The Failure of 'Shield Legislation':
Sexual History Evidence, Feminism and the Law

LEANNE M. BAIN *

1. Introduction

Over three centuries ago Sir Matthew Hale opined;¹

Rape is an accusation easily to be made and hard to be proved, and harder still to be defended by the party accused, tho’ never so innocent.

The Hale warning directed juries to the deep mistrust of female accusers embedded in the common law tradition and reflected a dominating male perspective in sexual offence crimes.² Similar judicial reactions towards victims have continued to taint rape trials from Hale’s time to the present day and have ‘included breathtaking illustrations of traditional patriarchal attitudes.’³ As a result, the rape trial has traditionally been a place for ‘fair game’⁴ character attacks on female complainants in a way which is inconsistent with the law’s general approach to victims and defendants in all other crimes.⁵ Where sexual offences are involved ‘the rules of the game are simply different’.⁶

The incentive for reform came in the 1970s, coinciding with the growth of the Women’s Movement and changing attitudes towards sexual

¹ Senior Honours Undergraduate, School of Law, University of Aberdeen. Many thanks to Professor Pete Duff and Dr Liz Campbell for their encouraging feedback on an earlier version of this work. Thanks also to Ryan Whelan for his on-going patience and advice.
² M Hale, History of the Pleas of the Crown (1st edn, London 1736) at p. 634.
³ H Kennedy QC, Eve was Framed: Women and British Justice (Vintage Books, London 1993) at p. 139.
⁵ ibid at p. 546.
⁶ V Berger ‘Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom’ (1977) 77 Columbia Law Review 1 at p. 10.
autonomy. Many jurisdictions enacted the first ‘rape shield’ laws with the intent to ‘curb the use’ of sexual history and sexual character evidence in rape trials. In 1986 Scotland followed suit, enacting new statutory rules of evidence to inhibit such questioning. These proved to be of limited success. After several decades of research and debate, the current ‘shield legislation’ came into effect in 2002 and aimed to address the failures of the previous laws. However, despite the legislative efforts ‘legal change has yet to be demonstrably effective.’ The aim of this paper, therefore, is to chart the legal development, address the reasons for the on-going inadequacies, and question if there is a viable solution for future reform. In doing so, it will suggest that it is not the rules of evidence in themselves, but rather the attitudes towards the evidence which are at the root of the current failures. Simply, the problem is not with the rules of the game, but with the players.

2. From Past to Present: Historical Development and the Current Law

Historically, at common law, it was permissible to attack the moral character and reputation of a complainer in cases of rape. It ‘represented the only exception to the general rule forbidding character evidence’ on the grounds that ‘there is so great a risk of her story having been concocted…’ However, in recent years it has emerged that the inferences which were brought by sexual history evidence ‘were not based on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief.’ As a result, there was much pressure for legislation to prohibit its use. The fact that there had already

---

8 Examples were seen in Canada, New Zealand, England, Australia and US. See Scottish Office Central Research Unit (Brown, Burman & Jamieson), Sexual History and Sexual Character in Scottish Sexual Offence Trials (Edinburgh, 1992) and also J Temkin, ‘Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives’ (1984) Modern Law Review 625 at p. 637.
12 Dickie v HM Advocate (1897) 5 SLT 120.
15 Scottish Office Central Research Unit (Brown, Burman & Jamieson), Sexual History and Sexual Character in Scottish Sexual Offence Trials (Edinburgh, 1992) at p. 2.
been shield legislation enacted in many jurisdictions, including England, fuelled the Scottish reform movement.

In 1983 the Scottish Law Commission (SLC) published Report No. 78.\textsuperscript{16} It proposed that legislation should be introduced to exclude certain types of questioning or evidence.\textsuperscript{17} The Report noted that ‘any evidence concerning negative aspects of sexual character may divert a jury from the proper issues in a case’.\textsuperscript{18} However, in order to achieve the ‘balancing aims’ of the reform this exclusion was then qualified by four exceptions, the last being extremely wide and allowing a judge to admit evidence if it was in the interests of justice to do so. With minor changes the SLC’s proposals were then implemented in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 s36.\textsuperscript{19}

