1. Introduction

1.1 I write this in my capacity as an academic criminologist with longstanding teaching and research interests in the criminal justice response to sexual violence, and the co-author of research papers on rape reform and the use of sexual history and character evidence in Scottish sexual offence trials.

1.2 I very much welcome the Sexual Offences (Scotland) Bill which seeks to place existing common law and statutory sexual offences into a single Act; makes important changes to the current definition of rape, and; sets out a statutory definition of consent. Together these mark quite radical and wide-ranging changes to the Scottish legal framework for rape and other sexual offences and, I believe, reflect a genuine and serious attempt to modernise and improve the legal response to such crimes.

1.3 In recent years, we have seen several significant reforms, legislative interventions and important judicial decisions affecting both the law of rape and the criminal justice response to it in Scotland. But we still struggle with the challenges posed by very high levels of under-reporting of sexual crime, the dismal fact that we have one of Europe’s lowest conviction rates for rape, and the prevalence of unenlightened social attitudes about rape and, in particular, about those who experience it. Legislative change, whilst much needed, can not on its own lead to improvements in this regard. Extensive reforms to policy, procedure, evidence, statute, and agency guidelines in relation to sexual crime have been undertaken in many jurisdictions around the world over the past 20 years, all with broadly similar intent. Many governments have made sexual violence against women a policy priority. Yet all jurisdictions have encountered difficulties with implementation and interpretation of reforming legislation, and have seen little change in willingness to report or conviction rates. Public confidence in the ability of law and the legal system to respond effectively to rape remains low. Sexual crimes still occur with relative impunity and this fact has to be acknowledged. Along with the widening of legal debate and the strengthening of the legal framework, we need, perhaps even more so, a sustained challenge to the culture of permissiveness towards sexual violence which lies beneath public attitudes to rape in Scotland. In particular, we need to confront the basis and the prevalence of widely held views that rape can be excused or explained away by reference to a particular lifestyle, character or sexual history, and that women are responsible for being raped.

1.4 My specific comments on the Bill, in relation to the definition of rape and sexual assault, the definition of consent and reasonable belief, and the use of sexual history and character evidence, are set out below.
2. **Definition of Rape**

2.1 I support both the Bill’s decision to retain the term ‘rape’ and the broadening out of the conceptual definition of the crime (Section 1). ‘Rape’ is a powerful and weighty word which taps into complex social and historical meanings. It conveys in specific terms the nature of the offence, while its separation from other sexual crimes denotes it as a specific type of wrong, with characteristics that are quite distinct. ‘Rape’ signals a unique indignity, conveying the serious nature of what is considered to be the most personal and private of crimes.

2.2 Scotland’s current gender-specific common law definition of rape as penile penetration of the vagina is too restrictive not only in that it represents a very narrow and specific form of criminal conduct. The current definition also emphasizes a traditional, male, phallo-centric perspective. By defining rape in this way, the sexual violence experienced by the victim may be disregarded as the definition is restricted to penile penetration of the vagina, thereby excluding other forms of violent sexual contact that might be equally devastating to victims. The broader definition proposed in the Bill is not limited to conventional notions of rape, but includes penetration of the anus and mouth, as well as the vagina, in circumstances where the victim does not consent. This, along with the removal of the outmoded offence of sodomy, also gives legal recognition that men can be victims of rape. These changes mean that the law on rape will no longer be gender-specific, but will apply without distinction to gender identity or sexual orientation. It will also bring Scotland more into line with other western jurisdictions, which use a wider definition and recognize male rape.

3. **Sexual Assault**

3.1 I support the introduction of a new statutory offence of ‘sexual assault’ which denotes specific sexual acts, which take place in the absence of consent, and which are distinct from the crime of rape.

3.2 However, the insertion of implements into the anus, vagina and other parts of the body is a very brutal sexual violation which can be just as devastating for the victim as penile penetration, and is no less serious a crime than rape. For this reason I would support the creation of a separate offence ‘sexual assault by penetration’ which is distinct from ‘sexual assault’ and which is equivalent in seriousness and maximum sentence to rape, rather than this being subsumed within the new offence category. The seriousness of this offence must be recognised as such at every stage of the judicial process, up to and including sentencing.

