

The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences

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Introduction

The investigation and prosecution of sexual offences remains one of the most fraught and problematic aspects of criminal justice. Even with the introduction of various protective measures for vulnerable witnesses and complainers, deep and justifiable concerns persist about the level of reporting to the police, the extent of attrition, and the conviction rates.¹ The treatment (actual and perceived) of complainers in the court room has a significant influence on these matters.

Sexual offence trials frequently involve the leading of sexual history evidence and the cross-examination of complainers about their previous sexual experience, behaviour and partners. This is despite the introduction of so-called “rape shield” provisions, which purport to restrict the use of sexual history evidence and to curb judicial discretion as regards its admission. Such provisions have been enacted in various common law jurisdictions including England and Wales, Canada, and Scotland, in an effort to improve courtroom experience and thus encourage greater reporting of sexual violence.² The rationale for these measures is to address the pervasive culture of disbelief regarding complainers and to offset the secondary victimisation or re-traumatisation that occurs through and as a consequence of the trial process. Rape shield legislation aims to protect the complainer’s right to privacy and dignity, as well as to increase the accuracy in fact-finding.

Although ‘rape shield’ protections have been embedded within criminal justice systems for some time, it has been suggested by commentators in various jurisdictions that these legislative efforts remain susceptible to being sidestepped either through defence trial strategies or through “judicial override”,³ such that the law in action is less protective and useful than was hoped.⁴ As we shall see below, this observation is borne out in Scotland. This chapter examines the ways in which laws designed to protect sexual assault complainers in Scotland fail in practice.⁵ We will argue that focusing on the ‘rape shield’ provisions, as well as the measures designed to protect vulnerable witnesses, as ‘solutions’ to the problems faced by sexual assault complainers in an adversarial system, allows us to ignore more systemic questions about how those complainers become vulnerable *within* the criminal justice system, as well as how the criminal justice system understands and perpetuates a certain view of what it *means* to be vulnerable.

¹ See *Report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (2010, Home Office).

² For discussion of the provisions introduced in a variety of jurisdictions see Scottish Executive *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions* (2002, Scottish Executive Central Research Unit).

³ L Ellison ‘Commentary on Re A (No 2)’ in R Hunter, C McGlynn, E Rackley (eds) (2010) *Feminist Judgments: From Theory to Practice (First Edition)* 205-211, citing A McColgan, *Women under the Law* (2000).

⁴ See for example L Kelly, J Temkin, and S Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History in Rape Trials* Home Office, June 20, 2006; M Burman, L Jamieson, J Nicholson and O Brooks *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007).

⁵ In Scotland, those who allege offences are termed ‘complainers’; in England and Wales the term is ‘complainants’. Likewise, those standing trial in Scotland are the ‘accused’, but are ‘defendants’ in England and Wales.

Focusing on Scotland as a case study, the first section outlines legislation limiting the use of sexual history evidence in criminal trials, and the evaluation of the impact of this legislation, before moving on to the second section, examining provisions introduced to help criminal justice agents identify vulnerable complainers, and in particular those that have alleged sexual assault. We will argue that since only a tiny minority of vulnerable sexual assault complaints ever make it to trial, such provisions cannot properly protect the vast majority of sexual assault victims who *are* vulnerable, and that in the absence of a more radical systemic and holistic review of criminal law, evidence and procedure relating to sexual assault, the provisions may serve as a distraction from, or an apparent panacea to, more significant, serious and entrenched challenges that vulnerable sexual assault victims face.

Although in what follows we refer primarily to legislation and practice in the Scottish criminal justice system, given the widespread use of similar protections in many other jurisdictions, our conclusions have relevance for the promotion of just outcomes in sexual assault proceedings more generally. Moreover, we aim to contribute to both contemporary critical scholarship on sexual assault, and to ongoing debates about the importance of recognising vulnerability as partly produced by social institutions and structures.⁶ The vulnerability lens through which many feminists and other critical scholars analyse legal and policy interventions across a broad spectrum of issues (including sex work, hate crime, family law, welfare rights and so on) has yet to be applied in this context of criminal evidence and procedure, where the criminal justice system formally recognises the vulnerability of some of its subjects, but fails to properly engage with more meaningful substantive questions of access to justice for others. In this paper, we use the lens of vulnerability to examine the problematic ways in which criminal evidence and procedure in Scotland fails to protect many of the most vulnerable victims of sexual assault, despite recent reforms. We suggest that more research is urgently required to shed light on the extent of the ‘justice gap’, and that further and deeper reform is needed, at the substantive, procedural and cultural levels.

A. SEXUAL HISTORY: THE SCOTTISH CONTEXT

As the rates of other sorts of crime continue to drop,⁷ the recording of sexual crimes in Scotland has increased and is at the highest level since 1971, the first year for which comparable crime groups are available.⁸ This may be explained by a growing likelihood of a report being made and the reporting of “historical” offences, rather than solely as a result of increased offending. But it is unlikely that the rise in recorded incidences can, in its entirety, be explained by increased reporting: it is reasonable to suppose that it can also be at least partially explained by an increase in offences. Regardless, the growing rate of recorded offences is not matched by a high conviction rate. The highest acquittal rate for any offence in Scotland is for rape and attempted rape, where 34% of those prosecuted in 2014-15 were acquitted on a “not guilty” verdict.⁹ Sexual assault has an acquittal rate of 21%, in contrast to a general acquittal rate of 5%. In 2014-15, 19% of those tried for rape and attempted rape

⁶ M Fineman ‘The vulnerable subject; anchoring equality in the human condition’ 20 (2008) *Yale Journal of Law and Feminism* 1-23.

⁷ *Recorded Crime in Scotland 2014-15*, <http://www.gov.scot/Resource/0048/00484776.pdf> p1. “Crimes recorded by the police in Scotland decreased by 5% from 270,397 to 256,350. This is the lowest level of recorded crime since 1974.”

⁸ *Ibid.*

⁹ *Criminal Proceedings in Scotland, 2014-15* <http://www.gov.scot/Resource/0049/00494474.pdf> p. 13.

received a “not proven” verdict, the highest rate overall, followed by sexual assault at 11 %.¹⁰ Moreover, the conviction rate as a proportion of reported cases of rape is low. In 2009 it stood at a mere 3%,¹¹ though as Rape Crisis Scotland highlighted, this figure may be somewhat inaccurate: the two sets of data from which the 3% rate was derived measure slightly different things, one focusing on offences, the other on offenders.¹² Matters are improving somewhat: in 2014-15 there were 125 convictions for rape and attempted rape,¹³ with a total of 1901 reports of rape and attempted rape during the same year, 1797 of which were reports of rape.¹⁴ This represents a conviction rate of 6.6% of reported cases. The proportion of rapes prosecuted that result in a conviction has also risen to 46%.¹⁵ However, it remains the fact that the majority of sexual crimes are not reported, and of those that are the majority do not result in conviction.

According to the Scottish Crime and Justice Survey 2014/15, most (87.4%) of adults who have experienced serious sexual assault¹⁶ in Scotland said that they knew the offender in some way, while 54.8% said that the perpetrator was their partner.¹⁷ Amongst those who had reported more than one form of serious sexual assault since the age of 16, 95.2% said that they knew the offender, and 76.8% said the offender was their partner. This underlines the fact that so many allegations of rape and other sexual offences hinge on the presence or otherwise of consent, rather than identity. A claim of lack of consent can be corroborated by, for example, evidence of physical injury; however, as is often said, consent frequently comes down to which of the competing testimonies the jury believes. Thus, the cross examination of the complainer about her sexual history, and ultimately character, becomes central in assessing whether or not her complaint is credible, meaning that finding corroboration of the lack of consent is extremely challenging. A pre-existing relationship or connection with the accused compounds the complexity of sexual offence trials in which

¹⁰ Ibid. Scotland has three possible criminal verdicts: guilty, not guilty, and not proven. The effect of the not proven verdict is the same as that of not guilty – i.e. acquittal. The not proven verdict has long been controversial, not least for its illogicality – if the case is not proven, then surely the accused should be found not guilty. See for example P Duff, ‘The not proven verdict: jury mythology and “moral panics”’ 41 (1) (1996) *Jurid. Rev.* 1-12. The Scottish Parliament’s Justice Committee has recently reexamined the verdict in the 2016 Criminal Verdicts Bill, and are recommending it be abandoned: see <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-35527022>, last accessed 1 September 2016.

¹¹ This is similar to, if a little lower than, the conviction rate in other jurisdictions. See M Burman, L Lovett, and L Kelly ‘Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries. Country briefing: Scotland’ (2009) [http://www.sccjr.ac.uk/wp-content/uploads/2012/11/Daphne_Scotland_Briefing-_Different_Systems_similar_outcomes\(3\).pdf](http://www.sccjr.ac.uk/wp-content/uploads/2012/11/Daphne_Scotland_Briefing-_Different_Systems_similar_outcomes(3).pdf), last accessed 1 September. Of course conviction rates are not by themselves an indicator that sexual assault is being taken seriously; nor, as Larcombe has argued, are they necessarily the sole or even main objective that feminists ought to be pursuing. See W Larcombe ‘Falling rape conviction rates: (some) feminist aims and measures for rape law’ 19(1) (2011) *Feminist Legal Studies* 27-45. See also C McGlynn, ‘Feminism, rape and the search for justice’ 31 (2011) *OJLS* 825, pp. 825-826; S Cowan ‘Taking a break from the legal to transform the social’ in D Cowan, and D Wincott (eds) (2015) *Exploring the Legal in Socio-Legal Studies* (Palgrave MacMillan).

