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Sexual Violence on Trial: Local and Comparative Perspectives: A Conference Organised by the Queen's University Belfast Human Rights Centre and Gender Network

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Sexual Violence on Trial: Local and Comparative Perspectives

A Conference Organised by the Queen's University Belfast Human Rights Centre and Gender Network

11th-12th September 2018

Introduction

On the 11th and 12th September, Queen's University School of Law's Human Rights Centre and Gender Network hosted a conference entitled 'Sexual Violence on Trial: Local and Comparative Perspectives'. The decision to host the conference followed the launch of the Northern Ireland Criminal Justice Board's independent review of the arrangements to deliver justice in serious sexual offence trials led by Sir John Gillen. This review explores the law and procedure covering the development and progression of cases of alleged serious sexual offences, taking account of experience from recent cases in Northern Ireland and developments in neighbouring jurisdictions. In addition to drafting a response to this review, the Human Rights Centre and Gender Network decided to arrange a conference in order to explore some of the issues raised by the review with relevant experts.

The conference brought together practitioners, politicians and academics from the United Kingdom, the Republic of Ireland and Iceland, who discussed legal, procedural, social and political aspects of prosecuting serious sexual violence. In addition to bringing together expert participants, the conference was invitation only, and included attendees from various organisations within the criminal justice system, activists, academics and staff from civil society organisations who work with victims of sexual violence. The conference organisers hoped that in bringing together diverse perspectives on this important issue, the event could prompt conversation and debate around the issues raised by the Criminal Justice Board Review. The purpose of this report is to summarise the topics discussed over the course of the two days, with the aim of providing another resource to the Criminal Justice Board, as well as to anyone else with an interest in this important topic.

Reporting and Investigations

The first panel featured participants from the criminal justice system and organisations who offer support to victims of sexual violence. The participants discussed three themes in the context of reporting and investigating sexual violence crimes: the challenges of investigating sexual violence, the reasons why victims do not report such crimes, and the impact the crimes have on victims. Suggestions as how to combat these challenges were also shared and discussed.

A number of challenges in investigating sexual violence were flagged. These included the fact that issues of consent often come down to one person's word against another. In this regard, the importance of clarifying and educating people on the meaning of consent was strongly highlighted. Other challenges included the lack of forensic opportunities due to the small window in which such evidence could be gathered. Other aspects of investigations, such as looking for digital and social media evidence, were highlighted as time and resource intensive. It was observed that despite the increase in reporting statistics, sexual violence remained an under-reported category of crime, and that there needed to be greater partnership between police forces and other organisations to ensure that victims feel confident in coming forward.

In relation to the lack of reporting, it was noted that many feared that they would not be believed. This could be for a variety of reasons, including having been told that nobody would believe them, having a distorted

memory due to trauma, or due to having been targeted specifically because they were not someone who would easily be believed, e.g. someone who had a previous criminal record. Victims also fear being blamed for what happened, especially if they had been drinking, wearing clothing that others may deem provocative, or had gone to the perpetrators home. Victims may also fear stigma, negative impacts on their friends and family, and the loss of control that comes from the commencement of a criminal investigation. It was observed that after an investigation begins, victims can sometimes try to retract their story, due to the negative consequences that come from people knowing, from media reporting, from the trauma of reliving the experience, and from the hurt of not being believed. The delay in bringing cases to trial, which could sometimes last up to three years, was highlighted as another element which discouraged reporting. It was also observed that specific minority groups, such as individuals from the travelling community, LGBT community or disabled community faced additional obstacles, and that reporting was particularly low within these groups. The specific challenges faced by such groups was acknowledged as requiring developments within policing, and partnership with relevant community groups, to strengthen confidence in the criminal justice system and willingness to come forward. Despite these challenges, it was noted that the amount of reported rapes had increased 103% since 2008/2009, and that this reflected increased confidence in reporting amongst victims.

