Scottish Law Commission

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EVIDENCE

REPORT ON EVIDENCE IN CASES OF RAPE AND OTHER SEXUAL OFFENCES

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SCOTTISH LAW COMMISSION

Item 1 of the First Programme

EVIDENCE

REPORT ON EVIDENCE IN CASES OF RAPE AND OTHER SEXUAL OFFENCES

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on

Evidence in Cases of Rape and Other Sexual Offences

(*Signed*) PETER MAXWELL, *Chairman*
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R. EADIE, *Secretary*
27th April 1983

CONTENTS

Part		*Paragraph*	*Page*
I	**INTRODUCTION**	1.1	1
II	**THE SUBSTANTIVE LAW**		2
	The law of rape	2.1	2
	The law relating to other sexual offences		
	Common law offences	2.4	3
	Statutory offences	2.7	4
	Homosexual offences	2.11	5
III	**THE EXISTING LAW OF EVIDENCE RELATING TO CASES OF RAPE AND OTHER SEXUAL OFFENCES**		6
	Character of the complainer	3.2	6
	Intercourse with men other than the accused	3.5	7
	Intercourse on other occasions with the accused	3.9	8
	Procedure	3.10	9
	Conclusion	3.11	9
IV	**THE NEED FOR REFORM**		10
	The nature of present concern and criticism	4.1	10
	The need for reform in Scotland	4.6	11
	Other jurisdictions	4.7	12
V	**RECOMMENDATIONS**		13
	Our general approach to reform	5.1	13
	Questioning or evidence as to the general character of the complainer	5.3	14
	Sexual behaviour with other men	5.4	14
	Sexual behaviour on other occasions with the accused	5.5	15
	Applicability to the Crown	5.7	15
	Exceptions to the general rules		
	Evidence introduced otherwise than by the accused	5.8	16
	Medical or scientific evidence	5.10	17
	Evidence of *res gestae*	5.11	17
	Incrimination	5.12	17
	A general exception	5.14	18
	Restrictions on the scope of permitted evidence	5.20	20
	Procedure	5.21	20
	Offences other than rape	5.23	21
	Ancillary matters		
	Cases tried summarily	5.29	23
	Exclusion of the public and prohibition of reporting	5.30	23
	Recording of submissions and decisions	5.33	24

Part *Paragraph* *Page*

VI SUMMARY OF RECOMMENDATIONS . . . 24

Appendix A
Draft Evidence in Sexual Offences (Scotland) Bill . 27

Appendix B
List of those who submitted written comments on Propositions 169 and 170 of Memorandum No. 46 34

PART I INTRODUCTION

1.1 In April 1979, in furtherance of our First Programme of Law Reform,[1] we published a Research Paper on the Law of Evidence which had been prepared for us by Sheriff I. D. Macphail. Following on this we published, in September 1980, a Consultative Memorandum[2] in which we put forward certain propositions for consideration in relation to the reform of many aspects of the law of evidence. Memorandum No. 46 was circulated to a large number of interested bodies and individuals for comment and many constructive and helpful comments have been received.

1.2 Following on the receipt of these comments we have started work on the preparation of a report or reports which will contain our recommendations for reform of particular parts of the law of evidence. In the course of 1982, however, we were invited by the Lord Advocate to give priority to a report on that part of the law of evidence which relates to rape and other sexual offences. We note that many reforms on these aspects of the law of evidence have in recent years been taking place both in England and elsewhere in the world and that, particularly in the last year or two, there has been some demand for reform in Scotland coupled with considerable media interest in the subject of trials for rape.

1.3 Standing the considerable amount that has been written and spoken about the subject of rape in the recent past, we should perhaps make two things clear at the outset. The first is that our recommendations in this Report are concerned solely with certain aspects of the law of evidence as it relates to rape and other sexual offences. We are, accordingly, not concerned with what constitutes, or more accurately should constitute, the crime of rape itself; nor are we concerned in any way with what should or should not be an appropriate penalty for those who commit such crimes. The second thing is that it is clear from much of what we have read and heard in recent times that the subject of rape is one which can generate a very considerable amount of emotion and passion. In formulating our proposals for reform we have endeavoured to be as objective and dispassionate as possible while not, we hope, failing to give proper weight to all of the considerations that have come, or have been brought, to our attention.

1.4 Although, as we have just observed, it is no part of our task to propose any change in the substantive law of rape, it is clear that any critisisms of the present law of evidence, and any proposals for reform of that law, can only be properly understood if the existing law itself is clearly understood. Accordingly, in Part II of this Report we set out so far as relevant the substantive law relating to rape and other sexual offences. We then go on in Part III to explain certain aspects of the law of evidence. In Part IV we consider the need for reform of the existing laws of evidence, and in doing so we make some reference to the legislative reforms that have been made in recent years in other jurisdictions. Finally, in Part V we set out our own recommendations for reform.

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[1]Published in 1965.

[2]No. 46 "Law of Evidence" referred to in this Report as "Memorandum No. 46".

The law of rape

2.1 In Scotland the crime of rape is based on the common law and has always been regarded as a specially aggravated form of assault.[1] Macdonald[2] states that rape is the carnal knowledge of a woman forcibly and against her will. This definition, which is taken directly from Hume[3] and Alison,[4] appears to suggest that force, in the sense of actual violence, is a necessary ingredient in the crime. In fact threats of violence will suffice and, no doubt with this in mind, Gordon[5] defines rape as being "the carnal knowledge of a female by a male person obtained by overcoming her will". The practice of treating rape as an aggravated form of assault has meant that recently the Scottish courts have been able to affirm that it is possible for a man to be found guilty of raping his wife notwithstanding the absence of any judicial separation.[6] It is not rape to have intercourse with a woman who is asleep[7] but it has, however, been held to be rape where a woman was plied with drink in order to overcome her resistance.[8] By statute it is deemed to be rape to have intercourse with a married woman by pretending to be her husband.[9]

2.2 However the crime is defined there can be no doubt that in many cases the issue of consent will be central to the determination of a trial. While the burden of proving guilt will in every case and at all times rest on the Crown an accused person will frequently wish to lead evidence or to ask questions in an attempt to establish that an act of intercourse took place with the complainer's[10] consent. This is inevitable since the central act involved is one which is not only a normal feature of human relationships but is also in general non-criminal if indulged in with the consent of both parties. It is in this connection that some of the most difficult questions arise as to the scope and nature of any evidence or questioning that should be permitted by the law. Moreover, there have been indications in a recent case that it is a defence to a charge of rape in Scotland that an accused person honestly believed that a woman was consenting to intercourse notwithstanding that such belief was mistaken and was not based on reasonable grounds.[11] In reaching this conclusion

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[1] It is always libelled as such in indictments, with full specification being given of all the elements making up the assault. In cases where the facts merit it, considerable detail may be contained in the indictment.

[2] *A Practical Treatise on the Criminal Law of Scotland,* by J. H. A. Macdonald (Lord Kingsburgh), 5th ed. (1948), p. 119.

[3] *Commentaries on the Law of Scotland Respecting Crimes,* by Baron Hume, 4th ed. (1844), vol. i, p. 301.

[4] *Principles and Practice of the Criminal Law of Scotland,* by A. J. Alison (1832 and 1833), vol. i, p. 209.

[5] *The Criminal Law of Scotland,* by G. H. Gordon, 2nd ed. (1978), p. 883.

[6] *H.M.A.* v. *Duffy* 1983 S.L.T. 7; *H.M.A.* v. *McMahon,* unreported, High Court, 2 June 1982. By contrast, this may not be possible in England: see *Criminal Law,* by Smith and Hogan, 4th ed. (1978) pp. 401, 402.

[7] *Chas. Sweenie* (1858) 3 Irv. 109.

[8] *H.M.A.* v. *Logan* 1936 J.C. 100. See also *Sweeney and Another* v. *X* 1982 S.C.C.R. 509.

[9] Sexual Offences (Scotland) Act 1976, s. 2(2), formerly Criminal Law Amendment Act 1885, s. 4.

[10] In Scots law the person against whom a crime or offence is alleged to have been committed is commonly referred to as "the complainer". For convenience we use the term in that sense throughout this Report.

[11] *Meek and Others* v. *H.M.A.* 1982 S.C.C.R, 613 and 1983 S.L.T. 280 (Notes).

the High Court followed the decision of the House of Lords in the case of *D.P.P.* v. *Morgan*[1] and stated that that decision "is one which readily accords with the law of Scotland". It may be doubted whether there will in practice be many cases where the holding of an honest belief in consent, in the absence of reasonable grounds for that belief, will be a live issue but, where it is, it may provide a possible justification for lines of evidence and questioning the relevancy of which might otherwise have been more difficult to support.

2.3 Before leaving the substantive law of rape one further matter may be noted. That is that it has recently been affirmed[2] that it is possible for a woman to be convicted of the crime of rape as an accomplice. Such cases will presumably be rare but they should not, we think, be lost sight of because they indicate that, while the problems that may arise in rape trials are normally perceived as simply involving a male/female conflict, this is not necessarily always so.

