

## Impact case study (REF3b)

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| <b>Institution:</b> University of Dundee  |
| <b>Unit of Assessment:</b> 20 Law   |
| <b>Title of case study:</b> Independent Legal Representation (ILR) for Rape Complainers   |
| <b>1. Summary of the impact</b> <p>Research on ILR undertaken by Professor Fiona Raitt has re-framed the terms of the debate in Scotland concerning participation of rape complainers in the criminal justice system. It has:</p> <ul style="list-style-type: none"><li>• Informed law reform campaigning by Rape Crisis Scotland in their discussions with the Scottish Government, the Crown Office and Procurator Fiscal Service, and the Faculty of Advocates.</li><li>• Been the subject of an international conference sponsored by the Equality and Human Rights Commission.</li><li>• Attracted widespread media attention.</li><li>• Informed the work of the team steering the Criminal Justice and Licensing (Scotland) Act 2010 through the Scottish Parliament.</li><li>• Informed policy debates in other common law countries e.g. England and New Zealand.</li></ul>  |
| <b>2. Underpinning research</b> <p>Fiona Raitt joined the University of Dundee in 1993 from legal practice where she had worked with numerous NGOs concerned with access to justice, and violence against women and children. In 2008, based on her expertise in criminal evidence, particularly gender and violence, Rape Crisis Scotland (RCS) commissioned Raitt to conduct research into the use of Independent Legal Representation (ILR) for rape 'complainers' (the Scottish term for those who allege that they have been the victim of a criminal offence). The report was commissioned against a background in Scotland of low reporting (90% of rapes are not reported to the police); high attrition rates (the vast majority of reported cases are not pursued to trial); and poor conviction rates, such that in 2009, Scotland had the lowest conviction rate in the EU, save for Ireland. The key research questions addressed were:</p> <ul style="list-style-type: none"><li>• What difference could ILR make to complainers' experiences?</li><li>• Is ILR compatible with an adversarial trial system such as the Scottish one?</li><li>• Is ILR contrary to the principle of 'equality of arms' enshrined in the European Convention on Human Rights (ECHR)?</li><li>• Could a suitable model of ILR be designed for Scotland?</li></ul> <p>The research report, <i>Independent Legal Representation for Complainers in Sexual Offence Trials</i>, was published by RCS in 2010 (<a href="http://www.rapecrisisscotland.org.uk/publications/research/">http://www.rapecrisisscotland.org.uk/publications/research/</a>). This was a library based research activity, supplemented by interviews and correspondence with researchers and practitioners in other countries. It enabled the construction of a comprehensive contemporary framework of the ILR models that operate elsewhere to evaluate the most suitable model for the Scottish legal system. The research identified features of Scottish criminal procedure and evidence that exacerbate the problems currently facing rape complainers and that shape the type of responses the criminal justice system can make. Without ILR, complainers, who are often highly vulnerable, have no legally qualified person to support them or to vindicate their interests</p> |

and rights. Other than the UK, almost all other countries in Europe permit rape complainants to have a lawyer to protect their rights, e.g. to privacy and compensation. The research explored the objections to ILR in countries with adversarial systems, such as Scotland, and found that third party representation of the type proposed in ILR is not necessarily incompatible with the Scottish system of investigation and prosecution. It considered the operation of ILR in Canada and Ireland, countries with similar legal systems to Scotland. Models could therefore be designed to accommodate third party representation in the courts. Raitt's research highlighted the key procedural stages where the intervention of ILR could significantly improve the experience of the complainant, and concluded that there were no insurmountable procedural or evidential barriers to its introduction in Scotland. This knowledge, and how it could be applied in the Scottish legal system to encourage reporting of rape and reduce attrition, has been used by RCS to re-frame recent and current debates in Scotland over further law reform.

Raitt conducted all the research between 2008 to date while employed at the University of Dundee. The research has led to numerous invitations to international conferences, Scottish Government events, and to contribute a chapter to an edited volume.

### 3. References to the research

Raitt is the sole author of each of these, except for No. 4.

