Introduction

I would like to start by thanking the Rape Crisis Network Ireland for the invitation to speak here today. I commend them for commissioning this research and Conor Hanly and his team from NUI Galway for undertaking it.

The Office of the Director of Public Prosecutions is committed to gaining a greater insight into the factors influencing attrition in rape cases. In speaking of attrition I adopt Conor Hanly's definition of the process by which cases fall out of the criminal justice system (1). The area of attrition was up to now virtually devoid of authoritative research so I was delighted our Office was able to assist in the pursuit of a greater understanding of the matter.

Because of this assistance I know what a huge undertaking this project has been. Our part alone required the provision of data from all of the rape files received by our Office in the period 2000-2004. I would like to take the opportunity to thank the members of my own staff who carefully completed detailed questionnaires in respect of over 600 files. This was a very resource intensive project, but a very rewarding process from our point of view, through which we have learnt a great deal. The knowledge attained will inform our future practice and policy in relation to the prosecution of rape cases.

From the point of view of our Office the most comforting finding of the Report is that the professional Officers in my Office:

> 'make their prosecutorial decisions largely on the basis of the evidence in the case, and that risk factors identified in the literature as supposedly leading prosecutors to make prejudiced decisions have limited impact in this jurisdiction'. (2)

The research confirms that the prosecutorial decisions of my Office are predicated 'primarily on evidentiary grounds' and not (as some commentators might have speculated) on prejudicial matters referred to in this research as 'risk factors' such as: whether the complainant went with the suspect to his or her home or hotel room, whether the complainant was or ever had been involved in prostitution, whether the complainant had been out alone (3).

The researchers thus conclude:

> "We suggest that cases that do not progress … have been properly filtered out of the system" (4)

1 Rape and Justice in Ireland (Hanly et al.) p. 7 (RAJI)
2 RAJI, p. 367
3 The term 'risk factors' in this context denotes as Conor Hanly explains: ' issues identified in the literature generally as decisions by or characteristics of the complainant that facilitated the incident. It needs to be stressed that denoting certain decisions or characteristics as risk factors does not in any way indicate that the complainant was *responsible* for what happened'
4 RAJI p. 367

Our Office is sometimes criticized for not simply running cases, even weak ones, and "letting the court decide". However, as the Report points out

> "To bring a prosecution, in a case whose evidential base is so weak that there is no prospect of a conviction, thereby requiring the complainant to undergo the rigors of the trial process with no prospect of the compensation of seeing the defendant convicted, surely would be a poor use of prosecutorial discretion." (5)

Complainant Withdrawal

We have, however, already given further attention to a number of matters which became evident to us during our participation in this research.

Before our participation in this research, the nature and extent, and particularly the timing, of complainant withdrawal was a phenomenon largely hidden within our overall categorisation of cases as non-prosecutions due to lack of evidence. Of course, where the evidence which is lacking is that of the complainant herself (6) the problem is a fundamental one.

It is important to note that in this jurisdiction our Office receives a file in all detected cases of a sexual nature (7). This is in contrast to some other jurisdictions where the prosecuting authorities – for example, the Crown Prosecution Service in England and Wales - receive a considerably smaller proportion of such cases, as effectively the police filter cases out at a very much earlier stage.

An Australian study of rape and attrition in the legal process (8) undertook a comparative analysis of attrition studies in five common law jurisdictions (U.S.A., Australia, Canada, England and Wales and Scotland) and found that of all the cases reported to police only, 35% were referred to the prosecuting authorities. We operate no such 'filter' here, with the result that a significant proportion of cases received are in effect, as acknowledged by Conor Hanly: "unprosecutable". (9)

Through our participation in this research it became evident that as a stand alone cause, complainant withdrawal accounted for a very significant percentage of non-prosecutions, amounting to 27% of the sample in the research published today.

Further analysis undertaken within the Office has revealed that the vast majority of complainant withdrawals occurred before the Gardaí submitted a file to the Office for a decision.

