Disclosure of Records and Privacy Rights in Rape Cases

Fiona E Raitt

A. INTRODUCTION

The prosecutor’s duty of disclosure of evidence to the defence in criminal prosecutions is one of the cornerstones of adversarial procedural justice and a long-standing principle in Scots law. It is a fundamental component of a fair trial, in particular the principle of equality of arms whereby the greater resources of the state to investigate crime entitle the accused to have access to the same

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School of Law, University of Dundee. I am grateful to Pamela Ferguson, Hilary Graham and an anonymous reviewer for helpful comments on an earlier version of this paper, and to Daniel Carr and Pete Duff for illuminating discussions on disclosure and confidentiality.

1 Smith v HM Advocate 1952 JC 66.
evidential material that is available to the Crown.\textsuperscript{2} This is so even if the Crown has no intention of relying upon that material as evidence. The defence has a right to examine all information uncovered in the course of a criminal investigation that might exculpate or mitigate any criminal liability of the accused, or undermine the Crown case.\textsuperscript{3}

The Scottish Parliament recently enacted the Criminal Justice and Licensing (Scotland) Act 2010 (henceforth “the Act”) which clarified and re-drew the boundaries of disclosure in Scots law. The Act contains detailed measures for extending the duty of disclosure together with the provisions for judicial regulation of non-disclosure in limited circumstances.

This article focuses on a hitherto neglected aspect of disclosure, namely the impact on witnesses and complainers. The article argues that the Act will impact negatively on all witnesses but raise particular concerns for complainers in cases of rape and other serious sexual assaults. In such cases it is predictable that there will be an increase in the disclosure of medical and other personal records of complainers for any potential they have to cast doubt on the credibility and reliability of complainers. For the purposes of disclosure, sensitive personal information such as mental health history could very possibly be characterised as material and relevant information.\textsuperscript{4} The problem with this lies less in the principle of disclosure of these records, and more in the ways in which the privacy interests of complainers could be heavily compromised in circumstances where they will have no access to independent legal advice.

The article explores the experiences in other jurisdictions where the disclosure of personal records has created an additional obstacle for complainants and a further disincentive to reporting rape. Clear parallels can be drawn with the use of sexual history evidence in rape trials which, despite efforts to regulate its admissibility, continues to be deeply problematic.\textsuperscript{5} The extended ambit of disclosure set out in the Act has direct implications for the privacy rights of complainers and it is argued that the Act provides insufficiently

\textsuperscript{2} See Smith at 72-73. “The Crown” is used in this article to refer to the Crown Office and Procurator Fiscal Service.

\textsuperscript{3} McLeod v HM Advocate (No 2) 1998 JC 67.

\textsuperscript{4} Section 116 of the Act sets out the type of information that must be disclosed.

robust safeguards for the protection of these individual interests. Given the complex environment in which disclosure obligations in adversarial proceedings must be satisfied, the article argues that on this issue Crown prosecutors cannot adequately discharge their traditional responsibilities to take the interests of complainers into consideration as part of the public interest. The article concludes that complainers should therefore have an entitlement to independent legal representation to pursue their legitimate privacy interests in non-disclosure. Although the article centres on the reforms in Scots law, the issues have broader application in all common law jurisdictions.

B. THE EVOLUTION OF THE DUTY TO DISCLOSE

Over the years the duty of disclosure has attracted a great deal of juridical and scholarly attention because challenges to its scope and application are integral to debates over the right to a fair trial. Until 2005 the way that the Crown discharged their disclosure duty was explained in the full bench decision in McLeod:

... the Crown will respond to specific requests from the defence for information or for the production of statements or other items where the defence can explain why they would be material to the defence... when they respond in this way, the Crown are not merely acting out of kindness but are performing their duty to impart information which supports the defence case in the particular situation where they have been made aware of the possible significance of these items for the defence of the accused.

McLeod had appealed against his conviction for various drugs-related offences, and sought production of all of the 77 pro forma questionnaires obtained as police statements, instead of the small proportion of these that the Crown had chosen to disclose. The court rejected the appeal, affirming the Crown position at the time—that the onus lay on the defence to show why there should be production—and declaring that this onus had not been discharged.

Two Privy Council decisions in 2005 set the course for substantial changes in Scottish disclosure arrangements: Holland v HM Advocate and Sinclair v HM Advocate. In Holland and Sinclair both the Scottish judges, Lord Hope and Lord

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7 McLeod v HM Advocate (No 2) 1998 JC 67 at 79.

8 [2005] UKPC D 1, 2005 1 SC (PC) 3.

Rodger, considered the Crown’s approach to disclosure was not wholly compliant with the Convention rights of the accused.

The Judicial Committee ultimately held that the duty to disclose did not have to be triggered by a defence request for release of information, nor by an assertion of its relevance, not least because the defence might not even be aware of the existence of any specific relevant information. Separately, the court considered the procedural mechanism for recovery of documents in the hands of the Crown or a third party, namely an application for commission and diligence, was flawed and unsuitable for the determination of disputed disclosure applications. Common law petitions to the court for commission and diligence feature occasionally in criminal litigation, usually where the defence apply for production of certain documents that the Crown are reluctant to hand over on the public interest ground of confidentiality. The Judicial Committee noted that in light of the Bonomy reforms and revised Crown disclosure practices, more information would routinely be released, making future applications for commission and diligence less likely.

