

REPEAL OF SECTION 157 (d) OF THE EVIDENCE ACT

IMPLEMENTATION OF "RAPE SHIELD LAWS"

Submitted pursuant to the Public Consultation Process in relation to Proposed Amendments to the Evidence Act Initiated by the Ministry of Law

30 October 2011

1. INTRODUCTION

1.1 We refer to the call for public feedback on the proposed amendments to the Evidence Act by the Ministry of Law on 30 September 2011.

1,2 We note that the amendments to the Evidence Act relate to a few areas, being legal professional privilege for in-house counsel; opinion evidence; computer output; and hearsay. Our feedback relates solely to Section 157(d) of the Evidence Act, which is outside the ambit of the proposed amendments.

1.3 We propose that:

(a) Section 15(d) of the Evidence Act be repealed; and

(b) Rape Shield Laws be implemented.

1.4 Section 157 (d) of the Evidence Act provides as follows:

“157 The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:

....

(d) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

It is not clear what is meant by the phrase “generally immoral character”. The drafting history suggests that it was originally targeted at “unchaste” women.¹ By virtue of Section 157(d), victims of rape or attempted rape, are unique in that their credit may be impeached by reason of their “generally immoral character”. The above provision implies that a chaste woman is more likely to have lodged a legitimate claim of sexual assault while an unchaste woman is either a) an untrustworthy witness or b) likely to have consented to the defendant’s advances and then lied about it at a later date.

Generally, the main purpose of admitting prior sexual history of the complainant is to impeach the credibility of the complainant and/or to support a consent defence.

2. OUTDATED, ILLOGICAL, UNFAIR AND AGAINST PUBLIC INTEREST

2.1 The above provision embeds a requirement that women maintain an ideal of sexual abstinence to obtain legal protection.² It rests on what the Canadian Supreme Court has called the twin myths – first, that ‘unchaste women [are] more likely to consent to intercourse’ and secondly, in any event, they are ‘less worthy of belief’³

¹ Woodroffe and Amir Ali, *Law of Evidence*, 14 ed. 1981, vol 4, at page 3,626.

² For the history of rape at common law, refer to From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, Michelle J. Anderson, 2002 *George Washington Law Review*, February, 2002, 70 *Geo. Wash. L. Rev.* 51

³ Seaboyer, 2 S.C.R. 577 (1991).

2.2 This “chastity” requirement, which is based on common law, is clearly outmoded and has been reversed by statute in most common law jurisdictions i.e. USA (1974), UK (1976), Hong Kong (1978), Malaysia (1988), Canada (1992), India (2002) and New Zealand (2006). Singapore is a laggard in this regard.

It is not the function of rape evidence law to perpetuate and enforce moral judgments on women's sexual lives but to promote the discovery of the truth.

2.3 Where credibility is concerned, the reasoning seems to be that promiscuity is a form of dishonesty and hence lessens a victim’s credibility. The rationale is fundamentally flawed; it is biased against women and against victims.

2.4 Where consent is concerned, it is illogical and unreasonable to make any inferences about the complainant’s consent to have sex with the defendant on the basis of the complainant’s sexual conduct with other third parties. Consent is surely not transferable from one party to another. Consent in a rape case must be specific to the accused.

2.5 Even if it can be argued that a promiscuous woman is more likely to engage in sexual intercourse in general and is probative of her having given consent in the specific case, when an accused argues consent in rape trials, he is in fact implying that apart from consenting, the complainant also gave false testimony about the incident to the police thereafter and is lying under oath about her experience at the trial. Thus, the accused needs to prove not just a pattern of prior sexual conduct but also a pattern of prior false accusations. "The appropriate question" is "not whether, having consented before, she is likely to have consented again; but rather whether having consented before without falsely charging rape, it is likely she would again consent and then falsely charge rape."⁴

2.6 In fact, research⁵ has shown that sexually experienced women are:

- a) not more likely to make false accusations of rape; and
- b) are in fact, less likely to perceive non-consensual sexual encounters as rape.

2.7 Further, it has been widely observed that, at least, in jury trials, admitting evidence of complainant’s prior sexual conduct can be extremely prejudicial to the complainant, creating an unfair bias against her in the court’s decision-making process. The complainant’s promiscuity or perceived promiscuity with third parties subverts the truth-seeking process by creating a perception of the woman as having failed to live up to a certain societal ideal of female modesty.⁶

⁴ Leon Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 S. Cal. L. Rev. 35, 60.

⁵ Rape Shield Laws and Sexual Behaviour Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations, Heather D. Flowe; Ebbe B. Ebbesen, Anil Putcha-Bhagavatula, Law and Human Behaviour, Vol 31, No. 2 (April 2007) pp. 159-175.

