The treatment of women reporting sexual assault by the Scottish Criminal Justice System

By

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Introduction

There has been a lot of public concern around the low rate of punishment for the offence of rape. It is a well-established fact that most know rapes do not result in the conviction of an offender. A central issue for this talk is whether we can conclude from this that the criminal justice system is failing women who have suffered a sexual assault. Obviously this depends on how we construe failure. Would a low prosecution rate or a low conviction rate necessarily mean failure if it is an outcome of a system in which everybody involved strives to convict the guilty while observing current understandings of best practice in terms of protecting the rights of both victims and accused persons? That would obviously be a very different sort of failure from systems in which efforts are routinely half hearted or which is less able to honour current understandings of good practice. It can be observed at the outset, that whatever sort of failure a low conviction rate for serious sexual offences is in Scotland, this is not just a Scottish problem as low rates of conviction for rape are also found elsewhere. I want to consider what the research that I have been involved in offers by way of evidence concerning the treatment of women as victims of sexual assault in the criminal justice system. This is not to suggest that this research provides anything like a full story but it does offer some insights.

I have been involved in two specifically relevant research projects. The first was with Beverley Brown and Michele Burman on the use of sexual history and sexual character evidence in sexual offence trials and more recently with Michele Burman a small study monitoring the progress of sexual offence cases from first report to the police to final outcome in two police forces. In addition to these specific pieces of research I attempt to keep up with certain literatures and debates around sexual offences. I often get phoned up by certain sections of the press about sexual offence issues, sometimes resulting in a more informed contribution from the press and sometimes not, sometimes managing to get points across that are based on evidence and sometimes not. A recent Scotland on Sunday article talking about the lottery suffered by rape victims in terms of the treatment they get at the hands of the police is an example of lack of success. This was a conclusion considerably removed from the interpretation that we make of our data. Occasionally issues provoke me into combing evidence and think-piece writing. For example, I wrote about the possible defence of ‘mistaken belief in consent’ whether or not a reasonable belief, following the appeal case that quashed the conviction of Brian Jamieson (Jamieson, 1996). While drawing on all these pieces of work, I will focus primarily on the more recent study.

The Progress of Reported Sexual Offences through the System

In the summer of 1998, Michele Burman and I conducted a small pilot project in which we sought to retrospectively track the progress of a batch of complaints alleging sexual offences through the criminal justice system from first report to the police to final outcome in the system. We started in two police forces, one urban, force A, and one rural, force B. Using their records for specific months we looked at complaints classified as rape, or the rape related offences of attempted rape, assault with intent to ravish and, because we wanted to look at a range of seriousness of offences, also indecent assault and indecent exposure. We wanted to focus on complaints made by adults and explicitly did not include charges that commonly or by definition involve children. It was a pilot study that was to be done in a short piece of time with a modest sum of money so we wanted to track about 150 cases[1]. As well as simply tracking cases through the records, we spoke to personnel within the police forces, the fiscal offices and Crown Office concerning the processing of cases.

Without going into great detail concerning record keeping practices, its important to give some sense of the nature of the data. The police keep records for a variety of reasons, with different databases and procedures for different purposes. There were variations in practices between the two forces studied and in the use of the terms such as 'police report' and 'crime report'. To avoid potential confusion, we use the term 'crime report' for the document(s) compiled by the police when informed of an incident and 'police report' for the report that is compiled by the police and sent to the fiscal. Reports of the former sort concern a whole range of incidents made known to the police. They include many cases that are never made known to the procurator fiscal. For example, there are many crime reports in which there is no named suspect. Among the offences we were looking at, this was particularly so for indecent exposure. What we are calling a 'police report' involves a process of communicating with the fiscal about formal charges against a named suspect. A 'crime report' then is a record of an incident that may or may not result in a 'police report'[2]. In the case of incidents made known to the police, the initial account of what has happened may be recorded in a police officer's note book before being put into a standard lay out on a crime report form kept at head quarters, probably on computer. All police forces must keep some central record of crime reports since these records are the basis of the official statistics on crime and its clear up. All reported incidents are classified as

[1] In the end we tracked 191 cases 142 in force A and 49 in force B. We choose a total of six months and a one in three sample in the case of force A because of its large case load (july – September 1996 & 199) and a total of nine months (the same months + October-December 1997) and all cases involving adult complainers in force B because of its much smaller case load. In the majority of the cases that we tracked these were complaints made by women against men although very occasionally a third persons had reported an incident rather than the woman concerned. Incidents involving children were excluded from sampled cases in force B. Following our sampling procedure of taking every third record in force A resulted in a sufficient numbers of adult women and child complainers to allow both a comparative focus on adult women between force A and B and some comparison between adult and child complainers within force A.