The law relating to other sexual offences

Common law offences

2.4 The common law of Scotland recognises a number of sexual offences falling short of the crime of rape. Apart from attempted rape itself there are two other aggravated assaults, namely assault with intent to rape,[3] and indecent assault. The former of these is apt to deal with the situation where the offender assaults the victim with the intention of going on to commit rape, but where matters come to a stop before any activity that would amount to an attempted rape. Indecent assault, which according to Gordon[4] is not a specific crime, is simply any assault accompanied by circumstances of indecency. In many instances indecent assaults will be relatively minor offences, but the possible range of such offences is very wide. It could include, for example, acts of oral or anal intercourse which do not amount to rape in Scotland but are so classified in some foreign jurisdictions.

2.5 Section 61 of the Criminal Procedure (Scotland) Act 1975 provides:

> "(2) Any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such a crime.
>
> (3) Where any crime is charged in an indictment as having been committed with a particular intent or with particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation."

Since, as has already been observed,[5] it is the practice in Scottish indictments to specify all the acts alleged to have been committed in the course of a rape it follows that, by virtue of the foregoing statutory provision, a person charged with the crime of rape may, after trial, be found guilty of a lesser sexual offence such as assault with intent to rape or indecent assault, or may indeed be found guilty of a simple assault. He may also, of course, be found guilty

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[1][1976] A.C. 182.

[2]*H.M.A.* v. *Walker and McPherson,* unreported, High Court, 10 March 1976.

[3]Until recently libelled as "assault with intent to ravish".

[4]*op. cit.* p. 823.

[5]Para. 2.1 above, note 1.

of attempted rape, or of an attempt to commit any of the other lesser crimes.[1] This has implications for the scope of any reform of the laws of evidence and we shall return to this later.[2]

2.6 The common law also recognises a wide range of other sexual offences under the general heading of indecent behaviour which includes lewd and libidinous practices.[3] On one view such offences are distinguishable from the others that have been mentioned above in that they do not involve any sort of assault. On the other hand there may be instances, for example, in charges of lewd and libidinous practices, where an accused person, if only to provide a basis for a possible plea in mitigation, may seek to assert that he had been led on or encouraged to do what he did by some kind of sexual behaviour on the part of the complainer. This also has implications for the scope of any reform of the laws of evidence and will be referred to later.[2]

Statutory offences

2.7 There are many statutory offences of a sexual character such as those relating to prostitution and brothel-keeping with which this Report need not concern itself. There are, however, others which are to a greater or lesser extent analogous with rape and other sexual assaults, and these fall to be mentioned briefly.

2.8 Mention has already been made[4] of section 2(2) of the Sexual Offences (Scotland) Act 1976 by virtue of which a man who induces a married woman to permit him to have sexual intercourse with her by impersonating her husband is to be deemed to be guilty of rape. That same Act of 1976 provides for several other relevant offences. By section 2(1) it is an offence to procure a woman to have sexual intercourse by threats or intimidation, or by false pretences or false representations, and it is an offence to apply any drug so as to overpower a woman and thereby have unlawful sexual intercourse. By section 3(1) it is an absolute offence to have unlawful sexual intercourse with any girl under the age of 13; and by section 4(1) it is an offence to have unlawful sexual intercourse with any girl of or above the age of 13 and under the age of 16 unless one of two specified defences can be established. The most commonly relied on of these is that the accused was under the age of 24, has not previously been charged with a like offence, and had reasonable cause to believe that the girl was of or above the age of 16. The other is that the accused had reasonable cause to believe that the girl was his wife. It is also provided by section 15 of the Act that if, upon the trial of any indictment for rape or any offence under section 3(1) of the Act, the jury are satisfied that the accused is guilty of an offence under section 2, 3 or 4(1) of the Act but are not satisfied that the accused is guilty of the charge in the indictment, or of an attempt to commit such a charge, then they may instead find him guilty of the statutory offence or of indecent assault.[5] It may be noted that it

[1]Criminal Procedure (Scotland) Act 1975, s. 63(1). See also Sexual Offences (Scotland) Act 1976, s. 15 and para. 2.8 below.

[2]Paras. 5.23–5.28 below.

[3]At common law the charge of lewd and libidinous practices appears to be confined to offences committed against children under the age of puberty. By s. 5 of the Sexual Offences (Scotland) Act 1976 the age limit in relation to girls is extended to 16 (para. 2.9 below).

[4]Para. 2.1 above.

[5]It would seem that, despite the doubts of Sheriff Gordon referred to in para. 2.4 above, the term "indecent assault" is acceptable to the legislature.

has been held, in relation to the comparable provision in section 9 of the now repealed Criminal Law Amendment Act 1885, that what is now section 15 of the 1976 Act does not apply where the common law charge is not one of rape but only of attempted rape.[1]

2.9 The Sexual Offences (Scotland) Act 1976 contains several other provisions relating to sexual offences which may for present purposes be noted only briefly. These are section 5 (indecent behaviour towards a girl between 12 and 16), section 8 (abduction of a girl under 18 with intent to have sexual intercourse), and section 9 (unlawful detention with intention to have sexual intercourse).

2.10 By section 96 of the Mental Health (Scotland) Act 1960 it is an offence for a man to have unlawful sexual intercourse with a woman who is mentally defective, and subsection (6) of that section contains a provision, similar to that in section 15 of the Sexual Offences (Scotland) Act 1976, whereby on a charge of rape the accused may be convicted of the statutory offence instead. By section 97 of the 1960 Act it is, in certain circumstances, an offence for a member of staff in a hospital or nursing home to have intercourse with a woman who is receiving treatment for mental disorder. It is also made an offence for a man to have unlawful sexual intercourse with a woman suffering from mental disorder who is subject to his guardianship.[2] By section 80(4) of the Criminal Justice (Scotland) Act 1980 the foregoing section of the 1960 Act is to have effect as if any reference therein to having unlawful sexual intercourse with a woman included a reference to committing a homosexual act.

Homosexual offences

2.11 Prior to the passing of the Criminal Justice (Scotland) Act 1980 homosexual acts between male persons, whether in public or in private, were contrary to law.[3] Homosexual acts in private between consenting females have never been contrary to law in Scotland. The law relating to homosexual offences has been altered by section 80 of the 1980 Act so that in certain circumstances homosexual acts are no longer contrary to law. However, by subsection (7), homosexual acts, or attempts to commit or procure them, remain as offences in other circumstances. Subsection (6) defines "a homosexual act" as meaning "sodomy or an act of gross indecency by one male person with another male person". The inclusion of the common law crime of sodomy in this definition might suggest that the crime no longer exists in its own right. While it is perhaps unlikely that it would now be charged in preference to the statutory offence created by subsection (7) we are not persuaded that the effect of the statutory changes has been to abolish the common law crime altogether. Apart from those crimes and offences already mentioned it is likely that certain behaviour involving parties of the same sex could be prosecuted at common law as, for example, indecent assault and there is no reason in theory why an indecent assault cannot be committed by one female on another, or upon a man for that matter. We mention such offences because,

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[1] *Townsend* v. *H.M.A.* (1914) 7 Adam 378.

[2] The present definition of mental disorder will be changed by the Mental Health (Amendment) (Scotland) Act 1983 when it comes into force, but this Act will not remove the offences created by ss. 96 and 97 of the 1960 Act.

[3] Sexual Offences (Scotland) Act 1976, s. 7, now repealed by Criminal Justice (Scotland) Act 1980, s. 83(3) and Sched. 8.

in common with some of the other offences that we mentioned earlier, we think that they may raise issues in relation to evidence and questioning which are not dissimilar to those that may arise in cases of rape and, we state later,[1] it is our view that any reform of the law of evidence should not necessarily be restricted solely to cases of rape.

PART III THE EXISTING LAW OF EVIDENCE RELATING TO CASES OF RAPE AND OTHER SEXUAL OFFENCES

3.1 There are three aspects of the law of evidence which are of particular significance in relation to cases of rape and other sexual offences. They are (1) evidence or questioning to show that a complainer is of bad character or associates with prostitutes, (2) evidence or questioning to show that a complainer has had intercourse with men other than the accused either before or after the alleged rape, and (3) evidence or questioning to show that a complainer has had intercourse with the accused either before or after the alleged rape. The present rules of evidence on these matters all date from at least the 19th century, though there seems to be some reason to suppose that in certain respects these rules are not always strictly followed in modern cases. Moreover, none of the older cases appears to deal specifically with crimes other than rape or attempted rape and it is accordingly uncertain to what extent, if at all, the same rules apply to other crimes of a sexual nature.