¹² <http://www.rapecrisisscotland.org.uk/blog/the-contested-3-conviction-rate-for-rape-in-scotland-what-is-the-real-story/> last accessed 1 September 2016.

¹³ *Criminal Proceedings in Scotland*, n9, p. 4.

¹⁴ <http://www.gov.scot/Publications/2015/09/5338/318214>, last accessed 1 September.

¹⁵ <http://www.rapecrisisscotland.org.uk/news/rape-crisis-scotland-welcomes-a-40-increase-in-the-number-of-people-convicted-for-rape-and-attempted-rape-in-scotland/> last accessed 1 September.

¹⁶ Serious sexual assault is defined as forcing or attempting to force someone to have sexual intercourse or other sexual activity (*The Scottish Crime and Justice Survey 2014/15: Sexual Victimisation & Stalking* p. 10). Less serious sexual offences are indecent exposure; sexual threats or being touched sexually when it was not wanted (e.g. groping or unwanted kissing) (p. 11).

¹⁷ Ibid p. 36

sexual history evidence is used.¹⁸ As Michele Burman *et al* note, in practice the complainer's sexual history evidence is regarded as relevant to establishing the guilt of the accused, particularly when it concerns a past history between the complainer and accused.¹⁹

Many have commented that old common law rules of evidence about corroboration and inferences of credibility from those have left a legacy of disbelief where the complainer (historically of course a woman, until the changes brought about in section 1 of Sexual Offences Act 2009 allowed men to be recognised legally as potential victims of rape) was 'unchaste'. These "myths"²⁰ about rape and complainers endure maintain that "unchaste women" are more likely to consent to sex, and that such women are "less worthy of belief".²¹ As Temkin and Krahe have shown, such beliefs impact on judicial reasoning, the views of barristers, and the determinations of juries. For instance, some degree of victim blaming is evident in a recent survey on Scottish social attitudes, and this is closely linked with judgment about behaviour and character.²² Just over half (58%) of those surveyed said that a woman who wore revealing clothing on a night out was "not at all to blame" for being raped, and 60% said the same of a woman who was very drunk. But this still leaves around 40% who believed that the woman was to some degree to blame for the assault. What is more, 23% agreed that "women often lie about being raped", with women, older people, and less educated people more likely to agree to this. There are further gender differences in this context. In evaluations of sexual assault, other studies suggest that women are harsher in their verdicts towards the accused and more believing of the complainant's claim compared to men.²³

¹⁸ Even where physical injury is present, a previous/current partner might still argue consent – see the Canadian case of *R v JA* 2011 SCC 28, and for comment, K Busby 'Every breath you take: erotic asphyxiation, vengeful wives, and other enduring myths in spousal sexual assault prosecutions' 24 (2) (2012) *Canadian Journal of Women and the Law*, 328-358; J Koshan 'Consciousness and consent in sexual assault cases' (2011) available at <http://ablawg.ca/2011/06/17/consciousness-and-consent-in-sexual-assault-cases/> last accessed 28 July 2016.

¹⁹ M Burman, L Jamieson, J Nicholson and O Brooks *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007, Scottish Government) p. 4.

²⁰ J Temkin, 'Prosecuting and defending rape: perspectives from the bar' 27 (2) (2000) *Journal of Law and Society* 219-248. The notion of 'rape myths' is not an uncontroversial one. Some argue that rape myths are themselves myths - see H Reece 'Rape myths: is elite opinion right and popular opinion wrong?' 33 (3) (2013) *Oxford Journal of Legal Studies* 445-473. Others suggest that myths (and stereotypes), particularly about what the behaviour, dress or demeanour of the complainer signifies, deeply permeate the ways in which sexual offences are perceived in public opinion and dealt with at all stages of the criminal justice system (see eg E Finch and V Munro 'Of bodies, boundaries and borders: intoxicated sexual consent under the law of Scotland and England' 1 (2005) *Juridical Review* 53-72; L Ellison and V Munro 'A stranger in the bushes, or an elephant in the room? critical reflections upon received rape myth wisdom in the context of a mock jury study' 13(4) (2010) *New Criminal Law Review* 781-801; Ellison LE, Munro, V, 'Of 'normal sex' and 'real rape': exploring the use of socio-sexual scripts in (mock) jury deliberation', 18(3) (2009) *Social and legal Studies* 1-22; J Temkin and B Krahe *Sexual Assault and the Justice Gap: A question of Attitude* (2009, Hart); B Krahe 'Myths about Rape Myths? Let the Evidence Speak: A Comment on Reece' (2013) available at: http://www.unipotsdam.de/sozialpsychologie/fileadmin/projects/sozialpsychologie/assets/Comment_Reece_Paper.pdf, last accessed 1 September 2016; J Conaghan and Y Russell 'Rape myths, law, and feminist research: 'myths about myths?'' 22(1) (2014) *Feminist Legal Studies* 25-48.

²¹ *R v Seaboyer*, McLachlin J at (1991) 83 D.L.R. (4th), 193, p. 258.

²² *Scottish Social Attitudes Survey 2014: Attitudes to violence against women in Scotland* (Scottish Government 2015).

²³ R Schuller and P Hastings, 'Complainant sexual history evidence: its impact on mock jurors' decisions' 26 (2002) *Psychology of Women Quarterly* 252-261, p. 254 citing Bell, Kuriloff, & Lottes, 1994, and Quackenbush, 1989; see also R Schuller and A Wall 'The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault' 22 (1998) *Psychology of Women Quarterly* 555-573.

Sexual history evidence can impact negatively on complainant credibility in that juries may perceive particular witnesses as more credible or trustworthy than others. Previous apparent or actual promiscuity can be conflated with likelihood of consenting to any subsequent sexual act. Of course, there is limited capacity to ascertain the workings and deliberations of juries, since section 8 of the Contempt of Court Act 1981 prevents research with 'live' juries. That being said, rigorous research producing robust findings about the perceptions and decisions of mock juries allow us to draw some conclusions about the likely impact of sexual history evidence on actual juries.

In this respect Regina Schuller and Patricia Hastings' study on the impact of complainant sexual history evidence on mock jurors' decisions is noteworthy. In their study, prior history evidence influenced participants' judgements of cases, with the impact of this information most pronounced when the sexual history information involved sexual intercourse.²⁴ Sexual history evidence was used by the mock jurors to assess the complainant's credibility and likelihood that she consented and these perceptions were related directly to their judgements of guilt. The study showed that the introduction of complainant sexual history evidence was not used to support the defendant's defence of an honest but mistaken belief in consent, which was in the context of the study a legally permissible inference but rather was used in a legally inappropriate manner to assess the complainant's credibility and likelihood that she consented.²⁵ This study has significant implications for rape shield legislation in its findings regarding the improper use of sexual history evidence by jurors.

B. SEXUAL HISTORY: THE EVIDENCE

1. Law on the books

"Rape shield" legislation has been enacted in various jurisdictions since the early 1970s in an effort to limit the use of sexual history and character evidence in criminal proceedings. In Scotland, this first took the form of section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, which amended the Criminal Procedure (Scotland) Act 1975 to introduce restrictions on the use of sexual history and sexual character evidence of complainants in sexual offence trials. This section was repealed in 1995 and replaced by s. 274 and s. 275 of the Criminal Procedure (Scotland) Act 1995, which essentially replicated its predecessor but also extended the protection's scope to a broader range of sexual offences. The Scottish Executive sought views in 2000 regarding the alteration of the law,²⁶ leading to the enactment of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which amended the 1995 Act. This altered the landscape radically, introducing new provisions to limit the scope of questioning relating to a complainant's character and sexual history in sexual offence trials.²⁷

The relevant provisions with respect to introducing sexual history evidence remain sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995.²⁸ These provisions relate to sexual offences and indecent assaults, and other forms of intimate interpersonal (or domestic) violence is not included within their scope.

²⁴ Schuller and Hastings, 'Complainant Sexual History' p. 257.

²⁵ Ibid. pp. 258-9.

²⁶ See *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* (Scottish Executive, 2000).

²⁷ S. 288C.

²⁸ As amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.

Section 274 has four distinct and alternative subsections. Section 274(1)(a) prohibits the leading of evidence or questioning that would show or tend to show the complainant is not of “good character (whether in relation to sexual matters or otherwise)”. Section 274(1)(b) prevents the complainant from being questioned, or evidence being led, about any “sexual behaviour not forming part of the subject matter of the charge”. Section 274(1)(c) prohibits evidence that the complainant has at any time “other than shortly before, at the same time as, or shortly after” the alleged offence “engaged in behaviour, not being sexual behaviour” which might found an inference that she consented or is not a credible or reliable witness. Section 274(1)(d) restricts evidence of “any condition or predisposition” to which the complainant is subject which might lead to the inference being drawn that the complainant consented or is not a credible or reliable witness. Together these provisions were intended to draw a tight net around the scope of questioning related to previous sexual behaviour, particularly where evidence related to sexual history was being used tactically as a defence strategy to undermine the credibility of the complainant.

