



Use of Sexual History & Character Evidence in Sexual Offence Trials Briefing paper, August 2008

What is sexual history & character evidence?

This is 'evidence' relating to a complainer's past or circumstances which is potentially considered to be relevant to her credibility during a sexual offence trial. It can include:

- past history with the accused, including sexual history
- sexual relationships with third parties
- current or past history of involvement in prostitution
- contraceptive history
- medical, psychological or psychiatric history e.g. any psychiatric diagnosis she has been subject to in the past, previous or current use of anti-depressants, history of self-harm
- prior allegations of rape or sexual abuse
- alcohol or drug use
- application for criminal injuries compensation
- previous convictions or arrests
- dishonesty – e.g. working and claiming unemployment benefit
- homelessness
- behaviour after alleged offence e.g. maintaining contact with accused; displaying no visible signs of distress
- sexual behaviour after the incident

Is there legislation prohibiting or controlling the use of this kind of evidence?

In Scotland new legislation was introduced in 2003 (replacing earlier legislation which was seen to be ineffective), with the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. This legislation set out that in order to introduce sexual history or character evidence, it is necessary that a written application is submitted to the judge, normally in advance of the trial. This requirement applies to both the prosecution and the defence. The judge can only allow such evidence where he or she is satisfied that:

- a) it is relevant to whether the accused is guilty of the offence
- b) the probative value¹ is significant and is likely to outweigh any risk of prejudice to the proper administration of justice. This includes consideration of the dignity and privacy of the complainer.

How effective is the legislation?

¹ Probative value is a legal term meaning "tending to prove"

An evaluation commissioned by the Scottish Government and published in 2007 found that far from tightening the use of sexual history and character evidence, the legislation had somehow made things worse². The key findings of the research are:

- 72% of trials featured an application to introduce sexual history or character evidence (these applications are known as S275 applications).
- Only 7% of these applications were refused
- The Crown rarely objected to defence applications to introduce this type of evidence

Nature of questioning sought	Proportion of all evidence sought %
Past sexual history with accused	16
Non-sexual past history with accused	3
Behaviour with accused on/around same occasion	14
Sexual behaviour with/in presence of a 3 rd party on same occasion	4
Complainer's current relationship status	4
Sexual history of complainer (other than with accused) including: sexual history with someone other than accused; sexual practices (incl. use of sex aids); virginity; contraceptive history & prostitution	20
Sexual character of complainer	4
General character of complainer including: mental instability, disorderly conduct, alcohol or drug use, alleged history of false allegations, dishonesty, homelessness	24
Behaviour of complainer after offence	11

What about the sexual character of this accused? Is that allowed to be brought up?
 Under the provisions of the Sexual Offences Act 2002, if the defence is successful in an application to introduce the complainer's sexual history or character, the Crown are obliged to put before the court any analogous convictions the accused has. These convictions would need to be for sexual offences to be considered relevant – previous convictions for physical violence against the complainer, for example, would not be admissible.

What impact does sexual history and character evidence have?

Concerns about the use of this type of evidence relate to 3 main areas:

- Potentially highly prejudicial to jury members, particularly in light of pre-existing attitudes they may hold³
- Extremely distressing for complainer & adds to ordeal of trial
- Actively deters women from reporting to the police in the first place

² Impact of Aspects of the Law of Evidence in Sexual Offences Trials; Burman, Jamieson, Nicholson & Brooks, 2007

³ See for example research by Amnesty International in 2005 which found that a quarter of people thought a woman was at least partially responsible for rape if she had had many sexual partners