Character of the complainer

3.2 For a considerable time it has been competent, certainly in cases of rape or attempted rape, for an accused person to seek to establish the bad character of the complainer at the time of the alleged offence.[2] The basis for this exception to the normal rules of evidence which would otherwise exclude evidence on such collateral matters has been stated in the following terms:

> "It is for the [accused] to show that at the time when the offence is said to have been committed, the woman was of loose and immoral character, not as a matter of defence, but as bearing very materially on the effect of the evidence on the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue, and allow a proof of a witness' character and repute."[3]

And again:

> "Further, it seems a relevant subject of enquiry whether the woman was at the time a person of reputed bad moral character, as bearing upon her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her. Such evidence may seriously affect the inferences to be drawn from her conduct at the time."[4]

3.3 It seems clear from the cases that have been referred to that any attack on a complainer's character has been held to be admissible only in relation

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[1]Para. 5.23 below.

[2]*H.M.A.* v. *Allan* (1842) 1 Broun 500; *H.M.A.* v. *Reid* (1861) 4 Irv. 124; *Dickie* v. *H.M.A.* (1897) 2 Adam 331.

[3]Per L.J.C. Inglis in *Reid* at p. 129.

[4]Per L.J.C. Macdonald in *Dickie* at p. 337.

to the time of the alleged offence: any questioning into the more remote past has been held to be irrelevant unless a continuous link could be established up to the time of the alleged offence.[1] There may be some reason to doubt whether that limitation has always been strictly followed in more modern times. Moreover, although the admissibility of character evidence has been justified as having a bearing on credibility, it seems at least possible, from a reading of the older cases, that the courts were directing their attention to the question of credibility in relation to consent and not to the question of credibility in general. Certainly, in *Dickie* the summary of the arguments for the accused appears to indicate that the presence or absence of consent was the issue in regard to which evidence of character was said to be relevant. If this is right it would suggest that the early authorities on this matter intended that this exception to the normal rules of evidence should have a somewhat limited purpose. We have the impression, however, that in more modern times the exception has been regarded as affecting a complainer's credibility generally, with the result that such evidence and questioning may be admitted even in cases where the accused is denying having had any contact with the complainer at all.

3.4 As part of an attack on a complainer's character an accused may also lead evidence or ask questions to show that at the time of the offence the complainer associated with prostitutes, but he may not lead evidence or ask questions to show that her friends and associates were otherwise of bad character.[2]

Intercourse with men other than the accused

3.5 Evidence or questioning designed to show that a complainer has on specified occasions had intercourse with men other than the accused is not competent in Scotland.[3] In the light of much of the modern comment on the subject it is interesting to look at the basis on which the principle was upheld by Lord Justice Clerk Macdonald in the case of *Dickie*. Having dealt with the admissibility of evidence as to a complainer's general character in the passage quoted in paragraph 3.2 above, he went on:[4]

> "But such evidence is something very different from evidence of individual acts of unchastity with other men at an interval of time. I am not aware that such evidence has ever been allowed, and indeed it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man—a proposition which is quite untenable. A woman may not be virtuous, but it would be a most unwarrantable assumption that she could not therefore resist, and resist to the uttermost, an attempt to have connexion with her by any man who might choose to endeavour to obtain possession of her person, and to whom she might have no intention to yield. Every woman is entitled to protection from attack upon her person. Even a prostitute may be held to be ravished if the proof establishes a rape, although she may admit that she is a prostitute."

3.6 The foregoing passage could well, we think, have been written by any of the contemporary critics of the way in which rape trials are conducted in

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[1] *Reid*: per Lord Neaves at p. 128, and L.J.C. Inglis at p. 130.
[2] *H.M.A.* v. *Webster* (1847) Ark. 269.
[3] See the cases of *Allan, Reid* and *Dickie* cited above.
[4] At p. 337.

this country; but if, as is the case, the Lord Justice Clerk's opinion has never been overturned, why should there now be any concern about this rule of evidence? There are, we believe, several reasons for this.

3.7 Although the general rule, as enunciated in *Dickie,* is clearly expressed it was recognised in that case itself that there may have to be exceptions to it. In the judgment already referred to the Lord Justice Clerk said:[1]

> "Whether proof of such unchastity might be allowed if it occurred just before and practically on the same occasion, I do not say. Such a case might be held as falling within the doctrine of the competency of proof of all matters forming parts of the *res gestae.* Such facts might have an important bearing on that branch of evidence in such cases which relates to the appearance of the private parts when examined."

The term *res gestae* in this and other contexts has often given rise to difficulties of interpretation but, so far as we are aware, it has in recent times been the practice, at least in relation to cases of rape, to regard the phrase as referring to those matters which are so closely linked to the alleged offence, in terms of place, time and circumstances, as to form part of a single event.[2] An exception to the general rule for matters forming part of the *res gestae* in this sense is plainly necessary to take account of group rapes and in cases where an accused person is seeking to establish that an alleged rape was merely an incident in some kind of group orgy.[3] An exception is also, as we understand it, generally recognised in cases where evidence of sexual relations with other men may be relevant to rebut or explain medical or scientific evidence. In the passage quoted above Lord Justice Clerk Macdonald appears to have seen this as part of the *res gestae* exception but, given our interpretation of that phrase, such cases now seem to be regarded as constituting a further exception to the general rule.

3.8 The law has thus developed in the course of practice during the last century or so, but we are unaware of any judicial pronouncement which has ever sought to define the limits of that development. As a result there is, we believe, some uncertainty as to the extent to which exceptions to the general rule may be permitted, and indeed there appears to be some doubt as to whether there still exists a general rule at all. We say that because it is our understanding that on occasions the rule itself is given scant observance today, with the result that complainers are sometimes subjected to quite detailed questioning about their sexual history and their sexual relations with other men. If our understanding is correct, that provides a further reason as to why there should be concern at the present time notwithstanding what was said on the subject as long ago as the end of the nineteenth century.

Intercourse on other occasions with the accused

3.9 Evidence of prior intercourse between a complainer and an accused is admissible in a trial for rape.[4] The basis for allowing such evidence has been expressed in the following terms:

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[1] At p. 338.

[2] We use the phrase in this sense throughout this Report.

[3] As in *Morgan,* cited above.

[4] *H.M.A.* v. *Blair* (1844) 2 Broun 167; *Dickie* cited above.

". . . it has been held competent for the accused to prove that the witness voluntarily yielded to his embraces a short time before the alleged criminal attack. That such proof should be allowed is only consistent with the clearest grounds of justice, for, in considering the question whether an attempt at intercourse be criminal, and to what extent criminal, it is plainly a relevant matter of enquiry on what terms the parties were immediately before the time of the alleged crime."[1]

So far as we are aware the practice of admitting such evidence remains unchanged at the present time. We note, however, that in the passage just quoted some emphasis is placed on the conduct of, and relationship between, the parties "immediately before the time of the alleged crime". We are not aware whether any such restriction on the extent of such questioning and evidence is in practice imposed in modern cases.

Procedure

3.10 The old cases to which we have referred contain indications that before a witness's character could be attacked it was necessary to give notice of an intention to do so. Textbook writers,[2] including one writing as recently as 1972, refer to this requirement but our understanding is that, at least in rape cases, there is some uncertainty and that it is not always observed. One reason for this may be that the basis for the practice is itself rather obscure. It appears to have developed alongside the former requirement for every accused person to put in written defences in advance of a trial, but whether it was seen as an essential part of such written defences is impossible to say. The lodging of written defences remains today only in the vestigial form of the few classes of special defence recognised by our law,[3] and there appears to be no modern authority other than the textbook writers for the need to give notice of an intention to attack character.

Conclusion

3.11 While the existing rules of evidence, as established by the 19th century cases to which reference has been made, seem at first sight to be reasonably clear, we have some uncertainty regarding the principles which were thought to support the distinction between, on the one hand, allowing evidence as to bad character and, on the other hand, excluding evidence concerning specified acts of intercourse with men other than the accused. It seems reasonably clear that when the judges spoke of bad character they meant bad moral character or, in other words, a character marked by unchastity and promiscuity. Indeed, in *Reid* Lord Justice Clerk Inglis refers expressly to "loose and immoral character."[4] But such evidence may be wholly generalised and unspecific and would, we think, be as objectionable as evidence which concentrated on specified incidents. We have difficulty in understanding the basis on which the objection of Lord Justice Clerk Macdonald in *Dickie*[5] to evidence of specific

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[1]Per L.J.C. Macdonald in *Dickie* at p. 337.

[2]See, for example, Macdonald *op. cit.* p. 309; Walker and Walker, *The Law of Evidence in Scotland* (1964) 19; Renton and Brown, *Criminal Procedure according to the Law of Scotland,* 4th edn. by G. H. Gordon (1972), paras. 7–16 and 18–76.

[3]*H.M.A.* v. *Cunningham* 1963 J.C. 80.

[4]See para. 3.2 above.

