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## **The Use of Sexual History Evidence and ‘Sensitive Private Data’ in Scottish Rape and Attempted Rape Trials**

Sharon Cowan, Eamon P.H. Keane, and Vanessa E. Munro



# The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials

## Authors

Sharon Cowan, University of Edinburgh  
Eamon P. H. Keane, University of Glasgow  
Vanessa E. Munro, University of Warwick

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## Executive Summary

### Overview

This report presents findings from a project on the use of complainers' 'sensitive private data' in rape and attempted rape trials in Scotland. It was funded by the Scottish Government Justice Analytical Services, and undertaken with the assistance of Rape Crisis Scotland and a Project Advisory Board of criminal justice stakeholders.

For the purposes of this project, 'sensitive private data' is information about the character and previous sexual history of complainers. The rules that specify when information about a complainer's character and sexual history can be introduced as evidence during a sexual offences trial are to be found in the 'common law' rules on evidence (that is, legal principles developed by courts when deciding cases) and also in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (referred to in this report as the 1995 Act). These statutory rules are known as the 'rape shield' provisions.

### The Law

Evidence relating to a complainer's sexual history or character must first meet the common law threshold of relevance before it can be introduced in court as evidence, and only then do the statutory rape shield provisions apply.

If the evidence *is* relevant at common law, its admission can still be prohibited by s.274 of the 1995 Act, if the evidence is intended to show:

- that the complainer is **not of good character**; or
- that the complainer has **engaged in sexual behaviour not forming part of the subject matter of the charge**; or
- that the complainer has engaged in **non-sexual behaviour** (other than shortly before or after events libelled) **that might lead to an inference that they are likely to have consented, or are not reliable or credible**; or
- that the complainer has at any time been **subject to a condition or predisposition which might lead to an inference that they are likely to have consented to those acts or is not credible or reliable**.

S.274 prohibits evidence from being introduced by the defence, or by the prosecution (known in Scotland as the Crown Office and Procurator Fiscals Office ('COPFS'), or 'the Crown').

If evidence is prohibited by s.274, the Crown or the defence can make an application to the court, under s.275 of the 1995 Act, to have the evidence admitted, at the discretion of the court (a 's.275 application'). This application will usually be decided

by a single judge at a ‘preliminary hearing’ some weeks or months in advance of the trial but may also be decided later than that on ‘special cause shown’. A judge may grant a s.275 application to lead evidence prohibited under s.274 if all three of the following things are established:

(1) the evidence or questioning will relate **only to a specific occurrence or occurrences of sexual or other behaviour**, or to **specific facts demonstrating—**

- **the complainer’s character**; or
- any **condition or predisposition to which the complainer is or has been subject**;

And

(2) that occurrence or those occurrences of behaviour or facts are **relevant to establishing whether the accused is guilty** of the offence with which he is charged;

And

(3) the **probative value of the evidence** sought to be admitted or elicited is **significant and is likely to outweigh any risk of prejudice to the proper administration of justice** arising from its being admitted or elicited.

The “proper administration of justice” is further defined in the 1995 Act as including “appropriate protection of a complainer’s privacy and dignity.”

Any application under s.275 to admit evidence otherwise prohibited by s.274 must be in writing and clearly set out the nature of the evidence and any questioning proposed, the issues to which the evidence is relevant and the reasons for its relevance, and the inferences which the applicant proposes should be drawn from it.

## Context of the Research

Michele Burman and colleagues published a report for the Scottish Government in 2007, evaluating the operation of the law on the admission of character and sexual history evidence in practice.<sup>1</sup> They raised concerns about the number and kind of applications to introduce sexual history and character evidence that were being made and granted in sexual offences cases, and the limited objection to, and scrutiny of, applications to introduce potentially irrelevant information about complainers. Since then, there have been only partial glimpses of how the law in this area operates in

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<sup>1</sup> Michele Burman, Lynn Jamieson, Jan Nicholson and Oona Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Edinburgh: Scottish Government Social Research, 2007).