The impact of Holland and Sinclair was to require disclosure of much more information than had previously been assumed necessary, and to locate the duty to disclose entirely upon the Crown:

... the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused. For this purpose any evidence which would tend to undermine the prosecution's case or to assist the case for the defence is to be taken as material.

“Any evidence” moved considerably beyond the usual items disclosed by the Crown to the defence such as police statements, previous convictions of witnesses, and forensic reports. The doubts expressed about Crown practice by such senior judges, with the inevitable implications for other cases and appeals, prompted the Scottish Government to appoint a retired judge, Lord Coulsfield, to conduct a comprehensive review of disclosure practice. In his subsequent report

10 Applications for recovery pose particular difficulties for third party record-holders, such as counsellors, psychologists and psychiatrists. See J Temkin, "Digging the dirt: disclosure of records in sexual assault cases" (2002) 69 CLJ 126; K Busby, "Responding to defense demands for clients' records in sexual violence cases: some guidance for record keepers", in C M Koggel, A Furlong and C Levin (eds) Confidential Relationships: Psychoanalytical, Ethical and Legal Contexts (2003) 207.
11 For example, see Lord Rodger’s comments in Holland at para 72, and Lord Hope’s comments in Sinclair at para 29.
12 Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary (2002), specifically recommendation 2 at 116, the fruits of which are now embodied in Part 6 of the Act.
13 Sinclair at para 29 per Lord Hope.
14 Sinclair at para 33 per Lord Hope, emphasis added.
Lord Coulsfield made a number of recommendations to clarify the law.\textsuperscript{15} After public consultation the spirit of these recommendations was largely adopted in the Criminal Justice and Licensing (Scotland) Bill, Part 6 of which was devoted to disclosure, though the clarity of Lord Coulsfield’s proposed statutory reforms was abandoned on the journey towards enactment.

The Crown’s disclosure policy was further revised following the Holland and Sinclair cases,\textsuperscript{16} and is set out in the current version of its Disclosure Manual. The first principle of the Manual states that the Crown’s disclosure duty extends to “\textbf{all} information received and known to the Crown in the course of the investigation and any criminal proceedings”.\textsuperscript{17} Section 116 of the Act confirms the very broad range of information which may potentially have to be disclosed to the defence. It is “material of any kind given to or obtained by the prosecutor in connection with the proceedings”. This definition includes precognitions and victim impact statements. It is commonplace for complainers during precognition (when the Crown interview the complainer to clarify or confirm the content of her police statement)\textsuperscript{18} to recall further details of the assault that amplify or moderate the original account. Although there may well be a benign explanation for newly recalled information, any discrepancy will be valuable to the defence if they wish to suggest it is indicative of mendacity, fabrication or simply unreliability.\textsuperscript{19} The Disclosure Manual states that:\textsuperscript{20}

\begin{quote}
Material discrepancies between the contents of a police statement and the witness’s position at precognition may bear on the witness’s credibility and/or reliability and would fall to be disclosed.
\end{quote}

Separately, the precognition process may reveal an episode or substantial history of mental illness deemed relevant to the complainer’s credibility or reliability and such mental health information will be scrutinised for any suggestion of


\textsuperscript{18} The feminine gender is used in the text to reflect the fact that in sexual offences the vast majority of adult complainers are female.


\textsuperscript{20} Disclosure Manual (n 17) 16.
fantasy or confusion. Section 121(2)(b) requires the prosecutor to disclose to the accused any information to which subsection (3) applies, namely, information that "would materially weaken or undermine the evidence that is likely to be led by the prosecutor", "would materially strengthen the accused's case", or is "likely to form part of the evidence to be led by the prosecutor". Section 122 permits the prosecutor to withhold "sensitive" information, defined in subsection (4) as information that need not be disclosed if there would be a risk of:

(a) causing serious injury, or death, to any person,
(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or
(c) causing serious prejudice to the public interest.

In regard to personal records, each of these criteria for non-disclosure sets a very high bar and it is difficult to imagine they will readily be satisfied.

Section 122(2) introduces a further, expansive dimension to the disclosure duty. It provides that "the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 121(2)(b) but which may be relevant to the case for or against the accused". The Act does not define what this additional relevant information might be but it presumably captures any other information unless it is deemed sensitive by the prosecutor and exempt from disclosure under section 122(3). The interpretive discretion surrounding the terms "materially", "sensitive" and "relevant" will increase the likelihood that information contained in complainers' personal records will be disclosed even if its relevance is highly contestable.

(1) The privacy rights of the complainer

The Scottish complainer has few distinct entitlements to privacy. The Act does not confer any express statutory privacy rights, and there is no guidance as to the degree of consideration or protection afforded to privacy rights in assessing the "public interest" in terms of section 122(4)(c) of the Act. The Act abolishes the common law rules on disclosure generally insofar as they are "replaced by or inconsistent with" the statutory provisions. Although any alternative procedures available to the accused for recovering records are preserved, i.e. proceedings using commission and diligence, these do not advantage aggrieved complainers in any particular way. As noted earlier, the development of the common law

22 Section 166.
23 Section 166(3).
of confidentiality concerning claims of privilege (public interest immunity-type claims) is largely confined to civil law,24 where the case law affords little comfort to complainers seeking to restrict access to their records in a criminal context. Although it has been acknowledged that “[t]he interest of an individual in his own privacy is in itself a public interest”,25 in the very few civil cases where individual privacy interests have prevailed over the public interest, the latter was comparatively insecurely grounded and therefore not too difficult to overcome.26 In contrast, the cases where pursuers have failed to recover information, where a privilege of confidentiality is claimed by those representing the state, reveal the immense hurdles these pursuers face.27

The statutory rights associated with the Data Protection Act 1998 have no application in this context because of the broad exceptions to privacy that are available in terms of Schedule 3. Personal records would be categorised as “sensitive personal data” within the meaning of sections 2(e) and 2(f) of the 1998 Act, if involving, respectively, “physical or mental health or condition” or “sexual life”. However, such data are not protected from disclosure in the context of a criminal investigation or prosecution as disclosure will be deemed “necessary for the administration of justice” by virtue of para 7(1)(a) of Schedule 3.