[2] The databases of such crime reports are force specific and at the time of the study there was no linkage of crime reports across forces. Within a force there is no record linkage between these crime reports and any document the police prepare for the procurator fiscal concerning the same incidents. At that point a new record is created.

either 'cleared up' or 'unsolved'[3] unless they are removed because they have been 'no crimed', that is they have been investigated and found not to be a crime[4].

For the purposes of this research, information was sought from each crime report on the progress of the case, the evidence gathering activities of the police and their judgements concerning the progress of the case[5].

Table One
Study sample by offence, originating force and case progress: numbers and percentage distribution

	Rape, AWIR, Attempted Rape		Rape		Indecent Assault		Indecent Exposure	
Originating Police Force	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**
Goes to Court	**16 47%**	6 22%	12 48%	3 14%	**16 36%**	5	**20 34%**	4
Fiscal/ Crown 'No Proceeding'	**12 35%**	7 25%	9 36%	6 27%	**17 39%**	2	**4 7%**	2
No Progress Beyond police	**6 18%**	14 52%	4 16%	13 59%	**10 23%**	5	**32 55%**	4
Total N=100%	**34**	27	25	22	**44**	12	**58**	10

One case of indecent assault and two cases of indecent exposure could not be traced in the case of Force A.

Table One shows that in force A, in the periods studied, the proportion of rape and rape related cases going to court compares favourably with indecent assault and indecent exposure cases. A higher proportion of rape cases got to court than is the case for indecent assault and indecent exposure. This is not true for Force B. Indeed there is quite a marked difference between force A and B with respect to the proportion of Rape and Rape Related offences that do not progress beyond the police. However, it cannot be assumed that this is the result of more or less favourable police treatment of rape victims which is how a recent journalist interpreted this difference. Table Two gives some further insight into the issue by showing that the difference is mainly because far fewer of the crime reports in force B involved a record of an accused person. This suggests that fewer complainers in force B were able to name the perpetrator. Half of rape cases in force B have no known suspect in comparison to

[3] The labels 'cleared up' and 'unsolved' applied to the crime reports did not always reflect the actual progress of the case at the time of the research. It is not possible to assume, for example, that no 'unsolved' cases have resulted in a prosecution.
[4] No crimed cases were checked for reported incidents that might otherwise have been classified as a sexual offence so that we could ensure we started with all such reports whether or not they were 'no crimed.'
[5] However, it is not always clear from a crime report what action has been taken. In Force 'A' a crime report does not routinely make clear whether a report has been made to the procurator fiscal or not. This had to be double checked by asking each fiscal office to whom a police report might have been sent to check whether they had a record of the case.

less than 10% of cases reported in force A. Our knowledge or rape cases indicates that it is more common for rape victims to know their accused than not to know them, and hence it is relatively unusual for there to be no suspect. The higher incidence of 'no suspect' in force B is puzzling but perhaps there just happened to be more cases involving strangers in this area in the months of our study.

Table Two
Cases that did not progress beyond the police: originating force and reasons for no progress

	Rape, AWIR, Attempted Rape		Rape		Indecent Assault		Indecent Exposure	
Originating Police Force	A	B	A	B	A	B	A	B
No Suspect	3	7	1	6	6	2	31	3
Complainer does not wish to pursue	1	3	1	3	1	-	1	-
Insufficient evidence / Police dubious/ no info.	2	4	2	4	3	3	-	1
Total	6	14	4	13	10	5	32	4
All cases	34	27	25	22	44	12	58	10

Police Procedures

Obviously police procedures can have an influence on whether a suspect who is not know to or named by a complainer is then found or not. However, we cannot conclude that the high incidence of cases in which there was no suspect in force B were the result of less rigorous police procedures. We simply do not know whether this is the case and there is no reason to consider it likely.

