Introduction

This research was commissioned to evaluate the impact of ss.274/275 of the Sexual Offences (Criminal Procedure) (Scotland) Act 2002, which introduced changes to the law of evidence in sexual offence trials, restricting the use of evidence or questioning concerning the sexual history and character of the complainer. The research involved: mapping all sexual offence cases called to the High Court from June 2004 to May 2005; detailed analysis of a sample of 30 trials; in-court observation of a further 10 trials; and interviews with a small number of Judges, Advocates Depute, Defence Counsel, and complainers who had given evidence. Research findings were compared with findings from an earlier baseline study, which examined the use of sexual history and sexual character evidence under the previous legislation.

Main Findings

I The numbers of trials with s.275 applications to introduce sexual history and/or character evidence has substantially increased compared to the baseline study. Almost three quarters of trials (72%) now include an application, compared to just over one-fifth of trials (21%) in the baseline study.

I The increase is partly due to the requirement to submit an application to introduce questioning about matters of character which, prior to the 2002 Act, did not require an application.

I A total of 118 applications were made in 88 trials. Whilst the Defence made most applications, the Crown did so in one quarter of the trials involving applications.

I Reasons given in Defence applications for proposed questioning were relevance to complainer’s consent; credibility; and character (in particular dishonesty, alcohol consumption, and motive for false allegation). Crown applications were typically made to introduce sexual history evidence to enable a jury to make sense of subsequent evidence or to provide context for the alleged events.

I Questioning and evidence on sexual matters sought in written applications is more detailed and extensive than that requested by means of verbal applications under the previous legislation.

I Communication between Defence and Crown at case preparation enhances the likelihood of agreement on applications. The Crown rarely opposed Defence applications.

I Applications were rarely disallowed by the court; just 8 (7%) were refused. With few exceptions, all evidence allowed was subsequently introduced in the trial.

I Just under half (14) of the 32 observed trials with s.275 applications involved evidence or questioning being introduced which had not been explicitly agreed in the application.

I Sexual history evidence is generally regarded as relevant to establishing the guilt of the accused, particularly when it concerns a past history between the complainer and accused.

I Complainers are not routinely informed by the Crown that an application to introduce sexual history or character evidence has been submitted or allowed, however, this is to be addressed as a result of the recommendations made by COPFS Review of the Investigation and Prosecution of Sexual Offences in Scotland (2006).

I Although some practitioners anticipated that there would be a reduction in applications due to the potential disclosure of analogous previous convictions of the accused, this has not occurred.
The legislative background
In November 2000, the Scottish Executive issued *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* seeking views on proposals to change the law of evidence in sexual offence trials. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 followed, introducing entirely new procedures restricting the use of evidence or questioning concerning the sexual history and character of the complainer in sexual offence trials. The 2002 Act sought to rectify the perceived deficiencies of the earlier 1995 Act and to strike a balance between protecting the complainer from indignity and humiliating questions, and admitting evidence which is nevertheless so relevant that to exclude it would endanger the fairness of the trial.

A key difference between the two Acts is the scope of the prohibited evidence; whereas the earlier legislation focused on sexual history and sexual character evidence, the 2002 Act extends to general character evidence. The accused is also required to give prior written notice if his defence is to include a plea of consent on the part of the complainer.

Key procedural changes include the requirement for both Crown and Defence to submit a written application in order to introduce otherwise restricted evidence or questioning, in advance of the trial. Applications must state the nature and relevance of proposed questioning, and the inferences that the court should draw from the evidence. The Court is required to set out the reasons for its decisions on the relevance and admissibility of evidence. Where a Defence application to introduce otherwise restricted evidence is allowed, the Crown is required to disclose any previous analogous convictions that the accused may have.

Sexual offence trials in the High Court
Two hundred and thirty one sexual offence cases were mapped, and 123 (53%) proceeded to trial. Of these 123 trials, 4 in 5 (80%) involved at least one charge of rape, and over half (55%) involved an advance intimation of a defence of consent.

The accused was acquitted of all sexual charges in just over half of trials (51%); found guilty of all sexual charges in just under a quarter of trials (23%), and guilty to some charges in just over a quarter of trials (26%).

Applications to introduce sexual history and character evidence
There has been a substantial increase, of almost 3.5 times, in the numbers of applications compared to the baseline study figures. Almost three quarters of all sexual offence trials (72%) now include an application, compared to one fifth of trials (21%) in the base-line. Three quarters of rape trials (77%) involve applications, as do just over half (52%) of trials for other types of sexual offences.

In the current study, just 8 (7%) of applications were refused by the court. In all but a few exceptions, all evidence allowed in the application was subsequently introduced in the trial, usually during cross-examination of the complainer.

The Defence made most applications, although the Crown made an application in one quarter of the 88 trials involving applications. Just under one fifth (17 out of 88) involved a (separate) application by both Crown and Defence. Applications by the Crown only were relatively rare (5 out of 88).

