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CHAPTER 15: INDEPENDENT LEGAL REPRESENTATION FOR COMPLAINERS IN SEXUAL OFFENCE CASES

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15.1 Introduction

As with the recording of police interviews (chapter 10 of the report), independent legal representation for complainers in sexual offence cases (ILR) is not expressly part of the (non-exhaustive) remit of the Post-Corroborator Safeguards Review. It was, however, suggested from within the Reference Group as an appropriate topic for the Review to consider, and Lord Bonomy asked the expert group to address this issue as part of its report.

A considerable amount of work on the possibility of introducing ILR in Scotland has already been done by Fiona Raitt, who produced a report on the issue for Rape Crisis Scotland in 2010, and published an article on the topic in the *Criminal Law Review* in 2013.¹ Rape Crisis Scotland and Professor Raitt have kindly agreed to the 2010 report being included as an appendix to this report.² As the report is an extensive treatment of the topic, there is a limit to what can usefully be added here, and this chapter does not seek to offer a full treatment of ILR. Instead, it summarises what might be proposed under this heading and highlights certain points for the Review's consideration.

15.2 What might ILR entail?

The phrase "independent legal representation" might be used to refer to a wide variety of schemes. As Raitt's report demonstrates, the nature and extent of such schemes varies considerably between different jurisdictions. It need not involve representation throughout proceedings, and this is not what has been proposed for Scotland to date. Raitt highlights two specific situations where the Crown is placed in particular difficulty in guarding both the accused's right to a fair trial and the interests of the complainer: the confidentiality of personal records and the use of sexual history evidence,³ and develops an argument for ILR focused on these particularly problematic issues. Drawing on Raitt's work, Rape Crisis Scotland prepared a proposal for ILR suggesting that it should be permitted in two cases, as follows:⁴

Procedures for providing a right to representation where the Crown seeks access to a complainer's medical and / or other sensitive records

Where the Crown Office seek access to a complainer's medical or other sensitive records, the Crown should have an obligation to notify the complainer that they have the right to seek legal advice in relation to this. The costs of this legal advice should be covered by legal aid on a non means tested basis.

¹ F E Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" [2013] Crim LR 729.

² F E Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (2010). Professor Raitt's paper is included as it was originally published, separately paginated, at the end of this report.

³ Para 7.12.

⁴ Rape Crisis Scotland, *Proposal for Introduction of Independent Legal Representation for Sexual Offence Complainers in Matters Relating to Sexual History and Character Evidence and Where Access to Medical and Other Sensitive Records is Sought* (2013).

If following legal advice the complainer refuses consent for the Crown Office to access her records and the Crown decides to seek a warrant for those records, as per their policy, then the complainer should have the right to representation at any hearing. Her legal representative should be given legal standing to participate in this hearing to enable her views to be represented. Again, this should be funded by legal aid on a non means tested basis.

Procedures for providing a right to representation where either the Crown or the Defence submits a s 275 application to introduce a complainer's sexual history and character

There is already a clear process in place with regard to applications to introduce evidence relating to a complainer's sexual history or character. Both the Crown and the Defence need to make a formal application to introduce this evidence, and the application and any objections are considered at a preliminary hearing. It would be relatively straightforward to introduce a right to representation for the complainer within this process – complainers should be notified of their right to obtain advice and representation in any circumstance where a s275 application is being lodged. If they choose to utilise this right, their legal representative would receive a copy of the application and be entitled to object to its introduction on behalf of the complainer and to attend the preliminary hearing to represent the complainer's view in relation to the application. This right should also apply to any late s275 applications which are lodged post the preliminary hearing stage.

As this makes clear, what is contemplated here is not any sort of status as an equal party with the prosecutor; it is instead a right to make representations at certain specific points. It bears similarities to the limited rights to representation which have been recognised in Canada (in respect of disclosure of personal records)⁵ and Ireland (in respect of applications to lead sexual history evidence).⁶

When the Victims and Witnesses (Scotland) Bill was being considered by the Scottish Parliament, Margaret Mitchell MSP tabled an amendment which would have created a right to ILR in cases where information about health or other sensitive information was sought in relation to a person who was or appeared to be the victim of a sexual offence (a right which would have been rather broader than that suggested in the proposal from Rape Crisis Scotland noted above). The amendment made provision for the right to be implemented on a pilot basis in the first instance, with a report on the pilot being required. The Cabinet Secretary for Justice expressed concern about the practicality of aspects of the amendment, and suggested, while undertaking to have further discussion with relevant parties, that it was inappropriate for the proposal to be placed in primary legislation. The amendment was put to a vote and defeated.⁷ In January 2014, Ms Mitchell raised the possibility of ILR again in Parliament, and the First Minister stated that he would “ask the Cabinet Secretary for Justice to look seriously at that suggestion”.⁸

⁵ See Raitt, *Independent Legal Representation* (n 2) paras 4.07-4.08.