In order to protect the fair trial rights of the accused, however, crucially, s. 275 contains an exception to these restrictions, which allows the defence to make an application to introduce sexual history evidence notwithstanding s. 274. It sets out a three-stage cumulative test which must be satisfied before the trial judge can allow questioning or evidence to be led about sexual history or character. First, the evidence must relate to a specific occurrence or occurrences of behaviour, or to specific facts regarding the character, condition or predisposition of the complainant. Second, the behaviour or facts must be relevant to establishing the accused’s guilt. Third, the probative value of the material must be significant and outweigh any risk of prejudice to the administration of justice, which includes the appropriate protection of the complainant’s dignity or privacy.

The compatibility of this legislative framework with the European Convention on Human Rights was upheld in *Moir v HM Advocate*.²⁹ Moir had been convicted of rape and sexual assault, and argued that Art 6 of the ECHR was breached by the excessive extent of the s. 274 prohibition and the restricted extent to which the prohibition could be over-ridden. The Court refused the appeal, holding that s. 275 was a reasonable and flexible response to the problem of the “embarrassment and humiliation of a complainant in a rape trial”³⁰ and a legitimate means of achieving the legislative objective, and the legislation did not have a disproportionate effect per se.³¹ However, it was observed by the Lord Justice-Clerk that a prior course of cohabitation by a complainant with an accused would not constitute engaging in sexual behaviour not forming part of the subject-matter of a charge (s. 274(1)(b)), and therefore such cohabitation would be beyond the scope of s. 274’s protections.³² In other words, evidence of cohabitation may be admitted. Such matters were considered further by the Privy Council in *DS v HM Advocate*, examining the admissibility of evidence regarding the behaviour of the complainant.³³ The Privy Council also held that the power to exclude evidence of “sexual behaviour” in s. 274(1)(b) did not extend to a prior course of cohabitation between the accused and the complainant. What is more, the exclusion of evidence of non-sexual behavior under s. 274(1)(c) did not extend to evidence that is directed simply to words that the complainant may have said to a third party which bear on her credibility or reliability. So, while the protection afforded to complainants by s. 274 is “very

²⁹ *Moir v HM Adv* 2005 1 JC 102

³⁰ *Ibid.* para 29.

³¹ *Ibid.* paras 36-38.

³² *Ibid.* para 29.

³³ *DS v HM Adv* 2007 SC (PC) 1

wide”,³⁴ according to the Privy Council, it does not apply to words the complainer might have said to a third party, nor to cohabitation.

The European Court of Human Rights has held that the "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify".³⁵ Thus, it is not surprising that the Court approved of the Scottish scheme in *Judge v United Kingdom*, dismissing Judge's claim that the UK had breached his Art 6 rights.³⁶ The Court emphasised that it was for domestic courts to decide whether it was appropriate to call a witness, and an issue would arise under Art.6(3)(d), which guarantees the right of the accused to examine or have examined witnesses against him, only if restrictions placed on the right to examine witnesses were so restrictive as to deprive that provision of its effect. The European Court remarked that the Scottish Parliament had introduced these provisions on the basis that, in criminal trials for sexual offences, evidence as to the complainer's sexual history and character was rarely relevant and, even where it was, its probative value was usually weak when compared with its prejudicial effect. Accordingly, the Parliament was entitled to take action to protect the rights of complainers and to generally prohibit the introduction of bad character evidence against them, whilst providing for an exception where such evidence was relevant or probative. Therefore, s. 274 and s. 275 were regarded as a reasonable and flexible response to the problem of questioning of complainers in cases concerning sexual offences and a legitimate means of achieving the objectives pursued by the legislature.³⁷

2. Law in practice

So what happens in practice when defence counsel wants to adduce evidence about the sexual behaviour of the complainer in a sexual offences trial? First of all, it is necessary that a written application be submitted to the court, in advance of trial. This requirement applies to both the prosecution and the defence. This is regarded as resulting in greater transparency as to the reasoning behind applications, but not as resulting in discussion of the relevance of the evidence by the Court.³⁸

The different formulations of Scottish rape shield legislation have been independently evaluated.³⁹ The most recent of these studies, published in 2007, indicated that 72% of all High Court sexual offence trials from 2004-05 included a s275 application,⁴⁰ with 76% of rape trials involving such applications. These figures represented an increase in the use of sexual history and character evidence since the introduction of the amendments in the 2002 Act. Just 7% of the s275 applications were disallowed, and in all but a small number of cases, all evidence allowed in the application was introduced in the trial, usually through cross-examination of the complainer.⁴¹ Several of the interviewed practitioners considered it

³⁴ Ibid. para 27.

³⁵ *Doorson v Netherlands* (1996) 22 EHHR 330 at para 70.

³⁶ *Judge v United Kingdom* 2011 SCCR 241.

³⁷ See Scottish Executive *Vulnerable and Intimidated Witnesses* section 5 for a discussion of similar 'tensions' in a number of international jurisdictions, relating to the balancing of the fair trial rights of the accused with the privacy rights of the witness.

³⁸ M Burman *et al* 'Impact of Aspects', p. 4.

³⁹ B Brown, M Burman and J Jamieson *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992, Edinburgh: Scottish Office Central Research Unit); B Brown, M Burman and J Jamieson *Sex Crimes on Trial: Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1993, Edinburgh: Edinburgh University Press; M Burman *et al* 'Impact of Aspects'.

⁴⁰ M Burman *et al* 'Impact of Aspects', p. 39.

⁴¹ Ibid. p. 2.

relatively easy to demonstrate that sexual history/character evidence is relevant.⁴² These findings are both surprising and worrying – and yet to date there has been no further research in Scotland indicating whether the figures have changed or whether the success of s275 applications has remained at such a high level, demonstrating a real and urgent need for more scrutiny and data on this issue.

In addition, case law on these provisions is rather chequered, with some dubious decisions. For instance, in *Kinnin v HM Advocate* the appeal court held that evidence of comments made by the complainer to K's son in the weeks prior to the alleged incident indicating that she wanted a sexual relationship with K's son was an essential part of K's defence and had been wrongly excluded.⁴³ Remarkably, the Crown offered no objection to the admission of the evidence and admitted that it appeared relevant and might have a bearing on the issues. The Court accepted that the evidence was not too remote in time or in its relationship to the issue of whether the physical contact had been consensual. It seems remarkable that the complainer's willingness to have sex with the accused's son was deemed to be relevant to consent to sex with Kinnin himself. Some of the legal practitioners interviewed in Burman's study viewed this decision, along with similar decisions (in *Cumming* for example⁴⁴), as a reason for a subsequent increase in s.275 applications.⁴⁵ Evidence or questioning concerning the character of the complainer featured in approximately 24% of cases in Burman *et al's* 2007 study, often concerning the complainer's use of alcohol or drugs.⁴⁶

The admissibility of such evidence, regarding former inconsistent complaints, borderline personality disorder and alcohol dependency syndrome, was considered and upheld in *HM Advocate v Ronald*.⁴⁷ Ronald was charged with rape; he claimed that he and the complainer had had consensual sexual intercourse, but that following a disagreement she made an allegation of rape. The defence sought to bring evidence of a previous allegation which they said was false. The Court held that where, as here, a complainer was diagnosed with a borderline personality disorder and an alcohol dependency syndrome, evidence about not only the disorder and the syndrome but also other aspects of a person's behaviour would be relevant to the existence of a "predisposition" in the sense in which the word was used in s. 275(1)(a). Moreover, the Court held that this complainer's recorded accounts of the incidents were relevant to the defence both as an example of impulsiveness and lack of self control relevant to her diagnosis and also as a means of challenging her credibility. Nonetheless, it was held that it would have been inappropriate to allow the accused to lead evidence or cross examine the complainer in an attempt to prove that she had not been raped or otherwise abused on other occasions.

Such issues were considered further in *M v HM Advocate*,⁴⁸ where M was convicted of the historic sexual abuse of three children. He had applied under s. 275 to question one of the complainers about a false claim she had made to the police of sexual assault by a third party when in her teens. The complainer had been cautioned and charged with wasting police time but not prosecuted. The defence argued that this matter was relevant as it went to the credibility of her complaint of abuse by M. Nonetheless, the issue was deemed to be

⁴² Ibid. p. 133.

⁴³ *Kinnin v HM Advocate* 2003 SCCR 295.

⁴⁴ *Cumming v HM Advocate* 2003 SCCR 261.

⁴⁵ M Burman *et al* 'Impact of Aspects', p. 50.

⁴⁶ Ibid. p. 3.

⁴⁷ *HM Advocate v Ronald* 2007 SCCR 451.

