

**RAPE CRISIS SCOTLAND**  
**SPEECH BY THE LORD ADVOCATE**  
**TUESDAY 4 MARCH 2008**

Good morning ladies and gentlemen and thank you to Rape Crisis Scotland for asking me to speak since we last convened to look at legal responses to rape. I said then that the legal system's response to rape was at a critical threshold for consideration of change.

In 2005 we in the Prosecution Service embarked on a root and branch review of the investigation and prosecution of sexual offences and I reported on the results of that review in June 2006. Through that work and with the help of those who have been our advisers, including Sandy Brindley from Rape Crisis Scotland, we are making profound changes to the way we investigate and prosecute sexual crimes. But the more we learn about sexual crime, its victims and its perpetrators, the more we begin to understand the scale of the task at hand.

Impatient for change, I have to remind myself that we have made more progress in the last three years than we had made in the preceding 200 years. The report of the review made 50 recommendations looking comprehensively at each aspect of the prosecutions' work from the raw product we receive from the police, through precognition and to advocacy in court. The review considered the support provided to the complainers, the speed at which these cases are dealt with and the law under which such prosecutions operate.

When I spoke in 2005 I looked at the pace of change since Baron Hume stated the definition of rape in 1797 – a definition which was based on the principle that on marriage a woman was deemed to have given her irrevocable consent to sexual intercourse, effectively becoming a part of her husband's property. Astonishingly, that rule was not abolished until 1989 when Scots law first recognised that a man could rape his wife. And it was not until 2001, when my predecessor challenged the previously accepted definition of rape, that Scots law recognised that rape occurred where sexual intercourse took place without a woman's consent – regardless of whether force was used to overcome her will. When we look at the history of the Scottish legal system's responses to rape it is clear that the absolute right to say no and, to do no more than say no, is indeed a modern concept. When the appeal court clarified the definition of rape in 2001 the Lord Justice General, Lord Cullen, not only provided us with a clarity of understanding of the law but provided a clear vision of what the legal response to rape should seek to protect:

He asked "what does the modern law of rape seek to protect in the modern world?" "It may be said with considerable force that it should seek to protect a woman against the invasion of her privacy by sexual intercourse, that is to say where that takes place without her consent. What happens with her consent on one occasion should not determine what is acceptable on another. In the present day, in which there is considerable sexual freedom, both in and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases?"

I am in no doubt that the decision in the Watt case and the Lord Justice General's vision of what the law of rape should seek to protect has signalled the need for a new era of enlightenment in the Scottish Legal System's response to rape. But a vision alone cannot bring about change – the question for all of those involved in

any way in the system police, prosecutors, judges, juries, defence lawyers, the media and the community at large – is whether we provide a response which meets that vision, and is capable of supporting that principle

We cannot hope to provide a modern response to rape when the law which defines the crime doesn't recognise as rape a multitude of sexually invasive and degrading acts which are perpetrated against women without their consent. It defies reason that acts of anal and oral penetration which are perpetrated without a woman's consent should be regarded as anything less than rape – yet in Scotland today we are still labouring under one of the most restricted definitions of rape in the western world. A definition which renders any comparisons of conviction rates between this jurisdiction and elsewhere meaningless.

One of the most fundamental developments since we last met in this forum has been the Scottish Law Commission's report on its review of the law of rape and sexual offending – a report which signals the first wholesale consideration of reform of rape law that there has been in the history of Scots law. On Thursday of this week I will be opening the Scottish Parliament's first debate on the proposals for law reform which the Commission has brought forward. And I'm sure that many of you here will be contributing to the consultation on the report – if you haven't I would urge you to do so because we have now an unprecedented opportunity to define rape and other sexual offences in a way which seeks to meet the vision of absolute sexual autonomy free from judgement.

The law commission has provided an opportunity for change and it is one which brings into prospect, laws in Scotland which – if enacted - will recognise the wider forms of sexual abuse which other jurisdictions have recognised as rape for decades. Widening the definition to include anal and oral penetration by the penis and recognising, for the first time, male rape on an equal footing will bring Scotland into line with England and Wales and many other jurisdictions in the World.