The absence of any common law guidance or other statutory definition of privacy rights leaves us with the jurisprudence arising from article 8 of the European Convention on Human Rights. Article 8 provides:

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

The European Court of Human Rights has upheld the article 8 interests of complainers as consistent with the right of an accused to a fair trial provided

24 McLeod v HM Advocate (No 2) 1998 JC 67 set the standard for dealing with confidentiality in criminal cases. This is now wholly under statutory control by virtue of the Criminal Justice and Licensing (Scotland) Act 2010.
25 Parks v Tayside Regional Council 1989 SC 38 at 42. Lord Sutherland held on the merits that the private interest of the pursuer outweighed the public one. Lord Sutherland also held that in any event only the Lord Advocate or another Minister of the Crown could claim public interest immunity, i.e. not local authorities or NGOs, thus indicating Scots law might not follow the English authority of D v National Society for the Prevention of Cruelty to Children [1978] AC 171. But see now Al-Megrahi v HM Advocate 2008 SLT 333 at para 17.
26 See e.g. Parks v Tayside Regional Council 1989 SC 38.
27 See e.g. AB v Glasgow and West of Scotland Blood Transfusion Service 1993 SLT 36.
certain fundamental principles are met. *Doorson v Netherlands* held that Art 8 interests;\(^{28}\)

... are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

There is a substantial body of Strasbourg case law that demonstrates that victims’ rights can be accommodated alongside the article 6 rights of the accused, confirming that while article 6 is very important, the concept of fairness that it embodies has many possible configurations. Thus, decisions from Strasbourg repeatedly remind us that while the right to a fair trial is absolute, none of its constituent parts, of which disclosure is one, is itself absolute.\(^{29}\) In a comparable balancing exercise, the Supreme Court of Canada has affirmed that trial procedures have to be fair, but not “the most favourable procedures imaginable.”\(^{30}\) Moreover, the state has positive obligations to ensure effective investigation and prosecution of rape cases and these include effective protection of a complainer’s interests.\(^{31}\)

The most recent Scottish judicial considerations of disclosure concerning when information is “material”, and thus must be disclosed, give some direction as to the limits of disclosure.\(^{32}\) Where personal and sensitive material is concerned, the Convention rights of witnesses under articles 2, 3 and 8 must be considered, especially if there has been any threat to their “physical or psychological integrity”\(^{33}\) “or to their “sexual life”.\(^{34}\) However, “the concept of ‘private life’ is a broad term not susceptible to exhaustive definition”.\(^{35}\)

(2) **Resisting disclosure**

As discussed earlier, under the Act the Crown have a duty to disclose to the defence two categories of records. First, records which meet the proposed statutory test of materiality. Second, records which are non-disclosable (because they fail the materiality test) but are nonetheless relevant, unless they are classed

\(^{28}\) (1996) 22 EHRR 330 at para 70.


\(^{30}\) *R v Lyons* [1987] 2 SCR 309 at 315.


\(^{32}\) *McDonald v HM Advocate* 2008 SLT 993; *Murtagh v HM Advocate* 2009 SLT 1060.


\(^{34}\) *Dudgeon v United Kingdom* (1982) 4 EHRR 140.

as sensitive. The Crown may be able to limit the extent of the disclosure through redaction, i.e. it can black out sensitive information to preserve privacy whilst disclosing only the essential information to enable a fair trial. This action is at the prosecutor’s discretion, though the defence can challenge the nature and extent of redaction, as well as non-disclosure generally, by an application to the court for full disclosure. Where the prosecutor considers that disclosure of information “would be likely to cause a real risk of substantial harm or damage to the public interest”, then he or she can apply to the court for an exclusion order preventing disclosure. Exclusion orders withholding disclosure must be consistent with a fair trial. There are various further orders regulating the right of the accused to be notified of, or represented at, applications to determine whether information can be disclosed. These are unlikely to concern complainers in sexual offence prosecutions, being more suited for matters such as national security where the public interest could only be protected if the order were to be made.

The test of “a real risk of substantial harm or damage to the public interest”, while well suited where national security is at stake, is a very demanding test for individual privacy interests to meet. Given this high threshold it is suggested that court rulings in disclosure disputes in sexual offences will be rare. Defending the privacy interests of individual complainers or witnesses through applications for non-disclosure orders will not be a priority for the Crown’s increasingly stretched resources which are acknowledged to impose a massive workload on prosecutors. One can imagine that disclosure of certain types of personal records will become routine as there is no-one to advocate the specific concerns of the complainer. Complainers who are aggrieved by disclosure decisions and claim they amount to a breach of their human rights have a right to pursue their grievances through an application to the European Court of Human Rights. However, they would face severe logistical hurdles including the availability of legal aid.