Scotland. In the intervening period, the Appeal Court has significantly restricted what is considered relevant and admissible evidence in this area, and there have been other changes to law, policy and practice that have not been evaluated.

This project aims to address that gap in knowledge and provide insights into the current application of the Scottish rape shield provisions in adult rape and attempted rape cases, taking into account shifts in law, policy and practice over the last two decades. The research findings highlight areas where there has been positive change, as well areas where further improvements could be made. We hope that the report's recommendations are helpful for criminal justice stakeholders, and complainers, in Scottish rape and attempted rape cases.



## Data Collection and Analysis

As noted, this research examines the operation of the rape shield provisions in Scottish rape and attempted rape trials. Such cases must be prosecuted in the High Court of Justiciary.

Having been given the permission of the Lord President, and with access to data granted by Scottish Courts and Tribunals Service and the ethical approval of the University of Edinburgh, we analysed files and preliminary hearings and trial proceedings in rape and attempted rape cases (including one case of assault with intent to rape), that had one or more s.275 applications to admit a complainer's sexual history or character evidence.

The sample included:

- **5 historical trials (2019-2020)**
- **20 'live' preliminary hearings (2021-2022)**
- **10 'live' trials (2022)**

We also **interviewed 38 stakeholders** (complainers, advocacy workers, police officers, judges, defence counsel and personnel from the Crown and Procurator Fiscals Service).

Analysing historical cases that had been subject to criticism in the Appeal Court allowed us to compare practice at that time with continuing developments in law, policy, and practice, as observed through analysis of case files, observations of hearings, and stakeholder interviews.

The research began in a period when strict Covid rules and a short moratorium on court-based research were in place, which delayed the project's start date and had an ongoing impact on the progress of the research. Starting with interviews with complainers in September 2021, followed by preliminary hearing observations that began in November 2021, we conducted court-based observation and case-file analysis from April 2022 to November 2022.

Notes were taken during observations of proceedings and from case files, and these were coded thematically using the qualitative software platform NVivo. Content analysis of these produced the quantitative and qualitative findings presented here. All the parties involved in the live cases analysed, and all of those interviewed, have been anonymised in this report.

To put our sample into context, while we saw 10 rape / attempted rape trials in a 6-month period during 2022, publicly available data shows that there were 577 evidence-

led trials in the year 2021-2022. It is not clear how many of these were rape / attempted rape trials, but figures show that in 2021-22, rape / attempted rape made up 43.8% of High Court of Justiciary indictments (documents setting out the charges).<sup>2</sup> Moreover, in 2021-22, 336 accused persons proceeded to trial on charges of rape / attempted rape,<sup>3</sup> whereas there were 10 accused (1 per trial) in the 10 trials we observed from 2021-2022.

## Summary of Findings

### a. Historical Cases

The 5 cases of *Donegan*,<sup>4</sup> *JG*,<sup>5</sup> *MacDonald*,<sup>6</sup> *Oliver*,<sup>7</sup> and *SJ*<sup>8</sup> were specifically selected for our study on the basis that they had generated published judgments in which problematic practice in relation to s.275 applications, and related matters, had been identified both by researchers and by the Appeal Court. This is clearly a small sample, and we do not intend to present it as generalisable; indeed, is not clear from available evidence whether these indicate problematic practice more broadly.

We drew on these cases to assist in better understanding the nature and impact of that problematic past practice regarding the rape shield provisions; and to evaluate whether, as reported to us by several interviewees, change had indeed occurred on the ground. Though framed as 'historical' cases, it is important to bear in mind that they are, in fact, relatively recent (2019/20) and so the lifespan of any such change is itself a short one.

The charges in these cases included rape, attempted rape and a penetrative digital assault with intent to rape. Consent was pled in all 5 cases in respect of certain charges. 4 cases were heard at the High Court and one in the Sheriff Court. We note that these cases were decided before the changes in practice that followed the full-bench appeal court decision of *RR*<sup>9</sup> that required the Crown to take and present to the court complainers' views on s.275 applications.