Similarly, removing from an accused the right to be acquitted because he believed that the complainer was consenting but where that belief was held on no reasonable basis – would represent an important change which - if enacted should mean that women and men are entitled to be protected from those who act entirely without reason but plead ignorance of what every right minded person would recognise as a refusal to consent to sexual intercourse.

Equally important are the Commission's proposals to redefine the way in which the question of consent is approached in law. The prospect of a definition of consent which does not operate on the notion that it is the complainer's responsibility to give or withhold consent, and to communicate her position to the accused, has the potential to shift the focus of scrutiny from the complainer alone – obliging the court to recognise the duty of both parties to be clear about to what – if any - sexual activity there has been consent.

The report which the Commission has provided is, therefore, one which I welcome – it contains proposals for fundamental reform which can only be regarded as positive reforms, which are long overdue and which the prosecution service would welcome. But as the prosecutor it should and never can be for me to set the goalposts – that would be fundamentally unfair – it is for the Scottish Parliament having carefully and objectively considered the issues to set the rules within which we as practitioners must work.

And as the Scottish Parliament moves to scrutinise the proposals it is critical that, the experience and expertise of those on all sides who deal first hand with sexual

crime and its effects – inform the decisions which are taken. If we are to effect real and profound change in the law then we must ensure that what we do now is right. If we move to redefine, in its entirety, the law of sexual offences, and to abolish the centuries of common law rules on which we rely today – we must be certain beyond reasonable doubt that we are making change for the better and not changing for change sake. Our approach must be considered, rational and modern.

I hope that this Report will signal important and appropriate reforms of the substantive law – but the substantive law is only one part of the equation. The quality of the investigations, the way we support complainers, the speed of the system, the expertise of the lawyers on both sides, the knowledge of the judges, the jury and the media all contribute to the nature of the environment in which such crimes are prosecuted. The law of evidence is also critical. In Scotland the principal feature of our legal system which sets us apart from every other jurisdiction in the western world is the requirement for corroboration. When applied to crimes which by their nature happen almost exclusively in private and where the perpetrator and victims are the only eyewitnesses the rule requiring corroboration sets a significant and often insurmountable hurdle which the prosecutor must overcome before contemplating a prosecution.

When I spoke in 2005 I was convinced that corroboration was a significant factor affecting the attrition rate in rape in Scotland and the findings of the Review which I instructed have only served to re-inforce that view. We should be in no doubt that the word of a woman, however compelling, is on its own no basis on which to prosecute in Scotland. Through the work of the Review we have been able to identify for the first time the key points of attrition in the prosecution process in Scotland, disclosing that a major point of attrition occurs when the cases are first considered by the Procurator Fiscal - with almost a third of all reports received by the police being marked for no proceedings at the outset.

The most common reason for not proceeding at that stage is that there is insufficient evidence in law to prosecute. Where – rightly or wrongly but commonly – the success of the justice system is measured according to the proportion of rapes reported to the police which result in a conviction at court – we cannot overlook the fact that the rules of evidence in Scotland have a significant influence on the rates of attrition in rape.

Against this background we must be realistic about the impact which reform of the investigation, prosecution and of the substantive law alone will achieve and I am heartened therefore that the Cabinet Secretary for Justice has now asked the Scottish Law Commission to review the law of evidence. My own view based on 25 years as a prosecutor is that only reform of both the substantive law and the law of evidence combined will provide us with a sound framework within which to tackle attrition. Any attempt to remove the requirement for corroboration in Scotland would be extremely controversial and rightly so – the requirement is one which may be regarded as a substantial challenge for the prosecutor but is equally regarded as an important safeguard for the accused, ensuring that where convictions are achieved they are secure and resilient to challenge. It is not for the Lord Advocate to decide on whether the requirement for corroboration should be retained but if we are serious about reforming the law in this area, the question is at the heart of that debate and is one which we cannot avoid – if we are to retain the requirement we must be certain that it continues to serve an important function in our legal system and that the Parliament and the community of Scotland are willing to accept that it will inevitably continue to limit significantly the number of cases which can be considered for prosecution and lead to a conviction.

I hope too that the Scottish Law Commission's new work will look in detail at the operation of the Moorov doctrine, recognising that the concession which it makes to the requirement for corroboration is a limited one which fails to recognise that in many cases where a perpetrator preys on multiple victims, he does so in a family setting and over a period of generations. The prospect of legislation which recognises with certainty that the rule of mutual corroboration can apply regardless of the length of time which applies between crimes or the variations in the particulars of the sexual abuse is one which would be welcomed by prosecutors and is relevant to the question of the accused's guilt and does not unfairly prejudice the accused.