The absence of any reference in the Act to arrangements for notifying complainers that their records are being disclosed, let alone provision to enable complainers to oppose requests for disclosure, will be of major concern to the individuals affected. Complainers have no standing at any stage to influence the

36 Section 145(5)(a).
37 Section 128.
38 Section 141(4). Section 141(3)(b) must also be satisfied, i.e. the information is not likely to form part of the evidence to be led by the prosecutor at the trial.
39 Section 144(5)(b).
40 For the full regime see ss 141-149.
42 A concern noted in England and Wales. See Temkin (n 10).
trial process. Once they become aware of the material that is being disclosed, it will inevitably generate anxiety and apprehension as their awareness will only arise after a crime has been reported and is being investigated. One conclusion is that in this particular aspect of their role as guardian of the public interest the Crown has reached its limit. It is faced with an irreconcilable conflict between serving the public interest and representing the complainer’s legitimate interest in non-disclosure. In the context of an elaborately constructed disclosure regime, it is hard to see how the Crown has the capability to reconcile multiple interests, given that these are inherently in friction.

In relation to the complainer’s interests, it is reasonable to assume the Scottish bench will approach their gate-keeping role to disclosure disputes in much the same way they determine the admissibility of sexual history and character evidence. The courts have been reluctant to attach much weight to articles 3 and 8 in their consideration of admissibility. Although there are powerful arguments that could be canvassed on behalf of the complainer’s Convention rights, there is very little detailed consideration of the Strasbourg jurisprudence that acknowledges the circumstances in which the full array of article 6 rights sometimes have to accommodate other interests. Recent empirical research conducted by Temkin and Krahé with the English judiciary, following adjustments to their disclosure regime in 2003, suggested a strong judicial leaning in favour of disclosure. It is therefore difficult to articulate precisely what protection a Scottish complainer can expect for her privacy interests, or to be confident that she can expect very much at all.

The tests in sections 144-145 set a high threshold for an order for non-disclosure and it is not easy to imagine the conditions under which a complainer’s privacy interests will be sufficient to lead to non-disclosure. The interests of complainers do not feature as a separate entity at all. For there to be any prospect of arguing that the conditions for a non-disclosure order are met, it would be essential to align the complainer’s privacy interests with the public interest, for only the latter are accorded any weight in the Act. One could argue that the effect of disclosure of personal records will act as such a powerful disincentive to reporting rape that it does seriously prejudice the public interest. It is unlikely that argument will be pursued as the legislation is disappointingly spare in its

43 See for example those made by P Londono, “Positive obligations, criminal procedure and rape cases” [2007] EHRLR 158.
44 Temkin and Krahé, Sexual Assault and the Justice Gap (n 5) 153-158. The research focussed on records held by third parties such as psychotherapeutic records. The English provisions are found in the Criminal Procedure and Investigations Act 1996, as amended. For a critique of the legislation see M Redmayne, “Criminal Justice Act 2003: disclosure and its discontents” [2004] Crim LR 441.
articulation of the constituent elements of “public interest”. In contrast, the Canadian legislation regulating disclosure directs the judge to take into account eight separate factors including “the nature and extent of the reasonable expectation of privacy”\textsuperscript{45}, “whether production of the record is based on a discriminatory belief or bias”,\textsuperscript{46} and “society’s interest in encouraging the reporting of sexual offences”.\textsuperscript{47} Each of these factors has a sound basis for its rationale. Privacy rights are a core principle of justice. Rape trials are beset with misinformation, bias and mythology,\textsuperscript{48} and reporting rates for rape are notoriously low—estimates suggest that between 75 and 95 per cent of rape crimes are never reported to the police.\textsuperscript{49} However, as neither the Act nor the accompanying Explanatory Memorandum and Policy Memorandum sought to articulate the connection between the public interest in reporting rape and the low conviction rates, there is little incentive and no empirical basis for the Crown or the judiciary to take it into account.

\section*{C. THE ROLE OF DISCRETION IN DISCLOSURE}

As discussed above, there are two separate levels of discretionary decision-making over disclosure, of which the first is by far the most significant and influential. The first level is when the prosecution decides whether information is disclosable, and the second level arises when a judicial ruling is required, either because the defence do not accept the prosecutor’s judgment that there is no relevant or material information, or disputes any redaction, or because the prosecutor seeks a non-disclosure order from the court to prevent otherwise relevant and material information from having to be disclosed.

\addcontentsline{toc}{section}{(1) Level one: prosecutorial discretion and disclosure of complainers’ records}

The Crown policy towards disclosure decision-making can be gleaned both from the \textit{Disclosure Manual} and from the overall policy changes introduced following

\begin{itemize}
\item[45] Bill C-46 s 278.5(2)(c).
\item[46] Bill C-46 s 278.5(2)(d).
\item[47] Bill C-46 s 278.5(2)(f).
a major review of prosecution procedures in sexual assault cases. This review revealed concerns that prosecutors were being out-flanked by defence counsel when the latter raised issues in cross-examination of which advocates-depute had no prior knowledge and thus no information from the complainer with which to challenge negative inferences. It recommended that prosecutors should pursue a more searching and robust approach to a complainer's evidence in order to be fully prepared for trial. Crown precognoscers (interviewers) are therefore now encouraged to “confront evidential difficulties” with complainers early on in order to clarify possible weaknesses and inconsistencies in their witness statements. As a result, although one would generally associate the pressure to recover personal records that have potential to undermine credibility or reliability with defence counsel, it appears the Crown is now just as likely to instigate recovery.