⁶ From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, Michelle J. Anderson, 2002 George Washington Law Review, February, 2002, 70 Geo. Wash. L. Rev. 51 citing the

2.8 Finally, it is a well known fact that rape is generally one of the most under-reported crimes⁷. In the UK, it is estimated that 75%-95% of rape cases go unreported⁸; in the US, it is estimated that 60% of sexual assault crimes go unreported⁹. Rape is likely to be heavily under-reported in Singapore as well¹⁰.

2.9 It is not surprising that rape is consistently under-reported. Not only is rape an extremely traumatic experience for the victim, a victim's decision to report the crime to the police involves a cost - social recrimination and lost privacy, with no guarantee of offender apprehension.

One barrier to reporting sexual violence is the perception that the complainant and her behaviour are put on trial, rather than that of the accused. Section 157(d) entrenches this and the risk of humiliation and loss of privacy¹¹.

2.10 In summary, it is in the public interest to repeal Section 157(d) of the Evidence Act because:

- a) it is based on the outmoded concept that only "chaste" women should be afforded legal protection;
- b) the moral or immoral behaviour of a woman in general has no logical link to her credibility or to the question of whether she consented to sexual intercourse in the specific case;

following studies: David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. Crim. L. & Criminology 1194, 1294 (1997); K. L'Armand & A. Pepitone, Judgments of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History, 8 Pers. & Soc. Psychol. Bull. 134, 135 (1982)); James D. Johnson, The Effect of Rape Type & Information Admissibility on Perceptions of Rape Victims, 30 Sex Roles 781, 790 (1994) (concluding that evidence that the victim has a "promiscuous sexual history" would tend to extract more "negative perceptions" of the victim and that once the jurors are exposed to sexual history evidence and then told that it is inadmissible, the evidence is still "likely to have an effect on the perceptions of victim enjoyment" which tends to "be a predominant factor in final decision making"); C. Neil MacRae & John W. Shepherd, Sex Differences in the Perceptions of Rape Victims, 4 J. Interpers. Violence 278, 284 (1989)

⁷ American Medical Association (1995) Sexual Assault in America. AMA; "A gap or a chasm? Attrition in reported rape cases", Liz Kelly, Jo Lovett and Linda Regan, Home Office Research, Development and Statistics Directorate, February 2005;

⁸ Without Consent: A report on the Joint Review on the Investigation and Prosecution of Rape Offences (2006), Her Majesty's Crown Prosecution Service Inspectorate'; A gap or a chasm? Attrition in reported rape cases;, Liz Kelly, Jo Lovett and Linda Regan, Home Office Research, Development and Statistics Directorate, February 2005

⁹ U.S. Department of Justice.2005 National Crime Victimization Study, 2005

¹⁰ There are currently no reported statistics or studies in Singapore on the under-reporting of rape.

¹¹ Many women do not report having been raped for fear that their private sexual lives will become public. Humiliation at trial when a victim's private sexual life is scrutinized in public often creates significant, secondary trauma for rape victims. Lee Madigan & Nancy Gamble, The Second Rape: Society's Continued Betrayal of the Victim 1-4 (1991).

- c) admitting evidence of a complainant’s prior sexual conduct can be extremely prejudicial to her and create an unfair bias against her in the court’s decision-making process;
 - d) it entrenches the risk of public humiliation to and scrutiny of a victim’s behaviour and deters rape reporting which is already very low;
 - e) it codifies victim blaming; and
 - f) all or most other common law jurisdictions have repealed this law.
- 2.11 A woman’s past sexual history should not be used against her in a way that is discriminatory and demeaning to her. The existence of this section and the spectre of a woman’s sexual history being used against her add further obstacles to the reporting of rape crimes.
- 2.12 Finally, it is noted that the Evidence Act contains general provisions in Sections 150, 153 and 154 which impose limitations on the extent to which counsel can attack the character of a witness. The problem is that Section 157(d) explicitly gives the accused the right to attack the creditability of the victim of rape or attempted rape by showing that she is of “generally immoral character”. It is arguable that the explicit provision in Section 157(d) is not limited or excluded, by implication, by Sections 150, 153 and 154.

