵ The Burman et al. evaluation research of the provisions of SOPESA raised concerns about the ability of the new legislation to fulfil that objective.¹⁷⁶ The researchers found that rather than reducing the use of sexual history and character evidence, under the new legislation there has been a significant increase in this type of evidence. Approximately 7 in 10 women giving evidence in the High Court in rape or attempted rape trials were asked questions about their sexual history and character. In the majority of cases, the Crown did not object to defence applications to introduce this type of evidence. The extended definition of character

¹⁷² *Report on Rape and Other Sexual Offences (2007)* Scot Law Com no. 209, citing literature from 1975 onwards, at para 6.24.

¹⁷³ SOPESA extended the type of character evidence that is potentially admissible to include non-sexual evidence, for example, evidence of drug addiction or dishonesty short of a criminal offence.

¹⁷⁴ *R v NR* (1997) O.J. No. 80 (QL) (Prov.Div.) para 8, cited in L. Gotell (2001) ‘Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law’, *Social & Legal Studies* 10: 315-346 at 328.

¹⁷⁵ Explanatory Notes accompanying the Act at http://www.opsi.gov.uk/legislation/scotland/acts2002/en/aspen_20020009_en_1

¹⁷⁶ See n. 10.

evidence to include evidence of character that is not just of a sexual nature has predictably contributed to the increased numbers of applications. This broader definition of character plays into the potential archival value of psychiatric, psychological and social work records for attacks on a complainer's character.

7.28 The reported case law also suggests a substantial gap between the intention of the legislature and the implementation in the courts. For example, in the first two reported cases on the admissibility of sexual history evidence, *Cumming v HM Advocate*,¹⁷⁷ and *Kinnin v HM Advocate*,¹⁷⁸ the appeal court upheld appeals against the refusal of each trial judge to admit certain questions that they respectively deemed to fall foul of the legislation. In neither appeal did the Crown support the trial judge's decision. This prompted Sir Gerald Gordon QC, a temporary High Court judge and one of Scotland's most respected criminal law commentators, to observe in his editorial commentary to the report of *Cumming*:

It is early days yet, but the impression given by this case and by *Kinnin* is that neither the Crown nor the court are likely to limit the scope of the defence evidence unduly, and that the Act may not be quite as restrictive as one might have expected, or as perhaps its supporters wished.¹⁷⁹

In his editorial comment in *Kinnin* Sir Gerald also remarked:

I do not propose to enter into the question whether the Crown have a duty to protect complainers in cases of sexual offences or whether they should have opposed the appeals in those cases, but their disinclination to do so does raise the question of whether the person who is directly affected by the evidence, and whom the statute is designed to protect, *should herself have some locus to object to proposed evidence*.¹⁸⁰

¹⁷⁷ 2003 S.C.C.R. 261.

¹⁷⁸ 2003 S.C.C.R. 295.

¹⁷⁹ At 270.

¹⁸⁰ At 298, emphasis added. See too the reservations voiced about the decisions in these cases by Andrew Lothian (2003) 'Allowing Sexual Questioning', *Journal of the Law Society of Scotland* 48(12): 52.

As Sir Gerald identified, the Crown's failure to posit any opposition to the applications to lead sexual history evidence in terms of section 275 in either of those trials, or subsequently to oppose the appeals, raise serious questions over their willingness and capacity to protect the legitimate interests of complainers. Given the extensive reforms the Crown Office have introduced since these decisions, one expects that a more pro-active and imaginative rebuttal of applications for character evidence would be mounted today. However, their capacity to do so will always be hampered by their duty to protect other interests in fundamental conflict with those of complainers.

7.29 The significance of the consequences of the Crown's approach in such decisions should not be under-estimated. As the first two reported appeals under the new provisions of SOPESA, *Cumming* and *Kinnin* were key indicators of the Crown's approach to the legislation. Judicial interpretations by the appellate court in early cases under new legislation also have a deep impact on subsequent decision-making by prosecutors, defence counsel and of course trial judges who are bound by the precedent set by higher courts. Ironically, the trial judiciary who have been on the receiving end of much criticism over the years concerning the ease with which sexual history evidence is admitted, acted in the spirit of the legislation in *Cumming* and *Kinnin*, but were confounded by the failure of the Crown to canvass any arguments before the appeal court.

IS ILR UNNECESSARY AS THE JUDGE HAS A PROTECTIVE ROLE?

