

## **Re-thinking Responses to Rape**

This programme was funded by the Scottish Universities Insight Institute, and ran from April to August 2012. The programme team members were:

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### **Note:**

The Scottish Universities Insight Institute (SUII) hosts programmes of enquiry which address and inform substantial issues that face Scotland and the wider world. SUII is a development from the Institute for Advanced Studies funded by the University of Strathclyde as a pilot from January 2009. During the period of this project in 2012, it was a formal partnership of five Scottish universities: Dundee, Edinburgh, St Andrews, Stirling and Strathclyde. The Institute is housed in purpose designed premises at the University of Strathclyde in Glasgow. Its objective is to encourage and facilitate interaction between members of wider communities - in the public sector, business and the third sector – to come together and bring fresh insights into issues that have an impact upon life within Scotland and to better inform policy and decision makers.

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## **1. Programme purpose and approach**

The purpose of the programme was to reflect on the complex and seemingly intractable problems concerning the legal and social responses to rape, to galvanise thinking and to generate fresh approaches in the way society responds to rape.

### **a. Background and current context**

A rape case may falter at many stages in the process towards justice for the victim (referred to in Scottish law as ‘the complainer’). A complainer may not report the attack to the police. Of those which are reported, some will not be prosecuted. Of those cases which do proceed to trial, some will result in acquittal for the accused, or conviction for a lesser offence. The process of determining attrition rates is complex and controversial, and varies from jurisdiction to jurisdiction. Nevertheless, the high attrition rate of rape cases in Scotland is of widespread concern. Recently, the definition of rape has been widened in Scots law, and its prosecution improved, but these changes will take some years to be felt and need supported. This programme collected initial soundings on the impacts of reform, recognising that experiences of rape survivors and public attitudes of blameworthiness towards them have in the past been stubbornly resistant to changes in law, policy and practice. The incremental steps that typify traditional legal reform represent progress, but are incapable on their own of producing the cultural shifts necessary to transform the social and legal practices that shape reactions to rape.

Participants included practising solicitors and advocates, academics from law, criminology sociology and psychology, government policy-makers, members of the police, prosecutors, judiciary, and survivor and health services professionals. They represented a variety of jurisdictions including Austria, Australia, Canada, England, Ireland, Scotland, South Africa, and the USA.

## **b. Programme aims and objectives**

The main aims were to:

1. Capitalise on the breadth, complexity and conflicting perspectives and experiences of participants as a positive dynamic to unsettle fixed thinking
2. Identify and critically assess the range of perspectives on what constitutes 'positive outcomes' in respect of responses to rape, e.g. increased prosecution/convictions; shifts in cultural attitudes as evidenced by public surveys; increased victim satisfaction
3. Clarify the legal, social, cultural and other barriers that exert most resistance to change in this area in Scotland
4. Collect and share information about innovative change and practice in other jurisdictions which have met similar barriers
5. Identify new ways of responding to rape and how best these can be implemented
6. Make recommendations for change and reform.

## **c. Format and structure**

The programme consisted of three workshops, each lasting for two days, which systematically addressed the major issues. The format of each day was a series of presentations, each followed by an open forum discussion which addressed one or more research questions and built progressively on the work and discussion arising out of previous sessions. Across the six days, nine formal presentations were delivered, complemented by a series of shorter presentations on specific initiatives including sexual assault rape centres and police initiatives on rape prevention with young men. Presentations were followed by a plenary discussion which maximised engagement and collective understanding. This encouraged follow-up discussions amongst participants during the regular breaks between sessions.

## **2. Thematic focus of workshops**

The programme design was intended to make use of reflections from three decades of reform to identify what had worked and what had not worked in terms of producing effective

reform in responding to rape. The focus was largely on the activities of the statutory bodies and the third sector within the criminal justice system. It had been anticipated that health professionals would play a greater role in the workshops than transpired. Ironically, but perhaps unsurprisingly, the attendance of some key health players proved impossible due to lack of resources to provide cover for their absence from their work. This difficulty encouraged a shift in focus of the third and final workshop to explore the potential of independent legal representation for rape complainers, a topic which emerged in the discussions in earlier workshops and which it was agreed would benefit from more extended debate. In order not to lose sight of the health dimension, as it was considered to have an important contribution to make to the programme outcomes, a number of key practitioners unable to attend are willing to provide input to future thinking, including a medical examiner and a psychologist with familiar with the needs of vulnerable witnesses and who regularly appears as an expert witness.