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<sup>2</sup> For reference, see: [https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/2022-2023/scts-quarterly-criminal-court-statistics---bulletin-q4-2022-23.pdf?sfvrsn=8f3e0cd5\\_2](https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/2022-2023/scts-quarterly-criminal-court-statistics---bulletin-q4-2022-23.pdf?sfvrsn=8f3e0cd5_2); and the Quarterly Criminal Court Statistics at: <https://www.scotcourts.gov.uk/official-statistics>.

<sup>3</sup> See the 'Main Bulletin Tables' available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/documents/>.

<sup>4</sup> *Donegan v HMA* [2019] HCJAC 10.

<sup>5</sup> *HMA v JG* [2019] HCJ 71.

<sup>6</sup> *MacDonald v HMA* [2020] HCJAC 21.

<sup>7</sup> *Oliver v HMA* [2019] HCJAC 98.

<sup>8</sup> *SJ v HMA* [2020] HCJAC 18.

<sup>9</sup> *RR v HM Advocate* [2021] HCJAC 21.

### **In summary, in these 5 historical cases there were:**

- 9 s.275 applications, all made by the defence.
- In 3 cases, the applications were late, and all 3 were heard on special cause.
- In 2 of these 3 cases, the application was made at trial.
- In only 1 of these 3 cases did the Crown object that special cause was shown.
- In 1 other case, a late application to appeal a refusal of s.275 was granted.

### **Additionally:**

- All 5 cases involved an application that was granted in full or in part.
- In 2 cases, the defence appealed a preliminary hearing judge's refusal of the s.275 (1 was refused, 1 was partially allowed).
- In 4 cases, the Crown opposed the s.275 application (albeit to varying degrees).
- In 1 case, aspects of the application were refused despite the lack of Crown objection.

Our analysis of the substance of the applications in these cases demonstrates that s.275 applications were made to adduce evidence of a complainer's sexual behaviour with the accused before and after the events libelled, and that post-incident behaviour was utilised by the defence to attempt to undermine a complainer's credibility. Of these 5 cases, 3 also featured a s.275 application to introduce evidence of sexual behaviour with third parties.

We also observed repeated attempts within a single case to admit evidence which had already been determined to be inadmissible. While the defence's focus on the complainer's credibility and sexual behaviour at the time of the incident is not unexpected in cases involving a defence of consent, often the way that these matters were explored across these historical cases appeared to us to be unnecessarily pejorative. Several of the applications were not clearly or fully drafted in line with the requirements of the 1995 Act, and even when submitted late were granted on 'special cause shown'. There appeared to be some confusion about when a s.275 application was needed, and we saw some defence counsel opting to be over-inclusive in respect of the material they included in the application. We also encountered problems with the quality of some of the audio recordings that were available of the trial. Finally, the standard of record keeping presented us with difficulties in terms of our analysis, and while we note this is in part due to records being kept for operational rather than research purposes, this is an issue that recurs throughout the criminal justice processing of these cases.

There have been two significant full-bench judgments of the Appeal Court (in 2013 and 2020) on the issue of the general approach to evidential relevance in sexual offences trials in Scotland, in which the court repeatedly emphasised that

consideration of side issues only serves to distract the jury from the ‘real issues’ – that is, whether the prosecution has proven the facts in issue as stated in the charge.<sup>10</sup> A key ambition in the current project was to explore, in the wake of these 5 historical trials, and the Appeal Court’s statement of the law in 2020, whether and how the law was being applied in first instance decision-making.

## b. Preliminary Hearings

### (i) Volume and substance of applications

When the defence or Crown make an application under s.275 to introduce sexual history or character evidence in a rape or attempted rape case, this is usually decided by a High Court judge at a pre-trial preliminary hearing.