Despite the aims of the legislation, it did not properly achieve its objectives.\textsuperscript{20} Research carried out after the introduction concluded sexual history evidence was ‘still being introduced in the Scottish courts’.\textsuperscript{21} The main failures identified were that the legislation was being ignored or manipulated,\textsuperscript{22} and that it did nothing to prohibit subtle character attacks. As a result, the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002\textsuperscript{23} introduced a new regime for evidence and procedure in sexual offence trials, by amending ss274-275 of the Criminal Procedure (Scotland) Act 1995.\textsuperscript{24}

The 2002 Act provides stricter rules for discouraging the use of sexual history evidence. It applies a prohibition for both the defence and the

\textsuperscript{16} Scottish Law Commission, \textit{Report on Evidence in Cases of Rape and Other Sexual Offences} (Scot Law Com No. 78, Edinburgh, 1983).
\textsuperscript{17} ibid. See also; J Temkin ‘Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives’ (1984) Modern Law Review 625 at p. 631. This exclusion would relate to evidence which showed or tended to show that the complainer was not of good character, (later restricted to only ‘sexual character’) was a prostitute or associated with prostitutes, or had engaged in sexual behaviour not forming part of the subject matter of the charge.
\textsuperscript{18} Scottish Law Commission, \textit{Report on Evidence in Cases of Rape and Other Sexual Offences} (Scot Law Com No. 78, Edinburgh, 1983), emphasis added.
\textsuperscript{19} ibid. This legislation added sections to the Criminal Procedure (Scotland) Act 1975, which then became s274 and s275 of the Criminal Procedure (Scotland) Act 1995 in the consolidation, with some minor extension of the provisions of the 1986 Act.
\textsuperscript{20} Note that it is interesting to see that Temkin identified these failures long before the 1992 review. Before the enactment of the 1986 legislation Temkin warned that the SLC proposals would mark ‘no major improvement’ mainly due to the wide judicial discretion which the proposals retained. See J Temkin ‘Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives’ (n 17).
\textsuperscript{23} Herein the ‘2002 Act’.
\textsuperscript{24} Herein the ‘1995 Act’. The 2002 Act also changed the provisions on conducting a defence for the accused, however this issue is beyond the scope of this paper and shall not be addressed.
Crown, and extends this prohibition to general character attacks. Section 275 then provides only one ground of exception. In order to satisfy this exception the evidence must be relevant to establishing guilt; be of significant probative value; and outweigh any prejudicial effect to the proper administration of justice. The legislation also introduces a unique concept of reciprocality to rape shield laws. Where the defence is successful in satisfying a s275 application, any previous convictions of the accused should also be disclosed to the court. Simply, if the shield is to be lowered, it is to be lowered for both parties.

It is fair to conclude that, prima facie, the 2002 rape shield law goes significantly further than any of its predecessors in restricting the use of sexual history evidence. The tests which the evidence must satisfy are relatively strong. In addition, Lord Hodge has affirmed that the tests sit on top of the rules of admissibility at common law. The evidential restrictions are then supplemented by procedural limitations which aim to provide a greater degree of focus on relevance. It is somewhat surprising, therefore, that recent research has highlighted that more sexual history evidence is being introduced in rape trials now than prior to the 2002 Act. Given that seven out of ten complainers are now virtually guaranteed to be questioned on sexual history and character, it is clear that the legislation has failed to achieve its goals.

26 s274(1)(a) Criminal Procedure (Scotland) Act 1995 c. 46.
27 That it entitles the court to admit questions or evidence of the kind prohibited by section 274(1) only in relation to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating the complainer’s character or any condition or predisposition to which the complainer is or has been subject. S275(1)(a) Criminal Procedure (Scotland) Act 1995 c. 46.
28 s275(1)(b)-(c) Criminal Procedure (Scotland) Act 1995 c. 46.
30 s275A Criminal Procedure (Scotland) Act 1995 c. 46.
31 This is given that there is only one ground on which evidence is admissible. On top of this there is a three tier test to establish its relevance, of which all three conditions must be satisfied. The provisions are cumulative. (HM Advocate v Ronald 2007 SLT 1170). The present author is aware that Temkin considers the conditions of the 2002 Act to be ‘weak conditions’, however cannot agree with this contention. (J Temkin ‘Sexual History Evidence - Beware the Backlash’ (2003) Criminal Law Review 217). Certainly, the application of the conditions may be weak, but this is with regards to the practical implementation of the law and not with the black letter of the law itself. As far as the written statutory conditions are concerned the present author submits that the requirements are as strong as they could be without infringing Article 6 ECHR.
32 HM Advocate v Ronald 2007 SLT 1170.
34 Recent research has also highlighted that rape myths still prevail in our society - see J. Temkin & B. Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (n 11).
3. ‘One Step Forward, Two Steps Back’: The Failures of the 2002 Act