---

5 RAJI p. 368
6 I have followed the practice used in RAJI (explained at p. 13) of referring to victims of rape in the feminine gender.
7 The Director of Public Prosecutions, pursuant to the powers conferred on him by section 8(4) of the Garda Síochána Act 2005, requires that the decision as to whether a prosecution should or should not be instituted shall be taken by the Director of Public Prosecutions in all offences of a sexual nature, (see 2.(d) of General Direction Number 1)
8 Authors : Kathleen Daly& Brigitte Bouhors, School of Criminology and Criminal Justice , Griffith University, Brisbane.
9 RAJI, p.363.

Table showing Levels Complainant Withdrawal 2000 – 2004

Year	Total number of files fitting research criteria (10)	Total number of Complainant Withdrawals	Number of Withdrawals prior to a file being submitted by to the ODPP	% of withdrawals prior to a file being submitted by to the ODPP
2000	128	22	17	77%
2001	130	34	28	82%
2002	134	37	31	84%
2003	120	37	33	89%
2004	128	31	29	94%
Total	**640**	**161**	**138**	**Average 86%**

Proceeding Notwithstanding Complainant Withdrawal

In the overwhelming majority of cases our Office respects the complainant's decision to withdraw and that is the end of the matter. From a practical point of view, continuing a case without the complainant's cooperation would always be difficult. But our system is one of public, not private, prosecution, by which is meant prosecution is in name of the People rather than an individual victim, and there will occasionally be exceptional circumstances which will justify proceeding notwithstanding the complainant's wish to withdraw. Since the passing of section 16 of the Criminal Justice Act 2006 there may be circumstances where if a complainant will not give evidence her original statement may be used, although to date this procedure has not been used in a rape case. I do not agree with Conor Hanly's view that the complainant's wish to withdraw must always take precedence (11). If I believe that the complainant has been pressured to withdraw her complaint or that the suspect poses a significant threat to the community, then it could be appropriate that I continue such cases where there is sufficient evidence available for me to do so.

10 The file sample was restricted to an allegation of Rape 1981 Act / Rape under s.4 (1990 Act) by a complainant aged 18 or over at the date of the alleged offence, occurring in Ireland, file received by the Office of the DPP 2000-2004.
11 RAJI p. 367

Support and Information

We need to ensure that the complainants who potentially might withdraw from prosecutable cases are offered whatever support and information we can provide, particularly as this research indicates that 'fear of the upcoming court appearance' and 'concerns about the impact of the case on their children, family members and relationships' (12) are specifically identified as causes for such withdrawals. It may well be that earlier meetings with the prosecution team, reassurance regarding the support available to them at court, or more general provision of information about the process could encourage such complainants to stay the course, and these are issues we need to review.

The findings of our subsequent internal research

The prosecution policy unit in our Office has undertaken an internal audit of rape files for 2006 and 2007. One of the factors looked at in some detail was complainant withdrawal, and whilst, as with all statistical analysis, caution has to be exercised, particularly when attempting to discern long-term patterns from relatively short time spans, the level of complainant withdrawal appears to have lessened somewhat. Analysis of our 2006 rape files found complainant withdrawal was a feature in 62 files (21% of the sample) falling to 32 (15% of the sample) of such files in 2007. This fall from the average noted by Conor Hanly's research of 27% appears to be substantial but it remains to be seen whether this is a temporary fall or represents a long term trend.

Complainant Withdrawal and False Complaint

There appears to be an interrelationship between complainant withdrawal and the issue of false complaint. In 28 [10% of the total sample, and 45% of all withdrawals of the 62 cases of complainant withdrawal in 2006 serious reservations were expressed by the Gardaí or prosecution lawyers as to the truth of the complaint. In two of the 28 there was a clear admission in the statement of withdrawal that the allegation was fabricated. Consideration was given to a prosecution under section 12 of the Criminal Law Act, 1976, in both cases although ultimately no prosecutions were in fact directed. It is, of course, important to note that suspicion by Gardaí or prosecution lawyers about the truth of a complaint does not amount to proof that a complaint is false and in my view figures based on suspicion alone need to be treated with a great deal of caution. The number of cases of a demonstrably false complaint remains low.