Guidelines on dealing with Rape Victims

There is certainly no difference in understandings of good practice between the forces. We interviewed a number of police officers about police procedures and found good practice being strongly emphasised. Chief Constables' Guidelines on the handling of sexual offence investigations typically emphasise the need for tact and consideration when dealing with the complainer. Police officers interviewed in this study were very sensitive to the fact that, in the past in some forces, women have experienced hostile interrogation when reporting a sexual assault. They stressed that the overall approach is to treat a complainer of rape as a credible witness, to be sensitive to her trauma, using women officers when appropriate and giving priority to arranging medical assistance and examination when appropriate. All the evidence suggested that these guidelines are widely followed and since the mid 1980's Scottish police forces have introduced specialist units staffed by specially trained officers to

deal with crimes of violence against women and children (Burman and Lloyd, 1993). In most forces in Scotland, these are known as Female and Child Units and are part of the Criminal Investigation Department (C.I.D.).

Standard Investigative procedures

There are a standard set of enquires that the police routinely make in response to a complaint of a sexual offence. According to police interviewees, the evidence routinely gathered includes an interview with the complainer, a medical examination of the complainer if appropriate, interviews with other witnesses indicated by the complainer as being present and an interview with the suspect if he is known. There is usually a scenes of crime investigation. If an attack is alleged in a place known to be under surveillance by video camera, then it is also routine for the police to take possession of the film. It is not unusual for cases to be closed after the standard enquiries because of insufficient evidence.

There is a degree of discretion concerning what further enquiries might be made when investigating a sexual offence. Efforts to establish whether there were people in the vicinity who might have seen or heard something can be more or less extensive and, according to interviewees, very labour intensive enquiries may be rejected as an over costly use of resources. Possibilities of seeking other victims may or may not be taken up. For example, in one of the sample cases, a woman complained of a sexual attack by her male employer at their workplace, and then the police interviewed all the other female employees. They were interviewed not only as potential witnesses but also as potential victims and indeed further victimisation did emerge and contributed to a conviction. However, a police officer made the following cautionary remarks: 'The police can be accused of touting for business and this can be used by the defence as a way of trying to discredit witnesses. For example, if we interview every child who has passed through an institution where abuse has taken place, they might say it is putting ideas into people's minds and encouraging them to make false allegations. While the police do sometimes look for other victims, there is a sense in which we have to be careful to allow complainers to come to us.'

Withdrawal or not wishing to pursue complaint

With respect to domestic violence there has been some discussion concerning the form of mandatory prosecution that operates in some jurisdictions – if police are called to a scene in which the evidence of their own eyes and ears indicates that a man has been or is assaulting his partner then a prosecution will proceed even if the woman subsequently says she does not wish to purse the complaint. Such an option is not a realistic possibility in a rape case, at least not with a charge of rape. The fact that a woman does not wish to pursue a complaint is not necessarily a failure of the procedures although it is rightly a matter of public concern that many women do not even go as far as reporting a rape. It would of course also be a matter of concern if women were being raped, reporting rape and then not taking it further because of a response that they felt was unhelpful on behalf of the police. There is no reason to conclude that this is what happened for the small numbers of women who did not pursue their complaint in this study.

No Criming and False Allegations

An areas which has caused concern in the past (Chambers and Millar, 1983) is that of no-criming. Chambers and Miller documented cases of in which 'no criming' was not the outcome of careful investigation of the evidence and they noted the possibility of prejudicial assumptions about women's character and veracity playing a part in 'no criming'. Codes of conduct which acknowledge the inappropriateness of treating women complaining of rape with automatic suspicion are explicitly tackling such issues. However, police perceptions of the incidence of false allegations and how to deal with them sometimes sit uneasily with these understandings of good practice. Clearly false allegations do occur and all members of the police interviewed recognised this. The fact that an allegation had been false or was suspected as being false was sometimes given as the reason for no criming[6]. The police's own account of good practice indicates that women must be treated as telling the truth and that standard police investigation will reveal if it is otherwise. However, it is possible that beliefs about the extent of false allegation might still undermine this good practice in the case of some police officers. Across the two forces there were a range of views concerning the extent to which false allegations were a problem.