7.30 A further argument against the need for ILR is that in addition to the Crown's responsibilities the trial judge has a duty towards the complainer, and is empowered to intervene to regulate inappropriate questioning or treatment of her and of all witnesses. The duty is to protect complainers throughout the trial process and at preliminary hearings – for example, applications to introduce sexual history evidence or applications for the use of special measures for a vulnerable witness. This duty confers powers to intervene to prevent improper conduct from counsel, and otherwise to have concern for the complainer's interests. However, this is a very difficult balance for judges to strike. Excessive intervention may form grounds of appeal if an accused perceives he has been prejudiced. The judge's role in an adversarial process is primarily to act as an umpire, as Lord Justice-Clerk Thomson explained in 1962:

A litigation is in essence a trial of skill between opposing parties, conducted under recognised rules and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at a boxing contest, they see the rules are kept and count the points.¹⁸¹

This role as an even-handed adjudicator does not sit easily with that of an intervener acting to protect one party's interests. Although s. 275(2)(b) of SOPESA requires judges to ensure the "appropriate protection of the complainer's dignity and privacy" when exercising their discretion to admit sexual history evidence, judges are always concerned not to intervene in such a way as to trigger an appeal and lead to the possible quashing of a conviction.

7.31 In *Black v Ruxton*¹⁸² a sheriff rebuked a defence solicitor for repeatedly asking a 15 year old girl during cross-examination why she had delayed reporting allegations of sexual abuse. The girl broke down and had to be taken from the court. When the trial resumed the sheriff gave her a glass of water. The accused was subsequently convicted and appealed on grounds alleging bias on the part of the sheriff. Although the sheriff's actions were ultimately sanctioned by the appeal court as within his discretion, the very fact that his practice was challenged could act as a disincentive to other judges to act in a similar fashion.

7.32 There is also understandable universal acceptance amongst the judiciary of the need for counsel to be permitted to "do their job" i.e. present the evidence and cross-examine the witnesses in as forceful a way as possible to discharge their duty to the accused to represent him to the best of their ability. Clients who are dissatisfied with the services of their counsel may pursue the so-called "Anderson appeal", an appeal based on alleged defective representation.¹⁸³ The Court of Criminal Appeal has stressed the need for a robust approach to cross-examination of complainers of sexual offences to test their credibility in order to avoid any suggestion that representation was defective.¹⁸⁴ Prosecutors rarely object to defence questioning for all the reasons discussed earlier. Independent legal representatives

¹⁸¹ *Thomson v Glasgow Corporation* 1962 S.C. (H.L.) 36.

¹⁸² 1998 S.L.T. 1282.

¹⁸³ *Anderson v HM Advocate* 1996 J.C. 29.

¹⁸⁴ *E v HM Advocate* 2002 J.C. 215.

acting for the complainer need have no such qualms. The presence of an independent lawyer, while not removing judicial discretion to intervene to protect complainers' interests, could relieve judges of many of the dilemmas surrounding the decision to intervene, as the main responsibility to raise objections would shift to the complainer's lawyer.

CHAPTER EIGHT

SUMMARY AND CONCLUSIONS

IS ILR FEASIBLE?

8.01 This Report set out to explore the feasibility and any benefits of introducing independent legal representation for complainers in sexual offence trials in Scotland and the likely objections it would provoke. Scotland currently has no independent legal support measures available to complainers of sexual offences. In contrast, legal advice, support and representation is available in some form in most other European countries. It is often assumed that Scotland's adversarial system precludes ILR. This is not necessarily so. It depends on the form of ILR one seeks to introduce. Several common law jurisdictions, e.g. Ireland and Canada, have introduced specialised procedures for legal representation at specific procedural stages, or, as in the US, promote a far more robust, prosecutorial-driven case-building approach linked to more direct access by complainants to prosecutors.

8.02 No fully argued case has ever been made in Scotland against the introduction of ILR. However, one can predict that the objections cited in other jurisdictions to ILR would also arise here. These objections include lengthened proceedings, duplicated work, expense and, above all, the threat to a fair trial. Such objections are part of the normal process of democratic debate, policy-making and law reform in any country committed to human rights and liberties. Speaking of opposition to ILR in the US, William Pizzi has observed:

Defense attorneys understand that constitutional recognition of a status for victims of serious crimes, independent of the prosecutor, has a tremendous symbolic value, and they do not want to see it accorded victims.¹⁸⁵

8.03 There is no reason to suppose the opposition in Scotland would be any less determined, but without a public debate, arguments on behalf of proponents and opponents of ILR will never be fully articulated. Although there are undoubtedly procedural difficulties in

¹⁸⁵ n. 47 at p. 354.

introducing ILR, there are no insurmountable theoretical obstacles to its use in a jurisdiction that favours an adversarial system. As other countries have demonstrated, with appropriate adjustments, it is possible to accommodate ILR within the adversarial process, observe the right to a fair trial, and find a response that is compatible with the ECHR or other constitutional imperatives. Scotland is just as capable of finding a resolution. Far better that the debate takes place than have a position where ILR is never even considered but simply presumed implausible or inappropriate.

WHAT ARE THE BENEFITS OF ILR?