⁶ Paras 4.17-4.18.

⁷ See Scottish Parliament Official Report 12 December 2013 cols 25733-25740.

⁸ Scottish Parliament Official Report 9 January 2014 col 26347.

15.3 Some observations on the scope and practicality of ILR

ILR in relation to medical and/or other sensitive records

The proposal from Rape Crisis Scotland refers to a right of ILR in respect of the Crown retrieving sensitive material. By way of comparison, it might be noted that in England and Wales, such material would be “excluded material”,⁹ meaning that special safeguards would apply to an application for a warrant to obtain it. Whereas search warrants in England and Wales may normally be granted by a magistrate,¹⁰ warrants to obtain excluded material must be sought from a circuit judge and applications are made *inter partes*.¹¹ This provides a level of safeguard against disclosure of such material as part of a criminal investigation which is not applicable in Scotland.¹² The introduction of ILR (along with a procedure allowing the complainer to be heard) in respect of such warrants would be a significant change to current procedure, although the expert group has no information on whether the Crown frequently have to seek a warrant to obtain such information, and cannot therefore comment on the practical consequences of any such right being introduced.

The access of the Crown to such material may not, however, be the most significant problem here. A complainer may be willing for the Crown to have such information but be unwilling for it to be disclosed to the defence. Discussions of the difficulties faced by complainers in this area are generally concerned with disclosure of such material by the Crown to the defence.¹³ Although the Rape Crisis Scotland proposal does not refer to this stage of proceedings,¹⁴ ILR may have a more important role here, and in two contexts. The first is where the Crown applies to the court for an order preventing or restricting disclosure of specified material.¹⁵ In that situation, ILR, in the form of the complainer being represented at a hearing to determine the Crown’s application, might readily be accommodated.¹⁶ The second – more difficult and perhaps more likely – case, however, is that where the Crown considers that it is obliged to disclose the information. As this would be done directly between the Crown and the defence, there is no existing procedural stage at which ILR can be accommodated. ILR would require a change to the statutory disclosure regime, perhaps in the form of notification to the complainer that the Crown intended to make such disclosure and a right for the complainer to seek a hearing on whether the material could properly be disclosed.

ILR in relation to section 275 applications

In considering ILR in relation to section 275 applications, considerations of timing should be borne in mind. An application for permission to lead sexual history evidence must (in High Court cases) be

⁹ Police and Criminal Evidence Act 1984 (PACE) s 11.

¹⁰ s 8.

¹¹ s 9 and Sch 1.

¹² Something which caused some difficulty in *R v Manchester Stipendiary Magistrate, ex p Granada Television Ltd* [2001] 1 AC 300, where a warrant was granted in Scotland to search for material which would have been subject to these special procedures had it been sought in England. The House of Lords held that the warrant was nevertheless enforceable under the legislation governing cross-border enforcement of warrants, as the procedures under PACE were not available to Scottish prosecutors and it would be anomalous for Parliament to have intended that they be unable to retrieve material in such circumstances.

¹³ See F E Raitt, “Disclosure of records and privacy rights in rape cases” (2011) 15 Edin LR 33; J Temkin, “Digging the dirt: disclosure of records in sexual assault cases” (2002) CLJ 126.

¹⁴ Unlike Raitt (n 1) at 748.

¹⁵ Under the Criminal Justice and Licensing (Scotland) Act 2010 Pt 6.

¹⁶ Consideration would have to be given to whether the complainer would, independently of the Crown, have a right of appeal against a refusal to make such an order.

made at least seven days before the trial diet or (in all other cases) no less than fourteen clear days before the trial diet. The trial judge, however, can consider an application at any later stage “on special cause shown”.¹⁷

Assuming that these timescales are sufficient to allow for ILR to be arranged in practice once an application is made, a problem remains in cases where section 275 applications are lodged at a later date. An evaluation of the changes made to the law of sexual history evidence by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 found that in a sample of 32 High Court cases, seven section 275 applications were made at the start of the trial, with a further application being made during the trial itself.¹⁸ That is, applications were made at the start of the trial or later in one-quarter of the cases.¹⁹ The trial judge accepted in all but one of these cases that “special cause” had been shown, allowing the application to be considered.²⁰

The possibility of a section 275 application being lodged at the trial might seriously undermine ILR. Although Rape Crisis Scotland’s proposal suggested that ILR “should also apply to any late s 275 applications which are lodged post the preliminary hearing stage”, adjourning the trial diet to enable the complainer to obtain legal representation may be impractical and lead to significant delay and distress even where it is possible. The application could be determined without ILR, but if ILR in practice reduces the extent to which section 275 applications are successful, late applications might become more common. In order to be properly effective, therefore, ILR might require that representation is provided as a matter of course at the trial diet itself, at least until the complainer has given evidence. That, in turn, raises the question of whether the independent legal representative should have further rights: most obviously, should they be entitled to object that certain questions asked by the defence (or, indeed, the Crown) are improper, particularly (but perhaps not exclusively) on the basis that they are incompatible with the decision on the section 275 application?