This study analysed the **preliminary hearings for 20 rape or attempted rape cases, involving 30 female complainers and 20 male accused, and 14 of the 20 cases involved a single complainer.** In doing so, we aimed to gain a clearer understanding of current practice in terms of the scope, terms and outcomes of s.275 applications, and of how the 1995 Act currently operates in conjunction with the common law of relevance. Greater clarity on these issues would assist in evaluating the extent to which there had been any change of approach relative to the heavily criticised historical cases discussed above.

Since we purposively sampled cases that included one or more s.275 applications, we cannot present findings on the proportion of rape and attempted rape cases that include a s.275 application, but in 17 of our sample of 20 cases the accused pled a special defence of consent. This suggests that a consent defence is very common in such cases, and from this it might be inferred that the number of s.275 applications is also high where the accused seeks to lead evidence of sexual behaviour that differs from that specified in the libel. Crown applications were reported to us to have increased due to changes in Crown policy around dockets, and guidance given by the Appeal Court on the need for mirror applications from both the Crown and the defence. However, in our sample, the defence made almost two-thirds of the s.275 applications, and therefore the changes that have influenced Crown practice cannot fully explain the volume of applications.

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<sup>10</sup> See *CH v HM Advocate* [2020] HCJAC 43.

**In summary, across the 20 preliminary hearings analysed, there were:**

- **39 applications under s.275** (almost two per case).
- **28 were made by the defence** and **11 were made by the Crown** (that is, just under a third made by the Crown); and **7 featured an application by both parties**.
- Of the 28 defence applications,
  - **25 were made at the preliminary hearing** (only one – by the defence - was submitted late, though many preliminary hearings were continued to allow an application to be considered in light of other evidential matters).
  - **3 were made during the trial**, 2 of which were granted on special cause shown.

**Additionally:**

- Of the 28 defence applications,
  - 18 were opposed fully or in part, and
  - 20 of the 28 were granted in full or in part (71%).
- Of the Crown's 11 applications,
  - 1 was objected to by the defence, and
  - 10 of the 11 Crown applications were granted in full or in part (91%) (though one was revisited and refused on the first day of the trial).

For the most part, defence counsel made s.275 applications when the accused had pled a special defence of consent, to introduce evidence relating to sexual behaviour not specified in the indictment and to allow the accused to put forward his defence. As compared with the historical cases, the contemporary applications were generally less speculative, and legal personnel interviewed were almost unanimous in their view that there had been a seismic shift in practice in terms of judicial scrutiny and the quality and precision of s.275 applications. However, some defence applications continued to contain material that seemed to us to be clearly irrelevant (even if these parts were ultimately refused by the judge), such as applications seeking to explore consensual sexual behaviour with the accused days before the events libelled. This suggests that, notwithstanding strong guidance from the Appeal Court, some counsel who are defending rape and attempted rape charges at trial are still willing to take the risk of pushing at the parameters of the common law of relevance and s.275. Additionally, there is evidence from our interviews that some defence counsel view the more robust approach currently taken by the judiciary to s.275 applications as unjust, and perceive this as illustrative of the court being unduly influenced by “pressure groups”.

That said, in only one case in our preliminary hearing sample was there evidence introduced about the complainer's sexual behaviour with a second man, which

contrasts to the more common efforts to introduce such evidence in the historical cases. In the case in question, the application to adduce the evidence was in fact made by the Crown, on the basis that it would help to contextualise the complainant's account, and it was granted by the judge. This was, in our view, somewhat surprising given the increasingly strict application of the law in respect to the relevance and admissibility of evidence of sexual history with third parties. Across the preliminary hearing cases that we observed, there was also evidence of subsisting confusion on both sides of the bar as to the exact parameters of s.275 and whether an application was necessary, as well as differing judicial responses to the question of relevance at the margins. Likewise, there was ongoing uncertainty – and sometimes inconsistency – around the relevance of contextualising detail, particularly prior or later sexual behaviour with the accused. That such confusion about the boundaries of the law persists is a key finding of this research.