⁴⁸ *M v HM Advocate (No.2)* [2013] HCJAC 22.

collateral and “removed in time and character to the charges on the indictment” and so inadmissible under common law.⁴⁹

On appeal, this ruling was upheld, though there was a divergence of views as to the admissibility of the making of false complaints and the propensity to do so. Thus, the case was remitted to a Full Bench.⁵⁰ As Pete Duff states, however, the matters for “consideration and determination”⁵¹ were not resolved,⁵² leaving the law somewhat uncertain. The Lord Justice General, giving the leading opinion, repeated that the common law is not circumvented by s. 275 to admit evidence that would otherwise be excluded as collateral. As for whether a relevant prior false complaint would always be inadmissible as a collateral issue, he stressed that such a complaint could only go to witness credibility.⁵³ He considered the proven dishonesty of a witness as an exception to this rule, where a prior allegation could be admitted only if its falsity is proved “by reference to established fact in the form of a previous conviction”.⁵⁴ Critically, there was no conviction here, and so the matter was deemed to be inadmissible. Lord Clarke expressed a different opinion, though agreeing with the ultimate conclusion regarding admissibility in this instance. He rejected a “prescriptive regime” predicated on conviction, preferring instead a proportionate approach which would involve careful scrutiny of any claims.⁵⁵ As Duff outlines, while Lord Clarke’s “nuanced” approach could lead to lengthy “satellite litigation”, it is more likely to avoid injustice.⁵⁶

Furthermore, the Lord Justice General distinguished the facts of *Ronald* on the basis that there the complainer had an “objectively diagnosed medical condition” which could contribute to the making of false complaints whereas in *M*, she did not.⁵⁷ He observed that “[e]vidence that a complainer suffers from an objectively diagnosed medical condition and that such a condition may, as a generality, have a bearing on a person’s ability to know or tell the truth is admissible, but the matter stops there as a matter of expediency”.⁵⁸ So, he disapproved of the admission in *Ronald* of expert evidence beyond that concerning the complainer’s psychiatric conditions which could affect her ability to know or tell the truth.⁵⁹ The Lord Justice General invited the court to disapprove of *Ronald*, though this was not necessary for the disposal of the present case. Lord Clarke preferred to postpone such matters.⁶⁰ Duff has disagreed with such disapprobation of *Ronald*, suggesting that this would lead to a rigid (and arbitrary) rule limiting the factors which a psychiatrist can cite.⁶¹ However, his objection overlooks the degree to which discretion in this context in the past has facilitated the introduction of speculation and stereotyping (see below).

Overall, concern was raised by some of the judges interviewed in Burman’s study about the intricacy of law in this area,⁶² and the provisions themselves were described as an “elaborate code” in *M v HMA*.⁶³ Taken together, these cases do seem to overly constrain the

⁴⁹ Ibid. para 6.

⁵⁰ *M v HM Advocate* [2012] HCJAC 83, para 23.

⁵¹ Ibid.

⁵² P Duff, ‘The admissibility of previous false allegations of sexual assault: *CJM (No.2) v HM Advocate*’ 17(3) (2013) *Edinburgh Law Review* 381-387.

⁵³ *M v HM Advocate* (No 2) n. 48, para 27.

⁵⁴ Ibid. para 32.

⁵⁵ Ibid. para 51.

⁵⁶ P Duff, ‘The admissibility of previous false allegations’, p. 384.

⁵⁷ *M v HM Advocate* (No 2), para 39.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid. para 53.

⁶¹ P Duff, ‘The admissibility of previous false allegations’, p. 387.

⁶² M Burman *et al* ‘Impact of Aspects’, p82.

⁶³ *M v HM Advocate* (No 2) n48.

'rape shield', and could indicate that the protections can be undermined somewhat indiscriminately, thereby circumventing the intentions of the legislators, and impeding certainty in the law. However, Peter Duff suggests that "[o]ne must be cautious about reading a pattern or trend into these cases because there are examples from the previous shield regime where judges took a very robust approach to the issue of relevance and, thus, individual decisions may reflect little more than the attitudes of different judges rather than any underlying change as a result of the new legislation".⁶⁴ This focus on individual judges calls to mind Louise Ellison's observation regarding the all-male composition of the House of Lords in *R v A* in 2001.⁶⁵ Similarly, there is striking gender imbalance in the Scottish courts. There are nine female judges in Scotland, out of 34 Senators of the College of Justice. The Lord Justice Clerk is now, for the first time, a woman, Lady Dorrian. While Baroness Hale emphasises the difference that having female judges can make more generally in the legal system,⁶⁶ it remains to be seen what, if any, the difference will be in terms of attitude towards, or outcomes, in sexual assault cases.⁶⁷

Burman et al's study indicated that Crown applications to introduce sexual history evidence usually related to evidence required to enable a jury to make sense of subsequent evidence or to contextualise the alleged events.⁶⁸ But the reforms in 2002 had the "largely unanticipated and unintended consequences of the introduction of *more* sexual history and character evidence than occurred under the 1995 legislation".⁶⁹ As Duff has stated: "It is perhaps significant that the 2007 study indicates that judges have difficulty imagining circumstances where they would rule out otherwise relevant evidence in order to protect the complainer".⁷⁰ This lack of judicial imagination speaks to a lack of understanding of the secondary victimisation often suffered by rape complainants and their potential vulnerability when giving evidence, or regarding their treatment in the criminal justice system more generally (see below). As Leanne Bain concludes, referring to Burman's study: "it is clear that the legislation has failed to achieve its goals... 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."⁷¹

Finally, and notably, where the court allows questioning or evidence under s. 275, this triggers disclosure of the accused's previous convictions for sexual offences or any offence where a substantial sexual element was present in its commission.⁷² This provision, which instantiates a *quid pro quo*, is unique to Scotland. Burman *et al* provide the most up to date figures we have on this, again highlighting a pressing need for more research in this area. They highlight that in eight rape cases in their study, the accused had a previous conviction for assault, assault to injury, or assault to severe injury in the context of domestic abuse;⁷³ these convictions would not be disclosed under s.275A as they do not involve a substantial sexual element. Yet, as Burman *et al* stress, prior convictions relating to domestic abuse

⁶⁴ P Duff, 'The Scottish "rape shield": as good as it gets?' 15 (2011) *Edin LR* 218-242, p. 236.

⁶⁵ L Ellison, 'Commentary on Re A (No. 2)', p206.

⁶⁶ See, for example, Lady Hale, Deputy President of the UK Supreme Court, "Appointments to the Supreme Court", Conference to mark the tenth anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015, <https://www.supremecourt.uk/docs/speech-151106.pdf>.

⁶⁷ Note about the relative infrequency of sexual assault appeal cases in Scotland.

⁶⁸ M Burman *et al* 'Impact of Aspects', p3.

⁶⁹ *Ibid.* p. 7.

⁷⁰ P Duff, 'The admissibility of previous false allegations' p. 238.

⁷¹ L Bain, 'The failures of 'shield legislation': sexual history evidence, feminism and the law' 96 (2010) *Aberdeen Student Law Review* 96-110, p. 101.

⁷² s275A.

⁷³ M Burman *et al* 'Impact of Aspects', p. 97.

could be relevant in a sexual offence case in demonstrating a previous history of violence against a woman, even more so where the same woman is involved.⁷⁴ Reform is needed here so as to permit the inclusion of such previous convictions alongside previous sexual assault convictions.

Having set out these provisions and problems relating to the use of sexual history evidence in Scottish sexual assault trials, it is worth examining other measures that have been considered to ameliorate the difficulties faced by complainers in sexual assault trials. One possible way forward is independent legal representation, via legal aid, for complainers. This issue has been discussed in some detail in England and Wales by Ellison, and in Scotland by Raitt, Duff (this volume) and Chalmers.⁷⁵ It was also debated recently by the Scottish Parliament's Justice Committee at their 26th meeting, Session 4, on 22 September 2015, with respect to an amendment to the Criminal Justice Scotland Bill that would allow legal aid funding for representation of sexual assault complainers who want to challenge the defence's use of 'private' information, including medical records, in sexual assault trials.⁷⁶ We will not rehearse further the arguments made by Duff and others on the merits or otherwise of legal representation for those alleging sexual assault. However, it is worth noting that, while the Justice Committee failed to agree to the amendment on legal aid for representation, their discussion sparked a request, from the Cabinet Secretary for Justice, to the Crown Office and Procurator Fiscal Service (COPFS), and Scottish Courts and Tribunal Service (SCTS), for a short monitoring exercise regarding the number of s. 275 applications made and granted.

The resulting data, published in a letter from the Cabinet Secretary for Justice on 26 June 2016,⁷⁷ shows that from 11 January – 11 April 2016, 57 applications were made under s. 275 (52 in the High Court and 5 in the Sheriff Courts).⁷⁸ Of these, 51 were unopposed by the Crown (48 in the High Court and 3 in the Sheriff Courts), and 6 were opposed (4 in the High Court and 2 in the Sheriff Courts). Of the 52 High Court applications, 42 were granted in full, 5 were granted in part, and 5 refused. In other words, 47 of 52 applications - 90% - were at least partially granted at the High Court. At the Sheriff Courts, only 1 of the 5 applications was granted and the other 4 were refused.