[5]See para. 3.5 above.

incidents could be stated without at the same time applying to generalised evidence about bad character. If we are right in thinking that the reason for the distinction is not apparent, either from what is said in the older cases or on any rational consideration, then this would suggest that the present rules of evidence are at the very least in need of some clarification. Moreover, as we have pointed out in the preceding paragraphs, the present rules may be said to be unclear in other respects as well. It is not clear whether they extend to cases other than rape or attempted rape. It is not clear whether evidence as to bad character is seen as being relevant to credibility only in cases where consent is in issue or more generally. It is not clear to what extent there may be permissible exceptions to the general rule prohibiting evidence of sexual intercourse with other men. It is also not clear what if any are the limits on evidence relating to previous or subsequent sexual relationships with the accused. If, as we have suggested, the present rules are not in any event being universally followed in modern practice, then the need for some review is even clearer.

PART IV THE NEED FOR REFORM

The nature of present concern and criticism

4.1 For a good many years now there has been widespread concern about, and criticism of, the way in which complainers are treated in rape trials. This concern has shown itself in a substantial volume of literature in England, the United States, Commonwealth countries, and elsewhere.[1] There has been considerable pressure for reform, instigated largely, though by no means entirely, by women's organisations; and in fact numerous reforms of the law have by now taken place in many countries. Some of these will be examined later in this Part of the Report.

4.2 The nature of this concern is both general and specific. On the general level it has been claimed that the police, prosecutors, the courts and perhaps society as a whole treat the victims of sexual crimes, and particularly rape, with a lack of proper sympathy and understanding. It is said that this lack of sympathy and understanding makes the whole experience up to and including an appearance in court much more traumatic and distressing for rape victims than is necessary. It is also suggested that a fear of having to undergo this experience may in fact deter some women from proceeding with a complaint of rape.

4.3 On a more specific level most critics assert that it can never be relevant to a charge of rape—any more than it is to any non-sexual crime—to assess a woman's general credibility by reference to what are seen as out-dated-Victorian, standards of moral propriety. Thus, it is said, it should never be competent to ask questions, or to lead evidence, to show that a complainer is of bad moral character or that she associates, or has associated with, prostitutes. In Memorandum No. 46 we sought views on this problem in proposition 170, which stated that:

[1]The following is only a brief selection: Report of the Advisory Group on the Law of Rape (the Heilbron Committee), 1975, Cmnd. 6352; V. Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom", 77 Columbia Law Review, 1 (1977); Jocelynne A. Scutt, *Rape Law Reform, A Collection of Conference Papers,* Australian Institute of Criminology, 1980.

"In cases of rape or similar assaults evidence that the complainer was of bad moral character or that she associated with prostitutes should no longer be admissible as being relevant to credibility."

The abolition of the rule which at present permits such questioning or evidence was supported by most of those who were consulted. We think, however, that it may be questionable whether an absolute prohibition can be justified.[1]

4.4 On the matter of sexual intercourse with men other than the accused, there seems to be a strong body of opinion that evidence about this should never be permitted. It is said that contemporary sexual habits and attitudes are such that no inference as to consent involving one man can or should be drawn simply because the woman in question has on other occasions consented to sexual relations with other men. The admission of such evidence, it is said, merely permits an examination of a woman's sexual history which can have no relevance to the facts in issue but which is at the same time highly distressing for the woman concerned. Proposition 169 in Memorandum No. 46 set out the following question:

"In cases of rape and similar assaults should the court have a discretion to admit evidence of the complainer's sexual behaviour with other men, both before and after the alleged offence?"

While an absolute prohibition of any evidence or questioning on such matters received some support, other consultees drew attention, rightly in our view, the the possibility that, quite apart from matters arising as part of the *res gestae,* evidence of this kind could be relevant to counter or explain medical or scientific evidence in certain cases.

4.5 So far as previous sexual intercourse with the accused is concerned, some of those who have written on this subject assert that even that should not be mentioned in the course of a trial. However, most of those whom we consulted were prepared to accept that such evidence would normally be relevant in cases where consent was in issue.

The need for reform in Scotland

4.6 Although some commentators on Memorandum No. 46 took the view that the present law is adequate to deal with most problems that may arise in practice, the majority of those consulted seemed to agree that there is a need for some reform. In some cases the need for reform was seen to arise simply because of the uncertainty which exists as to the extent to which present practice is governed by the rules which were established in the 19th century. We have already drawn attention to this uncertainty in Part III of this Report. Others, not surprisingly, took the view that the need for reform was more fundamental and involved bringing the law more clearly into line with contemporary attitudes on sexual matters. We consider that there is something to be said for both of these views and, in Part V of this Report, we shall give our response and our recommendations for reform. Before doing so, however, it may be helpful to give some examples of the ways in which reforms have been carried out in other jurisdictions.

[1] See para. 5.14 below.

Other jurisdictions

4.7 Although many countries have in recent years reformed their laws of evidence in relation to rape cases, the approach to reform has not by any means been uniform. In general it may be said that scarcely any of the jurisdictions which we have examined now admit evidence of a complainer's bad character in so far as that is intended merely to reflect on her overall credibility. On the matter of sexual experience with men other than the accused, the statutory approach ranges between the extremes of total exclusion on the one hand and a wide judicial discretion on the other. Somewhere in the middle come a variety of compromise solutions which mix a measure of express exclusion with a measure of discretion to admit. In some of these cases the statutes offer rules or guide-lines as to when, and in what circumstances, the judicial discretion should be exercised in favour of admission; in others there is a reference only to considerations such as fairness. An example of this last type of approach is to be found in England and Wales in section 2 of the Sexual Offences (Amendment) Act 1976 which provides:

> "2(1)—If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than the defendant.
>
> (2)—The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

It has recently been suggested that the foregoing provisions have had only a limited success in preventing the sort of probing into a woman's sexual history that the provisions were intended to prevent.[1]

4.8 An example of a reform which contains a general prohibition coupled with fairly clear indications of the circumstances in which prohibited evidence may be admitted is to be found in a recent amendment to the Criminal Code of Canada which received the Royal Assent in October 1982. Section 246.6 of that Code now provides:

> "(1) In proceedings in respect of [certain sexual assaults] no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complaint with any person other than the accused unless
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> (*a*) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
>
> (*b*) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
>
> (*c*) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge,

[1] Zsuzsanna Adler, "Rape—The Intention of Parliament and the Practice of the Courts", 1982 M.L.R., 664.

where that evidence relates to the consent that the accused alleges he believed was given by the comlainant."

Section 246.6 goes on to make provision for the service of a notice of intention by or on behalf of an accused and for the holding of a hearing by the judge for the purpose of determining whether or not the requirements of the section are met. Section 246.7 of the Code, as amended, contains another provision of some interest. It provides:

> "In proceedings in respect of an offence [of sexual assault] evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."

Although many more examples of recent reforms could be quoted, the two that have been given above serve to give a general indication of some of the lines that have been followed in other common law jurisdictions. We now turn to consider our own recommendations.

PART V RECOMMENDATIONS

Our general approach to reform

5.1 We are satisfied that there is considerable force in the criticism that our laws of evidence in rape and certain other sexual cases are out of touch with contemporary sexual habits and attitudes and that they often cause unacceptable trauma and distress to those who claim to have been the victims of such offences. We think that that is particularly so when these laws permit, or are seen as permitting, a wide-ranging enquiry into a woman's sexual history for the sole purpose of establishing that, because she has in the past had sexual relations with A and B, she must, therefore, have consented to intercourse with C. We are also persuaded that the present state of the law of evidence on such matters is unsatisfactory for other reasons as well. The declared law is in some respects unclear; it is apparently not always being followed in practice; and, as we remarked in Part III, it seems to us to be based on principles which cannot readily be reconciled with each other. Thus, while adequate safeguards for the accused must be maintained, we consider, for all of the reasons given above, that the law is in need of reform and clarification.

5.2 The precise circumstances of each case in which a sexual offence is charged will differ, and it is impossible to predict with any certainty the kinds of circumstances which may arise in future cases. Moreover, items of evidence which in one case may be objectionable or irrelevant may be highly relevant in the circumstances of another. For these reasons, therefore, although we subscribe to the principles of clarifying the law and of giving suitable protection to complainers, we do not think that this can be achieved, consistently with the interests of justice, simply by providing for a total prohibition of certain classes of evidence. At the same time we do not consider that the interests of justice can best be served by leaving with the judges a wholly unfettered discretion in such matters. To take that course would not only create the possibility that different approaches would be taken by different judges but also it would make it very difficult for those preparing for a trial to anticipate with any degree of confidence whether or not a particular line of questioning or evidence was likely to be allowed. In what follows, therefore, we recommend the prohibition of certain classes of evidence subject to certain defined

exceptions. In our view an application to the court should be necessary to determine whether or not any proposed questioning or evidence falls within one or more of these exceptions. We are also recommending that, in all cases where otherwise prohibited evidence or questioning is admitted following application to the court for that purpose, the court should not only have power to impose limitations on the scope and extent of such evidence or questioning at the time when leave is granted but should also have a continuing power to intervene to cut short or limit any evidence or questioning which appears to be exceeding the purpose for which the initial leave was granted.