Views of the frequency of false allegations ranged from: 'I'm not a person to subscribe to the view that people will never make false allegations. I think it's rare but I think it does happen'. To the belief that false allegations were very common or becoming more common. One officer suggested that false allegations were typically linked to the possibility of gain, such as in cases involving claims to the Criminal Injuries Compensation Board. One police officer who believed that false allegations of rape were common suggested that most false allegations are made by women 'on girls' nights out who have had too much to drink and gone further than they meant to', suggesting that rape allegations are a way of getting out of trouble with their partner when they got home. In our work on trials (Brown, Burman and Jamieson, 1992, 1993) we noted a number of cases in which defence advocates used exactly these lines of argument. It was clear to us then that these accounts of false allegations are much repeated in the accused's defence and seem to be part of a stock repertoire of stories used across cases despite wide variation in details of the alleged events.

A number of officers suggested that false allegations often reflect psychological problems and that therefore prosecution for wasting police time is not always appropriate. As one officer put it: 'Let's face it, some allegations are made and they aren't strictly correct. There's a reason why an allegation has been made. The person has difficulties … the person has a problem'. This officer also observed that particularly problematic individuals who have made past false allegations to the force would be identified from their own records. There was general agreement that it was not police policy to pursue charging complainers with wasting police time if mental health problems or human tragedies prompted the false allegations. There were two well documented cases of false allegations in our sample. Both involved claimed

[6] The narrative field of 'no crimes' as with other crime reports is very variable in length and is written for police purposes not for the benefit of a researcher. It is therefore perhaps not surprising that these reports do not always reveal a great deal about why an incident was 'no crimed'. In the three crime reports of no-crimed 'rapes', only one gives a very full story of the 'no crime'. One crime report does not provide any detail of the alleged events, beyond 'inserting naked private member into vagina thereby raping', or the reasons for 'no crime'. Another report outlined the events but only gives clues as to why the incident was 'no crimed'. The clues include reference to the medical evidence being 'inconclusive at present' and enquiries involving a taxi company revealing 'some inconsistencies' in the complainer's story.

attacks by strangers not named suspects. One case, which involved extensive police enquires, did conclude in prosecution for wasting police time.

Police forces have policies specifying procedures that must be followed if a case is 'no crimed'. In Force 'A', only a detective inspector or a higher rank has the authority to 'no crime' a case. In Force 'B', the detective sergeant authorises the 'no-criming' of a case, acting on information given to him by the detective constable. However, in Force 'B', officers spoke of 'no-criming' as a relatively infrequent occurrence and there is no evidence to suggest otherwise. The smaller number of officers and the relative absence of very senior staff means there are practical reasons for the lesser involvement of senior police officers in the process. This necessarily means fewer checks and balances in the system, should an officer be less rigorous in following good practice in dealing with women reporting sexual assault.

If a named suspect has been identified and a rape is involved, then it is police policy following guidance from the Crown Office to report the case to the procurator fiscal. Formally, it is the job of the fiscal and Crown Counsel, not the police, to judge whether there is sufficient evidence for a prosecution or not. However, the police do not necessarily send a police report on all rape cases in which they have a named suspect to the fiscal. A report may not be made when the police are sure there is no prospect of a prosecution on the evidence that they have – if for example the complainer says she does not wish to the case to be pursued. In cases that do not involve rape, there is no expectation that a complaint made by one person and denied by another, supported by no additional evidence should be sent to the fiscal.

Fiscal Procedures.

We asked fiscals to check whether they had received reports from the police of any of the sample cases. Seven fiscal offices were involved in this study; two offices were sent cases from the Force 'B' sample, and five offices were sent cases from the Force 'A' sample. Each case generates a paper file in the procurator fiscal's office. In most cases, the whole of the file was examined in order to follow fiscal and court decisions and the final outcomes of cases and the disposals of those convicted.[7] As Table Three shows, half of rape cases, slightly less than half of indecent assaults and less than a fifth of indecent exposures are marked 'no proceeding'

Table Three

[7] Information in fiscal files includes the 'marking decisions' of the fiscal, that is their judgement about how to proceed. This is usually written as a set of abbreviated notations on a form documenting the progress of the case. This form is typically attached to the papers laying out the charges against the accused. Each time a case involves a court appearance, a brief note of the outcome is typically written on this form. A case file also contains the 'police report' including witness statements and, where appropriate a list of the accused's previous convictions. In some cases it will contain a transcript of a tape recording the police have made of their interview with the accused. As well as statements gathered by the police, there might be precognition statements, that is a transcript of statements made to a fiscal or a precognition officer working on the fiscal's behalf. A rape case always involves precognition of the complainer. All the correspondence relating to the case is also in the file. This may include correspondence between the fiscal and the police, defence, precognition officers, social workers, the Reporter to the Children's Panel and Crown Counsel. In some cases, it was not possible to inspect the whole file - either because the file itself was not made available or some parts of it were in use elsewhere - and the final outcome was simply noted.

