

Rape Law Reform Group
Response to the Scottish Law Commission Proposals for Reform of Law on
Rape & Sexual Offences
April 2006

The Rape Law Reform Group is comprised of a range of individuals from voluntary sector and academic backgrounds who came together out of a shared concern about the response of the Scottish justice system to rape.

Members include Michele Burman, Sandy Brindley, Lily Greenan, Lynn Jamieson, Eileen Maitland and Fiona Raitt.

The Rape Law Reform Group would like to take this opportunity to comment on some of the proposals outlined in their discussion paper.

Our response will focus on the following issues:

1. Definition of rape
2. Consent
3. Evidence

Introduction

There are long standing and significant concerns about the response of the Scottish justice system to rape. Although the number of rapes reported to the police has increased substantially over the past 20 years, the proportion of recorded rapes leading to a conviction has fallen to 4%¹. Figures suggest only 10% of rapes recorded by the police reach court². The trauma experienced by complainers giving evidence in rape trials is well documented³. Much of the concern about women's experience of giving evidence in court relates to the use of sexual history and character evidence, and the impact of this evidence on the jury's perception of the complainer's credibility.

Subsequent to the clarification of the definition of rape in 2001 following a Lord Advocate's reference, a number of appeal cases led to concern about the inherent and significant difficulties faced by the Crown Office in bringing successful prosecutions for rape. The appeal judgement in *McKearney v HM Advocate* in 2004 clearly set out that the Crown have to prove beyond reasonable doubt not only that sexual intercourse took place and that it was without the consent of the complainer, but that the accused knew, or was reckless to the possibility, that the complainer was not consenting. There is currently no requirement that the accused's belief in consent is reasonable, and

¹ Scottish Executive Statistical Bulletins: Recorded Crime in Scotland & Criminal Proceedings in Scottish Courts, 2003

² Regan & Kelly, 2003

³ The Law of Evidence in Sexual Offence Trials: A Baseline Study, Scottish Executive, 2005; Brown Burman & Jamieson, 1992; Temkin 2002; Chambers & Miller, 1983

no onus on the accused to set out what steps he took to ascertain if the complainer was consenting. Proving beyond reasonable doubt the accused's state of mind at the time of an alleged rape seems to us to be a practically impossible task, and could lead to the situation where it is proven beyond reasonable doubt that a woman has not consented, but no conviction for rape is forthcoming because the Crown is unable to prove that the accused **knew** that the woman did not consent. In our view, this is incompatible with a woman's right to sexual autonomy.

In this context, the current review of the law relating to rape and sexual offences is to be welcomed.

1. Definition of rape

The Rape Law Reform Group is in agreement with the proposed definition of rape as outlined in the discussion paper. Specifically, we support the broadening of the current definition to include anal and oral penile penetration, and the retention of the term rape. We would further be strongly opposed to any moves to adopting a graduated approach to the crime of rape (as in Canada for example), and are pleased that this approach has been rejected by the SLC.

In relation to the proposed offence of sexual assault by penetration, we would like to emphasize the need for sentencing for this offence to reflect its seriousness; it should not in itself be seen as a lesser crime than rape.

2. Consent

Definition of consent

Given the continued existence of rape myths which obscure the reality of rape, and which blame women for the violence perpetrated against them, it is essential that the law in this area is as clear and unambiguous as possible. This is crucial both for the benefit of juries in rape trials and also for society more generally: the law has an essential educative purpose in clearly setting out which types of behaviour are unacceptable.

We are therefore in support of the move to set out in statute a definition of consent.

Of the two possible definitions of consent outlined in the discussion paper, we are of the view that 'free agreement' is to be preferred. This definition has the advantage of simplicity. We do not favour a definition of consent which uses the term 'co-operation' as this could too readily be interpreted in a very passive sense, and could also lead to actions such as a woman asking her rapist to use a condom being seen as a sign of 'co-operation'. However, as the discussion paper acknowledges, free agreement in itself does not add significantly to the

term consent in terms of explaining how this should be understood. For this reason, we strongly recommend that the term “free agreement” be qualified in a manner similar to that of the Australian state of Victoria. In Victoria, juries must be instructed by the judge that “the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person’s free agreement.” In other words some positive, tangible act or behaviour must be present that indicated agreement was given absent of any coercion.