#### **a. Key themes addressed**

- Following thirty years of reform what has Scotland achieved in relation to responding to rape, and what further measures could we envisage?
- How do we engage and sustain interest on justice issues concerning rape across Scottish society?
- Can we ensure that the social and health costs of rape are appropriately acknowledged?
- Can existing international research and comparative practices and models suggest new directions for Scotland, e.g. by questioning whether the adversarial process is most suitable for ensuring justice in rape prosecutions; considering the role of restorative justice; the role of specialist forms of adjudication; victim advocacy and representation; the role of human rights?
- What further measures are required to tackle the underlying pervasive social and cultural attitudes to rape found in Scotland, e.g. the role of education, health, social services and the media?

## **b. Workshop 1: Lessons from the past three decades**

The first Workshop was a stock-taking exercise to reflect on the reforms in law and policy that had occurred and the impact they had made. Reviewing the major legal landmarks, it was agreed that greater publicity was needed to explain the potential impact of new legislation. For instance, the Sexual Offences (Scotland) Act 2009 had radically reformed key aspects of the definition of rape, but the impact of these reforms is yet to be felt, and requires the public to be made aware of these changes.

In December 2012 the Scottish Government announced its intention to abolish the current requirement for corroborated evidence in criminal cases, at least in relation to the prosecution of sexual offences. This follows the recommendations from Lord Carloway's Review. However, in light of a government consultation on that Review and the solid opposition to abolition from many bodies, including the judiciary, Faculty of Advocates and Law Society, the government has launched a further consultation on the need for additional safeguards following the proposed removal of corroboration.

We can anticipate legislation on this matter during 2013, which will have a significant impact on the way that sexual offences are investigated and prosecuted in the future.

English experience offered from our English participants, where there is no corroboration rule, provided useful comparisons in the procedural rules for the conduct of trials. For example, in England adverse inferences can be drawn from an accused's silence, either at the police interview or at the trial. This means they mostly testify. In Scotland the culture of the defence Bar is that the accused is not encouraged to testify in case he inadvertently assists the prosecution case. In Scotland no adverse inferences are drawn from silence. Research in England using 'mock' jurors reveals that e.g. jurors have strong expectations that victims would promptly report to the police and would show visible distress during the trial. However, when educational guidance was given to mock jurors about the significance of distress and of the normality of delay in reporting, this had a positive impact; jurors became aware that genuine victims could delay reporting and could be calm in court. There was, however, also a high expectation among mock jurors that rape complainers would

have serious injuries (including internal trauma). Even if expert evidence was provided that a woman could be raped without such trauma, jurors still expected to find injuries. They also expected that the accused would be injured. These themes resonated throughout the workshops, being highlighted as a feature of police investigations in other jurisdictions, including South Africa and even colouring restorative justice interventions in that country. The provision of educational guidance that victims commonly offer little resistance had minimum impact on juror expectations in rape cases in which the accused and complainant were known to each other prior to the incident ('non-stranger' cases). Indeed, there was a perception among jurors that in many non-stranger cases, there had merely been a failure of communication – men 'misread the signals' being given by the complainants, believing that they were consenting to intercourse when this was not the case. In such situations, it seems that jurors are willing to give the men the benefit of the doubt. Research with mock jurors also revealed some troubling attitudes among the public; some mock jurors believed that it was acceptable for one person to coerce another into having sexual intercourse. Other research studies confirm that rape myths equally influence police responses to male rape survivors.

### **c. Workshop 2: New Directions and Practices**

This workshop was devoted to innovative forms of justice. Kathleen Daly's work on restorative justice programmes in the USA, Belgium, Australia and New Zealand provided a broad international perspective which was complemented by contributions based on a small scale, but in depth, empirical research study in England, and a separate discussion of the concept of parallel justice. Given the poor record of delivering justice by conventional means, there was considerable interest in exploring the potential for innovative justice responses to shape a fresh approach to the concept of what constitutes 'justice' for rape survivors. Some participants felt that the conditions could never be right for any response to rape other than prosecution. Others felt that alternative forms of justice would only be suitable in certain conditions e.g. confined to post-conviction cases where the offender admits guilt and/or historical cases of sexual abuse within the family. Most participants from victim support organisations thought it unlikely that victims would ever want to meet or