The law’s failure has challenged our optimistic belief that legal reform would relegate injustice to the past.\textsuperscript{36}

The policy objective of the 2002 legislation was to strengthen the existing provisions restricting the extent to which evidence could be led regarding sexual history. Despite this aim the amount of sexual history and character evidence has ‘increased markedly’ under the 2002 Act.\textsuperscript{37} Research has demonstrated that s275 applications are almost always granted.\textsuperscript{38} In addition, questioning often deviates beyond the agreed boundaries, and character evidence is still introduced in absence of any application at all.\textsuperscript{39} Notwithstanding the minimum procedural requirements for s275, applications which do not meet the required standard may still be allowed if rejecting it on procedural grounds would be contrary to Article 6 of the European Convention of Human Rights (ECHR).\textsuperscript{40} Furthermore, the aims and unique concept of s275A have been largely overlooked or undermined.\textsuperscript{41} As a result, it is clear that the legislation has little practical impact. In fact, ‘legal practice has weakened the reform intent.’\textsuperscript{42}

The 2007 Scottish Government study into the 2002 Act concludes the legislation has had ‘unintended consequences’.\textsuperscript{43} Formalisation of the procedures was intended to focus the trial judge on the true relevance of the evidence, and make it more difficult for the defence by requiring a soundly-argued basis for the proposed line of questioning.\textsuperscript{44} In this vein it is submitted that the success of the legislation is also its downfall. The procedural requirements are necessary to ensure that surprise lines of questioning are not sprung upon the complainer during the trial,\textsuperscript{45} and that

\begin{itemize}
\item \textsuperscript{36} D Nicolson & L Bibbings, Feminist Perspectives on Criminal Law (Cavendish Publishing, London 2000) Foreword by H Kennedy QC.
\item \textsuperscript{37} Scottish Government Social Research, Crime and Justice, Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study (n 33) at p. 6
\item \textsuperscript{38} Ibid at p. 131.
\item \textsuperscript{39} Ibid.
\item \textsuperscript{40} HM Advocate v MA 2008 SCCR 84.
\item \textsuperscript{41} The 2007 research indicates that the Crown has a substantial role in undermining this section, and that the Defence are thus not deterred from making s275 applications by s275A in the way the legislators had intended. Scottish Government Social Research, Crime and Justice, Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study (n 33) at p. 95.
\item \textsuperscript{42} Ibid at p. 134.
\item \textsuperscript{43} Scottish Government Social Research, Crime and Justice, Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study (n 33) at p. 134.
\item \textsuperscript{45} MM v HM Advocate 2004 SCCR 658 affirms that there is no human right to spring a surprise line of questioning on a complainer.
\end{itemize}
information is not leaked to the jury without having been properly granted. However, the more formalised procedure means that evidence sought is ‘far more detailed and extensive’ than under verbal procedures, and ‘greater emphasis on early preparation’ means that the defence has become even more skilled at ensuring its introduction, often through the use of multiple applications.\textsuperscript{46} In addition, whilst the policy aim of these procedural requirements was that advance notification would be given to the complainer, this ‘is also clearly not being met.’\textsuperscript{47} The idea that the complainer is ‘forewarned, and thus forearmed’\textsuperscript{48} has not been implemented, and victims are still left feeling inadequately prepared for giving evidence.\textsuperscript{49}

The task of applying legislation is a delicate one which requires judges to take cognisance of the intentions of Parliament when hearing the unpredictable cases before them. The present author contends that in applying the 2002 Act this intricate task has been overlooked. The letter of the law is largely being followed, however, in doing so, the spirit of the legislation has been undermined.\textsuperscript{50} Whilst the legislation aimed to achieve a balance between the rights of the complainer and the rights of the accused, greater weight has been placed on the latter due to ‘fair trial’ concerns.\textsuperscript{51} This ‘is in apparent tension with the legislative intent.’\textsuperscript{52}