8.04 To identify the benefits for complainers one need look no further than the conclusion from the Irish study, one of the most important empirical research reports published which found “a highly significant relationship... 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.”¹⁸⁶

8.05 From a complainer’s perspective, there are huge advantages in having an entitlement to a single adviser with the specialist knowledge and legal authority to access information and make representations to the court. While support services for complainers have improved greatly, there is a fundamental distinction between what the State can offer and what an autonomous and independent lawyer conferred with statutory powers can offer. VIA staff play an important support role, but they are a conduit of information to and from other COPFS staff. There is nothing less empowering for a complainer than being at one end of the chain without a representative able to influence the decision at the other end. It is highly significant that research with Canadian Crown counsel in regard to disclosure of records applications found they believed that when there is independent counsel involved “...everyone takes it more seriously”.¹⁸⁷

¹⁸⁶ See Bacik et al., n. 38 at pp. 17-18.

¹⁸⁷ R. Mohr (2002) *Words are not Enough: Sexual Assault - Legislation, Education and Information*, Ottawa: Department of Justice, Canada at pp. 16-17.

8.06 Apart from raised levels of confidence, complainers could receive the continuity of support and shared knowledge and understanding that accompanies an effective relationship of trust with one legal adviser committed to the complainer's interests. Overall, it could go a considerable way towards alleviating the long-standing discontent of complainers about their treatment and lack of support within the trial process. The availability of an entitlement to ILR might well improve the willingness of victims to report sexual offences.

8.07 From the perspective of those responsible for the investigation and prosecution of crime, the introduction of ILR would remove the irreconcilable conflict that arises for prosecutors in tending to the conflicting interests of the complainer, the public and the accused. For prosecutors, the complainer's rights can never be an exclusive consideration, whereas for a legal representative they have to be. Independent lawyers have only one interest to pursue – that of their client – subject always to their professional and ethical duties to the court. They are unburdened by the prosecutor's duty to balance a series of interests. The very fact of partisan advocacy would give a complainer assurance that her voice will be heard.

8.08 The most cogent argument for ILR in Scotland arises in response to breaches of the complainer's dignity and privacy. There is no scope for the Crown to embark on a policy of developing a coherent framework for complainers' privacy rights as the Crown are constitutionally bound to locate these interests within the wider public interest. In these conditions, as the interests of the complainer are not constitutionally embedded, they are always destined to be subordinate.

WHAT ARE THE OBJECTIONS TO ILR?

8.09 There is a possible objection to ILR for complainers of rape and serious sexual offences on the ground it would give them preferential treatment and open the floodgates to demands for ILR for all complainers. The response to that objection is that the nature of the trauma experienced by complainers in sexual offences and the focus on their character places them in a special category deserving of distinctive treatment.¹⁸⁸ One of the hallmarks of a civilised society is the manner in which it responds to rape, one of the most violent and traumatic crimes, and one which uniquely engulfs those who endure it in shame and degradation.

¹⁸⁸ Chambers and Millar, n.113

8.10 There would be increased cost to public funds in paying for the legal services of those providing ILR, but there is already a considerable cost to the public purse from abandoned prosecutions and the profound damage to complainers who may need long term physical and psychological support from health and welfare services. There would also be difficulties in identifying suitably qualified people to perform the role of an independent legal adviser. Given the importance of developing professional trust, it would not readily be a role that could be filled by those who routinely acted as defence counsel. This is a point noted in the research literature – complainers are not comfortable with those seconded from the ranks of the defence Bar.¹⁸⁹

8.11 In whatever manner the role of ILR is conceptualised, proposals for third party representation will likely be greeted by some with scepticism, and possibly even with hostility. Nonetheless, the status quo appears unsustainable if Scotland wishes to rid herself of an unenviable reputation in regard to the prosecution of sexual offences, haunted by an astonishingly low conviction rate for rape. Although no research has yet been conducted to establish whether these conviction rates bear any causal connection to the absence of ILR, informed observers might reasonably conclude that ILR would be much more likely than not to facilitate the complainer's best evidence and thus to improve conviction rates. The proposition that ILR should be explored as an option in adversarial systems was endorsed by Mary Robinson, the (then) UN High Commissioner for Human Rights in her Foreword to the Irish study:

Given the differences which exist between adversarial and inquisitorial systems, it might be difficult to introduce as comprehensive a right to representation for victims of crime as exists in some of the member states, but it is surely worth considering the introduction of some form of representation for victims.¹⁹⁰

A decade later Irish complainers at least have the foundations of such representation. Perhaps the time is right for Scotland to open a public debate and make the first step towards it.

¹⁸⁹ Bacik et al., n. 38.

¹⁹⁰ Foreword to Bacik et al., n. 38 at p. xii.

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