Third party record-holders of personal records include both public bodies such as health authorities, social work and education departments as well as private consultancy services. If the Crown is aware that the complainer has been in contact with health or social work services, or has received psychiatric or psychological treatment, it will want to explore that with her and may be obliged to consider recovery of records to establish what, if any, bearing they have on her credibility and reliability. Obtaining records will also allow the Crown to assess the vulnerability of the complainer and decide whether expert evidence may be helpful to explain her behaviour at the time of the offence. The proposition that if the Crown receives advance notice of potentially “awkward” evidence it is better to spoil a defence challenge presumes that prosecutors will take a robust stand against rape myths and will resist defaulting to shared understandings of what amounts to “relevant” information. The guidance in the Disclosure Manual provides that witness medical information should be redacted unless it is directly material to the cases, for example where there are injuries sustained by a complainer in an assault case, or where it is relevant to explaining the behaviour of a witness.

51 At 20 (recommendation 20).
52 Para 6.9. This would also forewarn complainers of challenges to their evidence, though that does not appear to be a consideration in Crown Office policy: see e.g. their stated concerns over coaching at para 7.12.
53 Section 275C of the Criminal Procedure (Scotland) Act 1995, as amended, allows expert evidence of “any subsequent behaviour or statement of the complainer” to be admitted “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”.
54 Disclosure Manual (n 17) para 15.8.1, emphasis added.
Precisely what constitutes “relevant” is not explored despite being a deeply contested issue in the literature concerning rape trials which suggests “shared understandings” between prosecutorial and defence counsel are very common, leaving little scope for the complainer’s distinct interests to be heard.55

In order for the Crown to predict what adverse inferences juries might draw from a complainer’s behaviour or evidence, and be prepared to respond, the prudent approach, based on guidance in the Crown Office review of prosecution procedures, would be to obtain a pre-trial psychological and / or psychiatric report.56 Such reports may have strategic significance – an essential precautionary step to establish the sufficiency and strength of the prosecution case and to anticipate areas of weakness for cross-examination.

The defence might bring the existence of records to the attention of the Crown if they have prior knowledge of these. Given how many prosecutions for rape involve men known to the complainer, the accused often has such inside knowledge. In one Canadian study, the majority of applications for disclosure were made by the defence team after their client had provided them with details of the complainant’s mental health history.57 Complainers who have a history of childhood sexual abuse or domestic violence often have a very comprehensive set of medical, including mental health, records. Such vulnerable women, pointedly described by Gotell as “extensively documented complainants”58 will have backgrounds that are well-known to accused men if they happen to be their current or ex-partner, pimp, drug-handler, or in some other position of power or exploitation.59

The arrival of a new disclosure regime virtually mandates prosecutors to explore the content of personal records for any material evidential purpose they might serve at trial. This is not good news for complainers as once the genie of information in personal records is out of the bottle they have no control over how it may be used. In order to discharge its duty to ensure a fair trial, there are only two options for the Crown. It must either disclose any information that satisfies the statutory criteria of relevant and material if it considers this will

55 See Brown, Burnman and Jamieson, Sexual History and Sexual Character Evidence (n 5); A Karmen, Crime Victims: An Introduction to Victimology, 2nd edn (1990) 165.
assist the defence to undermine the credibility and reliability of the complainer; or it applies for a non-disclosure order. The Act assumes that the Crown is able to take care of and represent complainers’ interests in the context of its broader duty to act in the public interest, and the consequences of that do not feature in government briefings or other policy papers. The balancing of the multiple interests for which the Crown has responsibility— including the public interest, the complainer, and the accused— invariably gives primacy to the accused’s right to a fair trial. It cannot be otherwise. The difficulty with this position is that there is no opportunity for the complainer’s legitimate privacy interests to be canvassed forcefully and competitively against other interests by an independent legal representative with all the entitlements of partiality that entails. If we are to be faithful to the adversarial tradition the least we can do is to ensure that distinctive, meritorious interests are not handicapped from the outset.

(2) Level two: judicial discretion and disclosure of complainers’ records

The Act accords the judiciary a very broad discretion in the determination of disclosure disputes. As already argued, it seems unlikely that the legislation will generate a high volume of pre-trial hearings citing public interest as a ground for denying disclosure. Judicial discretion is more likely to be exercised in regard to admissibility of records evidence during the trial. Where the defence seek to admit disclosed information as evidence, there is a further opportunity for the Crown to argue it should be excluded in terms of the legislation regulating the admissibility of sexual or other character evidence. Judges are already accustomed to making rulings on admissibility under these provisions, and they are specifically required to take account of the interests of complainers to ensure “the appropriate protection of a complainer’s dignity and privacy.” However, some of the appeal court decisions overturning trial court rulings concerning interpretation of these provisions suggest the reforms to the rape shield legislation, enacted in sections 7-8 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, have disappointed victims’ organisations and

60 See e.g. the Explanatory Notes and Policy Memorandum to the Act, along with the SPICe briefing on its provisions: F McCallum, Criminal Justice and Licensing (Scotland) Bill: Disclosure of Evidence (SPICe Briefing 09/38, 2009), available at www.scottish.parliament.uk/business/research/briefings-09/SB09-38.pdf.
others who campaigned for law reform. As Sir Gerald Gordon observed in his commentary to the first two appeals under the new provisions:

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.

A recent evaluation of these provisions suggested there is little judicial appetite for a restrictive interpretation of the legislation. The English courts have been much more willing to acknowledge the legitimacy of rape shield objectives, as in *R v A* where Lord Hope outlined the problem the legislation was designed to remedy.