It is submitted, therefore, that changing the letter of the law alone cannot have the necessary practical impact in this contentious area. It is expecting too much of the rules of evidence to alter the norms and beliefs of the people who are applying them. The area of sexual history evidence is one where legal reform itself is ‘unlikely to have any direct impact’.\textsuperscript{53} The solution for rape shield laws must lie in a ‘change of priorities at every stage of the criminal justice system’\textsuperscript{54} and more widely in society itself.

\begin{itemize}
\item \textsuperscript{46} Scottish Government Social Research, Crime and Justice, \textit{Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study} (n 33) at pp. 51, 132 and 134.
\item \textsuperscript{47} \textit{Ibid} at p. 135.
\item \textsuperscript{48} MM v HM Advocate 2004 SCCR 658 per Lord MacFayden.
\item \textsuperscript{49} Fawcett Society Commission, \textit{Report on Women and the Criminal Justice System} (London, 2004). 29: ‘Very few women understand the trial process in any depth, and find the process – especially the fact that they never get to “their story” – confusing and alienating.’
\item \textsuperscript{50} B Brown, M Burman & L Jamieson, \textit{Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts} (n 22) at p. 197.
\item \textsuperscript{51} Article 6 of the European Convention of Human Rights provides that the accused has a right to a fair trial. This includes the right to question those giving evidence against him. (Article 6(3)). There have been fears amongst the legal profession that restricting lines of questioning is incompatible with this right, despite there being no authority in the European jurisprudence that this would be the case. For example; see SN v Sweden (2004) 39 EHRR 13 and Doorson v Netherlands (1996) 22 EHRR 330.
\item \textsuperscript{52} Scottish Government Social Research, Crime and Justice, \textit{Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study} (n 33) at p. 135.
\item \textsuperscript{53} J Chalmers ‘Acquaintance Rape: A Reply’ 2000 SLT (News) 163 at p. 167. His comment is in relation to redefining rape itself, however the same principle applies.
\item \textsuperscript{54} H Barnett, \textit{Introduction to Feminist Jurisprudence} (n 3) at p. 278.
\end{itemize}
4. Who Broke the Shield?: Apportioning Blame in the Adversarial System

It is often said that the adversarial trial system ‘is a terrifying process’. The ‘ritual and mystique’ of the procedure is out of date, though it is not unintentional; ‘the participants are supposed to feel in awe of the process for its magic to work.’ In rape cases, however, the trial system conjures up a whole ‘moral universe’ where women are divided into ‘good’ and ‘bad’. Justice is compromised as complainers are judged on the prevalent sexist attitudes of our society, which have nothing to do with the facts of the case. It is important to note, however, that blame for the rape and sexual history crisis cannot be placed at the door of one particular group. The ‘justice gap’ and the failures of the ‘rape shield’ are due to a number of factors. This encompasses not only legislative wordings, but also:

...societal attitudes to and misperceptions of the crime; police and prosecution practices; the rules of evidence and procedure and the divergence between their theoretical meaning and practical application.

An accumulation of failures from within the system means that ‘the institution itself has to change.’ In addition, a long term solution needs to be addressed so that there is no place for sexist attitudes and rape myth in society as a whole.

A. ‘What the law giveth, it also taketh away’: Problems with Judicial Discretion

In 2000, the Sheriffs’ Association proposed that ‘judicial discretion … is a strength rather than a weakness in a criminal justice system, as it enables appropriate steps to be taken in the peculiar circumstances of particular cases’. Whilst this assertion is certainly true in most contexts, it has been traditionally problematic in the area of rape shield law. Many

55 H Kennedy QC, Eve was Framed: Women and British Justice (n 2) at p. 13  
56 ibid at p. 14.  
57 B Brown, M Burman & L Jamieson, Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts (n 22) at p. 207.  
58 H Kennedy QC, Eve was Framed: Women and British Justice (n 22) at p. 16.  
59 That is the ‘dramatic gap between the number of offences recorded by the police and the number of convictions’ in rape and sexual offence cases. J Temkin & B Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (n 11) at p. 9.  
60 J Chalmers ‘Acquaintance Rape: A Reply’ (n 50) at p. 167.  
61 H Kennedy QC, Eve was Framed: Women and British Justice (n 2) at p. 16.  
62 D Nicolson & L Bibbings, Feminist Perspectives on Criminal Law (n 36) ch. 9, at p. 159.  
64 Throughout the world jurisdictions have troubled with the idea of judicial discretion; the amount of discretion to admit, or whether to allow any discretion at all. Rejecting a
commentators have highlighted judicial discretion ‘as the core of the problem’, and demand that as far as possible discretion be eliminated. Barnett notes that:

The continuing dominance of the profession by middle-class, middle-aged white males... ensures a continuance of the traditional stereotypical attitudes to women.