Providing a robust legal framework is essential - but both the strength and the weakness of any system of justice lies in the fact that it is administered by the people – so the way in which the police, the prosecution and the judges apply and interact with that law is crucial in giving it effect.

The system is as fair as we know it to be: in an adversarial legal system which vests the responsibility for deciding matters of fact in the men and women of juries accused persons are, quite properly judged by their peers, people who will bring to bear on the decision making process their experience of life, their understanding of human nature and their values and beliefs - but in cases in which the victim is the only witness, trial by jury also means that, inevitably, the victim is judged according to the same set of experiences, values and beliefs; values which – as the Amnesty report discloses – readily apportion blame to the victim in circumstances in which the law does not.

We will all be familiar with research studies which have crystallised the notion of the deserving – and the undeserving victim research which discloses :

- That around 30% of people believe that victims of rape are partially or totally responsible for the crime if they were drunk at the time.
- With similar numbers blaming the victim where she behaved flirtatiously, was wearing revealing clothing or even where she was alone on a dangerous or deserted area.

We cannot underestimate the effect which judgements such as these must have on the rates of conviction and attrition – we must be clear: the indication is not that society thinks it unwise of women to wear revealing clothing, to act in a flirtatious manner or to consume alcohol – the indication is that where these factors are present society is prepared **to blame** the victim – not for the way in which she acted but for the crime perpetrated against her. For as long as society is prepared to blame the victim we cannot begin to hope that it will blame the perpetrators whatever the law may say.

And it's not only reliance on value judgements about the victim's responsibility to protect herself from criminal acts which can undermine her right to be protected in law – so too can the existence of myths around the circumstances in which sexual offences are committed and how a victim will react – beliefs which fail to take account of the realities of sexual offending and the complex psychological dynamics of victims' reactions to sexual crimes.

Stereotypes are also applied to perpetrators, creating a myth that they are, characteristically, strangers who use force of violence to overcome the will of lone

women walking at night in areas in which they shouldn't – an image which fails to recognise the reality which is that many rapes are not committed in public by strangers but behind closed doors by people known to the victim and often trusted by them.

Overcoming the prevailing values and beliefs of the community therefore presents a serious challenge for the prosecutor in a legal system which quite properly recognises the right of a woman to be protected by the law without reservation.

Through the Rape Crisis Scotland poster campaign we have for the first time the opportunity to challenge the myths around abuse of women and attitudes towards sexual offending and I am encouraged that societal attitudes are now being questioned and challenged and that there is the prospect of the values and beliefs of the community being influenced by public awareness campaigns intended to educate the public that the actions of victims however they may be judged are never an invitation to rape.

But when I speak about supporting and protecting those who are victims of sexual abuse we should not for a second be led to think that only those who are "vulnerable" fall victim to those intent on committing acts of sexual violation. There is a danger in promoting the myth that sexual crime befalls only the weakest in our society I am in no doubt that there are those criminals who seek out the weakest and most vulnerable in our communities but sexual crime is not reserved to those whom society would regard as weak or vulnerable. The reality is that rape is a crime perpetrated not only on the weakest amongst us but also on some of the strongest.

But while women who are raped are not always the weakest among us we know without question that, however strong, however vulnerable women who are raped are to begin with – the nature of an adversarial system of justice means that there is always the prospect that the experience of giving evidence and being cross examined as the victim of a sexual offence in a criminal trial has the potential to break even the strongest among us.

As part of our Review one woman told us:

"The system drained me, I went in fighting at the start and came out drained."

And when we look at some of the major challenges which lie ahead within the system, we should be in no doubt about the capacity of the experience to drain even the most resolute of victims.

As the head of the prosecution service it is my duty to ensure that prosecutors across Scotland are equipped to provide a response which avoids unnecessary secondary victimisation from the process; and in that regard I am confident that we are now beginning to see some of the most profound reforms in the investigation and prosecution of rape that the prosecution service has ever seen. As a young prosecutor in the early 80's I had no understanding of the scale and complexity of the impact of sexual offending on its victims.

