

Reforming Sexual Offences Prosecution

Exploring the case for judge-only trials in certain sexual offences cases

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Background

Recent years have seen an increased focus on improving the management of sexual offences cases which, as of December 2021, make up 70 per cent of High Court prosecutors' workload.

In March 2021, Scotland's Lord Justice Clerk, Lady Dorrian, published a review of sexual offences prosecution.

The review made a number of recommendations:

- Routine pre-recording of complainers' evidence.
- A right of anonymity for complainers.
- The creation of a specialised sexual offences court.

The review panel considered the case for judge-only trial in certain sexual offences cases but was unable to make any concrete recommendation.

Research question

Do judge-only trials represent the optimum way forward for the prosecution of consent-based sexual offences—that is offences under Part 1 of the Sexual Offences (Scotland) Act 2009?

Methodology

A critical review of literature on rape myths, sexual offences prosecution and trial by jury, taking account of approaches in comparable legal jurisdictions.

Engaged in a normative standard of criminal prosecution, determining whether judge-only trials aid the realisation of the norm.

Juries and rape myths

Rape myths are stereotyped beliefs about how rapists and rape survivors behave and what “real” rape looks like; e.g.:

- That a real survivor would always be visibly distressed while giving evidence.
- That false rape allegations are commonplace.

Research suggests belief in these myths are often held by jurors and affect their ability to reason and adjudicate rationally and according to the evidence (Finch and Munro, 2006; Ellison and Munro, 2009/10; Ellison and Munro, 2013/15; Chalmers et al., 2019; Leverick, 2020).

Judges and rape myths

It is suggested that rape myths would not inform judges' decision-making to the same extent:

- Rape myths are less common among higher-educated individuals (Suarez and Gadalla, 2010).
- It is easier to train and educate judges—a small, professionally regulated pool—than the general population.
- As judges give written verdicts, it is ostensibly easier to identify and tackle prejudice.

Alternatives to judge-only trials

There are alternative, less radical ways to address jury prejudice:

- Public education: some success has been found with, e.g., Rape Crisis Scotland's "I just froze" public information campaign. But change is slow-paced and some myths are harder to displace.
- Expert witness testimony: is resource intensive, expensive, and does not fit well into existing trial procedures.
- Judicial directions: some success (Ellison and Munro, 2009) but lengthy directions to cover a myriad of rape myths may not be memorable to the jury.

Conclusion

Rape myths prejudice the jury against the complainer.

Absent successful alternative solutions, serious consideration should be given to implementing judge-only trials in sexual offences cases under Part 1 of the Sexual Offences (Scotland) Act 2009.

While this is a radical step, it may be the only viable option should alternative solutions be impracticable, slow-paced or ineffective.