1. "Disclosure of records and privacy rights in rape cases" (2010) *Edinburgh Law Review* 15(1) pp. 33-56.
2. "Independent Legal Representation [ILR] in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings"[2013] *Crim.LR* 9 pp.730-750.
3. Independent Legal Representation for Complainers in Sexual Offence Trials, *Report for Rape Crisis Scotland* (2010) ISBN: 978-0-9561486-1-2
4. "Re-defining Rape" (with P.R. Ferguson), (2006) *Edinburgh Law Review* 10, pp. 185-208.
5. "Independent Legal Representation for complainants in rape trials" in McGlynn & Munro (eds) *Rethinking Rape Law - International and Comparative Perspectives* (Routledge: London, 2010) pp. 267-280.

### 4. Details of the impact

Between commission of the research in 2008 and its publication in 2010, Raitt gave interim reports to RCS and disseminated early conclusions in several conference papers on ILR. RCS issued press releases about the research, sparking media interest, including a radio programme in which Raitt participated: *Rape Investigation*, BBC Scotland, presenter Eamon O'Neill (2009). Reports were carried by *The Times*, *Sunday Times*, *The Scotsman* (a commissioned Opinion see note 3, below), *Scotland on Sunday*, *The Herald* (see note 5, below) and *BBC Scotland*. The research also attracted some interest from MSPs (e.g. email exchange with Alison McInnes) in 2011 after Raitt gave evidence to the Justice Committee on reform to evidence law and safeguards for complainants (13 December 2011) (see note 9, below). In 2009 the Criminal Justice and Licensing (Scotland) Bill introduced a new expansive regime to govern the obligatory disclosure of evidence by the Crown Office and Procurator Fiscal Service (COPFS) to defence lawyers, which struck at the heart of complainants' privacy interests. Raitt's work was used by RCS to argue that the proposed legislation would be particularly damaging for rape complainants whose personal data, including medical records, once disclosed to the defence could become a source of character evidence for their cross-examination, without complainants having any opportunity to oppose disclosure. These were the type of circumstances envisaged in Raitt's research as likely to lead to injustice, the remedy for which was to entitle complainants to their own legal counsel, ILR, to oppose or limit access to records. The research also articulated the complex competing interests which it was argued acted to prevent the prosecutor from safeguarding the rights of complainants. The research was used by

RCS to argue that complainers' privacy rights under article 8 of the ECHR could be seriously undermined without access to ILR. During the passage of the Bill, Raitt produced a Briefing Paper for RCS, (<http://www.rapecrisisScotland.org.uk/publications/resources/>; see note 6, below) based on the research report, detailing the Bill's negative effects upon rape complainers. This Paper was downloadable from the RCS website and led to Raitt being invited by the team steering the legislation through Parliament to meet with them and RCS to discuss her critique of the proposed regime (Summer, 2009). Since the Bill became legislation in 2010, the issue of disclosure and privacy rights has continued to attract considerable criticism from some practitioners and NGOs. The COPFS responded to concerns over disclosure by publishing a leaflet intended to allay complainers' fears (COPFS Policy on Sensitive and Personal Records - Information leaflet, May 2011: see note 8, below). In 2011 the Equality and Human Rights Commission responded to disquiet over the effect on privacy rights by sponsoring an international conference devoted to ILR for prosecutors, academics and practitioners: *Without Fear or Favour: A Voice for Rape Survivors in the Criminal Justice System*. Raitt gave a keynote presentation. Other speakers were: Derek Ogg QC, Head, National Sex Crimes Unit Scotland; Kate Mulkerrins, Head of Policy DPP Ireland; and Prof Lise Gotell, Canada (see note 4, below). Since 2008 Raitt has given another 3 keynote conference papers on ILR and 7 papers at workshops or research seminars involving prosecutors, legal and non-legal practitioners, policy-makers and academics.