Statutory indicators

We are unclear as to the purpose of the proposed statutory indicators, and how these would operate within sexual offence trials. We recommend that the proposed statutory indicators are replaced with a list of non-exhaustive evidential presumptions, similar to the approach introduced in England & Wales in the Sexual Offences Act 2003.

We agree with the general approach of setting out a list of situations in which consent is presumed to be absent. However, it is important to emphasize that these should not be seen or treated as a ‘checklist’ of situations in which rape can occur.

In relation to the content of the list currently proposed as statutory indicators, we would like to make the following comments:

It is essential to make explicit that any fear or force to which the complainant was subject may have a historical basis (e.g. it may have been part of an ongoing situation of long-standing in her relationship with the accused) and need not necessarily have arisen in explicit terms at or around the time of the incident in question.

Any definition of force must be sufficiently wide to encompass a range of situations in which different manifestations of coercion may have been used. ‘Force’ must extend beyond the conventional notion of coercion resulting in physical injury and acknowledge that force may come in many guises, including psychological coercion. In this regard, it may be more helpful for the term ‘force’ to be replaced with ‘coercion’.

It is curious that the current list does not include reference to expressions of non-consent from the complainant. Although on the face of it this may be taken as so obvious an indication of non-consent that it is redundant to include it in the list, we would nevertheless recommend that the following additions are made to the current list:

- Where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;

- Where the complainer, having consented to engage in sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity.

We further recommend that the list be supplemented by a separate list of factors which do not in and of themselves indicate consent to the act in question. Examples of what this list would include are: previous sexual relationship with the accused; consenting to some level of sexual activity with the accused immediately prior to the act in question; lack of physical resistance to sexual intercourse. This list could also usefully set out what the Scottish Law Commission refer to as 'inappropriate social conventions' relating to a woman's manner of dress etc to make it explicit that this has no bearing on the issue of consent.

Belief in consent

The current subjective approach to belief in consent – where there is no requirement for the accused's belief to be reasonable – is extremely problematic. We are firmly opposed to any continuation of this subjective standard, and believe that this area of the law is in need of urgent reform.

Of the 3 possible tests for the accused's belief, we therefore reject (a) the subjective test that he honestly held that belief.

We are also opposed to the test outlined in (c) that he held the belief but subject to the qualification that the belief must be reasonable having regard to all the circumstances (including steps taken by the accused to ascertain whether the victim did consent). By including the reference to 'having regard to all the circumstances', this test would retain a significant subjective element. This could lead, for example, to a situation where the accused stated that his belief in consent was reasonable as he lives in a sexist society, and regularly views pornography depicting women saying 'no' but meaning 'yes', or enjoying violent and abusive sex. His belief in consent would in these circumstances potentially (although unacceptably) be reasonable. There is also a significant concern that 'having regard to all the circumstances' would further open the door to irrelevant and prejudicial sexual history and character evidence i.e. an accused could claim that this belief in consent was reasonable due his knowledge of the complainer's sexual behaviour with other people.

We are therefore of the firm view that the only test which would go any way to protecting a woman's sexual autonomy and right to bodily integrity is (b) the objective test that he held the belief and that there were reasonable grounds for doing so.

This test should also include a consideration of steps taken by the accused to ascertain whether the victim did consent. It seems to us highly unsatisfactory

that an accused can claim he believed the complainer consented, even where the Crown have proved beyond reasonable doubt that she did not consent, and there is no requirement at all for him to outline why he believed this, or to show what steps he took to ensure consent. The Scottish Law Commission have indicated that they wish to refine consent to an active, rather than a passive, model. This positive model of consent rests on the principle that “all participants in sexual activity should respect each other’s sexual autonomy and all are equally active in reaching agreement on their sexual relations”. It is difficult to see how this can be achieved unless there is an onus on the accused to demonstrate what steps he took to ascertain if the complainer was consenting:

“It is possible for a man to ascertain whether a woman is consenting or not with minimal effort. She is there next to him. He only has to ask. Since to have sexual intercourse without her consent is to do her great harm, it is not unjust for the law to require that he inquire carefully into consent”⁴.