In cases involving sexual offences this has only served to sustain an ongoing cynicism towards judicial discretion.

The criticisms of judicial discretion are not simply linked to a historical distrust of our judges and law officers. The biggest drawback of the 2002 Act is that, despite the aim of the three-tier test, the overwhelming majority of s275 applications are successful. It is clear, that despite the legislative limits, the judiciary considers that it has a wide discretion to allow any evidence to be heard. In a recent study Temkin notes:

[S]everal judges considered themselves to be the ultimate arbiters of relevance and custodians of justice. Neither of these roles could or would be taken from them.

Of course, the downfall of the 2002 Act cannot solely be attributed to wide judicial interpretations. Whilst some judges may be tainted by rape myths, it must be acknowledged that the judiciary is undertaking a difficult task in interpreting the sections with little guidance from the legislator. This is particularly so where there are fears that rejecting a s275 application will result in an Article 6 appeal. The present author proposes that the Scottish drafters should have followed the Canadian legislation more closely when discretion became very difficult following the decision in R v Seaboyer [1991] 2 S.C.R. 577 which rendered the earlier Canadian law incompatible with the fundamental right to a fair trial.

---


66 H Barnett, Introduction to Feminist Jurisprudence (n 2) at p. 265.


68 J Temkin & B Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (Hart Publishing, Oxford & Portland, Oregon 2009) at p. 149. It is important to note that this study was undertaken in relation to English law; however given the similarities between the Scottish and English legislation and their respective problems, the same principles can apply.

enacting the 2002 Bill. Section 276 of the Canadian Criminal Code specifies several factors that judges shall take into account in exercising their discretion. These factors can act as guiding principles for judges who must determine what ‘the proper administration of justice’ means. After-all, it is somewhat unfair to criticise judges for exercising fully their judicial discretion on the basis of their own assumptions, when they are given no guidance to exercise it otherwise.

B. ‘Defence Counsel Behaving Badly’: Getting Round the Rules

A combination of defence techniques also attribute to the failures of shield legislation. The cross examination strategies used by defence counsel need to be addressed in order for the aims of the legislation to be attainable. Whilst there are those who still defend ‘who simply want to destroy a complainant’ the legislative objectives can never be achieved. Discrediting the complainant is often ‘the central strategy in the defence armoury.’ As a result, many complainants have described the task of appearing in court to be ‘worse than the rape itself’. Bad defence practice should be stamped out.

---

70 Scottish Office, Redressing the Balance: Cross Examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document (Edinburgh: 2000) showed that the legislators were influenced by this legislation and DS v HM Advocate [2007] UKPC 36 states that the 2002 Act was loosely modelled on it.
71 These include: the interests of justice, the right of the accused to make a full answer and defence, the need to remove from the fact-finding process any discriminatory belief or bias, the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury, the potential prejudice to the complainant’s personal dignity and right of privacy, and the right of the complainant and every individual to personal security and to the full protection and benefit of the law.
72 s275(1)(c) Criminal Procedure (Scotland) Act 1995 c. 46
73 B v HM Advocate 2009 SLT 284 cites Dunnigan which emphasises the discretionary natures of the exercise that the trial judge has to conduct, but offers no help on what test is to be applied. B was concluded without having to give full consideration to the exercise of the judge’s discretion and hence no help on this matter was given. This is unfortunate as the case opened up the question of how the judge should exercise this discretion in making a s275 decision.
74 J. Temkin & B. Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (n 11) at p. 129
75 ibid.
76 J Temkin ‘Prosecuting and Defending Rape: Perspectives From the Bar’ (2000) 27(2) Journal of Law and Society 219 at p. 231. For example some defence counsel stated that ‘there are lots of women who make complaints of rape who would sleep with the local donkey’ and conclude that ‘if the complainant could be portrayed as a ‘slut’ this is highly likely to secure an acquittal (at p. 234). In addition another stated that ‘if you live in a squat or are a single mother it does have an impact on juries….they think that you are more likely to have got what you deserved.’ (at p. 225).
to ensure that the courtroom provides a fair trial, not simply for the accused, but also for victims.\textsuperscript{78}