In relation to the impact of sexual violence, it was observed that many victims do not want to report the assault, but may nonetheless need guidance in seeking sexual health advice and other forms of support. It was noted that victims can feel overwhelmed, can feel fearful, suffer from sleeplessness and flash backs, a lack of focus and feelings of self-blame. It was explained that victims may not necessarily have told the people close to them, but that they may nonetheless wish to be heard and for their experiences to be validated. The participants noted that without adequate support, sexual violence can continue to cause ripple effects throughout a victims' life, and that the Criminal Justice Board Review should seek to reflect this lived experience.

The importance of challenging the underlying societal assumptions and rape myths was strongly emphasised throughout the panel. The introduction of the PSNI's new 'no grey zone' media campaign was highlighted as one positive move in this direction, but one which could be strengthened by greater collaboration with other relevant organisations and by mapping which vulnerable groups required further engagement. The need to educate young people about consent in an age appropriate manner was emphasised as something which needs greater attention, as much of school sexual education in Northern Ireland continues to be faith based. It was acknowledged that the age of sexual activity is getting younger and that even young children could be taught about boundaries and respect in an age appropriate way. This could combat situations in which young people either did not realise they were engaging in criminal behaviour, or did not realise they were being abused. Also highlighted was the need to educate society on the impact of trauma on an individual's ability to fight back and remember events.

On being asked what one thing the panellists would change to help victims, the panellists listed: quicker trials to prevent victim withdrawal, quicker access to victim counselling, for society's attitudes towards consent to change, and for sexual violence against men to receive greater acknowledgment.

The Trial Process

The conference featured two panels on the trial process, bringing together academics, criminal justice practitioners and organisations that support victims. It was acknowledged that the criminal trial brought multiple challenges to victims of sexual violence. The length of trials, particularly in Northern Ireland, was flagged as being an additional source of distress. Increased fear and anxiety could arise in the lead up to a trial, which could then be adjourned several times. The conduct of trials was also explored, with particular focus being given to rape myths, the adversarial process and the use of special measures.

Based on expectations of how women and men should behave, it was argued that rape myths are being reinforced every day in popular culture, and had been brought into the spot light by, for example, Game of Thrones plotlines, the rise of the men's rights movement, and controversial statements by public figures such as Jordan Peterson (who claimed the 'love of a good woman' could solve sexual violence), Germaine Greer

(who described most rapists as ‘lazy, careless and insensitive’), and Whoopi Goldberg (who claimed Bill Cosby’s crimes were not ‘rape rape’). The use of rape myths within the courtroom were highlighted, in particular in the context of defence strategies such as distancing assaults from ‘real rape’, discrediting the victim using myths or sexual history, highlighting inconsistencies which may be caused by trauma, and using a yes/no binary answer system. The use of rape myths within the recent high-profile Jackson and others rape trial was highlighted, using examples of language used such as ‘she went to pull’, ‘went upstairs on her own’, ‘she didn’t cry out’, ‘she didn’t fight back’ and ‘she regretted it, fearing she would be exposed on social media’.

The use of such tactics was placed within the context of the criminal justice process, where the adversarial process makes winning a priority. In the context of a sexual offence trial, it was observed that this adversarial process could be reduced to one person’s word against another, with each trial containing a complainant who may be a victim, and a defendant who is innocent unless or until proven otherwise. In such a case, it was important to balance interests and attempt to deliver a fair trial to both. However, it was acknowledged that as it was only the defendant who was on trial, the law had developed to primarily protect the defendant’s fair trial rights, for example through statutory restrictions on cross examination and the introduction of bad character evidence, and through the role given to the judge in ensuring the defendant’s rights are protected. For example, judges are required to warn the jury about factors that may have prejudiced the defendant, but there are no requirements to do the same with regards to complainants. Similarly, while judges are required to tell the jury to be cautious of complainants’ unsupported evidence, this was not required in the context of the defendant’s unsupported evidence. Again, while allowances could be made for a defendant’s good character evidence, none could be made for a complainant’s good character evidence. However, it was acknowledged that a complainant’s good character was presumed unless challenged, and that the threshold for bad character evidence in relation to a defendant was lower than that for a complainant.