Without more detailed information, it is difficult to offer any nuanced analysis of these figures. We cannot say whether this is higher or lower than previous years, because we have no comparative statistics, and we do not know whether a 3-month sample is necessarily indicative of any particular trend or pattern. While we can say that 47 of 52 applications were granted in full or in part, and that this seems like a high success rate, without more data, such as the number of sexual assault cases during that period, it is impossible to know whether this demonstrates the same kind of worryingly high rate of successful applications as seen in the Burman *et al* study. There is a pressing need for more sustained data generation in this area in order to be able to understand the experiences of those complainers who go through sexual assault trials, the practices of those who make, challenge and assess applications, and the question of whether further interventions, such as independent representation, are needed.

What we can say, interestingly, is that at the High Court, 4 of the 5 rejected

⁷⁴ Ibid.

⁷⁵ Put in references.

⁷⁶ Official Report of the Justice Committee, Tuesday 22 September 2015, available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10100&mode=pdf>, last accessed 1 September 2016.

⁷⁷ Letter from Michael Matheson to Margaret Mitchell, MSP, available at <http://www.parliament.scot/General%20Documents/20160624CSfJtoConvenerILR.pdf>, last accessed 1 September 2016.

⁷⁸ The Sheriff court is a court of first instance in Scotland, usually with one sitting Sheriff. There is a right of appeal to the High Court of Justiciary, which also is a court of first instance for more serious cases, hence the higher number of sexual assault cases coming before the High Court than the Sheriff court.

applications were not challenged by the Crown; at the Sheriff Courts, 2 of the rejected applications were similarly not challenged. Although these numbers are small, and it is difficult, as suggested above, to reach any robust conclusions, the data does draw attention to the claim made by Margaret Mitchell, who introduced the independent legal representation amendment to the Criminal Justice Scotland Bill. She argued that based on the evidence of victim support groups, the Crown is not proactive enough in its challenges to s. 275 applications.⁷⁹ Clearly, more research is needed here.

Leaving aside independent representation, there are a number of other provisions designed to support victims and witnesses who give evidence at trial, including those who claim to have been sexually assaulted. Here we turn to the issue of “special measures”.

C. SPECIAL MEASURES FOR VULNERABLE WITNESS AND VICTIMS

Although the complainer in a sexual assault trial may be subject to humiliating and discrediting questions about their sexual (or medical) history, they do have access to mechanisms within the criminal process that may help to minimise the detrimental effects of having to speak about intimate details of the offence, and of their lives more generally, in a public court room. If deemed a ‘*vulnerable witness*’ the complainer may be able to at least partially shield themselves from some traumatic aspects of giving evidence (though not from cross examination, as discussed below), through the use of what are commonly termed ‘special measures’ such as screens or live video links. Since it has been acknowledged that giving evidence in a sexual assault trial may be experienced as a secondary form of victimisation that causes further trauma,⁸⁰ special measures are not only an attempt to achieve the ‘best evidence’ possible in criminal proceedings⁸¹ but also go some way to recognising that the process itself can be a significant disincentive for victims of sexual assault to report offences. But who is defined as a vulnerable witness? To what extent are these attempts to protect complainers realised, and what is the impact of such protections on sexual victims?

1. Who is a ‘vulnerable’ witness and how are they identified?

a. Who is vulnerable?

In Scotland, provisions on the treatment of vulnerable witnesses and special measures were first introduced by the Criminal Procedure (Scotland) Act 1995. Under the 1995 Act, only children were deemed to be vulnerable witnesses. This was extended to adults with mental disorders by the Crime and Punishment (Scotland) Act 1997, and again by the Vulnerable Witnesses (Scotland) Act 2004: s. 1 of the 2004 Act amends s. 271 of the 1995 Act to include those who are under 16; and those for whom there is a “significant risk that the quality of the evidence to be given by the person will be diminished” either because of a mental disorder, (as defined by s. 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or because of fear or distress about giving evidence at trial. Richards et al⁸² suggest that, although the 2004 Act largely reproduced existing provisions, it was felt by the Scottish

⁷⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10100&mode=pdf> at Column 32.

⁸⁰ See for example, S Lees *Carnal Knowledge: Rape on Trial* (2002, Hamish Hamilton); L Ellison and V Munro ‘Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process’ (2016) *The International Journal of Evidence & Proof* 1-26

⁸¹ P Richards, S Morris and E Richards *Turning up the Volume: The Vulnerable Witnesses Scotland Act 2004* (Scottish Government, 2008)

⁸² *Ibid.* para 1.

government that a firm, clear legislative statement with a more inclusive definition of vulnerability and specific details of special measures was needed, as those who were vulnerable were not always getting the appropriate necessary support.⁸³ The category of ‘vulnerable’ was then further extended by the Victims and Witnesses (Scotland) Act 2014, which raised the age threshold for children to 18.⁸⁴ In addition, witnesses who are complainers in trials related to human trafficking, domestic abuse, stalking, and – importantly for our purposes – sexual assault, are also now deemed vulnerable.⁸⁵

When deciding whether a person is vulnerable, s271(2) of the 1995 Act (as amended by the 2004 Act), states that the court must take into account the following factors:

- (a) the nature and circumstances of the alleged offence to which the proceedings relate,
- (b) the nature of the evidence which the person is likely to give,
- (c) the relationship (if any) between the person and the accused,
- (d) the person’s age and maturity,
- (e) any behaviour towards the person on the part of—
 - (i) the accused,
 - (ii) members of the family or associates of the accused,
 - (iii) any other person who is likely to be an accused or a witness in the proceedings, and
- (f) such other matters, including⁸⁶
 - (i) the social and cultural background and ethnic origins of the person,
 - (ii) the person’s sexual orientation,
 - (iii) the domestic and employment circumstances of the person,
 - (iv) any religious beliefs or political opinions of the person, and
 - (v) any physical disability or other physical impairment which the person has.

The best interests (and any views) of the witness (or their parents/guardians) as to special measures also have to be taken into account.⁸⁷

There is as yet no evaluation of the most recent 2014 expansion of the measures. But in their evaluation of the 2004 framework, Richards *et al* interviewed 74 justice professionals and 11 vulnerable witnesses or their representatives about their experiences.⁸⁸ They found that many welcomed the new Act, despite some reservations by the judiciary,⁸⁹ however, they highlight particularly strong concerns about how criminal justice practitioners identify vulnerable adults, especially since, as they point out, many of the factors detailed in subsection (f) above are not immediately discernible: “Many examples were given of adults who may well have been vulnerable witnesses but received no offer of special measures”.⁹⁰

⁸³ For discussion of the international context in which the 2004 Act came about see Richards et al, *ibid*, chapter 2).

⁸⁴ S. 10(a).

⁸⁵ S. 10(c).

⁸⁶ I.e. this is a non-exhaustive list - other relevant issues can be taken into consideration according to the Act’s Explanatory Notes: available at <http://www.legislation.gov.uk/asp/2004/3/notes/division/3/1/1> last accessed 1 September 2016.

⁸⁷ S. 10(e), Victims and Witnesses (Scotland) Act 2014. A witness can also be considered vulnerable if “there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings” (s. 10(d)).

⁸⁸ P Richards et al, *Turning Up the Volume*.

⁸⁹ *Ibid.* para 27.

This finding raises the question, first, of what is meant by vulnerability, and secondly, how criminal justice practitioners might recognise it.

When debating the Policing and Crime Bill in the UK parliament in 2009, Jacqui Smith stated in relation to prostitution that: “The mark of any civilised society is how it protects the most vulnerable”.⁹¹ As Vanessa Munro and Jane Scoular have documented, vulnerability discourses proliferate in contemporary criminal justice debates.⁹² But this proliferation does not help with the question of what constitutes vulnerability, and whether we can ever reach a common understanding of vulnerability, so that we can ‘know it when we see it’.

According to vulnerability’s contemporary academic champion, Martha Fineman, vulnerability is “universal and constant, inherent in the human condition”, and that as such we *all* share “common vulnerabilities”⁹³ even while specific vulnerabilities are “particular”.⁹⁴ Fineman argues that rather than press for state recognition of the liberal autonomous choosing subject, we should embrace the notion of the “vulnerable subject” as “far more representative of actual lived experience and the human condition”.⁹⁵ In contrast to negative interpretations of vulnerability as coterminous with victimhood, Fineman urges us to “reclaim” vulnerability as a “heuristic” concept.⁹⁶ This would, she seems to suggest, allow us to examine how factors that are commonly folded into vulnerability are socio-politically and institutionally constructed.

Other commentators are more sceptical of the progressive potential of vulnerability, however. Munro suggests that using vulnerability to particularly mark out specific groups of people “risks ‘othering’ those individuals or groups in ways that further entrench their difference and stigma, whilst leaving unchallenged the residual norm of unbounded, empowered, and capable human agency”.⁹⁷ Similarly, Haas and García have suggested that “Whenever the deployment of vulnerability is only applied to ‘marginal’ subjectivities and exceptional situations, ideologies about the body as a naturally-given are reified, effacing the deeply political, exclusionary, and gendered and cultural affiliations...”.⁹⁸ Munro argues that vulnerability might also replicate some of the problems faced in more traditional rights-based claims related to the ranking of hierarchising of harms and hence vulnerability claims. Her concerns are echoed by Elaine Craig, who highlights the potential for group and community based markers of vulnerability to simply perpetuate “entrenched social hierarchies”

⁸⁸ Ibid. para 41.