It is distressing enough for women to have to give evidence in these cases. They are unwilling to face the prospect of being further humiliated by questions directed to their previous or subsequent sexual history. The low conviction rate acts as a further deterrent. The humiliation for the woman is much increased if no conviction results after she has been subjected to that kind of questioning.

There is a real risk that evidence in personal records becomes another source of humiliation for complainers whose only source of protection currently lies with the Crown and the judiciary.

**D. MENTAL HEALTH RECORDS, DISCRIMINATION AND DISCLOSURE**

The range of medical records which the Crown or the defence might seek to recover in sexual offence prosecutions is very broad. Dealing first with the straightforward categories of record, there are the forensic and clinical reports generated in the aftermath of an assault that have to be shared with the defence. While these would not generally be controversial in terms of their potential to breach privacy boundaries, there are points of tension where sensitive personal data can be inadvertently disclosed in circumstances where it ought to be protected. An example might be where irrelevant historical information recorded
during the forensic medical examination is revealed to the defence through lack of care in withholding it.

Aside from records collated by the authorities for evidence-gathering purposes, complainers might also generate their own confidential records in the aftermath of an assault if they obtain professional counselling, or support from organisations such as Rape Crisis or Victim Support. Such therapeutic records may also be eligible for disclosure, even though they are not created as any kind of “evidential record”. In England and Wales, if victims have received counselling to assist them to come to terms with what has happened, “the counsellor’s notes will be unused material, which may fall to be disclosed”.67 Such disclosure ought to be vigorously resisted, partly because there is a policy of encouraging complainers to obtain counselling as part of their recovery, and partly because a victim’s private expressions of emotions in a therapeutic context have no relevance for the courtroom. However, a defence lawyer could try to argue that they were relevant if they revealed inconsistencies or contradictions with the complainer’s police statement that might then serve to discredit the complainer’s account. We might hope that both the Crown and the Scottish courts would not countenance such arguments but the experience of other common law jurisdictions informs us that this area is fraught with procedural challenges to discretionary decision-making.68

Historical records provide the defence with the opportunity to construct all sorts of narratives with varying degrees of plausibility. Lise Gotell cites the Canadian case of R v R (N) where the defence sought medical records revealing when the complainant lost her virginity.69 These were deemed relevant and material by the trial judge as he agreed with the defence assertion that they had a bearing on the complainant’s credibility “in the sense that she has both a motive and a propensity to fabricate” in relation to the current allegation of rape.70 On this basis, virtually anything which has occurred in one’s past could be said to form the pretext for present day motive.

Information derived from historical psychiatric, psychological, or psychotherapeutic interventions is disproportionately prejudicial to complainers because it permits general public ignorance of mental disorder71 to be conflated with rape

67 Without Consent: A Report on the Joint Review (n 49) para 11.12. “Unused material” is information which the CPS has recovered but determines does not require to be disclosed to the defence.
70 R v R (N) 1997 CarswellOnt 88 at para 19.
myths. Stereotyping of mental illness reinforces the gender inequalities already embedded in rape and sexual offence trials. The effect is doubly discriminatory as “women are disproportionately likely to be clients of medical, therapeutic and counselling services”. This is due to the high rates of sexual assault against them and to re-victimisation. Historical mental health records embrace a spectrum from a one-off diagnosis for a depressive illness, to a long period of psychotic episodes, with many shades of grey interposed. Such records may have no relevance whatsoever for the prosecution in hand but both prosecutors and defence lawyers will wish to be persuaded of that before deciding what requires to be disclosed.

(1) Errors of interpretation

There is a high probability that the cross-examination process will distort or misinterpret information in records. The very mention of a mental illness, even one as common as depression, is potentially mischievous because it can so readily play into widely held misunderstandings and misconceptions of a person’s mental health and their ability to provide credible and reliable evidence. There may be no factual or evidential connection at all between some forms of mental illness and a complainant’s trustworthiness, but if the defence are given the opportunity to make the suggestion of a connection it may be enough to create a misleading doubt in the mind of a juror. The tendency for defence lawyers to exploit the “dramatic resonance” of certain mental illnesses is illustrated in Karen Busby’s review of disclosure applications in Canada where counsel sought to magnify the impact of illness to support their assertion of the relevance of the records. Thus, in one case, the Crown’s disclosure of a general diagnosis of “personality disorder” and “bipolar disorder” was translated in the disclosure application into “histrionic personality disorder” and “antisocial personality disorder”.

A parallel experience that we can document in Scotland is the unsophisticated use of “false memory syndrome”, a term with no official status in the DSM-IV-TR, but which is a popular idiom for a much more complex and deeply
contested set of psychiatric symptoms. In the absence of expert evidence to explain this complex area of medical science jurors may be susceptible to unproven but superficially attractive inferences about a complainer’s psychological and psychiatric instability. Public understanding of mental health issues is known to be out-dated, uninformed and prejudiced. It could certainly be argued that it is not within the common knowledge of individual jurors to be able to assess what effect, if any, a common illness such as depression might have on the credibility or reliability of a witness. Neither, it is suggested, and to illustrate the point, is the average juror equipped to assess the impact of a complainer’s referral for counselling for alcohol addiction or depression six years prior to the reported offence; or to assess the probative value of anti-depressant medication prescribed six months prior to the alleged offence.