Fair trial rights for defendants were flagged as extremely important. It was noted that the impact of a false conviction or accusation could be extremely severe, and also that in order to maintain fair trial rights it must be remembered that not every individual who received a not-guilty verdict was a perpetrator who had avoided their just deserts. The need to ensure full disclosure of evidence, and to follow correct procedures when using special measures such as pre-recorded interviews, was flagged as being central to ensuring fairness to both sides. Furthermore, criminal trials did not exist solely to give justice to the complainant, but to assess evidence and act in the public interest. However, it was also acknowledged that in such cases, complainants were in a sense on trial too. It was observed that as juries must be absolutely sure of guilt, the defence need only create doubt as to the complainant’s version of events. In such a context, rape myths often emerged as a means of casting doubt on the complainant’s story. The argument was made that while sexual offence trials often rest on the evidence of the complainant alone, victims are left without rights or formal standing, and vulnerable to being exposed to the defence tactics detailed above without an independent voice. Thus, a challenge remains in delivering justice to both parties.

The continued relevance of rape myths to sexual offence trials was also explored in the specific context of juror deliberations and special measures for complainants, such as the use of live link, video-recorded examination in chief, and video recorded cross-examinations. It was noted that complainants had a high appreciation for special measures, but that there were concerns that the use of special measures could reduce juror empathy, reduce emotional impact leading to reduced perceived credibility, interfere with ability to assess demeanour, prejudice the accused by implying guilt, and unduly influence trial outcomes. Recent research carried out to examine the impact of video-mediated testimony in particular was highlighted.¹ These studies suggested that the use of video-mediated testimony did not have a strong influence on juror perceptions of complainants’ credibility or the fairness of the trial. Similar conclusions were drawn in the case of child

¹ Natalie Taylor and Jacqueline Joudo, ‘The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study’ Research and Public Policy Series No. 68, Australian Institute of Criminology (2005); Louise Ellison and Vanessa Munro, ‘A “Special” Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials’ 23(1) Social and Legal Studies (2014) 3-29; Louise Ellison and Vanessa Munro, ‘Turning Mirrors into Windows? Assessing the impact of (mock) juror education in rape trials, 49(3) The British Journal of Criminology (2009), 363-383.

witnesses, while jurors might show a preference for children delivering evidence in live court, it did not appear to have a significant impact on verdicts. Jurors' evaluations of victim testimony were instead likely to be influenced by pre-existing expectations about 'normal' victim behaviours (delayed reporting, lack of physical resistance / injury) and beliefs about consent. Thus, educating jurors about varied reactions to rape was crucial as a means of countering common misconceptions. It was also highlighted that despite the limited impact of pre-recorded evidence on jurors, and despite calls for greater use of pre-recorded evidence for vulnerable witnesses, it remained under-used and subject to limited academic debate. Yet, it offered some support to vulnerable witnesses exposed to the combative ethos of the adversarial system.

There was some debate amongst the participants around issues of whether juror trials should continue to be used in the context of sexual offence trials and whether there is a case for a move to closed courts. While no consensus was reached, views included: that jury trials were inappropriate (for the reasons already discussed), that more should be done to support jurors and combat the prevalence of rape myths through education, and that there might be an argument for including the press but excluding the public.

Social and Cultural Influences

In this panel we heard from activists and academics with an interest in the broader context within which serious sexual offences occur. Statistics on rape in Northern Ireland were highlighted to demonstrate the extent to which rape is often perpetrated by someone known to the victim, with only 17% of reported incidents between January and July 2017 involving strangers. The impact of sexual violence was explored again, focusing on, for example, the immediate harms of physical injury, unwanted pregnancy and exposure to sexually transmitted infections, but also the long-term impacts such as post-traumatic stress disorder, anxiety, fear, self-blame, low self-esteem and feelings of guilt. It was observed that in Northern Ireland there was no rape crisis centre, and that high-profile cases had led to an increase in people coming forward, leading to a strain being placed on the services that are available.