confront the convicted perpetrator. One of the preliminary issues emphasised to participants by those familiar with the research in this area was the need to take care with the language around alternative forms of justice such as 'restorative' justice. Commonly held assumptions and possible misunderstandings about these labels could block debate and prevent informed, constructive exchanges of ideas. The merits of parallel justice were also illustrated to argue that a conventional justice response can work alongside an innovative mechanism. This can offer survivors options of a response other than a trial, e.g. diversion from prosecution, on condition that the offender co-operate with agreed restorative justice mechanisms, whilst retaining the option of a trial if the offender fails to co-operate. There are many forms of innovative justice but to be safe and effective, innovative justice measures require careful management, and carry as many, if different, risks and disappointments for survivors. Nevertheless, even if they only appeal to a few survivors, one argument is that they increase the options available, and increasing the range of treatment responses in the immediate aftermath of a rape could be particularly important for some survivors.

One Scottish example of extending choice and pursuing best practice is the Archway, the sexual assault referral centre based in Glasgow. Its purpose is to offer rape survivors time to assess their options and to participate in an evidence gathering process that avoids the more unpleasant features of police stations and of some police medical examinations. We were also advised that the local context and its politics influence greatly what people are ready to listen to, absorb, and consider. References to restorative justice, its merits and demerits, unless placed in a wider context of response options, risks polarising the debate rather than opening it up unless its complexities are fully explained. Daly's message was that 'We need to move beyond simple dichotomies and "justice systems" in the aggregate and think about concrete practices and options' if the debate is to move forward. This would require being open to diverse views of what might constitute justice for rape survivors, as it may not be the outcomes typically available in the criminal justice system. For example, if the 'best' outcome is a conviction and a heavy prison sentence, how often is that actually the outcome following a rape prosecution?



#### **d. Workshop 3: Alternative Perspectives**

The purpose of the final workshop was to resolve inconclusive discussions from previous sessions and assemble a vision for the next stages of the programme. As explained earlier, it was agreed that the focus of this workshop would shift from one that was solely on health and other often neglected dimensions, to include discussions about how the criminal justice practices in other countries had been modified to give complainants specific protections for their privacy rights in regard to disclosure of their personal records and attacks on their character during cross-examination. We had international contributions from Austria, Canada, Ireland and South Africa. Austria represented the approach adopted in most European countries where legal systems do not adopt a bi-partite adversarial process between prosecution and defence, but which instead take a judge-led inquisitorial approach to the investigation and the trial. Unlike Scotland, or other common law countries, most of Europe's legal systems do not insist upon live oral testimony in court, but rely instead on witness statements gathered for the purpose of the trial. Cross-examination has a very different character, being largely judge led. This places much less pressure on individual complainants (as they are known in all other jurisdictions) who are also entitled to independent legal representation (ILR) if they wish. Canada, Ireland and South Africa, are common law countries with similar adversarial legal systems to Scotland. Both Canada and Ireland have introduced ILR for rape complainants in specific circumstances. Canada permits it when the complainant wishes to oppose the disclosure of sensitive medical or other personal records to the defence. Ireland permits it when the complainant wishes to oppose an application from the defence to introduce sexual history evidence. There appeared to be no reason in principle why Scotland could not provide ILR on similar bases. To explore this further, a small working group has been established by Rape Crisis Scotland into the procedural mechanisms that would be required for this to happen in Scotland. That enquiry will learn from the continuing debates in Ireland about the risk of ILR distorting the equality of arms principle to the detriment of accused persons. Although South Africa has not

introduced ILR, it has been considered by their Law Commission, and remains on the reform agenda of some organisations.

Reforms to the legal process do not of course necessarily result in better experiences for complainers, so the workshop also concentrated on other forms of support, such as those developed in Canada with victim advocacy services based in sexual assault treatment centres. In addition to their role in forensic evidence-gathering post-assault, these centres offer a comprehensive advocacy service to individual survivors from the reporting stage to the trial, as well as a fulfilling a wider public education role.

### 3. Programme outputs

#### a. Background material and documentation for the workshops

The following previously published materials were provided in support of the workshop discussions:

- Kathleen Daly & Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries', University of Chicago (2012).

Kathleen Daly, 'Conventional and Innovative Responses to Sexual Violence' & Appendix: (Kathleen Daly & Birgitte Bouhours) 'Inventory of Responses to Sexual Violence', Australian Centre for the Study of Sexual Assault (2011).