15.4 Is ILR exceptional?

ILR may be regarded as unusual in the common law world, but it has been accommodated in Canada and Ireland to the limited extent outlined in Raitt’s report. It is, by contrast normal in continental Europe for complainers to have some form of entitlement to legal representation.²¹ It might be suggested that such systems offer no lesson regarding the importance of ILR as a distinct right in sexual offence cases, but simply represent different models of criminal procedure, where all (alleged) victims have established rights in the criminal process, and where the criminal and civil processes may be systemically interlinked, in contrast to their strict separation in Scotland.

However, at least some continental systems have also recognised that sexual offences are distinctive, and have reflected this either through the design of systems of legal representation or

¹⁷ Criminal Procedure (Scotland) Act 1995 s 275B.

¹⁸ M Burman and others, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007) para 5.48.

¹⁹ In the case where the application was made during the trial itself, this was the second application. It is assumed that the first application was made timeously (and so was not one of the seven made at the start of the trial), but this is not absolutely clear from the report.

²⁰ Burman and others, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials* (n 18) para 5.49.

²¹ See Raitt, *Independent Legal Representation* (n 2) para 3.03.

their use in practice. A 1999 study of the position of alleged victims of crime in German courts observed that the use of the *Nebenklage* procedure, “permit[ting] victims to participate through counsel at trial on nearly equal footing with the state’s attorney and the defense”,²² was relatively limited in general, but much more common in sexual assault cases. The authors cited data including one 1988-90 survey showing that about 20 per cent of eligible complainers used the procedure, rising to 67 per cent in sexual assault cases, while anecdotal evidence suggested that the rate at which the procedure was invoked in sexual assault cases had risen since then.²³

Elsewhere, Denmark introduced a right to legal representation for complainers in rape cases in 1980, but did not extend this to other victims of crime until 1997.²⁴ A similar development occurred in Sweden, where the role of injured party counsel was initially developed for cases of serious sexual offences, which a government report suggested could be distinguished from other offences in two respects: first, sexual offences were a particularly gross infringement of the victim’s integrity and secondly, the credibility of the complainer’s account was nearly always of great significance in sexual offence cases due to the lack of other evidence. These facts, it was suggested, meant that complainers in sexual offence cases were in greater need of support.²⁵ While subsequent developments (as elsewhere in Scandinavia)²⁶ expanded the role of the injured party counsel beyond sexual offence cases, a more recent report emphasised the special needs of complainers in sexual offences and child complainers, recommending enhanced provision in such cases.²⁷

15.5 Issues for consideration

It is assumed from the fact that the expert group has been asked to cover ILR in this report that the Review will wish to consider whether a pilot ILR scheme might be recommended for Scotland and what its scope should be. Accordingly, this chapter is presented solely to inform the Review in considering these issues. It is suggested that it will be necessary to consider:

- (a) whether the principle of ILR should be supported;
- (b) whether any ILR scheme should be introduced on a pilot basis in the first instance;
- (c) at which stages of the criminal justice process ILR should be permitted, and
- (d) whether and to what extent the legal framework governing warrants and disclosure should be amended to permit this.

²² W T Pizzi and W Perron, “Crime victims in German courtrooms: a comparative perspective on American problems” (1996) 32 *Stanford Journal of International Law* 37 at 54.

²³ At 55 n 76; see also 59: “Sexual assault victims’ desire for legal representation may be due to the highly personal and demeaning nature of the crime, as well as the nature of such trials, where it is not unusual for the character or reputation of the victim to come under attack.” See also E Erez and E Bienkowska, “Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland” (1993) 21 *Journal of Criminal Justice* 47 at 50; noting that use of the “supporting or subsidiary prosecutor” system in Poland was more common in crimes against the person (including sexual assaults) than crimes against property, but not distinguishing between sexual and non-sexual crimes against the person.

²⁴ I Bacik, C Maunsell and S Gogan, *The Legal Process and Victims of Rape* (1998) 198-199.

²⁵ *Målsägandebitråde* (SOU 1986: 49) 12.

²⁶ See *Målsägandebitråde – ett aktivt stöd i rättsprocessen* (SOU 2007: 6) ch 8.

²⁷ *Ibid.*