Nature of questioning and evidence sought
Written applications seek evidence or questioning about a wide range of sexual history and general character issues, at least 40 percent of which concerned matters that were likely to have been asked without an application being regarded as necessary prior to the 2002 Act. Reasons given for proposed questioning were relevance to consent; credibility; and the complainer's character, in particular dishonesty or motive for false allegation. Evidence or questioning concerning character featured in a quarter (24%) of cases, commonly this concerned the complainer's use of alcohol or drugs and dishonesty.

Written applications are often very detailed. The ‘belt and braces’ approach commonly adopted by Defence means that questioning or evidence sought is now more detailed and extensive than that sought in verbal applications made during the trial under the 1995 Act.

Deciding whether or not to admit the evidence or questioning sought
The requirement to make a written s.275 application to the court, and for this to be discussed and decided at a preliminary hearing, provides the opportunity for closer attention to be paid both to the probative value and possible prejudicial effects of any evidence sought.

Communication between Defence and Crown at case preparation enhances the likelihood of agreement on applications. The majority of Defence applications were not challenged by the Crown.

Sexual history evidence is generally regarded as relevant to establishing the guilt of the accused, particularly when it concerns a past history between the complainer and accused.

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Questioning or evidence which is considered to be too loosely phrased or lacking in specificity is disallowed by the court. The court tends to take the view that where what is included in the application can be demonstrated to have some relevance to the issues in the trial, in particular credibility and/or consent, then what might be termed ‘fair trial’ considerations outweigh the rights of the complainer. This approach sets aside the need to weigh up the probative value of evidence against the invasion of the privacy or dignity of the complainer, or the possible prejudicial effects on the jury concerning their views of the complainer, because any relevance of evidence to the issues in the trial is deemed sufficient for its admission.

Most s.275 applications were decided at one preliminary hearing, although several were continued to subsequent hearings. Continuations occurred due to lack of time or unavailability of relevant information, or where the application was refused or restricted, and the applicant amended or re-submitted the application.

Complainers’ experiences of the court process

Key issues identified by complainers were that they felt inadequately prepared for the process of giving evidence, in that they had a lack of information about what this would entail in both general terms, and in terms of specific issues which were raised while they were giving evidence. Complainers indicated that it would be helpful to be aware of these issues, and to meet the Advocate Depute prior to giving their evidence.

Questioning around ‘bad’ character evidence during cross-examination was identified as particularly distressing, and some complainers had further difficulty in understanding the relevance of specific issues which had been raised while they were giving evidence. Complainers indicated that it would be helpful to be aware of these issues, and to meet the Advocate Depute prior to giving their evidence.

Straying beyond boundaries set by the court

Just under half (14 out of 32) of the observed application cases involved some evidence or questioning being led at trial which had not been explicitly agreed. Objections by the other party and/or interventions by the court occurred infrequently.

Judges tended to allow evidence once it was before the jury, even if the nature of the evidence was such that it did require a s.275 application. The 2002 legislation does not appear to have reduced the amount of sexual history and character evidence that is introduced through straying beyond the permissions given following a s. 275 application.

Although numbers are small and should be viewed with caution, the Crown were more likely than the Defence to introduce sexual history evidence without application. Character evidence, and particularly questioning concerning alcohol consumption, continued to be introduced by the Defence without application.

Previous analogous convictions of the accused

In 3 rape cases where the accused had an analogous previous conviction, a successful application was made by the Defence. The relevant previous convictions of the accused were not placed before the court.

The anticipated reduction of applications as a result of the potential disclosure of analogous previous convictions has not occurred. Although numbers are small, practice does not appear to have followed legislative intent in relation to the disclosure of analogous previous convictions of the accused following a successful Defence application.

In 8 rape cases, the accused had a previous conviction for assault, assault to injury, or assault to severe injury in the context of domestic abuse. Under the 2002 Act, these convictions are not defined as relevant convictions since they do not involve a substantial sexual element. However, they are relevant for demonstrating that the accused has a history of violence against women.

Impact of the 2002 Act

The number of applications made to introduce sexual history and character evidence has increased markedly, although the increase has to be set against the fact that approximately 40 percent of the evidence or questioning sought would not have previously required an application. One reading of the increase might be that it simply reflects a channelling of questioning that was previously asked without an application, into an application. On the other hand, the legislation has not had the effect of decreasing the kind of evidence that was previously prohibited that is, questioning about the complainer’s sexual history and sexual character. Moreover, character evidence is introduced in the absence of an application and it is clear that this type of evidence has also not been reduced.

The 2002 Act has had the consequences of the introduction of more sexual history and character evidence than under the previous legislation, when an aim was to restrict such questioning. The proportion of trials with applications (almost all of which are successful) has increased markedly; questioning on sexual history and character is now sought by both the Crown and the Defence; the numbers of multiple applications have more than doubled; and the ‘belt and braces’ and ‘scatter-gun approach adopted by the Defence
means that the questioning or evidence sought in written applications is now far more detailed and extensive than that sought in verbal applications made during the trial under the 1995 Act.

The 2002 legislation has not reduced the extent to which complainers are subject to questioning about sexual history and character, although the procedures have rendered this more visible. Whilst the greater visibility of this type of evidence enhances the possibility of informed debate among practitioners, there has been little apparent shift in the balance in favour of complainers when weighing up the relevance of such evidence against the dignity and privacy of the complainer.

References


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