

Impact case study (REF3b)

Institution: University of Glasgow
Unit of Assessment: 22 – Social Work and Social Policy
Title of case study: Rape Law and Evidence: Legislative and Policy Reform
1. Summary of the impact (indicative maximum 100 words)

Legislation, policy and practice surrounding the criminal justice response to rape in Scotland have been profoundly influenced by the work of Professor Michele Burman. Her research directly informed the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, and continues to influence policy and practice guidance. Her research on rape attrition/conviction rates informed changes to investigative/prosecutorial responses. Her work was drawn on in the Scottish Law Commission’s review of the law of rape and informed the subsequent Sexual Offences 2009 Act which introduced radical changes to the definitions of rape and of consent. Burman’s research has been adopted by Rape Crisis Scotland in national campaigns, and crucially informed training materials for the judiciary in Scotland and abroad.

2. Underpinning research (indicative maximum 500 words)
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Michele Burman (Professor of Criminology, University of Glasgow 1994-present) has undertaken a series of externally funded research projects examining policy and legislative attempts to improve responses to rape and sexual violence in Scotland and across Europe (1993; 2005; 2007; 2009).

Three research projects on which Burman was PI (1993; 2005; 2007) were funded by the Scottish Government, and assessed the use and interpretation of ‘rape shield’ legislation restricting the use of sexual history and sexual character evidence of complainers in sexual offence trials. The first two projects employed in-court observation (over 200 trials heard in the High and Sheriff courts), analysis of case files and trial transcripts, in addition to interviews with judges, sheriffs, defence counsel and prosecution. The third project also included interviews with female complainers on their experience of giving evidence. The research found that successive legislative attempts at restricting the use of sexual history and character evidence had been unsuccessful, and suggested ways in which the criminal justice response could be improved. Burman’s earlier studies (1993; 2005) pointed to how legislation failed to discourage the use of such evidence; demonstrated that there was a lack of clarity on admissible content; and showed that even where such evidence was considered relevant and admissible, its probative value was frequently weak when compared with its prejudicial effect. The research also identified the lack of any express requirement that evidence or questioning must be relevant before it is admitted; the lack of any weighing up of the potentially prejudicial effect caused by diverting a jury’s attention from the issues it requires to determine in arriving at a verdict; the lack of guidance on the content of a decision on admissibility; and the fact that the complainer’s privacy and dignity were not accorded any particular status. These deficiencies were acknowledged in policy guidance and the research informed subsequent legislation which attempted to address the problems. The third study (2007) was undertaken with Lynn Jamieson (University of Edinburgh), Jan Nicholson and Oona Brooks (both University of Glasgow), and evaluated the use of the new legislation and revealed an unanticipated outcome – that it led to more detailed and extensive questioning on sexual matters. It also demonstrated that the complainer’s privacy and dignity were not always respected, highlighting the process of giving evidence as a form of ‘secondary victimisation’.

The fourth research project (2009), in which Burman was a partner, was funded by the European Commission Daphne II Programme to combat violence against children, young people and women (led by Professor Liz Kelly, London Metropolitan University). This was an analysis of rape attrition (the process by which the majority of reported rape cases fail to reach trial) of cases in 11 countries, and involved studying administrative data on arrest, prosecution and conviction rates over a 30-year period, alongside interviews with policy officials and criminal justice practitioners and the tracking of 100 rape cases from point of report to the police. Burman led the study in Scotland; with the Scots criminal law and justice system varying significantly from that of England and Wales, it formed an important and distinctive part of the Europe-wide project. This research found that Scottish arrest and custody rates were amongst the highest of all countries, and that attrition in Scottish cases took place across the legal process, most markedly during the later

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stages of the investigation. The findings also provided a strong challenge to existing conviction rate estimates, which had been calculated solely by administrative data.

3. References to the research (indicative maximum of six references)

- Brown, B., Burman, M., and Jamieson, L. (1993) *Sex Crimes on Trial* Edinburgh: Edinburgh University Press ISBN 0 7486 0408 1 [available from HEI]
- Jamieson, L. & Burman, M. (2001) 'Sharpening the Focus on Relevance? Sexual Offences (Procedure and Evidence) (Scotland) Bill in *SCOLAG Legal Journal*, September 2001, Issue 287 [available from HEI]
- Burman, M. (2009) 'Evidencing Sexual Assault: Women in the Witness Box'. *Probation Journal*, 56 (4), 379 -398. (Winner: Best Article Prize, 2009) ([doi: 10.1177/0264550509346506](https://doi.org/10.1177/0264550509346506))
- Brindley, S. and Burman, M. (2011) Meeting The Challenge? Responding To Rape In Scotland In: N. Westmarland & G. Ganjoli (eds) *International Approaches to Rape* Bristol: Policy Press [ISBN 9781847426208](https://doi.org/10.1080/18744674.2011.612208) [available from HEI]
- Burman, M. and Johnstone, J. (2013) 'High Hopes?' the gender equality duty and its impact on responses to gender-based violence, *Policy and Politics* (Fast Track. Available online 19 September 2013) Print ISSN 0305 5736, [Online ISSN 1470 8442](https://doi.org/10.1080/03055736.2013.8442)
- Scottish Executive (2000) Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials, Consultation Document. Edinburgh: Scottish Executive [available from HEI]