⁹¹ Available at

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090119/debtext/90119-0010.htm>, column 524, last accessed 1 September 2016.

⁹² V Munro and J Scoular ‘Abusing vulnerability? Contemporary law and policy responses to sex work and sex trafficking in the UK’ 20(3) (2012) *Feminist Legal Studies* 189-206.

⁹³ M Fineman, ‘The Vulnerable Subject’, p. 1.

⁹⁴ Ibid. p. 10

⁹⁴ Ibid. p. 2; see also J Butler *Prekarious life: The powers of mourning and violence* (2006, Verso) pp. 29–31; R Braidotti ‘Affirmation versus Vulnerability: On contemporary ethical debates’ 10 (2006) *Canadian Journal of Continental Philosophy* 235–254.

⁹⁶ M Fineman, ‘The Vulnerable Subject’, p. 9

⁹⁷ V Munro ‘Title’ (2016) *Social and Legal Studies* Page no. needed here – article based on her paper is in press and will be out later in 2016.

⁹⁸ N Haas and A García ‘Encounters with vulnerability: the victim, the fragile, the monster, the queer, the abject, the nomadic, the feminine, the shameful, and the rest...’ 11(1) (2015) *Graduate Journal of Social Science* 151-161, p. 152.

including but not confined to those related to moralistic views about sex, gender stereotypes and “the individualized rather than systemic response structure of the criminal justice system”.⁹⁹

In short, anxieties about relying on the concept of vulnerability seems to centre around a worry that, as conceptualised by for example Fineman, vulnerability runs the risk of being overinclusive; or that the potential for any practical or political application of it is mitigated by a tendency to over-individualise vulnerability in a way that focuses on individual solutions without addressing the the question of how and why people end up vulnerable. In concentrating on how a particular person is vulnerable, we might paper over more systemic fractures that perpetuate existing social inequalities and hierarchies. In the present context, this translates into a potential neglect, both of the ways in which the criminal justice system itself creates vulnerabilities, and the current political and legal failure to take seriously the significant and structural vulnerabilities of many sexual assault victims.

The use of vulnerability in the Scottish legislation, which focuses on particular groups of people, arguably risks prompting all of the concerns mentioned here. For example, do the characteristics listed in s. 271 (2) (f) (set out above) indicate *inherent* vulnerability? Notwithstanding the explicit statement of the Scottish Executive that the use of the term vulnerability in the legislation was not intended to denote any inherent personal factor or deficit,¹⁰⁰ it is hard to see how sexual orientation or any of the other factors do *not* relate to something personal and inherent to the individual, even if not strictly seen as a ‘deficit’. And what makes these characteristics the correct ones to include in such a list? At one level it is easy to see how this list was generated – it corresponds closely with the list of characteristics protected in hate crimes legislation (ethnicity, sexual ‘orientation’, religion, disability), though it does not mention transgender identity (which was added as a hate crime via the Aggravated by Prejudice (Scotland) Act 2009); and it includes a broader range of potentially vulnerable people since it includes consideration of a person’s social and cultural background, their domestic and employment circumstances, and their political opinions. Some of these characteristics are protected in other sorts of rights frameworks such as the Convention for the Status of Refugees 1951 (ethnicity, sexual orientation, social and cultural background, political opinion), or equality-based anti-discrimination laws. The relevance and meaning of ‘domestic and employment circumstances of a person’ is more opaque but it seems that we might interpret this as circumstances of duress or where there is a heavily unbalanced power relationship, such that the witness might feel significant pressure not to give certain kinds of evidence. In any case, despite the fact that these listed factors are all commonly recognised vectors of vulnerability, reliance upon these as ways of *recognising and marking out vulnerability* may at first glance merely perpetuate a problematic, individualistic and essentialised understanding of what it is to be vulnerable. For example, Piggott suggests that focusing on the characteristic of the victim of hate crime, rather than the social circumstances that make hate crime possible “depends on the identification of a person as different, thereby reinforcing culturally embedded ideas of normality”.¹⁰¹

The individualising tendencies of the legislation are especially noticeable when we take the factors listed in the 2004 Act as relevant to establishing vulnerability as *independent of each other*; i.e., there is no recognition of the complex ways in which different vectors of vulnerability intersect and are compounded in complex ways. For example, research in

⁹⁹ E Craig ‘Capacity to consent to sexual risk’ 17(1) *New Criminal Law Review: An International and Interdisciplinary Journal* (2014) 103-134, p. 127.

¹⁰⁰ Scottish Executive *Vulnerable and Intimidated Witnesses*, p. 4.

¹⁰¹ L Piggott ‘Prosecuting disability hate crime: a disabling solution?’ 5(1) (2011) *Place and Policy Online* 25-34.

England and Wales has shown that sexual assault victims who have mental health problems are less likely to report, less likely to have the incident recorded by police, and are less likely to be believed by criminal justice agents.¹⁰² Indeed, Ellison et al emphasise that although many studies point to the high rate of prevalence of sexual violence against those with mental ill health or learning disabilities, due to massive underreporting, the scale of this problem is not known¹⁰³ (though of course this is true of sexual offences more generally). This is a pattern replicated at the international level, where research has shown that those who experience mental ill health are especially at risk of sexual assault.¹⁰⁴ Betsy Stanko has described this as the *de facto* decriminalisation of sexual assault of those who suffer from mental ill health or have learning difficulties: one report of her research suggests that “Those with learning difficulties were 67% less likely to have their case referred by police for prosecution than those without. Mental illness reduced the chance by 40%.”¹⁰⁵

The complicated ways in which various factors related to for example, drug or alcohol use, mental health, a previous relationship with the accused, and a previous allegation of sexual assault, as well as difficulty in narrating a coherent account, interact with the long documented existing gendered ‘blind spots’ in a sexual assault trial¹⁰⁶ means that an atomistic approach to vulnerability in the court room does not adequately capture or reflect the reality of victims’ experiences. Indeed, many if not most sexual assault victims are unlikely to get anywhere near the criminal trial in the first place, particularly where they experience one or more of these other factors, such as drug use and / or poor mental health (see also Cairns, this volume). When they do, Ellison has highlighted the frequent inappropriate use of psychiatric and confidential mental health records in sexual assault cases in England and Wales, despite procedures being put in place for complainants to challenge applications for the disclosure of such records.¹⁰⁷ Similarly, Fiona Raitt has argued that recent amendments to rules of disclosure in Scotland have widened the duty to disclose to the point where they fail to sufficiently protect the privacy rights of complainants, in particular those of sexual assault complainants who have a history of mental illness.¹⁰⁸ Similar arguments have been made in other jurisdictions regarding medical records, and even simply records of previous counselling.¹⁰⁹ There may also be a culture of victim blaming and scepticism around those with mental ill health who allege sexual assault, particularly where they have been multiply

¹⁰² L Ellison, V Munro, K Hohl, and P Wallang ‘Challenging Criminal Justice? Psychosocial disability and rape victimisation’ 15(2) (2015) *Criminology and Criminal Justice* 225-244.

¹⁰³ L Ellison et al, ‘Challenging Criminal Justice’.

¹⁰⁴ L Ellison ‘The Use and Abuse of Psychiatric Evidence in Rape Trials’ (2009) 13(1) *The International Journal of Evidence and Proof* 28-49, p. 48.

¹⁰⁵ <https://www.theguardian.com/commentisfree/2014/mar/08/rape-consent-vulnerability-barfield-stanko>.

¹⁰⁴ See for example S Lees, *Carnal Knowledge*; J Temkin and B Krahe, *Sexual Assault*; J Temkin, ‘Prosecuting and Defending Rape’.

¹⁰⁷ L Ellison, ‘The Use and Abuse’.

¹⁰⁸ F Raitt ‘Disclosure of Records and Privacy Rights in Rape Cases’ 15(1) (2011) *Edinburgh Law Review* 33-56, p. 40. Raitt points out that there are few formal rights afforded to the complainant, with respect to privacy, in the criminal justice context. She suggests that only Articles 2,6 and 8 of the ECHR give the complainant any formal recourse, but that these are so broad that they may be difficult to pin down. However, see the recent 2016 ruling where the Court of Session in Scotland said that a complainant’s Article 8 rights would be infringed by the disclosure of private medical records, and that she was entitled to legal aid to challenge the application for disclosure: <http://www.bbc.co.uk/news/uk-scotland-35562009>. For discussion of the history of the reform of disclosure rules, see Duff (this volume).