In addition, defence counsel have changed their approach when making s275 applications to encompass a ‘belt and braces’ or ‘scattergun’\textsuperscript{79} technique. This is intended to avoid an ‘Anderson appeals’ situation.\textsuperscript{80} They note they are ‘covering’ themselves and ‘avoiding any comeback’ where an appeal could be raised on the ground of defective representation.\textsuperscript{81} This culture change, combined with the rules on Crown disclosure,\textsuperscript{82} means the defence now have the scope to make very wide applications, and do so to protect their own interests as well as their client’s. It should, however, be recognised that such defence tactics are being used, and applications should be scrutinised much more closely as a result.

C. ‘Playing the Victim’: The Failures of the Prosecution

In assessing the downfalls of sexual history provisions the prosecution has generally taken little blame.\textsuperscript{83} However, from the earliest stages in the police room, to the presentation of the case in the courtroom the prosecuting of rape is generally far from satisfactory.\textsuperscript{84} There is significant evidence that in these stages of the system, perhaps more than any other, sexist attitudes towards women and prejudicial beliefs remain.\textsuperscript{85} McColgan notes that there is a deep ‘mistrust’ of rape complainants which is prevalent throughout the

\textsuperscript{78} Of course, it is important to note that bad defence practice is not prevalent amongst the faculty as a whole. The judiciary will also aim to ensure that defence lines of questioning is relevant and without objection. However, whilst there are still some bad techniques that do continue to exist amongst a few, then the courtroom remains a place where justice cannot properly be done.


\textsuperscript{80} The case of \textit{Anderson v HM Advocate} 1996 JC 29 was the first case where it was acknowledged that the defence counsel could be held accountable for not conducting a defence properly under the ground of defective representation. However, it must be noted that securing an ‘Anderson appeal’ is far from easy, and successful appeals are certainly not common practice. For consideration of the case and some commentary see; M Strachan ‘Case Comment: Is Anderson Finally Dead?’ (2006) SLT (News) 203.

\textsuperscript{81} Scottish Government Social Research, Crime and Justice, (n 33).

\textsuperscript{82} \textit{ibid}

\textsuperscript{83} For the purposes of the present section ’prosecution’ shall be taken to encompass the whole prosecuting team, including the police.


The Failures of ‘Shield Legislation’

whole trial process.86 This is despite the fact that there is no evidence of more false allegations in rape cases than in any other crime.87

In addition, it is submitted that the failures of prosecuting counsel is a major contributor to the failures of ss274-275. Prosecutors need to be ‘up to the job’88 of challenging rape myths and prejudicial evidence. However, in both Kinnin89 and Cumming90 the prosecutors’ failures in raising objections to the applications or appeals was a significant factor in the success of the appeals.91 ‘All too often prosecuting counsel fail to make points which could or should be made’.92 In addition, the introduction of s275A has had little positive impact given that the prosecution do not insist on its use. On the contrary, in some cases the prosecution has put forward s275 applications which the defence would have otherwise made, in order to circumvent the effects of s275A.93 Whilst it is acknowledged that the prosecuting counsel act on behalf of the Crown and not on behalf of the victim, public confidence in the system of prosecution as a whole is dependant on successful prosecution advocacy. If the inexperience or incompetence of the prosecutors is leading to perpetrators evading justice the whole system itself is at risk.94

D. ‘Only Herself to Blame’ Jury Judgement, Myths and Prejudices

Public perceptions of rape remain a massive problem in the enforcement of rape shield laws. Sexual history evidence is successfully manipulated because sexist attitudes remain prevalent in our society.95 When sexual history evidence is admitted, even where it is relevant, juries will place considerable weight upon it and become ‘desperately moralistic’.96 Rape complainants are judged by a notion of ‘appropriate femininity’; simply that

---

87 ibid at p. 281.
88 ibid.
89 HM Advocate v Kinnin 2003 SCCR 295.
90 Cumming v HM Advocate 2003 SCCR 261.
92 J Temkin & B Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (n 11) at p. 130.
93 Scottish Government Social Research, Crime and Justice, Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study (n 33) at p. 94. It is unclear if the prosecution do so because of fears that the section is inconsistent with Article 6, but given the number of cases which now hold there is no incompatibility, this could no longer be a reasonable explanation. See in particular, DS v HM Advocate [2007] UKPC 36.
94 B Brown, M Burman & L Jamieson, Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts (n 22).
95 ibid.
96 J Temkin & B Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (n 11) at p. 134.
women should be adhering to certain standards. Women who are not appropriately feminine offend against society, and these women are, to some extent, ‘beyond the scope of the law’s protection.’ This is combined with perceptions of ‘real rape’ and ‘non serious’ rape, where people believe that ‘if somebody has been having a sexual relationship… it’s not really a terrible offence.’