Areas of concern in the prosecutorial decision making process.

The report highlights two particular areas of potential concern which I would like to mention briefly.

12 RAJI, p.363

The first area is the under-representation of certain complainants whose cases proceed to prosecution and the over representation of certain foreign national or ethnic groups as suspects.

Over-representation of foreign suspects and of some ethnic groups

> 'African men were approximately ten times more likely to be accused of rape than would be expected, and Eastern European suspects were over seven times more likely to be accused given the proportion of the population that come from Eastern Europe' (13)

Accordingly, the research recommends**:**

> 'The DPP should investigate the overrepresentation of non-national defendants to ensure that these prosecutions are being brought for proper reasons'. (14)

Firstly, one would need to know at what stage any over-representation arises. When there is an apparent over-representation of an ethnic or national group in prosecutions, is there a corresponding over-representation at the stage of complainants or investigations? It appears from the report that the over-representation first appears at the complainant stage.

Secondly I think it important not to make the mistake of assuming that a statistically significant finding of over-representation is in of itself evidence of impropriety in prosecutorial decision making. There are of course a range of possible reasons for over-representation which are not necessarily evidence of prejudiced decision making.

One cannot simply look at overall population numbers of ethnic or national groups with no regard to age, class, gender and employment profiles.

Migrants from some groups may be disproportionately young and male. Rape suspects are also disproportionately young and male (Conor Hanly's research indicates that 58.6 % of rape suspects fall within the age group 25-44 years). (15)

This age grouping (25-44) makes up 29.3 % of the Irish population. However the same age group makes up 59% of the African population in Ireland.

Having said that, it is clear that age provides only a partial explanation for the disproportionate figures. It is, however, quite possible that other cultural factors are in play. Young migrant male workers away from home without family support may, for example, be more prone to commit certain types of offence, particularly those associated with excessive consumption of alcohol or drugs. Immigrant groups may also be particularly vulnerable to being drawn into various types of crime.

Undoubtedly, however, these figures on their face give rise to concern and are worthy of more detailed investigation and analysis.

---

13 RAJI p. 226
14 Recommendation 11.
15 RAJI p. 227

Under-representation of the mentally ill

The second area of concern is the issue of non-prosecution in cases concerning complainants with a history of mental illness

The research notes:

> 'The second most common risk factor identified in this study is disability. Almost one fifth (18.8 per cent) of complainants were recorded as having a physical or intellectual disability or a history of mental illness. Psychiatric illness was by far the most common disability, representing 13.1 per cent of the total number of cases, followed by intellectual disability at 5 per cent. Only 6 cases had evidence of physical disability'. (16)

> 'a history of (complainant's) alcohol abuse and the presence of a psychiatric illness affected the decision to prosecute'. (17)

And accordingly the research found:

> 'Prosecutors were less likely to prosecute where the complainant had a history of alcohol abuse and more significantly where there was the presence of mental illness' (18)

But the extent to which this is so is perhaps surprising:

> 'Although 78 cases involved complainants with a history of mental illness, only two cases were prosecuted. Both of these cases had a preponderance of evidence to support the allegation, including forensic evidence, and both victims suffered injuries in the assault and reported the rape within one hour. Furthermore, the DPP indicated that the suspects' accounts of the events were less credible than the victims. Both cases, however, resulted in a 'not guilty' verdict at trial.' (19)

The research recommends:

> 'The DPP should develop a protocol for dealing with complainants with a history of mental illness to ensure that complaints by such people are not being dropped simply because they have a mental illness'. (20)

Mental Health Issues

Obtaining reliable information regarding the number of victims with mental health or learning disabilities is only possible through such detailed research as that undertaken by Conor Hanly and his team. We, in common with many other prosecuting authorities,

16 RAJI p. 231
17 RAJI p. 231
18 RAJI p. 239
19 RAJI p. 240
20 RAJI Recommendation 12

do not routinely record as a matter of course such features of a file. Indeed, were we to attempt to do so, accurate categorisation would be problematic, the range of what constitutes a mental health problem being so broad.