¹⁰⁹ See for example: E McDonald ‘Resisting defence access to counselling records in cases of sexual offending: does the law effectively protect clinician and client rights?’ 5(2) (2013) *Sexual Abuse in Australia and New Zealand* 12-20; L Gotell ‘Colonization through disclosure: confidential records, sexual assault complainants and canadian law’ 10(3) (2001) *Social Legal Studies September* 315-346.

victimised.¹¹⁰ The ameliorative effects of the vulnerable witness provisions are unlikely in practice then to make much of a dent in the problem of ‘access to justice’ in the sense of complainants having their claim – and their personhood – treated with dignity and respect.¹¹¹

b. Identifying vulnerable witnesses

So how is vulnerability, as complex as it is, recognised and acted upon by criminal justice agents? Burton *et al* conducted research in England and Wales, evaluating the effectiveness of special measures, introduced by the Youth and Criminal Evidence Act 1999, in real life cases, though not specifically sexual assault cases.¹¹² Their findings are similar to that of Richards *et al* in Scotland, discussed above: generally the treatment of vulnerable and intimidated witnesses (VIW) has improved but implementation is inconsistent. Having interviewed criminal justice agents and victims, tracked prosecution cases, and observed court practice, they concluded that the processes for identifying VIW significantly underestimated the number of those who were truly vulnerable: on a ‘very conservative estimate’ they concluded that 24% as opposed to the official figures of 7-10% were probably VIW.

Like Richards *et al*, they found that police officers had problems identifying VIW, particularly those with mental disorders, or learning disabilities, and those who were intimidated, and also were not always communicating effectively about the cases where someone was identified as VIW. They also found that the CPS rarely identified individuals as VIW, with some being identified for the first time by Victim Support at court, often too late for measures to be implemented. And although interviewed complainants reported that special measures enabled them to give evidence that they might otherwise not have given, Burton *et al* 2006 concluded that there was a significant unmet need. Importantly, and chiming with concerns raised above, they also found an informal hierarchy in VIW identification (presumably for pragmatic reasons) where children and victims of sexual offences were more easily and therefore more readily identified than others, and were more likely to benefit from special measures. This resonates with the findings of the 2010 Stern review – that prosecutors were generally reluctant to apply to use video evidence with adults.¹¹³

In response to the Victims and Witnesses (Scotland) Act 2014, and, apparently, the European Directive on the rights, support and protection of victims of crime, there is now a joint protocol between COPFS, SCTS, Police Scotland and Victim Support Scotland, last

¹¹⁰ L Ellison *et al*, ‘Challenging Criminal Justice’.

¹¹¹ See Cairns (this volume) for a critical discussion of what is meant by ‘access to justice’; see also W Larcombe ‘Falling Rape Conviction Rates’, critiquing the way in which feminist interactions with the criminal justice system’s treatment of rape too often end in an unreflective call for more prosecutions.

¹¹² M Burton, R Evans and A Sanders *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the criminal justice agencies* Home Office Online Report 01/06 (2006, Home Office), summarised in M Burton, R Evans and A Sanders, *An evaluation of the use of special measures for vulnerable and intimidated witnesses* Home Office Research Findings 270 (2006, Home Office). See also M Burton, R Evans and A Sanders ‘Vulnerable and intimidated witnesses and the adversarial process in England and Wales’ (2007) *The International Journal of Evidence and Proof* 1-23; M Burton, R Evans and A Sanders ‘Implementing special measures for vulnerable and intimidated witnesses: the problem of identification’ (2006) *Criminal Law Review* 229-240.

¹¹³ *Report by Baroness Vivien Stern*.

updated in September 2015.¹¹⁴ This document aims to allow agencies to “identify best practice and obtain consistency of approach to improve victims and witness engagement and support... to understand and meet victim and witness needs, treating them appropriately, professionally and with respect at all times”.¹¹⁵ Those deemed vulnerable by way of status (children, those with mental disorders and victims of specified offences) will be identified automatically, and a special arm of COPFS called Victim Information and Advice (VIA) contacts these people to discuss the most appropriate special measures, and make applications to courts, amongst other things. For ‘other’ vulnerable witnesses, the identification process is not so straightforward. VIA contacts those identified as potentially vulnerable by investigating police officers,¹¹⁶ or they can be identified, by Victim Support, other agencies, or other members of COPFS throughout the criminal justice process; they can also self-refer or be referred by a representative at the point of citation.¹¹⁷ However, a true understanding of how this process works in practice requires evaluation, not only of the extent to which the criminal justice process allows for identification and communication amongst its agents of potentially vulnerable witnesses, but also the extent of, for example, mental health training received by criminal justice agents such as the police and the Crown Office, as well as defence solicitors and even judges. The views and experiences of those who are (and are not) categorised as vulnerable are of course also central to such an evaluation.

It is not clear then that the statutory protections offered through special measures, have in themselves given us an adequate understanding of what constitutes vulnerability, and how we recognise it, in the context of sexual offences. And alongside these concerns about the meaning of vulnerability and how it is applied in practice, is the question of the *impact* of the measures themselves.

2. What impact do special measures have?

If a witness is found to be vulnerable, the 2004 Act sets out a range of special measures designed to protect them from the harsh realities of engaging with criminal justice processes.¹¹⁸ These are: the use of a screen, a live tv link, use of a video recorded prior statement, use of evidence taken by a court appointed ‘commissioner’, the opportunity for the witness to have a person supporting them as they give evidence, and ‘any other measure’ the Scottish Ministers may prescribe (1995 Act s. 275, as amended by s1 of the 2004 Act). The 2014 Act also added provision for closed courts (s. 21). Witnesses deemed vulnerable are entitled to ‘standard’ special measures, i.e. use of a live tv link, a screen, and a supporter, and are entitled to apply for non-standard measures, i.e. for evidence in chief to be given in the form of a recorded prior statement, evidence to be taken by a commissioner, or to exclude the public from the court while the witness gives evidence (closed court). Those who are not automatically deemed vulnerable can apply for any of these special measures, to be granted at the court’s discretion.¹¹⁹

¹¹⁴ *Working together for Victims and Witnesses: Protocol Between Crown Office and Procurator Fiscal Service (COPFS), Scottish Courts and Tribunal Service (SCTS), Police Scotland and Victim Support Scotland (VSS) (2015, Scottish Courts and Tribunal Service).*

¹¹⁵ *Ibid.* para 3.

¹¹⁶ *Ibid.* para 23.

¹¹⁷ *Ibid.* para 94.

¹¹⁸ Part 2 of the 2004 Act deals with witnesses in the civil context – for the purposes of this paper we will refer only to Part 1 of the 2004 Act which amends existing criminal law.

How effective are these special measure and what is their impact on a sexual assault trial? No evaluative study has been conducted in Scotland since Richards et al's study was published in 2008, as discussed above. However, in England and Wales, Ellison and Munro investigated the impact of three special measures upon mock juror evaluations of adult rape testimony: (1) live-links; (2) video recorded evidence-in-chief followed by live-link cross-examination; and (3) protective screens.¹²⁰ Their findings are illustrative since they refer to the same sorts of special measures as introduced in Scotland and elsewhere in the last decades.

The authors found that with respect to verdicts, jurors' evaluations of responsibility often had more to do with prior expectations regarding 'appropriate' responses to rape and 'normal' socio-sexual behaviour than they did with the mode by which the complainant's testimony was delivered.¹²¹ Their findings also "provide little support for the suggestion that the emotional impact of testimony will be reduced when a witness appears on a screen, translating into a loss of juror empathy."¹²² Overall they found that special measures themselves did not seem to have any discernible impact on jurors' assessments of the complainant's credibility, and that they could equally work 'in favour' as much as 'against' the complainant.

As mentioned above, the 2010 Stern review found that prosecutors in England and Wales were generally reluctant to make special measures applications for pre-recorded video interviewing with adults.¹²³ More recently, Westera *et al* in Queensland, Australia, tried to explain this prosecutorial reluctance in their own criminal justice system.¹²⁴ They evaluated police video interviews as evidence in chief in sexual assault trials, and found that police officers were often 'lost in the detail' such that the interviews were not seen by prosecutors as the best form of evidence to present to the court. However, they found in their 2013 New Zealand study that when compared with recorded police interviews, live evidence in chief at trial lost over two thirds of the detail of evidence relevant to establishing whether or not the alleged offence had occurred.¹²⁵ So while the use of prerecorded interviews might be

¹¹⁹ See Scottish Court and Tribunal Service, *Evidence and Procedure Review Report* (2015), available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2> and Scottish Court and Tribunal Service *Evidence and Procedure Review – Next Steps* (2016), available at <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2016/02/26/evidence-and-procedure-review---next-steps>. It may well be that the Scottish criminal justice system is generally moving in the direction of updating much of its evidential process through wider use of electronic and digital technology (SCTS) 2015, 2016), for reasons of cost efficiency, as well as to better 'ascertain the truth' (see Duff this volume). The SCTS 2015 report makes recommendations, such as taking all vulnerable witness statements *and* cross examinations by video as a matter of course. Whether or not this would bring us closer to an inquisitorial system is beyond the scope of this chapter.

¹²⁰ L Ellison and V Munro 'A 'special' delivery? exploring the impact of screens, live-links and video-recorded evidence on mock juror deliberation in rape trials' 23(1) (2013) *Social & Legal Studies* 3-29; L Ellison and V Munro 'Special measures in rape trials: exploring the impact of screens, live links and video-recorded evidence on mock juror deliberation' (2012, ESRC Briefing Report).