## (ii) Complainers' views

All the 20 preliminary hearings for which we have data should have complied with the change in practice brought about by *RR*<sup>11</sup> regarding the Crown obtaining, and conveying to the court, the complainant's views on the s.275 application. However, **in only 13 of the 20 preliminary hearings that we observed (65%), was there an indication either during court proceedings or in the accompanying paperwork to suggest that the views of complainers had been sought or ascertained at all.** The case files we analysed in relation to these preliminary hearings did not contain all the documentation that the Crown holds, and so the fact that some complainers' views regarding the s.275 application(s) were not recorded on the files that we analysed does not mean that their views were neither sought nor taken and recorded by COPFS. Equally, however, our findings highlight the need for better record keeping, for case management and auditing purposes, and to ensure that, if the parameters of a s.275 application are subsequently to be adjusted, the court can be guided by an accurate record of complainers' views, to determine whether further views need to be sought.

More generally, in implementing the new rules on seeking complainers' views, several interviewees noted a potential tension between ensuring compliance with timelines set to ensure effective case progression and scheduling a supportive, trauma-informed discussion with the complainant. Some of these problems may be alleviated through the extension of the period within which a s.275 application requires to be lodged (from 7 to 21 days in advance of the preliminary hearing), which has been proposed to support the introduction of Independent Legal Representation (LIR) for complainers at preliminary hearings for s.275 applications (currently being considered under the Victims, Witnesses and Justice Reform (Scotland) Bill). Equally, given our findings about the stress the criminal justice system is currently under, and the scarcity of legal representation, there remain questions as to the viability of such a change. Those

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<sup>11</sup> *RR v HM Advocate* (note 9, above).

complainers who are most vulnerable or do not have the capacity (emotional or practical) to interact with COPFS seem to be least likely to engage with processes designed to include them, and the often short time-scales in which their views require to be taken further impedes participation and inhibits trauma-informed practice.

Interviewees also raised further difficulties about what role complainers' views should have in proceedings and how much information should be given to them about the content of the s.275 application. For instance, while (unpublished) COPFS Operating Instruction 13/20 states the complainer should be advised of the full content of the application,<sup>12</sup> there may be some instances when doing so is more traumatising than not. It is possible that funded provision of ILR will also help to avert the perception – expressed to us by some interviewees – of view-taking as tokenistic, but there will be logistical challenges still to be overcome, particularly in the initial implementation period, to ensure sufficient availability of, and expertise in relation to, legal advice. It will also continue to be challenging, given time pressures and the backlog of cases, particularly post-Covid, to accommodate the process of seeking and obtaining legal advice in statutory timelines for the lodging and determination of s.275 applications.

### (iii) Delays

Delays in the criminal justice system, which are endemic and not specific to proceedings that include a s.275 application, have been further exacerbated by Covid. Ascertaining the views of the complainer about the s.275 lengthens the process. All but 1 preliminary hearing in the sample had been previously discharged and continued, and many of the preliminary hearings we attended where s.275 applications were due to be heard were also discharged and / or continued by the court for various reasons, including the unavailability of witnesses or key documents. We also witnessed late lodging of key court documents and evidence, including at trial, by parties. Reasons for delay were multi-factorial and compounding, such as: pressure of work, change in counsel, errors, technological failures, mental ill-health of complainers and witnesses and other health problems experienced by jurors and court personnel, availability of premises in which to take evidence on commission, poor quality audio recordings or transcriptions, availability of technological expertise and lack of court time. Interviewees reported that the Scottish defence bar were “stretched to the limit”. As others have noted, these are serious problems that could substantially

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<sup>12</sup> See HM Inspectorate of Prosecution in Scotland, 'Inspection of COPFS Practice in Relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995' (Edinburgh, 2022), para 41. See: <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2022/10/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995/documents/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995/govscot%3Adocument/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995.pdf>.