The notion that a woman who had experienced the most acute sexual violence was every bit as likely to suppress any outward reaction to the crime as she was to exhibit outward signs of distress was alien. Equally – the thought that a woman who had experienced sexual abuse could be reluctant to support a prosecution and even remain loyal to her abuser was beyond my understanding of life. But then why would I have known any differently? As a society our knowledge and understanding of rape, its effects and the diversity of reactions

which victims experience has grown exponentially in recent decades. And what's more as a young prosecutor my training at that time was that of an apprentice learning the art of investigation and prosecution – the black letter of the law and the skills of advocacy– skills received from the generations of prosecutors who had gone before me. It's a sound approach which instils in prosecutors of the future the core skills of prosecuting in the public interest, but it's a legacy which alone does not equip prosecutors to respond to the continual developments in medicine and science and our increasing understanding of criminology and victimology.

At the outset of my career, it was enough that the prosecutor was a good lawyer and effective advocate. In the 21<sup>st</sup> century, however, it is inescapable that an understanding of the psychodynamics of sexual offending, its impact on victims and the experience facing those who have to give evidence at trial cannot be separated from the investigation and prosecution of sexual crime – an understanding of those issues must be at the heart of all we do as prosecutors.

We must be equipped to investigate and prosecute with rigour while always remaining fair and objective, being frank and honest with victims while always remaining sensitive, acting independently while never leaving the victim feeling disempowered or isolated, listening to the victim's views while always representing the wider public interest, always being ready to take decisions which reflect the public interest even where they will attract criticism.

Just as we have learned that a failure to provide effective support to victims can leave them feeling further betrayed and isolated – we know too that providing appropriate support can serve to strengthen their resolve and improve the prospects of the prosecution.

With that in mind, the notion that it's enough that these cases should simply be investigated by the friendliest (usually female) face in the office is outdated – my clear belief is that these cases should be investigated and prosecuted by the very best of our staff – those with the utmost skill and ability. It is for that reason that we have committed to ensuring that by the Summer of 2009 only those prosecution staff who have been approved according to clear standards of competence will investigate sexual offence cases – creating in effect a specialist approach to the investigation of sexual crimes throughout Scotland.

The requirement to be approved is being supported by a major, comprehensive programme of specialist training on sexual offences; the first of its kind in the history of the prosecution service. At the end of 2007 a programme of on-line training courses was published on our internal website – providing essential training on decision making, our approach to bail and the need to identify and address evidential weakness early on in the life of a case. The course also provides important training on the law of rape, the approach to bail and provides staff with an understanding of the wider issues and myths which prevail in society.

The e-learning course is to be followed by a two day classroom based course at the new Scottish Prosecution College here in Glasgow. Between April and June of this year prosecution staff from across Scotland will undertake core sexual offences training on the legal issues surrounding rape, the psychodynamics of sexual offending, the medicine and science which plays a vital role in proving rape and the means through which we can support and communicate with victims during the prosecution. Training will be provided by those who have led the COPFS Review of rape and sexual offences together with senior Crown Counsel,

Rape Crisis Scotland, colleagues from the police and the medics and scientists who have been working with us to improve our collective response.

Our Review also signalled the prospect that in some parts of the country that specialism provided by our system of approval might be built upon by the creation of specialist sexual offence units. We have therefore taken the lead from the findings of the Review and established a Sexual Offences Investigation Unit at the Procurator Fiscal's Office in Edinburgh. The Unit will draw together the expertise of prosecution staff dedicated to improving the quality of the investigation and prosecution of crime and will become, I hope, a centre of excellence – from which we will apply the lessons learnt across the country as soon as possible.

Most recently Dorothy Bain QC - one of Scotland's most senior and skilled prosecutors - has agreed to work closely with police and prosecution staff as part of the Lothian and Borders Area Sexual Offences Team based in Edinburgh and linked to the Amethyst Centre at the Gyle. Dorothy – has successfully prosecuted some of the country's most complex and challenging criminal trials including the case against Giovanni Mola who was charged with culpably and recklessly infecting his victim with HIV and hepatitis C after failing to disclose his own condition to her and having unprotected sex with her whereby she too became infected with both viruses. As the specialist prosecutor attached to the Lothian and Borders Team she will ensure that investigations in serious sexual offence cases are, from their earliest stages, informed by the experience of those who prosecute in the High Court and make recommendations to the Solicitor General and I on how to build on the recommendations of the Review of Sexual Offences by identifying what further role Crown Counsel might play in the model of specialism which we are piloting across the country.