There is very little information available on the general level of mental illness within the Irish population. The Health Research Board undertook a National Psychological Wellbeing and Distress Survey in 2006. This is the first reliable 'prevalence' study providing information on the psychological wellbeing and distress of the adult population living in private households in Ireland. The survey found that approximately 12% of the Irish adult population were currently experiencing some form of psychological distress – a figure which is similar to that found in other countries. But the range of severity is enormous. What is widely acknowledged and supported by reliable international research is that people with mental health or learning disabilities are at greater risk of becoming victims of crime and experiencing harassment and bullying than the general population. (21) To illustrate, in 1997 research conducted in the United Kingdom found that people with learning disabilities were twice as likely to be victims of crime than the general population (22); and further research in 2007 found that 71 per cent of respondents with mental health problems had been victimized in the previous two years, compared with 22 per cent of adults in the general population (23).

I am aware that the Crown Prosecution Service of England and Wales responded to similar reports of cases being dropped or not resulting in a successful prosecutions due to alleged doubts over the ability of complainants with mental health disorders to give credible evidence (Mind, 1999) by conducting an audit of decision-making in a sample of cases that involved victims and key witnesses with mental health or learning difficulties, focusing on cases that did not proceed to trial.

The results of that audit are very interesting. Evidential issues pertaining to the reliability or credibility of the victim and key witness were the most frequently reported type of reason for a decision not to prosecute. Public interest reasons were also commonly identified where the prosecutor was informed either by the victim or a key witness, or a health professional or a social worker that it would be detrimental to the health of the victim or key witness to have to give evidence.

Recommendation 12 of the Report recommends the development of a protocol in this area. I believe that the mental health issues of complainants are but one of many challenging features of rape cases but undoubtedly they complicate the issue of prosecuting cases that are difficult even without such problems. I might add that the prosecution of cases where the victim is a very young child can present similar problems. I think it would be valuable to develop protocols in these areas.

21 See Williams, 1995; Brown, Stein and Turk, 1995; Mencap, 1997, 1999; Hiday, Swartz and Swanson, 1999; Mind, 2007.
22 Mencap 1997, "Barriers to Justice", London
23 See Kershaw, C., Nicholas, S. and Walker, A. (eds.) (2008). *Crime in England and Wales 2007/08*. London: Home Office.

Victim Compensation

Recommendation 23 of the Report is that section 6 of the Criminal Justice Act 1993 be amended to clarify and strengthen the victim compensation procedures. Compensation should be considered in every case in which a crime has been shown to have been committed. To ensure that this is done, it is recommended that a statutory obligation to seek compensation on behalf of the complainant be imposed upon the DPP.

I am not entirely convinced of the benefits of linking the issue of financial compensation (which essentially is a civil matter between the parties) and criminal prosecution in rape cases. Section 6 empowers the making of an order "instead of or in addition to dealing with [the offender] in any other way". I am not so concerned with the potential infringement on the independence of my Office as with the potential for an adverse effect on the consistency and fairness in sentencing particularly between the well off and less well off.

Whilst the Court of Criminal Appeal has made it clear that the acceptance of compensation does not preclude the imposition of a custodial sentence, they have held that compensation operates as a mitigating factor (24) and can therefore have an effect on the length of sentence. Recommendation 23 has the potential to introduce unjustified inequality in the criminal justice system by allowing rich defenders to buy their way out of jail.

There is I think a world of difference in seeking to ensure that those who have financially benefited from the proceeds of crime have, as a further 'disincentive' that fiscal advantage removed, from mixing together the issues of compensation and punishment in rape cases.

In my opinion the procedure for ordering compensation to a victim should follow sentencing and not be taken into account in determining sentencing. It should not be regarded as a part of the punishment inflicted on the offender but rather as a recompense to the victim. Section 6 should in my view be amended to so provide in its application to rape cases and indeed offences of personal violence generally.