'Marking' of Rape, Indecent Assault and Indecent Exposure

		Rape	Indecent Assault	Indecent Exposure
Proceed as charged		13	21	24
Charges reduced		2		
'No Proceedings'		**15**	**19**	**6**
Because	Insufficient Evidence	10	10	3
	Not in public interest	2	5	-
	Action other than prosecution	1	4	3
Total reported to fiscal by police		30	41*	32*

*One case of indecent assault and two of indecent exposure could not be traced.

Insufficient Evidence:
The main reason for sample rape cases being marked 'no proceedings' was insufficient evidence. Scrutiny of cases and discussion with fiscals reveal that the typical deficit in evidence are lack of corroboration and weaknesses in the complainer's account. As in all criminal cases under Scots law, there must be two independent pieces of evidence; hence the complainer's account must be substantiated by some other independent evidence. Possible corroboration includes eye and ear witness reports, injuries and 'first report evidence', that is the first person told by the complainer about the events, who can testify regarding her state of distress at that time. In some cases, all of these are entirely missing or judged as insufficient to justify prosecution. Clearly, the prosecution cannot be faulted for deciding not to proceed with a case if there is insufficient evidence to corroborate the complainer's account.

Some cases were marked insufficient evidence because the complainer was uncertain about pursuing the case or because of perceived weakness in her testimony. As a key witness, the clarity of the complainer's testimony concerning the events is a crucial part of the decision to prosecute. In earlier research (Chambers and Millar 1986) concern was expressed that judgements concerning the complainer's testimony were influenced by quasi-legal and extra-legal factors including common sense everyday inferences about her general credibility, morality and sexual habits. In our study, fiscals presented prosecuting on the basis of the sufficiency of the evidence, not the credibility of the complainer, as normal and good practice. As one fiscal put it, if there is sufficient evidence to proceed then they would proceed to a prosecution and let the jury decide the credibility of their witness. However, fiscals interviewed also acknowledged that judgements of credibility were made. One commented 'And we actually have to have a wee note at the end of their statement saying 'she appears credible, or she appeared shifty and evasive, or she won't come across well', that sort of thing.'' In the case files we examined, we formed the impression that judgements

about credibility were most often recorded in cases in which there is equivocation about the sufficiency of the evidence. Moreover, it seems that the boundary between common sense and legal judgement is inevitably blurred if judgements are made on the basis of what a jury are likely to think.

Chambers and Millar particularly highlighted the role of the relatively untrained precognition officer in making judgements about rape cases. The practice of using precognition officers has not changed in the intervening period. Two complaints of rape in the Force 'A' sample involved the same complainer and were marked 'no proceedings' because of the weakness of the complainer's report. The woman concerned reported being raped by three men on the night in question, but only two of the cases came up in our sample. Five months had passed since her initial police statements when she was interviewed by a precognition officer for the procurator fiscal. Her account was tenuous and lacking the detail crucial to establishing all the alleged offences. However, the complainer did give a detailed description of one incident of alleged rape including being thrown down, trying to run away, being grabbed and held by the hair. The complainer also acknowledged that she did not say anything to the accused while she was being penetrated. The author of the precognition report sums up as follows:

> the victim was very drunk when incident happened and cannot be sure if she consented or not. … In the case of (the third accused) she remembers having intercourse but was too afraid due to fear and didn't inform him of her lack of consent.

This and a number of other cases exhibits something of the extra-legal judgements to which Chambers and Millar referred. This summing up makes no reference to the violence reported by the complainer with respect to the third incident although the violence contradicts the notion of consent and suggests the accused knew consent was not given. Rather the precognition officer focuses on the complainer's silence as weakening her case. However, the transcript of the interview with the complainer also records the following comment made by the complainer herself: 'I am in two minds whether I would want this case to go to court now anyway because I feel it would be very embarrassing and there is no prospect of any of them being convicted.' This expressed ambivalence was about going to court not about whether she was raped, but it might have contributed to the tone of the precognition officer's summing up and the decision not to prosecute. While quasi-legal and common sense judgements may play a role in the decision whether to prosecute or not in some cases, overall it seems that the insufficiency of evidence is the main reason why cases do not get to court.

