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The use of sexual behaviour evidence in rape trials: challenging legal reasoning and decision-making

Professor Joanne Conaghan and Dr Yvette Russell, University of Bristol Law School

About the research

Public policy has been concerned with whether the current system is delivering justice for victims of sexual violence for some years. The government has commissioned numerous reviews including the End-to-End Rape Review in 2021. A key concern has been the way generalised, factually incorrect, and prejudicial beliefs about what constitutes rape and how rape victims (ought to) react influence legal proceedings. The Law Commission of England and Wales, tasked with examining law and policy on evidence in sexual offence prosecutions, published a lengthy consultation paper in May 2023. Their provisional proposals are evidence-based, creative and ambitious. In this briefing, drawing on our recent research on sexual history and behaviour evidence in rape trials, we consider the extent of the challenge the Law Commission faces in resolving the many difficulties in this area, highlighting priorities for change.

One of the Law Commission's key objectives for law reform is to limit reference to and reliance on myths and misconceptions in RASSO (rape and serious sexual offence) trials. We worry that the concept of 'myths and misconceptions' may not be a robust enough policy and change-driving tool. Characterising myths and misconceptions as consciously held beliefs misunderstands how problematic assumptions about sexual behaviour enter and function in the trial process. Our research shows that that myths and misconceptions influence legal reasoning and decision-making in complex ways.

Reform to the law, guidance and practice relating to evidence in RASSO trials needs to prioritise scrutiny of the reasoning processes which judges and other legal actors apply to sexual behaviour.

We need robust techniques for challenging claims that a complainant's sexual behaviour is relevant evidence so that 'common sense' assumptions do not continue to subvert justice.

Policy recommendations

To better serve the interests of justice, the Law Commission should prioritise:

- Examining the assumptions that underpin decision-making about the relevance of evidence to a trial; the role relevance reasoning plays in facilitating the entry of perpetrator-exonerating and victim-blaming beliefs into RASSO trials; and the legal culture which supports the presentation of such beliefs as 'common sense'.
- Reassessing the idea that myths and misconceptions are beliefs consciously held by individuals. They should be reconceived as part of the cultural framework that supports social and legal understandings of sexual behaviour, influencing both relevance reasoning and legal decision-making in explicit and unconscious ways.
- Specifying a high threshold of relevance for admitting sexual behaviour evidence into RASSO trials.
- Requiring judges to provide written reasons for their decisions on an application to admit sexual behaviour evidence. This would ensure transparency, enable scrutiny and encourage more care around relevance reasoning.
- Developing a framework of tangible and defensible rights (including independent legal representation) for RASSO complainants that affirm their interests as key stakeholders in the criminal justice process.
- Continuing to emphasise the need for holistic reform to law, policy and practice in sexual offences prosecutions. This will require multi-year funding commitments and concerted monitoring from government agencies.

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Key findings

- The inclusion of sexual behaviour evidence in RASSO trials raises serious and important issues of fairness. In 2016, footballer Ched Evans was acquitted of rape after the Court of Appeal allowed the introduction of evidence of the complainant's sexual behaviour with two other men (*R v Evans* [2016] EWCA Crim 452). Since then, the adequacy of the legal framework that governs such evidence has been called into question. Law and practice in this area needs to change, but for such reform to be effective it must be accompanied by wider societal change.
- The current legal framework relies on a distinction between:
    - myths and misconceptions about sexual behaviour that are false and therefore irrelevant to the matter being decided in the trial, and;
    - information that is said to have an 'evidential basis' and is therefore relevant.

  This distinction fails to recognise that the 'evidential basis' that claims of relevance rely on is also the main way that such problematic myths and misconceptions enter the reasoning process.
- Our general knowledge of the world is embedded in a gendered framework, which attributes roles and responsibilities to sexual behaviour. The factual bases that support relevance reasoning are drawn from this knowledge. Problematic myths and misconceptions enter legal deliberations as culturally prevalent ideas about how to interpret and evaluate sexual behaviour. These ideas, which include assumptions about the relative roles and responsibilities of men and women in sexual encounters, shape discussion about sexual behaviour whether or not discussants (in the case of law, judges, juries and lawyers) consciously agree with them.
- This problem cannot be solved by reform to law and policy alone. However, clearer articulation and stronger justification of the relevance of sexual history evidence in RASSO trials will undoubtedly help.
- Mainstreaming a framework of complainant rights in RASSO trials is important because it would make the state's responsibilities to ensure justice for both the defendant and the complainant more tangible.
- Any changes to the law and policy around evidence in sexual offence prosecutions must form part of a holistic response to the problems in this area. Legal and policy changes must be part of a suite of responses to the problem of sexual violence.

Further information

For a full analysis see:

Joanne Conaghan and Yvette Russell, (2023) *Sexual History Evidence and the Rape Trial* (Bristol University Press)

Contact the researchers

Professor Joanne Conaghan, Professor of Law, University of Bristol Law School

joanne.conaghan@bristol.ac.uk

Dr Yvette Russell, Associate Professor in Law and Feminist Theory, University of Bristol Law School

yvette.russell@bristol.ac.uk