Restriction on the introduction of previous sexual history by the prosecution

Recommendation 21 is that restrictions on the introduction of sexual history evidence should be extended to the prosecution. In the alternative, if the prosecution is to be permitted to continue to introduce such evidence, the complainant must be consulted in advance of any such introduction.

---

24 *DPP v. John McCabe* (Unreported, Court of Criminal Appeal, 13th July 2005)
DPP v. John McLaughlin (Unreported, Court of Criminal Appeal, *ex tempore*, 13th July 2005)

Under the current law, the restrictions as to the introduction of evidence regarding the complainant's sexual history do not apply to the prosecution. (25) I believe this exemption is justified and ought to be retained. There are many reasons why the prosecution might want to lead such evidence:

The prosecution may believe that evidence of the complainant's sexual history or character is either central to the prosecution case or alternatively, that it is likely to be admitted on application by the defence, and thus the prosecution may consider that it would be better for such evidence to be introduced by them, allowing the complainant an opportunity to present it in the overall context of her direct evidence rather than under what can be the very stressful experience of cross-examination. If the issue cannot be raised other than in cross-examination the jury may wrongly infer that the complainant has tried to hide relevant evidence.

I am aware of the debate on this issue in other neighbouring common law countries (26) and of the ultimate decision to amend the law in many jurisdictions, for example Scotland (27).

I am aware too that by and large it was the lawyers who lobbied for retention of the prosecution exemption and Rape Crisis Centres and others who lobbied (ultimately successfully) for change in many of those instances. Ultimately it is a matter, of course, for the legislature to decide.

Cross-examination of complainants by the accused

I strongly support the recommendation to prohibit a defendant from conducting a cross examination of the complainant in person.

I would concur with the views expressed in the Scottish Executive's discussion paper and their ultimate decision to legislate on this issue:

> 'The purpose of cross-examination is to test the reliability and credibility of the witness's evidence, not to humiliate the witness or afford personal satisfaction to the questioner. As things stand however, an accused could try to use his right to cross-examine the complainer as a way of obtaining some perverse pleasure in humiliating and controlling her, forcing her

25 By virtue of section 3 of the Criminal Law (Rape) Act 1981, as amended by section 13 of the Criminal Law (Rape)(Amendment) Act 1990, at the trial of a "sexual assault offence", no evidence may be adduced or no question asked in cross-examination about the complainant's sexual experience with any person except with the leave of the judge.

26 The Scottish executive published a consultation process : REDRESSING THE BALANCE Cross-Examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document in 2001

27 Subsequent legislative reform in Scotland extended the restrictions on adducing evidence of previous sexual experience to the prosecution:
Criminal Procedure (Scotland) Act 1995 as amended by the Sexual Offences (Procedure and Evidence) Act (Scotland) 2005
The restrictions in relation to adducing evidence of previous sexual history in the new Scottish legislation (s.274) apply to both the Crown and the Defence.

> to recount to his face the full details of what happened to the complainer, in effect forcing her to relive the experience. There have been disturbing cases in England and Wales and in Scotland. Although the number of such cases is very small, the danger of equally or more serious cases occurring in the future cannot be ruled out. There is also a fear that increased publicity about the issue may lead to an increased risk of "copycat" cases occurring.' (28)

I believe that, in common with Scotland, the number of such cases in our jurisdiction are very small (29), but, by allowing such conduct in our courts, the potential for adverse impacts is disproportionately high, not least to the complainant. I believe that it is right to confine the proposed restriction on an accused representing himself to the cross-examination element of the trial only (and not to the full trial) as such a narrow construction is more likely to be found to be compatible with the defendants right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights.