Questioning or evidence as to the general character of the complainer

5.3 We have already remarked, in Part III, on the difficulty of determining with any certainty the principle that was thought to be applicable so as to justify the allowance of evidence as to bad character while excluding evidence of specified acts of intercourse with men other than the accused. Certainly the judges of the 19th century seem to have regarded it as axiomatic that a woman's reputation should affect her credibility, at least where consent was in issue, and may well have taken the view that it should equally affect her credibility in other cases as well. Moreover, although in some of the older cases the judges seem to have been thinking of bad character in terms of carrying on a life of prostitution, there are some indications that they meant no more than unchastity. The phrase "bad character" is itself very uncertain and unspecific, and in our view opens the door to the introduction of much that is irrelevant. We can, in general, see no justification for the view that evidence of bad character, however defined, is bound to be relevant to a proper determination of a trial for rape or other sexual offences. To admit such evidence is, in our view, inconsistent with contemporary sexual attitudes; it may cause quite unnecessary distress to a complainer; and it may divert a jury from the proper issues in a case. We also consider that in the majority of cases evidence that a complainer associates with prostitutes, or indeed is one herself, is unlikely to be relevant to credibility or to a proper determination of the issues in a case. Accordingly, **we recommend** that as a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time been of bad character, associated with prostitutes, or engaged in prostitution. (Recommendation 1)

Sexual behaviour with other men

5.4 As we have observed earlier, the present law is that evidence of specified acts of sexual intercourse with other men prior to the alleged offence is not admissible in a trial for rape, and the reasons for that exclusion given by Lord Justice Clerk Macdonald in 1897[1] remain as valid today as they were then. They are, so far as we can tell, precisely the reasons that are advanced at present by those who seek reform of the law. As we have observed, however, it seems that these rules are by no means being strictly observed nowadays. It is our view that in general they should be. Moreover, we can see no reason why a restriction on this kind of evidence should be limited to prior sexual intercourse with other men: the objections to such evidence are just as valid

[1] *Dickie* v. *H.M.A.*, see para. 3.5 above.

in our view in relation to subsequent intercourse. Indeed, we take the view that the restriction should not be confined to full acts of intercourse. To do so would by implication admit evidence or questioning about sexual behaviour falling short of intercourse but that may be just as objectionable as evidence or questioning about intercourse itself, and in any event that may be the only kind of behaviour that is in issue in the case of less serious sexual offences.

Sexual behaviour on other occasions with the accused

5.5 Although some who have written on the subject of evidence in cases of rape have expressed the view that it should be incompetent to lead evidence about sexual behaviour on other occasions involving a complainer and an accused, the majority of writers and of those who commented on Memorandum No. 46 seem to accept that such evidence is in general much more likely than not to be relevant to a question of consent. While we agree that such evidence will generally be relevant, there will, we think, be some cases where it will not. For example, in some cases the evidence may relate to a chance encounter accompanied by some sexual behaviour many years before the alleged offence. Exceptional cases apart, we doubt whether evidence of such an encounter could ever be regarded as relevant. There may be some doubt as to whether a court has a general power which would enable it to disallow questioning or evidence about such an incident, and on balance we have come to the conclusion that it would be preferable that any evidence or questioning about prior or subsequent sexual behaviour involving a complainer and an accused should also be prohibited except with the permission of the court after an application has been made to it. In taking this view we are conscious that there may occasionally be cases where an accused and a complainer are married to each other and, in such cases, the recommendation which follows in the next paragraph would by implication preclude evidence even as to the existence of that marriage. In most of such cases, however, we think that such evidence would normally be introduced by the Crown, and for reasons which we explain in paragraph 5.7 below, we are recommending that our general proposals should not apply to the Crown. If, for any reason, the Crown has not introduced such evidence, we do not regard it as an unreasonable burden that an accused should have to seek the leave of the court before introducing it.

5.6 We have therefore come to the view that the same prohibition should apply both in relation to evidence or questioning about sexual behaviour between a complainer and persons other than the accused,and in relation to sexual behaviour between a complainer and an accused person. Accordingly **we recommend** that as a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time engaged with any person in sexual behaviour not forming part of the subject-matter of the charge. (Recommendation 2)

Applicability to the Crown

5.7 We have considered whether the general rules which we are recommending should be applied to evidence led or questions asked by the Crown. Our recommendations are largely designed to protect complainers in cases

of rape and similar assaults from unnecessary distress caused by wide-ranging examination of their character or past sexual behaviour. We are not aware of such problems having arisen as a result of evidence led or questions asked by the Crown. So far as we can judge the occasions when such evidence or questions will be relevant for the Crown's purposes will be infrequent and probably not open to controversy. None of those who commented on Memorandum No. 46 suggested that any restrictions should be imposed on the Crown and we do not think that any useful purpose would be served by suggesting otherwise. Accordingly, **we recommend** that the prohibitions contained in Recommendations 1 and 2 above should not apply to questioning or evidence adduced by the Crown. (Recommendation 3)[1]

Exceptions to the general rules

Evidence introduced otherwise than by the accused

5.8 Since by virtue of the foregoing recommendation, the prohibitions which we are proposing will not apply to the Crown, circumstances may arise where an accused person will wish to cross-examine, or subsequently to lead evidence, on prohibited matters simply because they have been introduced in evidence in chief. Occasionally, indeed, evidence on a prohibited matter may inadvertently be elicited as a result of a question put to a witness by a presiding judge. Again, there may occasionally be cases where an accused may wish to cross-examine a complainer in respect of matters which he has reason to believe will be spoken to in evidence in chief by a subsequent witness. According to the normal rules of evidence and procedure an accused person is always entitled to cross-examine a witness, and to lead evidence in explanation or rebuttal, in respect of any matter which is spoken to by that witness, and he may be bound to put to that witness matters which he intends to raise in cross-examination of subsequent witnesses. We have come to the conclusion that, in the case of sexual offences, the unrestricted application of these normal rules would be inappropriate. They would be capable of allowing an accused person to range freely through any of the matters which our recommendations would otherwise prohibit. Without some indication of the extent and purpose of the proposed cross-examination, it is difficult for any effective judicial control to be exercised. We have little doubt that questioning or evidence, by or on behalf of an accused person, should in general be permitted in circumstances of the kind which we have described in this paragraph, but at the same time we think that it is desirable that any such questioning or evidence should be capable of being restricted in accordance with the recommendation which we make in paragraph 5.20 below. For that reason we have concluded that any such questioning or evidence should be permitted only after application has been made to the court. Accordingly, **we recommend** that, where questioning or evidence would be prohibited under Recommendation 1 or Recommendation 2 above, the court should admit such questioning or evidence where it is satisfied, on an application by or on behalf of an accused person, that it is necessary to explain or rebut evidence led or to be led otherwise than by or on behalf of that accused person. (Recommendation 4).

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[1]The restrictions introduced by s. 2 of the Sexual Offences (Amendment) Act 1976 for England and Wales apply only to defendants.

5.9 Several of those who commented on Memorandum No. 46 drew our attention, rightly we think, to problems that could arise if Recommendation 2 above were to be an absolute prohibition. In our view there are three specific situations where such a prohibition would be inappropriate in respect of sexual behaviour involving the complainer and any other person including, where relevant, the accused.

Medical or scientific evidence

5.10 Firstly, there is the case where evidence or questioning about sexual behaviour is, or may be, relevant to rebut or explain medical or scientific evidence. This could be evidence relating to the physical condition of the complainer, to the presence of semen or disease, or to the complainer's pregnancy. Evidence or questioning about sexual behaviour which was designed to rebut or explain any such medical or scientific evidence would plainly be relevant only within a relatively short time-span on either side of the alleged rape. We consider that it would be contrary to the interests of justice for such evidence or questioning to be excluded. Since, however, any such evidence or questioning would arise from evidence led or to be led otherwise than by or on behalf of an accused person, we do not consider it necessary to recommend any express exception to the general rules in order to cover such a case: in our opinion it is adequately covered by Recommendation 4 above.

Evidence of res gestae[1]

5.11 Secondly, there is the case where the otherwise prohibited evidence relates to matters forming part of the *res gestae*. This could, for example, be the case where rape was said to have been committed by several co-accused. They could all be charged jointly, but even if only one was standing trial on his own, the indictment would, in accordance with normal practice, contain the words "while acting along with others". Or again, an accused seeking to establish consent might wish to lead evidence that an alleged rape had simply been an incident in some sort of group orgy.[2] In either of these cases, in our view, it would plainly be contrary to the interests of justice for such evidence to be excluded.

Incrimination[3]

5.12 The third situation where, in our view, an exclusion of evidence or questioning about sexual relations with someone other than the accused would be inappropriate is where that accused is seeking to incriminate another person. Under Scottish procedure incrimination is a special defence of which notice has to be given prior to the commencement of a jury trial. It would clearly be quite unacceptable that, having given notice of such a defence, an accused person should be prohibited from leading any evidence in support of it.