- Clare McGlynn, Nicole Westmarland & Nikki Godden, "'I Just Wanted Him to Hear Me.'" Sexual Violence and the Possibilities of Restorative Justice.' 39(2) Journal of Law & Society 213 (2012).
- Clare McGlynn, 'Feminism, Rape and the Search for Justice' Oxford Journal of Legal Studies 1 (2011).
- Without Fear or Favour conference paper: *The Experience in Ireland A Voice for Rape Victims in the Criminal Justice System? (2010)*.
- In addition, **the following workshop papers were produced for the programme:**
- Nicole Westmarland, Briefing Note, Parallel Justice
- Powerpoint presentations from Lydia Fiorini, Kate Mulkerrins, and Phil Rumney

- Verana Murschetz, Briefing Paper, The Role of Victims of Sexual Offences in Austrian Criminal Procedure

### **c. Anticipated peer reviewed publications**

Proposals under discussion include an edited volume of comparative essays aimed largely at an academic audience; an edited book aimed at a largely multi-disciplinary practitioner market; peer reviewed journal articles on a range of issues arising from the programme.

### **d. Other relevant activities anticipated**

A request will be made Donald Garvie of the Futures Forum to consider the opportunity for a briefing with the Justice Committee on the programme recommendations.

Our thinking has already informed responses to the Scottish Government Carloway Review Consultation Paper (2012) and the Scottish Government Making Justice Work Consultation paper (2012). It will also inform responses to the Scottish Government consultation paper entitled, *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration* (2012) as it specifically raise issues debated during the programme.

New working relationships have been established between academic researchers, legal practitioners and Rape Crisis Scotland with the working group on a pilot for ILR. The timing is remarkably apposite give the forthcoming Victims and Witnesses (Scotland) Bill in 2013.

### **e. Added value of the programme and its potential impact**

The work emerging from this programme would not have happened but for the opportunities offered through the SU11 research funding. The immediate principal benefit was in bringing together academic lawyers, legal practitioners, the police, policy-makers and NGO professionals from many different backgrounds and several jurisdictions which have enabled new collaborations to form.

Its longer term impact will develop against a backdrop where the Scottish Government is poised to introduce a Victims and Witnesses (Scotland) Bill to implement the 2011 EU Directive establishing minimum standards on the rights, support and protection of victims of crime. At the start of 2013 the prosecution of rape and other sexual offences is therefore high on the Scottish political agenda and the outputs of the programme have every opportunity to contribute to these debates.

## **f. Conclusions and recommendations**

### *Conclusions*

The Programme succeeded in bringing together a broad spectrum of academic disciplines, practitioners and sectors to reflect on the limited success of decades of reform of legal and policy responses to rape, and to search for fresh ideas and initiatives. It was able to draw upon expertise from numerous jurisdictions, and was presented with a wide range of proposals for new directions, some controversial, but all valuable contributions to suitable options for Scotland. The project team confidently concluded that the programme had achieved its principal aim –to unsettle fixed thinking and to galvanise new energy.

Specifically, we concluded that there was merit in pursuing further research into the scope in Scotland for innovative justice mechanisms; and for piloting ILR at defined stages of the trial, each a potentially transformative new direction. Although these two examples could appear to be at opposite ends of the spectrum, they share a vital common feature in their ability to be simultaneously inside the conventional justice system whilst also occupying a parallel path towards justice. More importantly, they share a common goal in seeking to deliver a level of justice to rape survivors which conventional justice often denies them.

The Scottish Government's proposal to abolish the corroboration rule raises the prospect of major changes in the way that rape and other sexual offence are investigated and prosecuted. While some believe this will lead to more prosecutions, it is far from certain what impact, if any, it will have on the attrition rates, conviction rates or on victims' experiences. Based upon the debates in this programme, we concluded that research into the functioning of Scottish juries would be an essential component of any reform to the rules of evidence. The apparent caution of juries to convict in rape cases may be reinforced if corroboration is abolished. The 2012 consultation paper mentioned above – *Additional Safeguards Following the Removal of the Requirement for Corroboration* – acknowledges that abolishing corroboration necessitates jury reform and makes proposals as to what these might be. It is impossible to predict how juries will react to the prospect of convicting

an accused person of rape when there may only be one piece of evidence. But some fear that it will make convictions less likely, or that convictions will generate more appeals and claims of miscarriages of justice. These arguments and similar concerns have informed the latest government consultation and will doubtless be publicly aired during the passage of the legislation. As already note, the findings of this programme will be used to inform contributions to the public debate.