In addition, juries will often not realise the different conclusions which can be drawn from sexual history evidence. Rape prejudices mean that a complainer who has had many sexual partners will be judged as being more likely to consent to intercourse on the occasion in question. However, Redmayne notes the correlation between sexual history and vulnerability to rape, where women become a legitimate target. In addition, sexual history may be a weaker indicator of consent as ‘it makes it less likely she would lie about it.’ Juries are largely unaware of such parallels and generally construct sexual history evidence as a negative aspect of the complainer’s case. As a result of the myths which exist in our society, sexual history evidence is being wrongly interpreted by those who are judging its effect.

5. Culture Shock?: Proposals for Wider Reform

In order to improve the situation regarding sexual history evidence it is clear that a wider reform agenda is needed. Three legislative reforms have been undertaken in the past two decades; all have proved to be of limited success. It is proposed, therefore, that more radical change is needed. The question arises as to what form this radical amendment should take. The present author proposes that there are two options; either the legislation needs to provide for a complete prohibition on the use of sexual history evidence, or the whole attitude of society to these forms of evidence needs to change. Both options shall thus be considered.

Given that rape shield laws which retain judicial discretion and allow for flexible application have largely failed to achieve their goals, it must be questioned whether such flexibility should be allowed. The Women’s

100 ibid at p. 226. One prosecution barrister was noted to have said that ‘it is a great waste of public money to prosecute the ex-husband or the ex-boyfriend rape unless there is extreme violence involved…’ Given that Rape Crisis Scotland report that only 8% of rapes will involve a complete stranger, it is worrying to speculate as to the number of rapes which are ‘worth’ prosecute.
102 ibid.
The Failures of ‘Shield Legislation’

Movement has maintained that a complete prohibition should be introduced as sexual history evidence is (almost) never relevant.\(^{103}\) McColgan too takes this stance and argues that ‘sexual history evidence will be irrelevant in all but the most exceptional cases’.\(^{104}\) However, at the other end of the spectrum there are many who feel the legislation at present goes too far against the rights of the accused; the measures are ‘draconian’\(^{105}\) and amount to ‘legislative overkill’.\(^{106}\) Given the complete lack of consensus on the issue, it could perhaps be concluded that the current legislative wording strikes the prohibition just about right.

The present author submits that a complete prohibition on sexual history evidence would never be viable in Scots law due to Article 6. In \(\text{MM}\)\(^{107}\) it was held that if s274 had imposed an absolute prohibition there would have been a violation of Article 6.\(^ {108}\) The only measures which are permissible to restrict the rights of the defence are those which are strictly necessary,\(^ {109}\) and a provision which ‘categorically excludes evidence’ runs the risk of over breadth.\(^ {110}\) Whilst the rights in Article 6 are not absolute\(^ {111}\) the least restrictive measure should be applied.\(^ {112}\) The Canadian case of \(\text{Seaboyer}\)\(^ {113}\) concludes that a complete prohibition, or a system which retains no judicial discretion, is inconsistent with the fundamental rights of an accused to a fair trial.

As a radical overhaul of the legislation is not a satisfactory solution, a change in attitudes across society as a whole is the potential - though perhaps most unattainable - answer to this problem. A culture change which would challenge traditional rape myths, through public and jury education,\(^ {114}\) is necessary for the improvement of the rape shield provisions. If all the players in the justice system were no longer influenced by rape stereotypes, undeserved acquittals based on sexual history evidence would simply not exist.