We are committed to being innovative and outward looking in seeking to find solutions to the problems we face. But as we continue to push at the boundaries of the criminal justice system's understanding of how victims should be treated by the courts we must also recognise that we are never immune from challenge - as is brought in to sharp focus when we look at the operation of Scotland's Rape Shield legislation. It would be easy to avoid public criticism and to be regarded as guardians of the victim's right to be protected from irrelevant questioning by opposing routine applications by the defence to have prohibited questioning admitted. But not only would that betray the prosecutor's duty to act independently and always in the public interest, an overly restrictive approach by prosecutors and the court also carries a risk that any conviction will be overturned on appeal. Lord Marnoch commented that the provisions:

“require a value judgement to be made by the court, usually in advance of trial, as to the probative value or importance of evidence . . . the operation of these provisions is on any view a matter of great delicacy since the risk of prejudicing a fair trial is an obvious one.”

Last year, the Appeal Court overturned a conviction in respect of three charges of indecent assault against two victims on the grounds that the trial judge refused to allow the defence to lead evidence that the victim had at one stage in the proceedings asked the Procurator Fiscal to withdraw the charges. The court held that one possible outcome of questioning on this point might have been that the complainer would have admitted that she had asked for the case to be dropped because the allegations were false.

In his judgement one of the judges opined that:

*“What is important is that the opportunity to ask the question was lost and could not be retrieved. Such an answer would of course be highly relevant to the defence and having been denied the opportunity to at least seek to elicit it, it is my view that the defence was materially hampered. A mistake was made and having regard to the seriousness of the issue, a miscarriage of justice cannot be excluded.”*

The task might be simpler if the parameters of the prohibition were clear but, as Lord Marnoch has observed:

“the assessment is a subjective one and predicting what may be regarded as relevant is – on any view – an imperfect science.”

The task of applying the legislation requires a delicate balance to be struck but our work with the advisory group and our close links to the research to evaluate the provisions – undertaken by Michelle Burman and Lynn Jamieson, has allowed us to develop a sound statement of policy and practice; making it clear to all prosecutors that the provisions should be applied with rigour – and providing prosecution staff with comprehensive guidance which should support them in adopting a consistent approach which will protect the dignity and privacy of victims while allowing relevant questions to be asked.

The Crown’s new obligations of disclosure cannot be understated – developing at a rapid pace and placing an increasingly profound duty on the Crown, always presenting new dilemmas. The obligation to disclose some of the most sensitive information which is contained in statements, medical and social work records and statements made at precognition has an obvious potential to undermine the complainer and, ultimately, the Crown’s case. But as recent appeal cases have shown – the obligation on the Crown is to disclose not the best of the evidence but also the worst of it and failure to disclose material evidence risks convictions being overturned by the Appeal Court. Meeting the obligations of the disclosure regime place the prosecutor in an unenviable position when seeking to reassure victims and protect their privacy.

But as we as prosecutors seek to meet the challenges of disclosure, it has become ever more critical that those who are victims of sexual offences understand the need to be open and honest with the police and prosecution services from the outset. At a time when we are striving to shift the focus of rape prosecutions from the conduct of the victim, the entitlement of the defence to full disclosure means that there is an increasing focus on the statements of the complainer and weaknesses which they contain. The need for victims to be candid from the outset is critical.

In the face of research which shows how many in the community stand ready to blame women who have acted in a so called inappropriate manner, it is easy to understand why a woman might be tempted to conceal those aspects of her conduct which we know will attract the condemnation of the moral majority.

I am very clear that it should never be our aim to prosecute only the strongest cases. A strong conviction rate can always be achieved where prosecution is selective - reserved only to those cases which are likely to result in a conviction – we must continue to prosecute cases in the face of evidential weaknesses – the nature of rape cases is that they are rarely strong and there is rarely an abundance of evidence. Victims should not be judged according to their behaviour, background or sexual conduct – but we must also be realistic and recognise that victims will be judged according to whether the jury feels that it can be confident about the reliability of their evidence. I do not judge those who

have been raped and seek to minimise those aspects of their behaviour or character which we know will attract blame from a significant portion of the community but I must be realistic about the likely impact which doing so will have on the outcome of the case.