undermine ambitions to develop effective, sustainable, trauma-informed processes.<sup>13</sup>

### c. Trials

Once any preliminary hearing for a rape or attempted rape trial is concluded, the parties proceed to trial where the offences labelled are heard by a judge and jury. In this study, we analysed **a sample of 10 rape / attempted rape trials, involving 13 complainers, through a combination of in-person observation at trial and retrospective listening to and transcription of audio recordings, alongside case file analysis.** Special measures were in place for 12 of these complainers, and 7 cases involved an accused who was a partner or ex-partner. Of the 7 cases involving a partner or ex-partner, 6 of the charges were aggravated under Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and in 2, there were accompanying charges under s.1 of the Domestic Abuse (Scotland) Act 2018. 7 of the 10 sample cases involved a single complainer, of which 3 resulted in conviction, 2 resulted in not proven, 1 resulted in not guilty and 1 was deserted. In the 3 cases where there were two complainers, only 1 resulted in convictions against the accused in relation to both sets of allegations. In the remaining 2 cases, juries returned mixed verdicts, on both occasions convicting by majority in respect of one complainer but returning a majority not proven acquittal in respect of the other. In 7 of the 10 cases, the complainer had consumed alcohol and / or drugs, sometimes to a significant extent, and in 5, there were (sometimes overlapping) allegations of rape while asleep. In 3 cases, defence counsel made a s.275 application during the trial, 2 of which were granted, and one previously granted s.275 application was revisited and refused at the start of the trial.

The longest period from reporting to trial for these cases was 5 years. This can be compared with figures, released by the Scottish Government, which show that the longest criminal justice journey times between April – December 2022 (which aligns with the period during which data was collected for this project) were for accused persons charged with at least one sexual crime and prosecuted in the High Court, with a median time of around 4 years.<sup>14</sup>

In contrast to the analysis of historical trials, in our sample of contemporary trials, we identified positive shifts towards more robust application of the rape shield laws, with respect to s.275 applications, defence cross-examination and judicial oversight. We did observe some instances of poor practice, with persistent efforts by counsel in one case to introduce evidence regarding the complainer's sexual history with parties other than the accused that did not appear to us to meet the appropriate thresholds for relevance and admissibility. However, this was not representative of the behaviour of

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<sup>13</sup> For recent comment on delays in Scotland, see Michele Burman and Oona Brooks-Hay, 'Delays in Trials: The Implications for Victim-Survivors of Rape and Serious Sexual Assault: An Update' (2021) <https://www.sccjr.ac.uk/wp-content/uploads/2022/03/Delays-in-Serious-Sexual-Offence-Cases.-Dec-2021.pdf>.

<sup>14</sup> <https://www.gov.scot/publications/journey-times-scottish-criminal-justice-system/>.



defence counsel generally in the trials that we observed. Instead, there appeared to be a more targeted focus, on the whole, upon conduct with the accused that was close in time to the act libelled. That said, it was clear that there was still a considerable degree of variability in the interpretation and application of the rape shield provisions in practice, with experienced practitioners indicating in interviews that they struggled to understand and apply the law. In 3 cases, defence counsel made applications to admit evidence during the trial - rather than through a s.275 application in advance - and in some instances, the basis for its authorisation by the judge was unclear.

Meanwhile, in other cases, it seemed that the parameters of admissibility set within previous s.275 preliminary hearing rulings were breached during the substantive trial. We also observed defence counsel making – sometimes repeated – attempts to introduce evidence that would be caught by s.274 but for which no s.275 application had been made or granted. In one case, we witnessed multiple errors and pressures of time that led to more evidence being introduced than was allowed by the existing s.275 application.