Table Four gives an overview of the progress through the system of our sample cases. The top rows of the table show the outcome for the crime reports in our sample that not only resulted in a police report but also a court case. It shows that of the rape cases originating in force A, 12 got to court and 7 of these resulted in a conviction. This is a much higher conviction rate than was found in our previous study of sexual offence trials (Brown, Burman and Jamieson, 1992, 1993) and is largely an artefact of the high proportion of a particular type of cases involving crimes against children. Of court cases monitored in our previous study between 1987 and 1990, among cases involving a single charge of rape, 102 cases, only 22 resulted in a conviction, an acquittal rate of 78%. The number of cases in the more recent study are very small

and in Force 'A' they include a high proportion of cases in which the complainer was a child at the time of the offence. Table 5 illustrates that these cases involving a child victim had a much higher conviction rate than cases involving adult women complainers.

Table Four
From First Report to Final Outcome, Rape, Indecent Assault and Indecent Exposure by Originating Police Force

		Rape		Indecent Assault		Indecent Exposure	
	Originating Police Force	A	B	A	B	A	B
Court Proceedings		**12**	**3**	**16**	**5**	**20**	**2**
	Guilty Verdict	7	1 (a)	6	2 (b)	17	2
	NG/NP Verdict	1		1	1		
	Case still pending	2	1	6	2 (c)	2	
	Charges reduced	2		3		1	
No Progress Beyond Fiscal		**9**	**6**	**17**	**2**	**4**	**2**
	Action other than court proceedings	1		4		2	2
	Insufficient Evidence	7	3	8	2	2	1
	Not in public interest	1	1	5		-	
	No crime						1
Record not traced				1		2	
No Progress Beyond police		**4**	**13**	**10**	**5**	**32**	**4**
	No Suspect	1	6	6	2	31	3
	Complainer does not wish to pursue	1	3	1	-	1	-
	Insufficient evidence / Police dubious/ no info.	2	4	3	3	-	1
Total		**25**	**22**	**44**	**12**	**58**	**10**

(a) subsequently quashed on appeal. The outcome of the third case was not known
(b) one guilty verdict was for the more serious charge of attempted rape
(c) both accused had absconded while on bail and in one case was believed to have left the country

The figures in table five indicate a conviction and acquittal rate in rape cases involving adult complainers that is no better than the 78% acquittal rate previously reported.

Table Five
Force 'A': Rape cases by end-points , adult and child complainers

	Complainer and accused both adults	Child complainer, adult accused
Court Proceedings		
Guilty verdict	2	5
NG/NP verdict	1	
Case still pending	1	1
Charges reduced	1	1
No Progress Beyond Fiscal	6	1
No Progress Beyond Police	3	1
Total	14	9

Two additional cases not listed in this table involved an accused who was a child

In our previous work we looked in detail at the trial process and in particular at the use of sexual history and sexual character evidence during the trial. The study had the explicit remit of assessing the effectiveness of the legislation passed in order to exclude such evidence unless it fell within specified exceptions[8]. Our study began two years after the introduction of the legislation and found that sexual history and sexual character evidence was still introduced in about half of rape trials. In about two thirds of the cases in which this type of evidence was introduced, the formal rules were invoked, that is an application was made seeking judicial permission for its introduction and the permission was granted. In the remaining cases the evidence bypassed the formal procedures. In the majority of cases in which the rules were followed, our scrutiny of the whole trial documented many instances in which the formal procedures were admitting evidence that contradicted the spirit of the legislation. The exception clauses were being used to introduce evidence that was of very little relevance to the facts of the case and likely to form impressions of the character of the complainer liable to prejudice the jury against her. At the point of making an application the defence were rarely asked searching questions by either the prosecution or the judge and subsequent lines of questioning often exceeded the brief indication given in the application. It is not possible to know the effects of sexual history and sexual character evidence on juries since direct research on juries is not permitted but the persistence of sexual history and sexual character evidence may play a significant role in the high acquittal rate. At the time of our research there was no current understandings of good practice among defence lawyers which would work against the introduction of sexual history and sexual character evidence. Some

[8] The Law Reform (Miscellaneous Provisions) (Scotland) Act (1985), section 36 amended the Criminal Procedure (Scotland) Act 1975 by inserting new sections (sections 141A, 141B and 346A, 346B). dealing, respectively, with solemn and summary procedure (i.e. jury trials and non jury trials).

defence advocates openly took the view that if they could 'throw a smoke screen of immorality' around a complainer and in the process help their clients case, then that is what they would do.