A dialogue, however, is a two way exchange and we can only expect openness and candour from victims if we in the prosecution service are open and candid in return. Achieving that, requires more than straight talking from the prosecutor; instead we must look at and address those aspects of the system which inhibit us from being open and frank. Our system is one which – for good reason – guards the principle that witnesses' evidence must be free from contamination or influence from other sources. That principle is often observed by adopting a conservative approach to the level and detail of information which is provided to victims; an approach which at times can serve to undermine the openness of the relationship between the prosecutor and victim. It is not yet customary in the culture of our justice system in Scotland that complainers and witnesses would be allowed to see their own statements in advance of trial, yet this approach is regarded as entirely legitimate in jurisdictions across the world, including in England and Wales. Should this practice now become the norm in Scotland? Similarly – the prosecutor must guard against any accusation that they may have tainted the witness's evidence by coaching them in advance of trial. I would never advocate coaching of witnesses which has become a routine part of television drama in the – typically American – portrayals of the prosecution process. As a prosecutor I must never lose sight of the accused's right to a fair trial, not all those accused of crimes are guilty and the presumption of innocence is fundamental. It would never be appropriate to suggest to a victim *how* they should answer and *what* their evidence should be. Nor should the prosecutor contrive to provide the victim or witness with an opportunity to adjust their account to meet the remainder of the evidence. But there is a fine and at times invisible line between coaching a victim and providing them with information which they must have either to keep them legitimately informed or to allow them to respond properly to the prosecutor's legitimate questions.

But as we test the boundaries of what is acceptable a clearer recognition of the victims rights to be informed is emerging.

Recognising the prosecutor's right to re-interview a victim on the basis of all accused's application to ask questions about her character or sexual history, the court has held that:

“there is no human right to spring a surprise line of questioning on a complainer” – a statement which stakes an important claim on the rights of victims to be treated fairly within our system of justice and makes the boundary of what is acceptable increasingly clear.

But while we must always strive to push at the boundaries of the law, we must not be cavalier in our approach to the developments we seek. The Vulnerable Witnesses Act has introduced clarity on the law of psychological and psychiatric evidence – providing a statutory power to lead evidence of which might explain the reactions of victims in sexual offence cases which might not accord with preconceived notions of how victims respond to sexual trauma.

Regarded as an important provision - we must nevertheless be convinced that relying on the provision to admit in rape trials evidence of Psychiatric / Psychological evidence is likely to have a positive impact on the prosecution of rape. The prospect of leading evidence to challenge common but wrongly held beliefs about what is a legitimate response to rape is appealing but we must be

clear about how and when such evidence should be used. There is a clear attraction in seeking to lead evidence to explain those reactions of victims which may not conform to stereotype or expectation. But equally we must guard against replacing existing stereotypes with new ones. My experience tells me that often the most compelling explanation for what may be regarded as a counter-intuitive response can come from the victim herself – but we can only do that if we have laid the groundwork as part of our investigation by identifying potential weakness in cases and asking the right questions of victims which will allow them to explain in their own words, how they responded to the crime and why they feel they responded as they did. But there will be other victims who are less articulate and less able to explain their behaviour – behaviour which we know the defence will rely upon to suggest that the crime did not occur. In those cases there may be a case for leading expert psychological or psychiatric evidence about the way in which the victim has reacted to the crime.

In 2008 - three years on from the work which we had newly embarked upon in 2005. Through the Review of Sexual Offences and the work to implement its recommendations we have built a solid foundation for change but it is just that – a foundation – the real strength of the Review lies not in the answers which it has provided but in some of the questions which it has raised.

As a prosecutor I cannot banish the rigours of the justice system – the adversarial system has at its core the right of every person accused to test evidence of their accusers – the presumption of innocence is sacrosanct and the right of the accused to lead all relevant lines of questioning in a fair trial are fundamental but I am convinced that we are now better placed than ever not only to deliver the change which we have identified as necessary but to ensure that for all time coming our response to rape and other serious sexual offences continues to evolve to reflect changes in social practice and our understanding of the effects of sexual victimisation.