The panel also explored the phenomenon of child sex abuse committed by peers, and the social and cultural influences on these types of activities. The impact of new norms around sex were highlighted, including the media and culture of sex in advertising, gaming fashion and elsewhere, the changing modes of communication between children as a result of social and online media, changes in dating and courting practices as a result of new technologies, widespread access to pornography, the rise of 'corporate paedophilia' (e.g. selling sexualised clothing to children), and the prevalence of a party culture involving drugs and alcohol. Differences in how sex is viewed and understood were examined, focusing on the impact of changing social scripts on how young people understand sex and sexual identity. This was framed as giving rise to a culture of confusion, in which lines between normal and harmful sexual behaviour were blurred, inadvertent infringement of legal norms could occur (e.g. through 'sexting') and the boundary between consent and coercion became confused.

The challenges associated with responding to these new norms was also explored. It was observed that tensions existed between the age of criminal responsibility (10), the age of consent (16) and the age of consent for indecent photographs (18), with a reliance on age prohibiting a focus on consent. Another challenge was highlighted in the normalisation of peer on peer sexual behaviour, which could lead to difficulties in establishing intent on the part of the perpetrator, as well as a victim's capacity to see themselves as having been victimised. Additional challenges came from the prevalence of 'victim blaming', the influence of social attitudes towards moral and immoral behaviour, and the often 'grey area' which exists between consensual and non-consensual relationships. With regards to procedural challenges, the issue of children as vulnerable witnesses was raised. It was observed that special measures were discretionary rather than automatic for child defendants. It was also observed that cultural stereotypes could work in favour of child defendants, with younger children being given greater credibility than adolescents. The complexities that surrounded the categorisation of 'victims' and 'perpetrators' when dealing with peer on peer sexual behaviour was highlighted, as was the prevailing use of terminology which frames victims as female and perpetrators as male. The importance of education around consent, privacy, sex and sexuality was stressed as a means of addressing some of the challenges raised by these types of crimes.

Finally, the panel explored the approach of abolitionist feminism, an anti-carceral perspective of violence against women which aims to highlight the structural production of violence while advocating for the abolition of prisons and a move towards transformative justice. This approach would highlight the role of gender oppression within a patriarchal society, but also the role of the state and the criminal justice system in harming both victims and perpetrators. The criminal justice system's own biases were highlighted, with examples being used such as the criminalisation of children from the care system, and the overrepresentation of minority groups such as Roma traveller children within the criminal justice system. The harms caused by imprisonment were explored, and the claims that prison can be a place of rehabilitation were questioned. It was observed that while prisons may be seen as natural responses to violence, the majority of prisoners are not considered dangerous, and the links between poverty and imprisonment are significantly higher. With criminal justice agencies often appearing unable to respond effectively to sexual violence, it was argued that perhaps there was a need for more transformative solutions, which started by providing immediate safety to victims, and focused on healing and reparation, accountability, the transformation of social and economic accountability (e.g. providing welfare for those in need instead of responding to mental health issues and poverty with criminalisation), prevention through education, and decarceration.

Comparative Perspectives

During the panel on comparative perspectives, we heard from politicians and academics from Iceland, the Republic of Ireland and Scotland.