4. **Consent (section 9 and 10)**

4.1 I fully support the move to create a statutory definition of consent to provide much needed clarity in this area. I also support the statutory definition of consent as ‘free agreement’, and the principle of expanding on this definition by setting out a (non-exhaustive) list of circumstances where consent is deemed to be absent. This is a significant change from the current position, which is that a defence of consent requires an ‘honest belief’ by the accused regardless of how reasonable or otherwise that belief is. The concept
of ‘honest belief’ enables a subjective interpretation to be applied to consent, and has allowed the accused to maintain that the victim’s behaviour amounted to what he believed to be consent - even if that belief is not reasonable. I support the move away from the subjective approach currently taken to establish mens rea, in the belief that a far greater degree of objectivity is required to test to belief in consent. The current position means that trial proceedings are far more likely to focus on the actions of the complainer than on those of the accused, who is under no obligation to give evidence himself, while she may be forced to undergo a secondary ordeal in the court room in the form of intrusive and detailed cross-examination of a highly personal nature on aspects of her sexual life. The focus on the victim’s actions has led to situations where evidence of her clothing, lifestyle, behaviour, character, reputation as well as past sexual activity has been brought to bear in order to demonstrate consent.

4.2 The Bill provides for a greater focus on the responsibility of the accused to demonstrate what steps they took to establish that there was consent and, whilst I remain doubtful that this will significantly reduce the focus on the victim’s actions, even less prevent prejudicial value judgements being made about the victim as a result, this is nonetheless to be welcomed.

4.3 The Sexual Offences (Criminal Procedure) (Scotland) Act 2002 s149A requires the accused to give advance intimation if his defence is to include a plea of consent on the part of the victim, and recent research found that this occurs in the vast majority of rape trials (Burman et al, 2007). It is important that the current requirement for the defence to lodge a prior notice of consent is continued under any new legislation. This prior notice, in principle, allows the complainer to be informed that it will be argued that she consented and, to some extent, prepare for it.

4.4 A key strength of the term “free agreement” is said to be its simplicity and succinctness. It is considered a phrase that the public and, in particular, juries can readily understand. In rape and sexual assault cases it is crucial that the law is clear. Yet there is a real concern that “free agreement” as a concept remains open to subjective interpretation and therefore might mean different things to different people. It is essential therefore that if the Bill becomes law, it provides as clear a framework as possible, in order to allow the court to accurately convey the meaning of this term to juries (and victims and accused persons) in clear and straightforward terms.

4.5 The Bill puts forward an important set of statutory indicators of situations in which consent will not apply. The relationship between the definition of consent and the statutory indicators which outline when consent is not present reflects the idea that the interactive nature of sexual behaviour means that the focus should be on the circumstances surrounding the act in question, and in particular on the interaction of the parties involved and the role played by each in ascertaining that consent was given.

4.6 The proposal to introduce the concept of “prior consent” to sex (Section 10, (2) (a) and (b) gives some cause for concern. At present, the Crown has to prove that someone is asleep or unconscious at the time of the alleged
rape. If these provisions become law, there is a strong possibility that they will also have to prove that the complainer didn’t previously give consent to having sex in these circumstances. It is very difficult to see under what circumstances an individual would wish to consent to sexual activity at some point in the future when they would be asleep or unconscious. The very idea that someone can give their advance consent to sex one afternoon and that this consent would still apply at 1am the next day when they are incapable of giving consent is quite ridiculous, and subverts the very important concept of ‘sexual autonomy’ which underlies the Bill. This provision also has the potential to undermine the provisions at Section 8 (Administering a substance for Sexual Purposes).

4.7 In addition, the provision at 10, (2) (c) also gives cause for concern. It is vital that the statutory indicators make explicit that any fear or force to which the complainer was subject may have a historical basis (e.g. been part on an ongoing situation in her relationship with the accused) and need not necessarily have arisen in explicit terms at or around the time of the incident in question. This is not sufficiently clearing the provision, which does not adequately capture the effect of past abuse on a person’s ability to freely agree to sexual activity. How distant (or proximate) in time do previous instances of violence/threats have to be to be irrelevant? Importantly, it does not address the impact that living in a relationship characterised by threats of violence and sexual coercion has on someone’s capacity to freely agree to sexual activity. If the Bill becomes law, it must seek to address the more subtle forms of violence, coercion and intimidation which so often form the wider context in which rape and sexual offences take place.

5. Reasonable Belief (section 12)
5.1 Whilst the insertion of the reasonable belief provision (Section 12 is welcome, it raises an important question about how this provision might be met without prejudicing the accused’s right to silence. The provision that “regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were” begs the question of exactly how the court is to determine if any such steps were taken if the accused refuses to provide evidence. It is rare in sexual offence trials for an accused person to take the witness stand. It is difficult to see how juries can properly examine whether the accused reasonably believed the complainer consented – or consider what steps he took – if he doesn’t give evidence. If there can not be a requirement that the accused take the witness stand in such cases and be cross-examined on the basis of his/her belief in consent, then can the Bill make it more explicit that an inference may be drawn from an accused’s refusal to outline the steps taken to determine consent?