5.13 Where evidence or questioning by or on behalf of an accused person can be shown to be relevant to matters forming part of the *res gestae* or to

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[1]See para. 3.7 above.

[2]Cf. *Morgan*, cited above.

[3]In this context incrimination (sometimes known as impeachment) involves an allegation that someone other than the accused committed the offence.

a defence of incrimination we consider that no question of discretion as to admissibility can or should arise. Provided that a court is satisfied, on consideration of an application, that evidence or questioning is required for one of these purposes, we think that it should be admitted. Accordingly, **we recommend** that, notwithstanding the general prohibition contained in Recommendation 2 above, the court should admit questioning or evidence concerning sexual behaviour involving the complainer and any person where it is satisfied, on an application by or on behalf of an accused person, that the evidence (a) relates to matters forming part of the *res gestae*, or (b) is relevant to a defence of incrimination. (Recommendation 5)

A general exception

5.14 Apart from the specific cases dealt with in the foregoing Recommendation, we can without much difficulty envisage circumstances where a total prohibition of the kind recommended in Recommendations 1 and 2 above could lead to a positive risk of injustice. So far as Recommendation 1 is concerned, the following possibilities occur to us. If, for example, an accused were to assert, in answer to a charge of rape, that he had had consensual intercourse with the complainer for payment, she being a prostitute, it would be difficult to say that there should be a general exclusion of questioning or evidence to suggest that she was a prostitute or that she associated with prostitutes. Another possibility is that an accused might wish to establish, if not consent itself, then at least his honest belief that the woman concerned had consented.[1] In support of that contention he might wish to lead evidence as to what he believed her reputation to have been. The truth or falsity of that reputation would, so far as the accused's belief was concerned, be immaterial, and the introduction of such evidence would not necessarily have any bearing on the complainer's credibility; but the evidence might nonetheless be relevant to the accused's defence. Although, upon one view, that would not be evidence to show that the complainer was of bad character, it would probably be prohibited by the general exclusion. These are but two examples that occur to us where a total exclusion of such evidence would be likely to lead to injustice, but there could well be others.

5.15 So far as evidence of sexual behaviour with persons other than the accused is concerned, one cannot foresee all the possible circumstances of future cases. It is, however, not difficult to envisage some of the possibilities that could arise. For example, there might be evidence available in a particular case that a complainer had had sexual relations with another man shortly after an alleged rape, and prior to reporting that alleged rape to the police or anyone else. If the accused in such a case was alleging consent, then common sense would suggest that this was very important evidence which ought to be admitted. It has been held recently in England that an allegation that the complainer had, shortly before the alleged rape, made sexual advances to two other men, and that a man was seen in her home, naked, shortly after the alleged rape but before it had been reported to the police, could have been relevant to the question of consent and questions relating thereto should have

[1]See the case of *Meek* cited in para. 2.2 above.

been allowed.[1] Again, there may be exceptional cases where evidence relating to a complainer's general behaviour can be shown to be relevant.[2]

5.16 So far as evidence of sexual behaviour involving a complainer and an accused is concerned, this may often be relevant to a defence of consent, but there may also be occasions when it will have no relevance to any of the issues in a particular case. It is impossible to predict with confidence the circumstances in which such evidence should and should not be admissible, and we are of the view that a more general exception should be available for this type of evidence also.

5.17 The examples which we have given in the preceding paragraphs demonstrate, we think, that there may be circumstances, of a kind which cannot be accurately predicted, where the prohibitions contained in our Recommendations 1 and 2 would be inappropriate. The variety of these possible circumstances is such that it would be impossible to legislate specifically for them all.

5.18 In relation to evidence of sexual behaviour with persons other than an accused, the Heilbron Committee recommended in 1975[3] for England and Wales that a test of similarity should be applied. They suggested that evidence of sexual behaviour with other men should be admitted if it:

> "relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following, the alleged offence."[4]

In the result that recommendation was not given effect in the Sexual Offences (Amendment) Act 1976 which, as has been seen, bases the exercise of judicial discretion solely on considerations of fairness to the accused.

5.19 We do not consider fairness to the accused to be an appropriate criterion since, in our opinion, it tends to obscure what we regard as the true criterion which is that all relevant evidence should be before the court to enable a proper decision to be arrived at. So far as the test of striking similarity is concerned, we can see certain attractions in this but our fear would be that it might prove to be unduly restrictive in certain cases, and it would not in any event be appropriate for some of the examples and situations which we have suggested in preceding paragraphs. We think that a general principle should be applied so as to test the admissibility of otherwise prohibited evidence in such cases, and we have come to the conclusion that "the interests of justice" best describes that principle. Accordingly, **we recommend** that, notwithstanding the general prohibitions contained in Recommendations 1 and 2, the court should admit questioning or evidence relative to any matter prohibited under these Recommendations where the court is satisfied, on an application by or on behalf of an accused person, that it would be contrary to the interests of justice to exclude the questioning or evidence concerned. (Recommendation 6)

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[1] *R.* v. *Viola* [1982] 1 W.L.R. 1138.
[2] *Green and Leitch* v. *H.M.A.*, unreported, High Court, 28 January 1983.
[3] Report of the Advisory Group on the Law of Rape, Cmnd. 6352.
[4] *Ibid.*, p. 36.

Restrictions on the scope of permitted evidence

5.20 It is not our intention that an allowance, after application, of otherwise prohibited evidence should thereby permit unlimited questioning or evidence on any of the prohibited matters. We consider it to be essential that, so far as possible, a judge should indicate, when allowing evidence or questioning, the limits to which it is intended that that allowance should extend. Although the comparable English provisions, which are silent on this point, have been interpreted as permitting such a limitation,[1] we think it is preferable that there should be express statutory provision to that effect. Moreover, we think that this provision should go further than merely to permit a court to impose a limitation at the time when an application is being granted. If the provision were not to be extended in this way, it might be thought that any further judicial intervention would be precluded even if the subsequent evidence or questioning began to stray into areas that had not been intended, or foreseen, when the leave was originally granted. Opinions to this effect seem to have been expressed in the English courts in relation to the provisions of section 2 of the Sexual Offences (Amendment) Act 1976[2] and we think that it would be unfortunate if a similar view were to be taken in relation to the recommendations which we are making for Scotland. Accordingly, **we recommend** that, where otherwise prohibited questioning or evidence is admitted by the court, the court should have power at any time to limit as it thinks fit the extent of that questioning or evidence. (Recommendation 7)

Procedure

5.21 If some types of evidence are to be prohibited and the court is to be given power, as we have recommended, to admit questioning or evidence in certain circumstances, it will plainly be necessary to devise some form of procedure whereby the matter can be brought to the attention of the court for a decision. One suggestion that was put to us on consultation was that there should be some kind of special defence procedure for cases where an accused intended to attack a complainer's character or to lead evidence of specific acts of sexual behaviour with persons other than the accused. As has been seen[3] a special defence or notice procedure is not without some historical precedent. It seems to us, however, that such a procedure is inappropriate in the context of the recommendations which we are making. Most importantly, it makes no provision for a judicial decision on the admissibility of evidence and indeed proceeds on the assumption that, if due notice is given, the evidence concerned will be bound to be admissible thereafter. It is, of course, implicit in our proposals that the court should have an opportunity to ascertain whether or not the proposed questioning or evidence falls within one of the prescribed exceptions to the general rules, and should also have the power which we are recommending to limit the extent of any such questioning or evidence. One could, no doubt, incorporate some sort of judicial hearing into a special defence or notice procedure but that would have to take place in advance of a trial before there could be any opportunity for a judge to have discovered the relevant issues in the case, and would, in our view, be likely

[1] *R.* v. *Fenlon and Others* (1980) 71 Cr.App.Rep. 307.

[2] *R.* v. *Lawrence* [1977] Crim.L.R. 492; *R.* v. *Mills (Leroy)* (1978) 68 Cr. App. Rep. 327; *Viola* cited above.

[3] See para. 3.10 above.

to result in unnecessary procedure, delay and expense. The solution that has been adopted in England under the 1976 Act is for an appropriate application to be made in the course of a trial. As one might expect this is normally done at the end of a complainer's examination-in-chief and before the start of cross-examination. This practice has the advantage that the Crown case will normally have become fairly clear before any decision on admissibility has to be made. According to some senior English judges whom we have consulted, this practice works reasonably well and is no more time-consuming than the "fishing" cross-examinations that used to take place prior to 1976.