To sum up, the Scottish criminal justice system is failing women who are the victims of sexual attack because very few complaints result in a conviction their attacker. However, this is not a failure that is the outcome of widespread indifference or lack of good practice throughout the system. While there is attrition at every level, arguably the most problematic area in terms of the final outcome for adult women is the court not the police or the fiscal service. At the level of the court, there are problems of practice and aspects of the system that should be addressed that I do not have time to explore in this talk.

The police have well-developed notions of good practice which include treating all complaints of sexual assault seriously until the evidence tells them otherwise. They have established procedures for ensuring that they act accordingly. The belief that certain types of false allegations are common, that is held by some police officers may work against good practice but there are checks and balances in the system that should block such tendencies. However, our comparison of forces suggests that such checks and balances may be less well established in some forces than others. Clearly the insight that can be gained from retrospective inspection of records does not tell a full story, but, overall, we feel able to conclude that the overwhelming majority of cases that do not get beyond the police do not represent any malevolent failures in the system. The lack of a suspect does not generally represent a failure to take complaints seriously. Improvements in the clear up rate of cases without suspects could perhaps be achieved. It is not possible to establish this from the data and it may be that this would require considerable resources.

In the fiscal services there are also well-developed understandings of good practice and the general rule is to prosecute all cases of rape if there is sufficient evidence. The majority of cases that do not proceed beyond the fiscal to court lack sufficient evidence. However, the practice of gathering evidence and preparing the case involves relatively untrained precognition officers without obvious checks and balances. Our scrutiny of cases suggests that common sense judgements and therefore also prejudices including the imagined prejudices of juries do continue to influence cases that are marginal in terms of conventions of sufficient evidence. However, this does not explain the majority of cases that do not go onto court proceedings.

The conviction rate in cases involving the rape of adult women remains very low. At the court level the prosecution have standards of good practice which include leading out all of the relevant evidence. The more or less conscious approach of many defence advocates of exploring anything and everything that may help to get their client off has not been radically altered by attempts to protect victims from sexual history and sexual character evidence. The contest between prosecution and defence is not even handed in a number of respects, including, sometimes, the amount of experience practitioners have of rape trials or the time they have for preparation. In our earlier research we observed that the prosecution often did little to check in advance for (during applications), challenge or counteract defence practices that, from the point of view of protecting victims, might be called bad practices. I personally would welcome consideration of specialist rape prosecutors and suggest more fiscals as prosecutors at

the High Court level since the fiscal service has more experience of preparation of rape cases than many advocates depute. In terms of the damage done by sexual history and sexual character evidence, I hope that recommendations only just laid out in the prelegislative document, *Redressing the Balance: Cross-examination in rape and sexual offences trials* are adopted and believe that they could make a very significant difference.

Finally, I note that various legal judgements have fed a public perception that women will get no justice in court. One such judgement is the affirmation in Scots law of the view that a man has not committed rape if he believes a woman consents, even if that belief is unreasonable. While the 'mistaken belief in consent' defence is rarely used in practice, the fact that such a position was upheld by three Scots judges in the 1990s does not incite confidence in the ability of the courts to protect the interest of victims. Similarly, the fact that the charge of clandestine injury remains the appropriate charge if a woman is unconscious does not indicate a system determinedly protecting women. The notion that it is necessary to show an active will that has been overcome before rape can be acknowledged helps to privilege the use of physical force on the part of the man and the use of physical resistance on the part of the woman as the only 'real' form of rape. Cases of 'clandestine injury' are very uncommon but the legal denial of rape in such cases remains deeply problematic[9]. As an aspect of the system, it undermines my case that failings are contingent rather than fundamental.

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[9] The judgement made by Lord Abernethy in the case of Edward Watt had not been made at the time of this talk but it was highly illustrative of the difficulties referred to here.

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