In the wider context of the adversarial trial, we also observed several ways in which counsel deployed strategies that continued to target the character and behaviour of witnesses by relying on problematic assumptions about rape or gender norms, or implicitly asking the jury to speculate about various aspects of the case, including about reasons for delayed reporting and how complainers should behave in coercive or violent relationships. Several defence counsel – particularly in closing speeches – also referred to a political climate in which they suggested that pressure groups who “have the ear of government” are “clamouring” for more convictions. Judges were often alert to this, intervening when required - and sometimes doing so robustly and repeatedly; but this was not a consistent practice. Some judges were also, in our observation, more proactive than others in giving breaks to witnesses and using appropriately sensitive language and tone. Technological failures and problems were not uncommon in the trials that we observed, particularly where live video links or pre-recorded evidence (such as evidence on commission or a suspect’s police interview) were used, or where screen shots of the complainer’s or accused’s text messages were shown to the jury.

## Key Messages

The rape shield provisions that govern if, and how, evidence of a complainer’s sexual history and character is admissible during a sexual offences trial in Scotland explicitly refer to the need to consider the complainer’s privacy and dignity. In addition, in two full-bench judgments of the Appeal Court (in 2013 and 2020) the senior judiciary stated that more robust application, and scrutiny, of the law in this area was required. Since then, there have also been important cultural changes at the ground level, as reflected in revised and new prosecution policies, that signal significant shifts since Burman et al’s research in 2007.

Our research shows that **clear progress** has been made in the following areas:

- Although we found that **the number of s.275 applications made by the Crown has increased, this is often due to changes in Crown practice to allow for more rigorous application of the law.** For example: the Crown must make a ‘mirror’ s.275 application even when seeking to elicit the same evidence that is sought by a defence s.275 application; and the Crown are now required to make a s.275 application when introducing evidence in a docket attached to the indictment.<sup>15</sup>
- Burman et al found that the Crown objected to defence s.275 applications in only a *third* of cases (that is, in 10 of the 32 applications they studied in detail);<sup>16</sup> **our findings indicate the Crown objected to defence s.275 applications in two-thirds of cases.**
- The **quality and precision of drafting of s.275 applications by both the Crown and defence counsel has improved significantly.**
- We also found **enhanced judicial scrutiny** of (i) how s275s are drafted and submitted; (ii) the terms of a previously granted s.275 application (for example, in one case, we saw a previously granted s.275 application being overturned at trial); (iii) whether parties had strayed beyond the terms of a previously granted s.275 application; and (iv) whether generally, evidence elicited by parties at trial required a new s.275 application.
- Importantly, in contrast to Burman et al’s findings, **s.275 applications relating to a complainer’s sexual history and behaviour with a 3<sup>rd</sup> party were very rare** (only one was made in the 20 preliminary hearings we observed); and **the time window for what is deemed relevant sexual behaviour appears to have shrunk significantly.**
- **s.275 applications made at trial were less frequent in our study** than was found by Burman et al (3/39 applications (7.7%) and 8/47 applications (17%), respectively).
- Complainers’ **views about s.275 applications are now regularly sought and taken,** reflecting a change in the law.

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<sup>15</sup> A docket allows the Crown to lead evidence of issues related to a sexual offence that has been charged, including issues that would not be competent for the trial court to hear if they were contained in a formal charge. The docket does not contain charges, but evidence in a docket can be of corroborative value.

<sup>16</sup> Burman et al, note 1, above, p. 3; p. 70.

At the same time, our findings highlight areas that require further review and improvement. For example, some defence counsel continued to rely on gender stereotypes when eliciting evidence, or challenging the credibility and reliability of the complainer, such as what a ‘real’ victim of rape or domestic abuse would do in those circumstances. Some also voiced resistance to change, or criticism of the Appeal Court as having yielded to pressure in guiding those changes, citing concerns about fairness to the accused. Given that the shift towards a stricter interpretation of the rape shield provisions has been to a large degree led by senior judges, it is unclear whether cultural shifts ‘on the ground’ will remain embedded when those currently in senior roles move on. Several stakeholders also mentioned that the legislation may sometimes constrain complainers in being able to give a full account of the events libelled that could support the Crown case, although that is an inevitable consequence of the parameters of relevancy being defined narrowly here. Crucially, the Scottish criminal justice system is currently under immense strain, and we identified resourcing issues that negatively impact on the system from end to end, and which have implications for the prospect of a trauma-informed process for complainers (and accused individuals).