5.22 We think that a similar procedure should operate in Scotland. In cases on indictment any such application should be heard in the absence of the jury. We also consider that it would be inappropriate that the complainer or any other witness should hear the content of the application and, since one of the objectives of our proposed reforms is to protect from public scrutiny the private life of a complainer, we think that the public should also be excluded.[1] Accordingly, **we recommend** that an application to lead evidence or to ask questions prohibited under Recommendation 1 or Recommendation 2 above should be made at any time during the course of a trial, and should be heard in the absence of the jury (if any), the complainer, any person cited as a witness, and the public. (Recommendation 8)

Offences other than rape

5.23 Although practically all of the public debate about the rules of evidence in cases of sexual offences has centred on cases of rape, we consider that any restrictions on particular forms of evidence or questioning should extend to a wider range of offences. There are several reasons for this.

5.24 In the first place we have earlier drawn attention to the way in which, in accordance with Scottish practice, a charge of rape is libelled as an aggravated form of assault with quite detailed specification being given of all the alleged incidents up to and including the rape itself. The consequence of this style of libelling, in conjunction with the provisions of section 61(2) of the Criminal Procedure (Scotland) Act 1975,[2] is that a person charged with rape may, depending on the evidence in the case, be convicted of assault with intent to rape, of indecent assault, or even of simple assault. Apart from these common law offences, there are also several statutory offences to which we have drawn attention in Part II[3] which may also provide alternative convictions in the case of a person charged with rape. It seems to us to be quite illogical that restrictions could be imposed on the evidence to be led in respect of any of these other offences simply because the accused had originally been charged with rape while similar restrictions would not apply where the crime originally charged was itself one of the other offences.

5.25 Our second reason for favouring a wider extension of the restrictions which we are recommending is that in any event many of the considerations which, in our opinion, point to the need for change in cases of rape apply with equal force in the case of other sexual offences. We may take indecent assault as an example to illustrate this. Just as in rape itself, the kind of behaviour

[1]See also Criminal Procedure (Scotland) Act 1975, s. 145(3); and see paras. 5.30–5.32 below.
[2]See para. 2.5 above.
[3]See paras. 2.7–2.10 above.

which may amount to an indecent assault may be criminal only because it is done without consent. That being so, we can think of cases where, for similar reasons as in rape cases, an accused person may wish to lead evidence or to ask questions of the kind that we have been considering in this Report. The considerations which should determine whether or not such evidence and questioning should be admitted are, in our view, likely to be substantially the same in these cases as in cases of rape.

5.26 Our third reason for favouring a wider extension of the restrictions is that there may be cases where, in support of a statutory defence, or perhaps simply to provide a basis for a possible plea in mitigation, an accused may wish to ask questions or to lead evidence of the kind considered in this Report. Again, we consider that our proposed restrictions should apply in such cases.

5.27 Our final reason for favouring a wider extension of the restrictions is that to concentrate solely on rape cases would be to ignore certain homosexual offences where again we think that similar considerations may apply. Such cases are no doubt rare but we do not think that they should be denied the benefit of our proposed reforms.

5.28 We have considered how this extension of our general recommendations should be defined since obviously there are some sexual offences, such as indecent behaviour and lewd and libidinous practices, where the considerations which have prompted us to favour such an extension will only occasionally apply. Our preferred approach, however, has been to include all offences where our restrictions may be appropriate, however infrequently. It is better in our view to err, if at all, on the side of unnecessary inclusion rather than to risk our recommendations being excluded on some occasions when they ought to be included. We have considered the possibility of achieving our desired result by using some comprehensive phrase such as "sexual offences" in any legislation that might be enacted following on our recommendations, but that would not achieve the degree of certainty which we regard as essential in a matter of this sort. The better course, in our opinion, is to specify precisely the offences, both statutory and at common law, to which the general provisions of any legislation are to apply. This course also has the advantage that it enables us specifically to exclude certain crimes in respect of which we are satisfied that our recommendations would be inappropriate. One example in this category is the crime of incest which, in our opinion, is of so specialised a character that it is not suitable for inclusion.[1] On this matter, accordingly, **we recommend** that the reforms to the laws of evidence recommended elsewhere in this Report should apply to the following offences in addition to rape itself, namely: attempted rape, sodomy or attempted sodomy, assault with intent to rape, indecent assault, indecent behaviour, including any lewd, indecent or libidinous practice or behaviour, and statutory offences under sections 2, 3, 4, 5, 8 and 9 of the Sexual Offences (Scotland) Act 1976,[2] sections 96(1)(*a*) and 97 of the Mental Health (Scotland) Act 1960,[3] and section 80(7) of the Criminal Justice (Scotland) Act 1980;[4] and we further recommend that, as appropriate, this recommendation should apply to cases where both the complainer and the accused are of the same sex. (Recommendation 9)

[1]See Report on The Law of Incest in Scotland (Scot. Law Com. No. 69), 1981.
[2]See paras. 2.8 and 2.9 above.
[3]See para. 2.10 above.
[4]See para. 2.11 above.

Ancillary matters

Cases tried summarily

5.29 Cases of rape are always prosecuted under solemn procedure, that is, on indictment and before a judge and jury; and many other serious sexual offences are normally prosecuted in this way. Less serious sexual offences are usually prosecuted summarily, that is before a judge sitting alone. In our view, however, the fact that such cases may be less serious makes it no less desirable that the same rules of evidence should apply to them. If we had been recommending the introduction of some sort of special defence and pre-trial hearing procedure for the determination of questions relating to the admissibility of evidence, there might have been some difficulty in extending our recommendations to summary cases since such procedures would not have fitted easily into the normal pattern of summary procedure. We consider, however, that the application procedure which we have recommended above could be followed just as easily in the course of a summary trial as in the course of one on indictment. Accordingly, **we recommend** that all our other recommendations should apply to cases tried on indictment and summarily. (Recommendation 10)

Exclusion of the public and prohibition of reporting

5.30 In any trial of a sexual offence, and particularly in trials for rape, there can be no doubt that an already unpleasant experience may be made worse if a complainer has to give evidence in the presence of possibly large numbers of the general public and in the knowledge that such evidence may subsequently be reported to the world at large by the Press. A fear of this may indeed make some complainers reluctant to report cases of rape in the first place. In these circumstances we considered whether we should make any recommendations for statutory reform, bearing in mind that the English statute of 1976 contains detailed provisions[1] to prevent the publication of material from which a complainer might be identified. In the end we decided that it is not necessary to recommend any statutory provision for Scotland on these matters.

5.31 It is already normal practice in Scotland for members of the public to be excluded while a complainer in a rape case is giving evidence and, although the Press are not normally excluded and sometimes remain in court during that time they are usually asked by the trial judge to exercise discretion in their reporting of her evidence and to refrain from identifying her. The present practice has recently been expressed by Lord Avonside as follows:

> "In our courts a victim alleged to have been raped almost invariably gives evidence behind closed doors. In such a situation the public is not permitted to hear her evidence. It has been the practice, particularly in Glasgow, to allow the press reporters to remain. They are asked to exercise a wise discretion, and, in my experience, this they do admirably. The trial judge could, of course, if he thought it desirable, exclude the press and clear the court completely."[2]

We think that this accurately reflects present practice and we accordingly do not think it necessary to recommend legislation on this matter.

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[1] s. 4.

[2] *H.* v. *Sweeney* 1983 S.L.T. 48 at p. 61; and see Criminal Procedure (Scotland) Act 1975, s. 145(3).

5.32 The only point of doubt so far as this is concerned is that there seems to be some uncertainty as to the extent to which such a practice may be followed in cases other than rape, and in particular as to whether it may be followed at all in cases other than those in the High Court. In fact the practice is, to our knowledge, not infrequently followed in the Sheriff Court and we are aware of no reason why it should not be. Although we think it right to leave the matter as one for the discretion of the court in each case, we would hope that courts would always give consideration to following the practice of the High Court in rape cases in any other appropriate case.

Recording of submissions and decisions

5.33 We think that it will be essential in the event of a subsequent appeal that in cases where an application is made for the admission of a particular line of questioning or evidence, the submission made in the course of the application and the judge's decision thereon should be adequately recorded. We do not expect this to be a problem since, in cases on indictment, we understand that it is now normal practice for all submissions and decisions in the course of a trial to be recorded verbatim by the shorthand writer, and in summary cases it is normal practice for a trial judge to keep sufficient notes to enable him to provide an accurate summary of submissions and decisions in any stated case that may be required. We accordingly do not make any recommendations on this point but we would add that, should any difficulties arise in practice, it is probable that they could be resolved in an Act of Adjournal without the necessity of any further primary legislation.

PART VI SUMMARY OF RECOMMENDATIONS

1. As a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time been of bad character, associated with prostitutes or engaged in prostitution. (Paragraph 5.3; Clause 1(1).)

2. As a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time engaged with any person in sexual behaviour not forming part of the subject-matter of the charge. (Paragraph 5.6; Clause 1(1).)

3. The prohibitions contained in Recommendations 1 and 2 above should not apply to questioning or evidence adduced by the Crown. (Paragraph 5.7; Clause 1(4).)