### *Recommendations*

1. The Scottish Parliament enact legislation to require Scottish judges to direct juries that they should not treat delay in reporting a rape as equivalent to a false allegation.
2. The Scottish Government fund research to scope the nature and extent of innovative justice activities currently available in Scotland; and evaluate their suitability, if at all, for survivors of rape.
3. The Scottish Government fund a pilot study to test the feasibility of introducing Independent Legal Representation to Scottish pre-trial hearings.

## Appendix 1: Contributions delivered at each workshop

Workshop 1	
Michele Burman	Reflections on Thirty Years
Kathleen Daly	Innovative and Restorative Justice
Clare McGlynn	Is restorative justice possible in cases of sexual violence?
Dr Nicole Westmorland	Parallel Justice
Workshop 2	
Phil Rumney	
Claire McGuckien	
Workshop 3	
Lydia Fiorini	Responding to Victims – services and legal response
Dee Smythe	
Kate Mulkerrins	
Verena Murschetz	The Role of Victims of Sexual Offences in Austrian Criminal Procedure

## Appendix 2: List of participants

<b>Name</b>	<b>Affiliation/organisation</b>	<b>Geographic origin</b>
Kathleen Daly	School of Criminology and Criminal Justice, Griffith University	Australia
Kate Mulkerrins	Director of Public Prosecutions Office, Dublin	Ireland
Dee Smythe	University of Cape Town	South Africa
Tom Welsh	Sheriff, Director of Judicial Studies Committee	Scotland
Lydia Fiorini	University of Windsor, Ontario	Canada
John Hamilton	Faculty of Advocates	Scotland
Tony Kelly	Solicitor, Glasgow	Scotland
Clare McGuckien	Strathclyde Police	Scotland
Katrina Parkes	Crown Office	Scotland
Verena Murschetz	Leopold-Franzens University, Innsbuck	Austria
Clare McGlynn	Durham Law School	England
Lily Grenan	Scottish Women's Aid	Scotland
Susan Mcinally	Domestic and Sexual Assault Team, West Lothian	Scotland
Marsha Scott	West Lothian Council	Scotland
Nicole Westmarland	Durham Law School	England
Michele Burman	Glasgow University	Scotland
Miranda Pio	West Lothian Council	Scotland
Louise Ellison	Leeds University	England
Liz Kelly	London Metropolitan University	England

Lorraine Almond	Crown Office and Procurator Fiscal Service	Scotland
Helen Nisbet	Crown Office and Procurator Fiscal Service	Scotland
Sandy Brindley	Rape Crisis Scotland	Scotland
Pamela Ferguson	University of Dundee	Scotland
Fiona Raitt	University of Dundee	Scotland
Pete Duff	University of Aberdeen	Scotland
Jane Scoular	University of Strathclyde	Scotland
Kathryn Sharpe	Dundee Violence Against Women Partnership, Dundee City Council	Scotland
Phil Rumney	University of the West of England	England
Miranda Horvath	Department of Psychology, Middlesex University	England
Ilona Cairns	School of Law, University of Aberdeen	Scotland
Gunilla Ekberg	University of Glasgow	Scotland
Georgia Scott-Brien	University of Glasgow Caledonia	Scotland
Deborah Fry	NSPCC Child Protection Research Centre	Scotland
Kath Gallagher	National Health Service, Glasgow	Scotland
Deb Wardle	Archway, Sexual Assault Centre, Glasgow	Scotland
Trisha Clark	Lothian & Borders Police	Scotland
James Chalmers	University of Glasgow	Scotland
Liam Ewing	Solicitor, Glasgow	Scotland
Don McGillivray	Scottish Government	Scotland
David Parratt	Faculty of Advocates	Scotland
Niamh Nic Daeid	University of Strathclyde	Scotland



Lesley Orr	Edinburgh Women's Rape and Sexual Abuse Centre	Scotland
Peter McPike	ACPOS/Strathclyde Police	Scotland
Rikke Iversholt	IRISS, Glasgow University	Scotland
Eileen Maitland	Rape Crisis Scotland	Scotland
Ruth Henry	NHS	Scotland
Tania Reneaum	Pompeu Fabra University, Barcelona	Spain
Claire McDairmid	Glasgow University	Scotland
Louise Raphael	Strathclyde Police	Scotland