In the context of Iceland, it was observed that Iceland was ranked at the top of the 'Global Gender Gap Report' 2017, but that sexual abuse remained an issue that required attention and that had been considered across multiple political parties in Iceland. The result was a new bill on the definition of rape, which came into being in March 2018 after 48 out of 63 Members of Parliament voted in favour. A bill passing this quickly was acknowledged as unusual, and attributed to the preparation that went into the bill, as well as it being introduced at the right political moment. The bill provided for a new definition of rape, which aims to centre the victims' full sexual autonomy:

*Any person who has sexual intercourse or other sexual relations with a person **without his or her consent shall be guilty of rape** and shall be imprisoned for a minimum of 1 year and a maximum of 16 years. **Consent is considered present if it is expressed by free will. Consent is not considered present if violence, threats, or other unlawful coercion is used.** 'Violence' here refers to the deprivation of independence by means of confinement, drugs, or other comparable means.*

*It is also considered rape and shall result in the same punishment as specified in the first paragraph of this Article **to employ false pretences or utilize a persons's lack of understanding concerning circumstances**, or exploit a person's psychiatric disorder or other mental handicap in order to have sexual intercourse or other sexual relations with him or her, or the fact that, for other reasons, he or she is not in a condition to be able to resist the action or to understand its significance.*

This definition was praised for both recognising sexual autonomy and for assisting in investigations. It was noted that the burden of proof remained on the prosecution, and that such cases remained difficult to prove. However, it was argued that this definition sent a clear signal in relation to the wrong of non-consensual sexual relations, which should be supported with education and prevention measures.

In the context of the Republic of Ireland, core themes of privacy and dignity were identified – if a victim is without privacy, then there could be no remedy for them. Thus, the focus became what information was actually needed for a trial. The issues of anonymity, public access to the courtroom, the use of sexual history evidence and the admittance of counselling records were explored. An overview of the anonymity provisions for complainants and defendants was given, focusing on sections 7 (complainants) and 8 (defendants) of the Criminal Law (Rape) Act 1981. It was noted that no formal procedure exists for complainants to waive their

anonymity, although some have done so in order to raise awareness. In relation to the defendant, anonymity ceases on conviction unless revealing the defendant's identity would allow the complainant to be identified. The legal framework for excluding the public was also explored (section 6 of the Criminal Law (Rape) Act 1981; section 20 of the Criminal Justice (Victims of Crime) Act 2017), noting that most sexual offence trials will exclude the public. In relation to previous sexual history, it was noted that applications are heard in private, that admittance is discretionary, that sexual history is sometimes slipped in without following formal procedures, and that its admittance can be unstructured. It was noted that complainants can access representation for the purposes of a hearing on previous sexual history, but this can be hard to arrange when applications are submitted late, and many complainants are not aware of their ability to access this legal advice. In relation to the disclosure of counselling records, changes to this framework were highlighted, noting that in the new scheme, the prosecution will have to notify the defendant if a "counselling record" exists but must not disclose the content of the record without obtaining the leave of the court via the new disclosure regime. It was noted that a complainant can waive the application of the provisions of the 2017 Act and allow for records to be disclosed without going through this procedure, however this was highlighted as potentially problematic if informed consent was not fully obtained. Drawing from the Republic of Ireland experience, it was recommended that both complainants and defendants are granted anonymity, and that privacy be maintained by excluding the public from rape trials. It was argued that responsible reporting could fulfil the requirements of open justice instead.

Finally, in the context of Scotland, the Rape Crisis Scotland National Advocacy Project was introduced. This project was funded by the Scottish Government following the "Support to Report" pilot; this was launched in response to concerns about the criminal justice system's process and outcomes. The Project involves emotional and practical support throughout the criminal justice process, giving a complainant a "Dedicated Advocacy Worker" in every rape crisis centre across Scotland. The Project is coordinated by Rape Crisis Scotland and overseen by a National Advisory Group. In a victim-survivor appraisal of the Project, victims-survivors were overwhelmingly positive, describing the Project as invaluable and life-changing. All interviewees described the Project as having a positive impact on their ability to engage. The project delivers victim-survivor led support which was flexible, covering a wide ranging of criminal justice and non-criminal justice focused support. It provides users with advisors with a specialist understanding of sexual violence, following the Rape Crisis Centre ethos of empowerment, and providing information with regards to the victim-survivor's case and the criminal justice system more generally. The valuable role this project played in supporting victim-survivors and liaising with police and criminal justice agencies was flagged, as was the importance of providing a consistent point of contact throughout. Victim-survivors spoke positively about having someone who is there for them and on their side as a counterbalance to formal and intimidating criminal justice agencies. It was highlighted that the support was offered irrespective of whether a report is made. Finally, it was observed that the Project, beyond helping individuals, also provides an important means to harness the experience of survivors and feed them into policy and practice at a local and national level.