4. Where questioning or evidence would be prohibited under Recommendation 1 or Recommendation 2 above, the court should admit such questioning or evidence where it is satisfied, on an application by or on behalf of an accused person, that it is necessary to explain or rebut evidence led or to be led otherwise than by or on behalf of that accused person. (Paragraph 5.8; Clause 2(1)(*a*).)

5. Notwithstanding the general prohibition contained in Recommendation 2 above, the court should admit questioning or evidence concerning sexual

behaviour involving the complainer and any person where it is satisfied, on an application by or on behalf of an accused person, that the evidence (a) relates to matters forming part of the *res gestae*, or (b) is relevant to a defence of incrimination. (Paragraph 5.13; Clause 2(1)(*b*).)

6. Notwithstanding the general prohibitions contained in Recommendations 1 and 2 above, the court should admit questioning or evidence relative to any matter prohibited under these Recommendations where the court is satisfied, on an application by or on behalf of an accused person, that it would be contrary to the interests of justice to exclude the questioning or evidence concerned. (Paragraph 5.19; Clause 2(1)(*c*).)

7. Where otherwise prohibited questioning or evidence is admitted by the court, the court should have power at any time to limit as it thinks fit the extent of that questioning or evidence. (Paragraph 5.20; Clause 2(2).)

8. An application to lead evidence or to ask questions prohibited under Recommendation 1 or Recommendation 2 above should be made at any time during the course of a trial, and should be heard in the absence of the jury (if any), the complainer, any person cited as a witness, and the public. (Paragraph 5.22; Clause 2(3).)

9. Our recommended reforms to the laws of evidence should apply to the following offences in addition to rape itself, namely: attempted rape, sodomy or attempted sodomy, assault with intent to rape, indecent assault, indecent behaviour, including any lewd, indecent or libidinous practice or behaviour, and statutory offences under sections 2, 3, 4, 5, 8 and 9 of the Sexual Offences (Scotland) Act 1976, sections 96(1)(*a*) and 97 of the Mental Health (Scotland) Act 1960, and section 80(7) of the Criminal Justice (Scotland) Act 1980 and, as appropriate, to cases where both the complainer and the accused are of the same sex. (Paragraph 5.28; Clause 1(2).)

10. The foregoing recommendations should apply to cases tried on indictment and summarily. (Paragraph 5.29; Clause 2(2).)

APPENDIX A

Evidence in Sexual Offences (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. General prohibition.
2. Exceptions to prohibition.
3. Citation and extent.

DRAFT

OF A

BILL

TO

Amend the law of Scotland in relation to the evidence and questioning concerning the character or behaviour of complainers which may be admitted in the trial of persons charged with certain sexual offences; and for purposes connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

General prohibition.

1.—(1) In any trial of a person on any charge to which this Act applies, subject to section 2 below the court shall not admit questioning or evidence which shows or tends to show that the complainer—

(*a*) is not of good character;

(*b*) is a prostitute or an associate of prostitutes; or

(*c*) has at any time engaged with any person in sexual behaviour not forming part of the subject-matter of the charge.

(2) This Act applies to a charge of committing any of the following offences (whether such charge is tried under solemn or summary procedure), that is to say

(*a*) rape or attempted rape;

(*b*) sodomy or attempted sodomy;

(*c*) assault with intent to rape;

(*d*) indecent assault;

(*e*) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);

1960 c.61.

(*f*) an offence under section 96(1)(*a*) or 97 of the Mental Health (Scotland) Act 1960 (unlawful sexual intercourse with female defective or with patient);

1976 c.67.

(*g*) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 1976—

(i) section 2 (procuring by threats, etc.);

(ii) section 3 (unlawful sexual intercourse with girl under 13);

(iii) section 4 (unlawful sexual intercourse with girl under 16);

(iv) section 5(indecent behaviour towards girl between 12 and 16);

(v) section 8 (abduction of girl under 18);

(vi) section 9 (unlawful detention of female); or

1980 c.62.

(*h*) an offence under section 80(7) of the Criminal Justice (Scotland) Act 1980 (homosexual offences).

(3) In this Act, "complainer" means the person against whom the offence referred to in subsection (2) above is alleged to have been committed.

(4) This section does not apply to questioning, or evidence being adduced, by the Crown.

EXPLANATORY NOTES

Clause 1 implements Recommendations 1, 2, 3, 9 and 10 and, subject to the exceptions provided for in Clause 2, renders inadmissible questioning or evidence relating to the character, reputation and sexual behaviour of complainers in trials of rape and certain other specified offences.

Subsection (1) states a general prohibition of the types of evidence specified in paragraphs (*a*) to (*c*). Evidence showing that the complainer was of bad character, engaged in prostitution, or associated with prostitutes may be admissible at present in cases of rape and attempted rape (see paragraphs 3.2 to 3.4). Paragraphs (*a*) and (*b*) prohibit evidence or questioning on these matters. Evidence of intercourse between a complainer and men other than the accused on specified occasions is generally not admissible at present: however, there are a number of exceptions (see paragraphs 3.5 to 3.8.). Paragraph (*c*) prohibits evidence or questioning about any sexual behaviour involving a complainer and a person other than the accused. Evidence of prior intercourse between a complainer and an accused is presently admissible (see paragraph 3.9). Paragraph (*c*) also prohibits evidence or questioning about any sexual behaviour involving a complainer and an accused, except where that behaviour constitutes the alleged offence (see paragraphs 5.4 to 5.6).

Subsection (2) specifies the offences to which the Bill applies. The prohibition set out in subsection (1) will operate in trials under solemn or summary procedure relating to any of these common law and statutory offences (see paragraphs 5.23 to 5.29).

Subsection (3) defines "complainer" as the person against whom any of the offences to which the Bill applies is alleged to have been committed, including the "victim" of certain statutory offences whether or not that person was a willing participant.

Subsection (4) excludes questioning or evidence led by the Crown from the operation of the prohibition (see paragraph 5.7).

Exceptions to prohibition.

2.—(1) Notwithstanding the terms of section 1 above, in any trial of a person on any charge to which this Act applies, where the court is satisfied on an application by that person—

(*a*) that the questioning or evidence referred to in section 1(1) above is designed to explain or rebut evidence adduced or to be adduced otherwise than by or on behalf of that person,

(*b*) that the questioning or evidence referred to in section 1(1)(*c*) above—

(i) is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming the subject-matter of the charge, or

(ii) is relevant to the defence of incrimination, or

(*c*) that it would be contrary to the interests of justice to exclude the questioning or evidence referred to in section 1(1) above,

the court shall admit such questioning and evidence.

(2) Where questioning or evidence is or has been admitted under this section, the court may at any time limit as it thinks fit the extent of that questioning or evidence.

(3) Any application under this section shall be made in the course of the trial but in the absence of the jury, the complainer, any person cited as a witness and the public.

Citation and extent.

3.—(1) This Act may be cited as the Evidence in Sexual Offences (Scotland) Act 1983.

(2) This Act shall extend to Scotland only.

EXPLANATORY NOTES

Clause 2 implements Recommendations 4 to 8. It provides limited exceptions to the general prohibition set out in Clause 1 and a procedure for determining the admissibility of questioning or evidence which would otherwise be prohibited thereby.

Subsection (1) provides that such questioning or evidence must be admitted if the court is satisfied, on an application made in the course of a trial by an accused person, that it falls within one of the categories specified in paragraphs (*a*) to (*c*). Paragraph (*a*) relates to cross-examination or evidence to explain or rebut evidence introduced by someone other than the accused (see paragraphs 5.8 to 5.10).. Paragraph (*b*)(i) relates to questioning or evidence as to a complainer's sexual behaviour where that behaviour is closely linked with the offence with which the accused is charged, and paragraph (*b*)(ii) relates to questioning or evidence relevant to show that someone other than the accused committed the alleged offence (see paragraphs 5.11 to 5.13). Paragraph (*c*) is a general exception designed to guard against the possibility that the prohibition stated in Clause 1 might, in certain circumstances, cause injustice (see paragraphs 5.14 to 5.19).

Subsection (2) empowers the court to limit at any time the extent of questioning or evidence admitted under Clause 2. Thus, restrictions may not only be imposed at the stage when a decision is made on an application to admit such questioning or evidence but the court may also intervene thereafter to prevent any subsequent abuse or excess (see paragraph 5.20).

Subsection (3) specifies the procedure by which any application to the court for admission of questioning or evidence under Clause 2 must be made (see paragraphs 5.21, 5.22 and 5.30 to 5.33).

APPENDIX B

List of those who submitted written comments on Propositions 169 and 170 of Memorandum No. 46

Association of Chief Police Officers (Scotland)
Committee of Senators of the College of Justice
Crown Office
Edinburgh Rape Crisis Centre
Faculty of Advocates
Ms. Vicki Forest
Glasgow Bar Association
Sheriff G. H. Gordon
Law Society of Scotland
Procurators Fiscal Society
Scottish Council for Civil Liberties
Scottish Courts Administration
Sheriffs' Association

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