6. Sexual History and Character Evidence
6.1 Although unaddressed by the Bill, sexual history and character evidence are crucial issues in relation to any consideration of the legal response to sexual offences. Despite two (well-intentioned) legislative attempts to restrict the use of sexual history and character evidence of the complainer in sexual offence trials in Scotland, such questioning and evidence
is in fact introduced in the vast majority of sexual offence trials heard in the High Court (Brown, et al, 1992, 1993; Burman et al, 2007). Currently seven out of ten complainers in High Court sexual offence trials are questioned on their sexual history and character, usually in order to ‘show’ consent and challenge the credibility of the complainer. Questioning on sexual history and character is sought by both the Crown and (routinely) by the Defence, applications to the court to introduce such evidence are rarely disallowed and the resultant questioning is almost always highly detailed and intrusive. This type of questioning adds significantly to the distress experienced by complainers, and has the potential to mislead juries. The introduction of such evidence also paves the way for the deployment, in the court room, of sexist stereotypes and clichés about female sexuality and sexual character, and feeds into myths about women being responsible for being raped. The awful prospect of facing a secondary ordeal in the courtroom is a clear disincentive for reporting a sexual crime. Research in other jurisdictions has revealed the potential that the introduction of sexual history evidence has for affecting jury perceptions of the victim, and ultimately trial outcome.

7. Challenging Cultural and Social Attitudes

7.1 The steep increase in the use of sexual history and character evidence introduced in Scottish sexual offence trials runs counter to the policy aims of the ‘rape shield’ legislation (the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002) which were to prevent complainers being subjected to unnecessary and irrelevant questioning. It seems clear that this legislation has not improved the position, and indeed has had the opposite effect. This is a sober reminder of the limited effectiveness of legislative change in the area of rape.

7.2 The Rape and Sexual Offences (Scotland) Bill heralds an important and much needed reform of Scots criminal law of rape. The Bill has attempted to provide greater clarity about the law of rape and about sexual autonomy, and sharpen the definition of consent. Without doubt, changes to the substantive law of rape both update and bring Scotland more in line with other jurisdictions, offer more clarity of definition, and provide further legal protection for victims. For these reasons, the changes are very welcome and to be supported. Yet it is important to be realistic about the impact that such legislation can bring to those who seek justice in cases of rape and sexual offences. Having appropriate legislation, statutes and procedures in place are just one, albeit important element. Crucially, those who implement such laws and procedures must be fully (and demonstrably) committed to the spirit of any reforms.

7.3 On the basis of a reading of a body of feminist scholarship and international research evidence on the reach and effectiveness of rape law reform, I am seriously doubtful that these changes to the substantive law, whilst welcome, will lead to an increase in the reporting of sexual crimes, a decrease in case attrition, an increase in conviction rates, or a decrease in unjustified acquittals in Scotland. There are wider cultural and attitudinal shifts required before any such changes will occur. Real rape reform will be signalled by a willingness to seriously investigate, prosecute and convict
sexual crimes that take place in ‘risky’ contexts where, for example, a woman accepts a drink from a man, dances with him, kisses him, accepts a lift from him, and goes back to his flat for more drinks. When such a scenario will not invoke scepticism, disbelief, and cries of false allegation. When defence counsel do not invoke outmoded sexist stereotypes about female sexuality and paint pictures of ‘bad’ sexual character in attempts to discredit complainers and undermine their credibility. When prosecutors present an account of events in which they assert the rights of women who do not fulfil conventional expectations of femininity, and when juries are prepared to convict despite a women’s sexual history.

8. Monitoring the impact of the legislation

8.1 In order to fully determine and assess the impact of any new legislation in this area of law, it is important that the Scottish Government and Scottish Parliament consider the adoption of appropriate mechanisms. For monitoring and evaluation which will facilitate a review of the operation of the new legislation. A primary consideration is to ensure that criminal justice data in relation to rape and sexual offences can be disaggregated by both gender and age; this will be particularly important should the provisions in the Bill relating to the changes to the definition of rape and the new offence of sexual assault be enacted. Not only is this likely to be a requirement of the Gender Equality Duty, but our available criminal justice data on sexual violence is extremely limited. A more robust system of data collection and monitoring will not only allow a detailed assessment of the impact of new legislation, but would also inform policy development and practice.

8.2 Relatedly, there should be a commitment to commission independent research to evaluate the operation of any new legislation in this very important, and complex area of law.

Bibliography


Professor Michele Burman
Professor of Criminology and Co-Director of the Scottish Centre for Crime and Justice Research, University of Glasgow