Grants and Corresponding Research Reports:

- [Evaluating the Impact of the Law of Evidence in Sexual Offence Trials](#), Scottish Executive (Jun 2005-Dec 2006, £126,000). Burman, M. (PI), Jamieson, L., Nicholson, J., and Brooks, O. (2007) *Impact of Aspects of the Law of Evidence in Sexual Offence Trials* Edinburgh: Scottish Government, 155pp.
- [The Law of Evidence in Sexual Offence Trials: Base-Line Study](#), Scottish Executive (Jun 2003-Dec 2004, £58,000). Burman, M (PI), L. Jamieson, J. Nicholson with F. Cartmel (2005) *The Law of Evidence in Sexual Offence Trials: Base Line Study*, Crime and Criminal Justice Research Series. Edinburgh: Scottish Executive.
- [Policy and Legislative Responses to Gender-based Crime](#), Equality and Human Rights Commission, (Sep 2008-Aug 2009, £14,400). Burman, M. (PI), Johnstone, J., De Haan, J. and McLeod, J. (2009) Responding to Gender-based Violence in Scotland: The Scope of the Gender Equality Duty to Drive Cultural and Practical Change.
- *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries – Scotland Country Report (2009b)*, European Commission Daphne II Programme to combat violence against children, young people and women (project co-ordinator: Prof Liz Kelly, London Metropolitan University)

4. Details of the impact (indicative maximum 750 words)

Policy and Legislative change

Professor Burman's body of research has contributed to policy documentation on the investigation and prosecution of rape and sexual offences produced by the Scottish Government and Scotland's prosecution service, the Crown Office and Procurator Fiscal Service (COPFS). It also contributed to a series of changes in rape law and the law of evidence relating to sexual offences, the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 and the Sexual Offences (Scotland) Act 2009, which remain in force today. As with all legislative change, the process has been a cumulative and complex one, but through research-based publications, key note addresses, expert testimony and substantial involvement in the consultative processes, Burman's research has had a significant impact on the law and criminal justice policy on rape and sexual offences in Scotland.

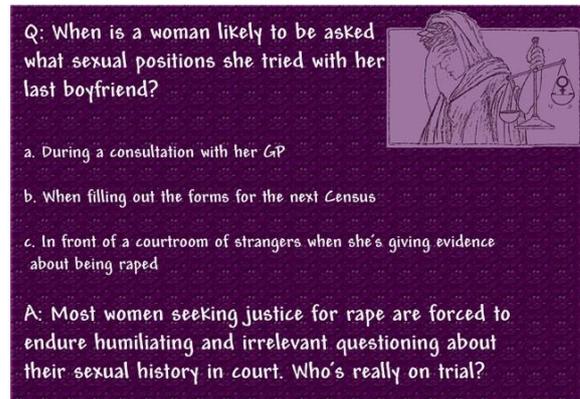
Under the 2009 legislation, the National Sexual Crimes Unit statistics (December 2011) indicated an initial rise in the conviction rate of concluded prosecutions to 62% for rape. With a statistic of 33% from Rape Crisis Scotland in December 2010, this demonstrated the new legislation has

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almost doubled the rate of conviction for those cases of rape brought to court. Lord Advocate Frank Mulholland stated that *'the new Sexual Offences Act brought about significant changes in the prosecution of sexual crime in Scotland'*.

Findings from the first Scottish study on 'rape shield' legislation were published in 1993, amending existing legislation in 1995 and ultimately informing the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The research was cited in a House of Lords Appeal judgment, and went on to underpin the Scottish Government consultation document *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials*. The second and third 'rape shield' studies informed the COPFS *Review of Investigation and Prosecution of Sexual Offences in Scotland* (2006) and the *Scottish Investigators' Guide to Serious Sexual Offences*. This research also formed the basis of advice to the Scottish Law Commission's *Review of Law on Rape* and the Scottish Justice Committee consultation which led in turn to the development of the Sexual Offences (Scotland) Act 2009.