Raitt's work has led to invitations to participate at policy-making events organised by the Scottish Government, including a consultation seminar (October, 2011) on EU Directive 2011/0129 (COD) which recommended numerous rights for victims of crime including access to legal assistance (see note 7, below). ILR also featured in the international research programme, *Re-thinking Responses to Rape*, funded by the Scottish Universities Insight Institute (SUII). Raitt was a co-applicant for the SUII programme which had a multi-sector and multi-disciplinary focus, with contributions from UK and international participants, including representatives from Canada, Ireland and Austria which permit ILR. Following this programme, in late 2012 RCS established a small working group including Raitt and two experienced solicitor-advocates to design a pilot ILR model suitable for introduction in Scotland. The working group finalised its recommendations in July 2013 and, at the invitation of Scottish Government, the National Co-ordinator of RCS submitted the model to Government for their consideration (see note 10, below). This development is particularly significant as the consultation paper, *Making Justice Work for Victims and Witnesses* (Scottish Government, 2012) attracted responses in support of ILR. The Victims and Witnesses Bill introduced to Parliament in February 2013 provided an opportunity to legislate on ILR. In their Stage 1 Report on the Bill, the Justice Committee of the Scottish Parliament stated: "...we do consider this issue [ILR] to be worthy of further consideration and we therefore ask the Scottish Government to examine this proposal further with the two organisations [Faculty of Advocates and RCS] and others and to report back to the Committee in due course." [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Reports/juR-13-07w.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/juR-13-07w.pdf): at para 148 (see note 9, below). A subsequent meeting to discuss ILR involving Raitt, RCS, Scottish Government and the Crown Office took place on 15 October 2013. Further meetings are planned.

Raitt's work for RCS has irrevocably changed the terms of the debate. There is increasing recognition within the legal profession and by politicians that the COPFS position is untenable. (Justice Scotland Seminar (Glasgow, 2012); Sir Gerald Gordon Seminar (Edinburgh, 2012) Faculty of Advocates, evidence to Justice Committee (2013)). It is notable that at several public events the COPFS has felt it necessary to defend its position on ILR and justify the organisation's view that prosecutors are capable of supporting complainers (e.g. presentation by Ogg QC, and panel discussion in *Without Fear or Favour: A Voice for Rape Survivors in the Criminal Justice System*, Conference Proceedings; Sir Gerald Gordon Seminar; Scottish Women's Aid, Carlway Round Table Seminar, Edinburgh, 2012). This represents a significant shift in position: suggestions of ILR were previously dismissed as fanciful, irrelevant and incompatible with adversarial proceedings and a fair trial.

**5. Sources to corroborate the impact**

1. National Co-ordinator, Rape Crisis Scotland, 46 Bath Street, Glasgow, G2 1HG (all claims relating to RCS; and press reports).
2. Helpline Manager Rape Crisis Scotland, 46 Bath Street, Glasgow, G2 1HG (claims relating to RCS; and meetings with Scottish Government and Crown Office in 2013).
3. *The Scotsman* invited Opinion article by Raitt, "If trials are theatre, rape cases must not become tragedies" published on 09 June 2009.  
<http://www.scotsman.com/news/fiona-raitt-if-trials-are-theatre-rape-cases-must-not-become-tragedies-1-1041663>
4. Transcript of the proceedings of the conference *Without Fear or Favour: A Voice for Rape Survivors in the Criminal Justice System*, Rape Crisis Scotland, Glasgow, 2011.
5. Newspaper article *The Herald* on 10 August 2009  
<http://www.heraldscotland.com/news/crime-courts/why-is-scotland-s-rape-conviction-rate-so-dismal-1.822238>
6. *Disclosure article of personal records of complainers of sexual assaults* by Raitt F, *RCS Briefing Paper, 2010* available from RCS webpages at :  
<http://www.rapecrisisscotland.org.uk/publications/legal/>
7. Invitation to Scottish Government Consultation Seminar on Victims' Rights Bill held 4 October 2011.
8. COPFS Leaflet: *COPFS Policy on Sensitive and personal Records- Information leaflet*, (May 2011).
9. Justice Committee, 7th Report, 2013 (Session 4) Stage 1 Report on the Victims and Witnesses (Scotland) Bill.  
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64072.aspx>
10. RCS Working Group Proposal for Model for ILR in Scotland submitted to Scottish Government (July 2013).