(2) Errors of fact
Official audits of medical records have uncovered a significant level of error. There is therefore a considerable risk of historical evidence in medical records being incomplete and de-contextualised leading to misinterpretation in the way it is presented in court and to the trier of fact. Although only information that is relevant and material has to be disclosed and may therefore be admitted to court, such data are generally capable of more than one interpretation. Past events may have a benign explanation but have produced outcomes that appear to undermine the credibility or reliability of a complainer. For example, suppose there is a record of a previous rape allegation that was investigated but not prosecuted. This could be due to a host of reasons none of which has anything to do with the allegation being false, though one can see that a cross-examiner might infer fabrication. Alternatively, perhaps there has been a credible previous rape allegation which was not prosecuted due to lack of evidence, but which the police erroneously recorded as a false allegation. Perhaps the information contained in the medical records has been inaccurately recorded. If the complainer is not consulted, how will these inaccuracies come to light?

84 Audit Commission, PbR Data Assurance Framework (n 82).
Other countries with a common law tradition, beyond the UK, have dealt with privacy rights in ways that reflect their distinctive constitutional status. For example, the Canadian Charter of Rights and Freedoms specifically protects the privacy and equality rights of citizens, which has led to a much richer jurisprudence as their judiciary produce closely argued and detailed reasoning of the choices they make when balancing competing constitutional rights.  

E. TENSIONS WITHIN THE PROSECUTOR’S ROLE

The absence in the Act of any direct recognition of complainers’ privacy interests sends a particular message about the regard in which these interests are held. Given that they have no legal standing in Scotland to take action on their own behalf during a criminal trial, complainers’ interests are reduced to one of a series of interests comprising the “public interest”, compelling them to rely upon prosecutorial discretion to redact information, identify sensitive information that can be withheld, or seek an exclusion order. References to article 8 privacy rights in the Disclosure Manual are almost always accompanied by the illustration of where there is “a threat to the life or limb of a witness or other persons”. This example is at the extreme end of the scale and suggests a rather narrow focus on physical bodily integrity, thereby pre-empting consideration of the damaging implications of disclosure on a complainer’s psychological integrity. As Londono has argued, Strasbourg jurisprudence concerning articles 3 and 8 encompasses so much more than life and limb.

The consent of the complainer is not required for disclosure of records. Although her consent will be required at various stages of the investigation, such as the forensic medical examination and the taking of samples, these are guided by ethical medical practice and once material and relevant information is gathered as evidence in a criminal investigation it is presumed disclosable unless positive steps are taken to exclude it. There is no requirement for Crown precognoscers to advise witnesses that information contained in the whole or part of their precognition may be disclosed. It is only if a witness enquires about disclosure that precognoscers are instructed to advise the witness of the Crown

86 As noted earlier, complainers have standing to pursue a breach of their human rights. However, a breach might only come to light post-trial.
87 Disclosure Manual (n 17) para 2.1.13.
88 See Londono (n 43).
duty to disclose to the accused, or the accused’s legal representative, all material information for or against the accused.⁸⁹

In some circumstances the Crown might seek the complainer’s consent at the precognition stage before obtaining medical records and explain the reasons for doing so, but it is not obliged to do so, and there is no guarantee she will be consulted or her permission requested over access to records.⁹⁰ The Crown’s duty to supervise the conduct of the investigation and prosecution in the public interest overrides any objection from an individual complainer to aspects of that process. Complainers who are faced with a direct request for permission may feel they have little choice in the matter, as to refuse consent would likely result in no proceedings. Victim support organisations are already dealing with enquiries from complainers that capture precisely these issues.⁹¹ Some complainers may opt to withdraw their co-operation from a prosecution which may endanger its viability and lead to it being abandoned. There is a separate concern that victims who have a very real need for treatment will delay therapeutic help in order to preserve the confidentiality of their patient records.

Complainers whose consent to the recovery of their records is sought, or who agree to undergo a psychiatric or psychological examination pre-trial, need to have a sufficient appreciation of the implications of the request if they are to be able to give fully informed consent. In particular, their privacy interests deserve to be respected to the extent that they have access to independent legal advice as to the possible consequences of consent so that they understand the full extent of wider circulation of their records. They cannot control what the Crown releases to the defence, nor what it redacts. They cannot require the Crown to oppose a defence application for disclosure, nor can they influence the nature or strength of any opposition to disclosure. They are entirely dependent upon the Crown to identify, categorise, and defend their privacy interests. They cannot even review the information disclosed (for errors) and they will not know exactly what is being disclosed. Thus, as discussed above, if disclosed records are taken at face value, there is a great deal that has to be taken on trust and in situations where the meaning of the records is capable of multiple representations, some of which may reflect unfairly on credibility or reliability.

To expect complainers to co-operate in an exercise where their privacy interests are at risk of being heavily compromised, and where they have no access to independent legal advice, is a very serious step. This degree of disclosure is a

⁸⁹ Disclosure Manual (n 17) para 4.5.4.2.
⁹⁰ Ibid.
⁹¹ Information held on file with author.
greater intrusion on privacy than anything currently experienced by complainers. Certain records capture and reflect a personal history that goes to the heart of their identity and their most intimate experiences. They were not recorded for future public consumption let alone a rape prosecution. In a dissenting opinion in *R v O’Connor* L’Heureux-Dubé J highlighted the “psychological traumas potentially faced by sexual assault complainants”, observing:92

These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

The Coulsfield Review put victims on notice about the impact of the recommended new disclosure regime: “It is therefore fair to say that victims and witnesses have much to lose from an enhanced system of disclosure of information to the accused and his representatives”.93 Victims will want to weigh up very carefully the consequences of reporting a rape. Their supporters and advisers will need to consider what safeguards exist to resist this intensified pressure arising from access to their personal records. Complainers may wish disclosure to be opposed vigorously in order to protect their privacy interests. However they may be disappointed to discover the extent of their rights which may affect their confidence in those charged with the responsibility for protecting them.