A campaign from Rape Crisis Scotland (2008) was directly influenced by Burman's research evaluating the impact of sexual history and character evidence in sexual offence trials. The promotional postcard from this [campaign](#) asks 'Who's really on trial?' and continues to feature on the Rape Crisis Scotland website. Rape Crisis Scotland says, *'Professor Burman's research into rape shield legislation has been very valuable in informing Rape Crisis Scotland campaigning against the use of sexual history and character evidence in rape trials, and in providing both statistical data and anecdotal evidence of the damaging impact this can have on rape complainers and their chances of obtaining justice.'*



Burman's research and testimony to the Justice Committee on the Scottish Parliament's proposed Sexual Offences Scotland Bill (18 November 2008) contributed to the 2009 Act. It also influenced the definition of consent in law as 'free agreement' and the requirement for the defence to provide evidence of having sought consent. Burman's research showed that consent and the credibility of the complainer are at the heart of most rape cases, and the need to prove non-consent often leads to arduous cross-examination of the complainer, and questioning on her sexual history and character, which rape shield legislation often fails to restrict. Under the 2009 Act, the accused must now demonstrate that they took steps to establish consent, rather than the focus on the victim to demonstrate non-consent. Ultimately, this aims to reduce secondary victimisation, and encourage victims to come forward to report, thus addressing a long-term policy concern about under-reporting of rape.

Informing policy and practitioner debate

Professor Burman's research has led to numerous invitations to address and engage with a wide range of academic and professional conferences and consultative sessions for those involved in the formulation and implementation of policy in this area, including lawyers, policy officials and third sector organisations. This has included: a keynote address to the Rape Crisis Conference (2008); an invited address (with Derek Ogg QC, then Head of the Crown Office National Sexual Crimes Unit) at the Association of Criminal Justice and Development Annual Conference (Dublin, October 2009); participation in an intersectoral round table considering the scope of the Gender Equality Duty for informing criminal justice responses to violence against women for the Equality and Human Rights Commission (Glasgow 2009); a plenary address to the Annual Conference on Sexual Crime hosted by the COPFS (2009) on rape attrition; a presentation for the Europe-wide comparative event organised under the auspices of the Daphne 11 Programme, in Athens, Greece; and a keynote address on rape law reform in Scotland to the intersectoral workshop on Re-thinking Responses to Rape (2011).

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Her body of research has also led to further commissioned work, such as Burman acting as Academic Reviewer for Baroness Vivien Stern's (2009) *Review of Criminal Justice Responses to Rape and Sexual Assault in England and Wales*, and membership of a specialist advisory group for the EHRC-funded project Map of Needs, which mapped violence against women support services in the UK in 2009. Throughout 2013, Burman has been providing consultation and advice, and (with colleagues) commissioned by the Scottish Government to provide an international literature review of best practice interventions in gender-based violence to inform Scotland's cross-government strategy on violence against women.

Shaping practitioner training

Burman's research has informed considerable discussion among practitioners, challenging existing understanding and helping to build consensus on the need for specific changes in practice and legislation. On the basis of her research, Burman was invited (2004) by the Judicial Studies Committee to provide judicial training to the Scottish judiciary on sexual offences and, in particular the law of evidence in relation to sexual offences. This continued on an annual basis and in 2010, culminated in her participation in an innovative training DVD, shot in the High Court and produced by the Judicial Studies Committee (now the Judicial Institute) (*Judicial Skills: Sexual Offences and Expert Evidence*, March 2010). The DVD was initially used as part of a training module developed by the Director of the Judicial Institute for Scotland as a direct result of Burman's 'rape shield' research. This bespoke training module was delivered to 35 High Court Judges in June 2010 including the Lord Justice General and Lord Justice Clerk. The training also included a number of Canadian judges in conjunction with international judicial training partner, the National Judicial Institute of Canada. The Director of the Judicial Institute for Scotland stated; *'I was very pleased with the module which explores the rationale behind the need for rape shield legislation... The module also raises awareness among the judges of your [Burman's] research and various criticisms that you [Burman] make in relation to the operation of the shield. It also gave the judges an opportunity to discuss with Canadian Judges how equivalent legislation operates in Canada...the DVD was and remains an extremely valuable training tool which has much life still left in it'*. This DVD is now regularly used for the induction of Scottish and Canadian High Court Judges and Sheriffs.

5. Sources to corroborate the impact (indicative maximum of 10 references)

Legislative influence & policy and practitioner debate

- [Sexual Offences \(Scotland\) Act 2009](#)
- The Scottish Parliament Justice Committee 28th Meeting, Session Three. 18 November 2008. Sexual Offences Scotland Bill Stage 1 Col. 1348-1358 (Oral evidence) (available from HEI)
- [The Scottish Parliament, Justice 2 Committee 13th Report, 2001: Stage 1 Report on Sexual Offences \(Procedure and Evidence\) \(Scotland\) Bill \(pp 48-57\)](#). (Written and Oral Evidence given to Justice 2 Committee)
- [Rape Crisis Newsletter](#) (Winter 2011)
- [End Sexual and History and Character Evidence](#) Campaign (Rape Crisis Scotland)
- Statement from Information & Resource Worker, Rape Crisis Scotland (available from HEI)

Practitioner training

- Judicial Studies Committee (2010) *Judicial Skills: Sexual Offences and Expert Evidence* (DVD - available from HEI)
- Statement from the Director of the Institute for Judicial Studies in Scotland (available from HEI)