Restorative Justice

In the final panel, we considered the value of restorative justice as an alternative means of addressing serious sexual crimes. It was acknowledged that victims will have different understandings of what justice means to them, and that for some, this will involve participating in the criminal justice system. However, for those who wished to be able to share their story, it was noted that the criminal justice system may not be best placed for this purpose. For other victims, it might be important to receive validation that their story is believed and vindication that what happened to them was wrong; both criminal justice and restorative justice could be valuable in this regard. For others, it might be most important to obtain accountability, therefore leading to a prioritisation of criminal justice. Victimisation was described as a process, not a category or identity. Thus, context and being aware of victims' diverse wishes were important aspects of delivering justice to victims.

Restorative justice was introduced as being a set of processes which bring victims and offenders together in dialogue. The principles were outlined as including: a victim led approach to justice in serious crime (although it can be offender led in some youth offending); voluntary participation; that the offender must take

responsibility for the harm done; that safety of all is paramount; that preparation is key; and the need for facilitators to be aware of restorative justice, trauma and the dynamics of sexual violence. The reasons why victims and offenders might participate in restorative justice were explored. In the context of the victim, it offered an opportunity to face the offender with statements or questions, to gain some form of accountability, to pursue reconciliation, and to receive an apology and offer forgiveness. For offenders, motivations included a sense of debts owed, of a moral obligation, to offer a full story rather than the limited one shaped by a trial process, a desire to see the victim move on with their lives, and a chance to obtain forgiveness.

Some common concerns with regards to restorative justice were also explored. For example, victims could be concerned that too much time had passed, that it might re-ignite trauma, that power imbalances might emerge, that there might be safety risks, and that they might be pushed in that direction when they wished for a criminal justice response. In order to avoid restorative justice being harmful for victims, it was important to focus on voluntary participation, preparation and risk-assessment, putting physical and emotional safeguards in place, building in time-outs for the participants, adequately training facilitators, and considering indirect rather than direct meetings. This became particularly important in the context of sexual offences. From the point of view of the offender, it was also important to stress the voluntary nature of participation, and to ensure the offender was aware of their right to a fair trial and the presumption of innocence. It was observed that restorative justice and criminal justice might take different approaches to guilt, with restorative justice focusing on moral rather than legal guilt.

A survivor of sexual violence then shared her story of engaging in restorative justice practices. While her attacker had been found guilty and given a proportionate sentence, the criminal justice system had not delivered a sense of justice to the survivor. Once the perpetrator had been released, she realised that she wanted to meet him. This was described as coming from a wish to find closure, seek empowerment, stop fearing the perpetrator, be seen by the perpetrator as a human being, and to ask questions that only he could answer. She described the experience of meeting the perpetrator as helping her let go of her feelings of pain and disempowerment. Following the meeting, she was left with a clear, full picture of what had happened, which had not been possible through the criminal justice system. Overall, she spoke of a feeling of physical lightness, and an ability to enjoy the present and the future rather than being burdened with the past. However, she was also keen to emphasise that her story was a reflection of her own experience, and that people who have experienced sexual violence will have diverse needs and wishes.

Launch of the Criminal Justice Board Review Response

The conference finished with the launch of the QUB Human Rights Centre and Gender Network's draft response to the Criminal Justice Board Review. A copy of the draft was given to participants to allow opportunities for feedback before the response is submitted to the Review.

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