The Scottish legislation should minimise defence “fishing expeditions” by placing extensive statutory duties to disclose squarely on the Crown. However, the hidden dynamic in the process of determining what has to be disclosed is the extent to which cultural assimilation of legal norms and values is shared by legal teams in the adversarial trial. The potential for shared legal understandings between prosecution and defence lawyers, especially in a small jurisdiction like Scotland with its common training and career structure, means the range for interpretive dissent of key concepts such as “relevance” in the context of information that must be disclosed is in practice quite limited.94 This is one reason why sexual history evidence is often admitted in court without objection, even where it is in breach of the legislation and even where there have been prior restrictions placed upon admissibility by the judge.95

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93 *Review of the Law and Practice of Disclosure* (n 15) para 6.3.
The Coulsfield Review affirmed that “the accused’s right to a fair trial must ultimately take precedence over any other person’s right to privacy”.96 The fact that article 6 rights ultimately prevail make it all the more important that the complainer’s rights in articles 3 and 8 in particular have due attention and consideration. It is difficult to see how that can be achieved under a regime where complainers’ privacy interests are conflated with the public interest whenever the Crown seeks or opposes disclosure. The unavoidable conclusion is that disclosure of personal records is one area where the Crown cannot fully discharge its duty to protect the complainer’s interests.

F. INDEPENDENT LEGAL REPRESENTATION

Some adversarial jurisdictions have conceded that it is not possible for a public prosecutor to safeguard the separate and deeply conflicting perspectives that arise in disclosure regimes. Under Canadian law rape complainants can invoke their privacy and equality rights to instruct their own counsel to look after their interests in applications for disclosure of medical and therapeutic records and other confidential papers such as diaries.97 If complainants have their own lawyer they have the opportunity to mount a much more robust and individualised opposition to record production than is otherwise possible if left to the prosecution. That is not to say the availability of separate counsel prevents disclosure – approximately half of all Canadian applications are granted – though it has been estimated a significant number of complainants do not object to disclosure as they are persuaded by Crown counsel of the merits of consent.98 Whatever the explanations behind these statistics, at least Canadian complainants have the opportunity of independent advice and representation. Scottish citizens do not have the benefit of constitutionally embedded rights of either privacy or equality.

Closer to home, the Republic of Ireland gives complainants a statutory right to independent legal advice, funded by the state, to oppose applications to admit sexual character evidence.99 While Irish representation does not extend to disclosure applications as such, there is an obvious close connection between these two areas of evidence and procedure. The larger point is that it is clearly

96 Review of the Law and Practice of Disclosure (n 15) para 4.4.
98 See Busby (n 10).
99 Sex Offences Act 2001 s 34.
possible for adversarial proceedings to accommodate third party standing. Arguably, therefore, if the Convention rights of complainers are to be fully recognised they need an alternative mechanism to protect their interests. The debates about independent representation have barely surfaced in Scotland, but concerns that it is inherently incompatible with the rights of the accused to a fair trial are misplaced based on the experience in other adversarial jurisdictions. There are many ways of discharging disclosure obligations to an accused person in legal systems with either an accusatorial or an inquisitorial tradition. For example, in Norway, which has features of both traditions, the defendant and the victim have access to all material in the files at the investigation stage.

G. CONCLUSION

Fear of not being believed, or of attacks on their credibility during cross-examination, is already a renowned disincentive to those considering whether to report a sexual assault. We also know the extent to which rape myths dominate rape trials. The enhanced disclosure regime set out in the Criminal Justice and Licensing (Scotland) Act 2010 with its extended range of information liable to be disclosed will almost certainly act as a further deterrent to reporting sexual assault. Without adequate reassurance of how privacy interests will be safeguarded, victims have another reason not to report assaults, which is neither in the public interest nor in the interests of justice. In its current form the Act does not give complainers any express statutory rights for advocacy of their interests, and there is no guidance or reassurance given as to the degree of consideration or protection they will be afforded.

Complainers have no influence over prosecutorial or judicial decision-making beyond that which the Crown considers appropriate to extend to them. It is not possible to be confident that the Crown has the capacity to give the interests of complainers the priority they deserve given the powerful competing interests pressed by other factions. This is not a criticism of the Crown, but rather a

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100 I Bacik, C Mannsell and S Gogan, The Legal Process and Victims of Rape (1998); C Hanly with D Healy and S Scriver, Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape (2000).
102 T Hatter, Survey of Sexual Assault Survivors: Report to Participants (1999); Regan & Kelly, Rape: Still a Forgotten Issue (n 73).
103 Finch and Munro (n 48); Ellison and Munro (n 48).
recognition of the genuine predicament in which it is placed. Where disclosure
gives rise to a conflict of interest between individual privacy rights and other
dimensions of the public interest for which the Crown assumes all responsibility,
the current system provides no satisfactory means of reconciliation. One option
that would recognise the very vulnerable position in which complainers are placed
in these circumstances is to acknowledge that their privacy rights are discreet and
distinct from the public interest and justify the appointment of an independent
legal adviser. While Scotland has never seriously contemplated this option, that
is not a good reason to shrink from such a debate. Independent advisers would
satisfy the legitimate demand for a visible and measurable protection of privacy
interests. It would also position Scots law at the forefront of progressive reform.