Recommendations 14 & 16

Research on jury deliberations and the 'gender' issue

There are many issues concerning juries which should be addressed if jury trial is to remain our preferred method of dealing with serious crime. I have spoken on this subject on a number of occasions. The present Juries Act dates from 1976, before the information era, and its reform is long overdue. (30)

From a prosecutorial perspective the main areas which warrant examination include:

- Jury Security - Protection from Intimidation and Infiltration
- Jury Composition - Exemptions, Exclusions and Eligibility, and the need for juries to be representative of society as a whole
- Jury Selection and Juror Comfort
- Pre-Trial Hearings

Research on the Operation of the Jury in Practice

The gender issue identified in this research is most interesting and warrants further research. The Law Reform Commission might consider in its upcoming consultation on juries including gender in a more general jurors' research of juror characteristics (age, class etc.), and the effect on verdicts. It might also provide an insight as to how complicated issues of law can best be communicated to lay persons as part of the judge's charge to the jury.

---

28 Section 1 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 prohibits personal conduct of defence in cases of certain sexual offences. This is a link to the Act:http://www.opsi.gov.uk/legislation/scotland/acts2002/asp_20020009_en_1#pb1-l1g1
This is a link to the explanatory:
http://www.opsi.gov.uk/legislation/scotland/acts2002/en/aspen_20020009_en_1

29 DPP v Mariusz and Pawel Ludecke,CCC, Mr Justice Abbott in July 2005

30 As I have previously stated, see Submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, *Review of the Criminal Justice System arising from Public Concern at Recent Developments* (Dublin, 2003), p.13.

Recommendation 18

> 'The interaction of suspended sentences and post release supervision orders should be examined'.

I agree that issues of suspended sentences and post release supervision require examination. In particular the question of when and by whom post release periods of supervision and the conditions attached to same should be ordered, ought properly to be considered. In the case of a very lengthy custodial sentence, of perhaps 12-15 years it may be entirely impractical to expect a sentencing judge to be in a position to make post-release decisions that will not have effect for such a long period of time. Entirely new circumstances may come to light (either positive or negative) which could not have been anticipated by the judge when sentencing. The legislative regime governing the post release supervision of sex offenders has been with us for nearly a decade (31). Now might be an opportune time to review its provisions.

Recommendation 24

It is recommended that an expert group be convened to consider the acceptable limits of cross examination and defence strategy in criminal cases generally and rape cases in particular. The expert group should consider also whether there is a need to introduce specialist training for lawyers involved in rape cases.

I favour improved training aimed at improving the quality of rape hearings. My Office has always invested in the continuing professional development of staff and furthermore I know from informal discussions that I have had with members of the Bar, whom of course we engage to present such cases on our behalf, that they would welcome joint training initiatives. Learning all we can about how to improve the manner in which we conduct rape cases, both from home-grown expertise available to us and from our near neighbours who have invested heavily in specialisation and training in such cases would be valuable. Research could assist us greatly in the identification of where to focus our efforts.

Separate legal representation. Current research underway which will be presented at the joint Dublin Rape Crisis Centre and Trinity Law School Conference 16 January 2010

Before I end I want to say a little about separate legal representation. I have noted with interest Conor Hanly's analysis of the 39 Applications between 2001-2005 to adduce the previous sexual history of the complainant pursuant to Section 3 of the Criminal Law (Rape) Act, 1981, as amended by section 13 of the Criminal Law (Rape)(Amendment) Act, 1990.

31 Sex Offenders Act 2001

As no evidence may be adduced or no question asked in cross-examination about the complainant's sexual experience with any person except with the leave of the judge these applications and their subsequent outcome tell us a great deal about an area of huge concern to complainants. On foot of a request by Dublin Rape Crisis Centre and Ivana Bacik I have asked the prosecution policy unit within my Office to undertake a dedicated piece of research on the 72 applications between 2001 and 2009 to date which are known to us. A researcher in our Office, Ms. Jane Murphy, is at present working on this with a view to its presentation in January.
It is early days and I don't want to spoil the element of surprise in both Ivana Bacik's and my own presentations at this upcoming event, but it seems that the number of applications in recent years has risen considerably, and it would appear that the majority of applications are being granted. It remains to be established why this is so but we hope we may be able to enlighten you further in January.

Finally, again I want to congratulate Conor Hanly and all his team on a very valuable piece of research and to compliment the Rape Crisis Network for their initiative in commissioning it.