¹²¹ However, as they point out, "verdict outcome alone offers a limited indicator of influence, and myriad other variables can play a part in its framing. It is necessary, therefore, to delve further into the substantive content of the deliberations to explore more subtle signs of influence." L Ellison and V Munro, 'Special Measures', p. 3.

¹²² *Ibid.*

¹²³ *Report by Baroness Vivien Stern.*

¹²⁴ N Westera, M Keibell and B Milne 'Want a better criminal justice response to rape? Improve police interviews with complainants and suspects' (2016) *Violence Against Women* 1-22; N Westera, M Powell and B Milne, B 'Lost in the detail: Prosecutors' perceptions of the utility of video recorded police interviews as rape complainant evidence' (2015) *Australian and New Zealand Journal of Criminology* 1-17.

¹²⁵ N Westera, M Keibell and B Milne 'Losing two thirds of the story: a comparison of the video-recorded police interview and live evidence of rape complainants 4,(2013) *Criminal Law Review* 290-308.

essential to protect complainants and produce ‘best evidence’, they must be conducted in a way that is useful to prosecutors if the special measure is to be fully effective.

Special measures are obviously essential, not “to provide (witnesses) with an unfair advantage, but to allow them to participate in a meaningful way”.¹²⁶ Sexual assault is clearly a traumatic experience, and having to recount the assault at trial often compounds the trauma for many complainants. This is to some extent recognised through explicit inclusion of sexual assault claimants as vulnerable within the terms of the Vulnerable Witnesses (Scotland) Act 2014. However, Hardy et al have shown in their study that ‘trauma memory’, account incoherence and dissociation all affect not only the ways in which sexual assault is recounted to the police, and the quality of evidence available to the prosecution, but the way in which a complainant is treated by criminal justice agents, and therefore, whether or not complainants decide to take the allegation forward in the first instance.¹²⁷ In other words, vulnerability arising from the trauma of the assault, or from some other characteristic such as drug or alcohol use, mental ill health, or some combination of these issues, as well as the treatment of complainants by criminal justice agents, has an impact on whether sexual assault cases drop out of the criminal justice system, or even enter the criminal justice system at all. As Ellison and Munro have recently argued, the impact of trauma on victims of crime at every stage in the criminal justice process, and in particular on sexual assault victims, has barely been acknowledged either by policy makers or practitioners.¹²⁸ Legislation relating to the treatment of evidence in sexual assault trials does not address these issues; treating special measures as a solution ignores the extent to which witnesses are made more vulnerable by the criminal justice system itself. It also ignores the ways in which trauma and vulnerability can affect both the quality of a complainant’s testimony and the credibility it is afforded by the judge and jury.¹²⁹ That is not to detract from the importance of protecting witnesses in sexual offences trials. But an overly narrow focus of our energy on refining provisions that deal only with the way in which a complainant’s evidence is presented in court can distract us from addressing questions about the deep seated vulnerabilities that lead certain complainants to be both more vulnerable to sexual assault, and yet less likely to have access to criminal justice redress, or indeed to be retraumatised by the adversarial process, for example through cross examination.

D. CONCLUSION

It is frequently lamented that law ‘in action’ often does not reflect law ‘in the books’. This is perhaps especially so in the area of sexual assault where feminist commentators, amongst others, have noted the obduracy of assumptions and stereotypes about ideal victim behaviour, despite repeated attempts at substantive and procedural law reform. The spectre of sexual history looms over every individual who considers reporting a sexual offence. Laws introduced to limit defence lawyers’ reliance upon sexual history evidence to cast doubt on a complainant’s behaviour have been shown to be ineffective in practice, and in some cases can exacerbate the most problematic aspects of referring to a complainant’s sexual history. This renders complainants especially ‘vulnerable’ to being humiliated and disempowered in the criminal justice process. Although it appears that the majority of sexual assault trials

¹²⁶ Scottish Executive *Vulnerable and Intimidated Witnesses*, p. 99.

¹²⁷ A Hardy, K Young, and E Holmes ‘Does trauma memory play a role in the experience of reporting sexual assault during police interviews? an exploratory study’ 17(8) (2009) *Memory* 783-8. See also G Gudjonsson ‘Psychological vulnerabilities during police interviews: why are they important?’ 15(2) (2010) *Legal and Criminological Psychology* 161–175.

¹²⁸ L Ellison and V Munro, ‘Taking Trauma Seriously’.

¹²⁹ *Ibid*; see also J Herlihy and S Turner ‘Untested assumptions: psychological research and credibility assessment in legal decision-making’ 6 (2015) *European Journal of Psychotraumatology* 27380.

ultimately do include evidence of sexual history, special measures can protect sexual assault complainers from some of the embarrassment and trauma of having to give evidence and have their credibility and sexual integrity challenged in a public court room.

But we do not know enough about vulnerability in sexual offences; there is dearth of data on these issues, particularly in Scotland, where little is known – excepting anecdotal accounts and reports from NGOS – about sexual assault complainers’ contemporary experiences in the criminal justice system, not only of their experience leading up to and of the trial process, including applications to introduce their sexual history and other private information, but also if, when, and how the vulnerable witness procedures impact upon them.

We do not know how vulnerability is currently identified or communicated by police officers, or by COPFS or other agencies, or whether there is reluctance to apply certain kinds of special measures to certain kinds of complainers. We do not know the experiences of those who are deemed vulnerable – and those who may need to be, but are not. Neither do we have data on whether or not particular measures such as police interviews provide the best kind of court room evidence, or the impact that any of the special measures have on the court room dynamics, or outcomes. It might well also be true that there is an informal hierarchy of identification. Scotland deems certain categories of people vulnerable, who are automatically identified and contacted (children, those with mental disorders and those who have alleged particular offences). However, those who do not fall within those categories may not be easily identifiable as vulnerable. Again, given that neither sexual history evidence applications nor the vulnerable witnesses scheme has been evaluated for around a decade,¹³⁰ there is an urgent need for more research in Scotland - and in England and Wales - to better understand the reliance on sexual history evidence, the gaps in provision of special measures, the impact that the use of sexual history and other private information, as well as the special measures themselves, have on witnesses and other trial participants, and if possible, trial outcomes.

Nonetheless, a better understanding of the processes currently in place should not distract us from important questions about the socially embedded structures that prompt vulnerability. While protecting individual complainers and allowing them to have a voice in the criminal justice process are laudable aims, this cannot come at the expense of a proper inquiry as to what is meant by vulnerability, and the ways in which the justice process itself is implicated in compounding vulnerability and trauma. Peroni and Timmer have recently called for judicial and legislative authorities to justify why a group is considered especially vulnerable and why an individual should be treated as a member of that group.¹³¹ Going further, we have argued that what is needed is a more systemic focus on the ways in which certain kinds of victims become, by virtue of their circumstances, especially vulnerable, both to being sexually assault in the first instance, and to being denigrated and disbelieved in the criminal justice process, with little likelihood of being treated with respect, dignity or indeed receiving just outcomes, however that might be understood.

Cardwell and Hervey recently observed that critical analysis of the use of legal techniques can highlight the way that law itself “sustains certain assumptions that support structures of

¹³⁰ Though in England and Wales, Jacobsen, and Jacobsen and Seden, have examined the experiences of people with learning disabilities and learning difficulties within the criminal justice system: J Jacobsen *Police Responses to Suspects with Learning Disabilities and Learning Difficulties: A Review of Policy and Practice* (2008, Prison Reform Trust); J Jacobson and R Seden *A Review of Court Provision for Defendants with Learning Disabilities and Learning Difficulties* (2009, Prison Reform Trust). In addition, Plotnikoff and Woolfson have evaluated the government’s commitment to young witnesses: J Plotnikoff and R Woolfson *Evaluation of young witness support: examining the impact on witnesses and the criminal justice system* (2007, Home Office); J Plotnikoff and R Woolfson *Measuring up? Evaluating Implementation of Government Commitment to Young Witnesses in the Criminal Justice system* (2009, NSPCC).

¹³¹ 2013, p. 1073, cited in L Ellison and V Munro ‘Taking Trauma Seriously’.

power as 'background rules of the game', essentially by hiding them from scrutiny".¹³² We have argued that the laws of evidence and criminal procedures around sexual assault must be held up to closer scrutiny. There has also been a proliferation of rules, exceptions, policies, protocols and case law relating to the use of sexual history evidence, and to the proper treatment of vulnerable victims and witness; as Annalisa Riles has suggested, "when controversies flare up the literature becomes technical".¹³³ We have seen the policy and academic landscape become arguably overly technical in this legal area; what we have not seen is any real engagement with what it means to be vulnerable regarding sexual assault. A concerted attempt must be made by academics, policy and lawmakers, and practitioners to properly understand the underlying dynamics, and the reality of the depth and breadth of lived vulnerability in this context.

¹³² P Cardwell and T Hervey 'Bringing the technical into the socio-legal: the metaphors of law and legal scholarship of a 21st Century European Union' in D Cowan and D Wincott (eds) *Exploring the Legal in Socio-Legal Studies* (2015, Palgrave MacMillan).

¹³³ A Riles 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' 53 (2005) *Buffalo Law Review* 973-1033, p. 1008, fn 9.