If we are to adopt a positive model of consent then a shift will have to occur in regard to the expectations placed on the accused. We think this is quite appropriate. Currently the accused need only state to the police that he believed the woman consented. If he does this, even if he does not give evidence under oath, he has established an evidential basis for cross-examination to take place in court on the question of consent. Standing our point that the Crown may already have proved beyond reasonable doubt that she did not consent, fairness demands that if the accused wishes to contest this he should be required to state the reasons why he believed she consented. These reasons can then be evaluated by the jury in the light of the complainer's evidence, and all the other evidence in the case, in arriving at a decision as to the objective reasonableness of the accused's position.

We acknowledge that this impacts on the legal burden of proof but to no greater extent than the Scottish Law Commission have proposed in regard to the proposed change to the defence to statutory rape (see the discussion at para 5.66).

3. Evidence

Corroboration

We are not convinced that removing the requirement for corroboration in cases of sexual offences would in itself address the significant obstacles to justice for women who have been raped. There is no evidence in jurisdictions where there is no requirement for corroboration (in England and Wales, for example) to suggest that it results in significantly more successful prosecutions. In our opinion, the risk that this development would lead to a general perception that convictions obtained on this basis were unsafe may put complainers at more of a disadvantage than any resulting benefits would advance their interests.

⁴ Toni Packard, in the debate on the Sexual Offences (Amendment) Bill, 1976, quoted in Temkin, 2002

Corroboration by distress

The Rape Law Reform Group supports the proposal that corroboration by distress should be set out in statute. In our view it is essential that any statute fully takes account of the impact of rape and the fact that women may be so traumatised that some time elapses before they feel able to tell anyone about what has happened. Survivors of rape and sexual assault experience a very wide range of emotional and psychological consequences following an assault and express these in widely diverse ways. Shock is an entirely normal response to a traumatic event and can manifest itself in differing ways: it is not at all uncommon for women to appear to be entirely calm following an attack.

Sexual history and character evidence

There has been long standing concern about the use of sexual history and character evidence in sexual offence trials, and its prejudicial impact on the perceived credibility of the complainer. Attempts were made recently in the Sexual Offences (Procedure & Evidence) (Scotland) Act 2002 to tighten restrictions relating to the introduction of evidence of this nature, and to ensure relevancy was a key test in assessing whether or not this evidence should be introduced. Although the Act is in the process of being evaluated, there are some concerns that the Act has not been as effective in preventing prejudicial questioning of complainers as was hoped⁵. We are strongly of the opinion that issues relating to sexual history and character evidence are inextricably linked with the proposals in the Scottish Law Commission review relating to consent and belief in consent. For this reason, we are of the firm view that the Scottish Law Commission should await the results of the current evaluation of the provisions contained in the Sexual Offences Act prior to commencing the drafting of any legislation resulting from the discussion paper.

Conclusion

The Scottish justice system is currently failing to provide real justice for women who have experienced rape. It is unsurprising that many women choose not to report rape given the extremely low conviction rate and the very traumatic experience of giving evidence should the case make it as far as court. The review currently being conducted by the Scottish Law Commission represents one of the most significant opportunities to address some of the concerns relating to the legal response to rape, and to ensure better protection for women in Scotland who are raped. The rights of an accused to a fair trial are essential and must be protected but it must be borne in mind that women who have been raped also have human rights. These rights are not easy to balance, but we believe that some of the proposals within the SLC recommendations, along with some of the proposals in our paper, would go some way to addressing the current imbalance experienced by complainers of rape and sexual offences.

⁵ See for example *Kinnin V HM Advocate*