\(^{103}\) This would be except for where forensic/medical issues were involved. Scottish Office Central Research Unit (Brown, Burman & Jamieson), \textit{Sexual History and Sexual Character in Scottish Sexual Offence Trials} (Edinburgh, 1992) at p. 7.
\(^{104}\) A McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (n 84) at p. 302. McColgan seems to praise the old Canadian provisions which allowed for no judicial discretion at all.
\(^{106}\) ibid.
\(^{107}\) \(\text{MM v HM Advocate}\) 2004 SCCR 658.
\(^{108}\) \textit{ibid} at 660. Similar comments were made in \(\text{Moir v HM Advocate}\) 2005 J.C. 102 where it was concluded that the discretion to allow applications meant that the provisions were not unfair.
\(^{109}\) \textit{Rowe and Davis v United Kingdom} (2000) 30 EHRR 1.
\(^{110}\) \(\text{MM v HM Advocate}\) 2004 SCCR 658 at 667 citing \textit{Seaboyer}.
\(^{111}\) \textit{Stott v Brown} 2001 SCCR 62.
\(^{112}\) \textit{Van Mechelen v Netherlands} (1997) 25 EHRR 647.
\(^{113}\) \(\text{R v Seaboyer}\) [1991] 2 SCR 577.
\(^{114}\) B Brown, M Burman & L Jamieson, \textit{Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts} (n 22) concludes this necessary as does J Temkin & B Krahé, \textit{Sexual Assault and the Justice Gap: A Question of Attitude} (n 11) ch. 10.
It is the belief of the author that the scene has already been set for public reform, and tentative steps have been taken in the right direction. The enactment of vulnerable witness provisions in 2004 has had a positive effect in protecting rape victims.\(^\text{115}\) In addition, the COPFS review into the prosecution and investigation of rape in 2006\(^\text{116}\) made 50 recommendations for improving this aspect of the justice system.\(^\text{117}\) As the recommendations only fully came into force in recent months it is not possible to assess their full effects, however, it is anticipated that they will work towards narrowing the justice gap.\(^\text{118}\) Much change has been initiated under the present Lord Advocate, and her determination remains a driving force behind many long term improvements.\(^\text{119}\) She notes that ‘a solid foundation for change’ has been built and concludes;\(^\text{120}\)

...we are now better placed than ever not only to deliver the change which we have identified as necessary, but to ensure that for all time coming our response to rape and other serious sexual offences continues to evolve.

This long term evolution will be the key to the success of the current rape shield laws.

~

As a concluding note it should be acknowledged that ‘rape is an experience which shakes the foundations of the lives of its victims’\(^\text{121}\) and therefore the foundations of our society. Embarrassment of a complainer at a rape trial is a ‘genuine social problem’\(^\text{122}\) and steps must be taken to protect her from further victimisation after experiencing ‘the most humiliating, distressing

\(^\text{117}\) These include; proper training for prosecution staff on the nature of rape and sexual offending, raising awareness to dispel myths within communities, publication of conviction rates, a comprehensive guidance manual on rape including the Lord Advocate’s guidelines to the Police on reporting of rape, a presumption in favour of prosecution, appropriate liaison with Victim Information and Advice about sexual history evidence. See Crown Office and Procurator Fiscal Service, Progress on the Recommendations of the Review of Sexual Offences (Online Report: 2008).
\(^\text{120}\) Crown Office and Procurator Fiscal Service: Lord Advocate’s Rape Crisis Speech<http://www.copfs.gov.uk/Publications/2008/03/LASPEECH> (Accessed 03.11.09).
\(^\text{121}\) J Temkin, Rape and the Legal Process (n 76) at p. 2.
\(^\text{122}\) MM v HM Advocate 2004 SCCR 658.
and cynical of crimes’.\textsuperscript{123} There exists a positive obligation under Article 8 ECHR to protect the physical and moral integrity of any individual, including his or her sexual life, and ‘a legal system that allows extensive examination might one day be contrary to Article 8.’\textsuperscript{124} In applying the rape shield legislation of s274-275 this is certainly something the judiciary should bear in mind. To return to Sir Hale’s initial warning, it is fair to conclude that perhaps the opposite is true.\textsuperscript{125} In modern times, rape is an accusation hard to be brought, and easily defended, due to the prevalence of stereotypes, myths and prejudices against women. If real change is to be achieved a much greater culture shift is needed.

\begin{flushleft}
\textsuperscript{123} R v A [2001] UKHL 25 per Lord Hope of Craighead.
\textsuperscript{124} DS v HM Advocate [2007] UKPC 36 per Baroness Hale of Richmond.
\textsuperscript{125} H Kennedy QC, Eve was Framed: Women and British Justice (n 2) at p. 139.
\end{flushleft}