3. IMPLEMENTATION OF “RAPE SHIELD LAWS”

- 3.1 “Rape Shield Laws” are laws which prescribe or guide when and how previous sexual conduct could be used by a defendant at trial.
- 3.2 We note that many common law jurisdictions have enacted Rape Shield Laws. These provisions were implemented to reduce the trauma and humiliation that a rape victim may face in court, to encourage the reporting of rape and to prevent misleading evidence from being adduced in court. The Rape Shield Laws implemented by Canada, Malaysia, Hong Kong, New Zealand, UK and USA are set out in Appendix A.
- 3.3 Even with the offending section 157(d) repealed, counsel for the accused is normally given a wide latitude to attack the general credit and credibility of the complainant. The enactment of a Rape Shield Law would make it clear that the latitude given in cross examination does not extend to sexual history unless it is sufficiently relevant to the charge.
- 3.4 The courts had in the past increased the sentence of an accused where the defence lawyer had “annoyed, embarrassed and humiliated the victim” during cross examination.¹² Increasing the sentence is an after-the-event deterrence: it deters others from embarking on overly intrusive cross-examination of sexual complainants. It is better to prevent such cross-

¹² In a molest case reported in the Straits Times in 11 January 1995 against Teo Chor Hong, Chief Justice Yong Pang How was angered by the transcripts of a trial conducted in the subordinate court where the defence lawyer “had annoyed, embarrassed and humiliated the victim” during cross-examination. According to the newspaper report, the Chief Justice said, “If I see this sort of cross-examination again, I will double the sentence!”

examination from occurring by disallowing overly intrusive questions from being put to the complainant by Rape Shield Laws.

4. RECOMMENDATIONS

- 4.1 Section 157(d) should be repealed.
- 4.2 Rape Shield Laws be implemented.

Submitted by AWARE¹³, 30 October 2011
Enc: Appendix A

Contact persons:

Nicole Tan, President, nicoletansp@gmail.com

Corinna Lim, Executive Director, ed@aware.org.sg

Phone: 67797137

¹³ AWARE is grateful for the views given by Professor Michael Hor and Professor Ho Hock Lai of the Law Faculty, National University of Singapore, on the issues covered in this paper. AWARE is solely responsible for the views, arguments and positions set out herein.

About AWARE

AWARE is Singapore's leading gender equality advocacy group.

AWARE believes in the rights of women and men to make informed and responsible choices about their lives and to have equal opportunities in education, marriage and employment, and in the right of women to control their own bodies, particularly with regard to sexual and reproductive rights.

AWARE is dedicated to removing gender-based barriers.

Since its formation in 1985, AWARE has carried out research into numerous issues affecting women, including workplace sexual harassment, poverty of older women and Singapore's compliance with UN anti-gender discrimination standards.

AWARE provides a feminist perspective in the national dialogue. It has effectively advocated against laws, public policies and mindsets that discriminate against women. AWARE has contributed towards the strengthening of laws dealing with domestic violence.

About AWARE'S SABS Programme

AWARE started its Sexual Assault Befrienders Programme (SABS) in May 2011 to provide specialised services to support victims and survivors of sexual assault. SABS comprises the helpline, befriender programme, legal counselling, counselling and case management services for sexual assault victims. The SABS programme was created to address the growing need for support services in this area.

APPENDIX A

CANADA

Criminal Code

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that the judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

HONG KONG

Crimes Act (Cap 200)

154. Restrictions on evidence at trials for rape etc

- (1) If at a trial before the High Court any person for the time being charged with a rape offence or indecent assault to which he pleads not guilty (whether or not at the trial he or any other person, is for the time being charged with an offence which is not a rape offence or indecent assault), 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 that defendant.
- (2) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him in the absence of the jury by or on behalf of the 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.
- (3) In subsection (1), "complainant" means a woman upon whom, in a charge for a rape offence or indecent assault to which the trial in question relates, it is alleged that rape or indecent assault was committed, attempted or proposed.
- (4) Nothing in this section authorizes evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

INDIA

Evidence Act

The equivalent of Section 157(d) was repealed and replaced with the following provision:

"Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."

MALAYSIA

Evidence Act

146A. Notwithstanding anything in this Act, in proceedings in respect of the offence of rape, no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any person other than the accused unless—

(a) it is evidence that rebuts, or a question which tends to rebut, evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

(b) it is evidence of, or a question on, 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, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.

NEW ZEALAND

Evidence Act

The Evidence Act 2006 protects complainants from certain questions and evidence about their reputation and past sexual experience. Section 44 of the Act states:

1. In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
2. In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
3. In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

United States of America (USA)

Federal Rule of Evidence

Section 412 states that evidence of a rape complainant's sexual history is inadmissible, except: (1) when it is offered "to prove that a person other than the accused was the source of semen, injury or

other physical evidence," (2) when it is offered to prove consent and it consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused," or (3) when the exclusion of the evidence "would violate the constitutional rights of the defendant."

United Kingdom (UK)

Youth Justice and Criminal Evidence Act 1999

41 Restriction on evidence or questions about complainant's sexual history

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

- (a) no evidence may be adduced, and
- (b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

- (a) that subsection (3) or (5) applies, and
- (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—
 - (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
 - (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or

main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.