The following specific issues were identified as in need of **further improvement**:

- A significant degree of **confusion persists on both sides, about when a s.275 application needs to be made, and how much detail to include.**
- We saw some **defence attempts to introduce irrelevant material in s.275 applications** – sometimes as a result of the above mentioned confusion, or what might be termed a ‘belt and braces’ approach, or (less frequently) as a deliberate attempt to push the boundaries of what would be allowed under rape shield provisions; but in one case we also saw **the Crown restrict evidence** in a way that seemed to us problematic, given their obligation to prosecute in the public interest’.
- Although complainers’ views about s.275 applications are regularly being taken, **it was not clear that views were obtained in all cases**; the timeline for taking complainers’ views is often **too short to ensure trauma-informed practice**; and there seems to be **poor record keeping** of views in some cases.
- There is **inconsistency of practice and a lack of clarity amongst stakeholders as to whether a supporter is allowed to be present with the complainer while they are told about the s.275 application** and asked for

their views, though new (unpublished) Crown policy suggests that the supporter can be present.<sup>17</sup>

- **Independent Legal Representation for complainers for a s.275 application hearing might counter some of these issues** relating to taking complainers' views, but given the immense pressures on the defence bar in particular, and the scarcity of available legal representation, **resourcing and capacity issues remain a key concern.**
- Although less frequent, **late s.275 applications are still made at the trial stage** (in 3 of the 10 trials we observed). At times this is because of availability of / change of counsel, or because counsel makes repeated attempts to introduce material that had previously been refused by the preliminary hearing judge. Also, **defence counsel sometimes repeatedly test, or, as we saw in one case, repeatedly breach the parameters of the previously granted s.275 application.**
- Some **technological failures or errors** made in advance of or during the trial process had a direct effect on the extent of the delay in the case coming to trial, and in one case, had a direct impact during the trial in inadvertently extending the parameters of the previously granted s.275 application. These errors and malfunctions were most often a result of pressures of time and / or resources. **The Scottish criminal justice system is currently under extreme stress**, with almost all stakeholders we spoke to recounting lengthy delays in processing cases and a lack of available counsel to take on cases. While this is not specific to s.275 applications, the short timelines for obtaining complainers' views on s.275 applications and changes in counsel as the case proceeds **have a direct effect on when s.275 applications are made, heard, decided, and the quality of their content.**

Finally, but significantly we wish to highlight **the problems we experienced in accessing data** during the research. We were helpfully given access to records kept by SCTS, in part because it was suggested these would be more complete than other records, such as those kept by the Crown. However, SCTS case files are kept as part of a 'live' system of case management, for operational reasons, and not for the purposes of research. As such, they are not easy to access or navigate by researchers aiming to understand the criminal processing of sexual offences cases; and the

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<sup>17</sup> Chapter 9 of the COPFS Sexual Offences Handbook (which was released in October 2022, but is not a public document) states, in Part 5.4.3: "If the complainer is accompanied by an advocacy or support worker, they can be present when the complainer is advised about the section 275 application and the law and practice around section 275 applications is explained and also when the complainer is being precognosed about the content of the section 275 application unless there is a particular reason why this is deemed inappropriate."

hundreds of hours of transcription and manual recording of key documents and trial proceedings by the researchers made necessary by data protection regulations and availability of technology, as well as ethical considerations, renders this sort of research extremely difficult to undertake.

## Recommendations

- 1. Professional training** for the Faculty of Advocates and COPFS to clarify and emphasise the boundaries of what constitutes relevant evidence for the purposes of a s.275 application; clarifying as far as possible the time periods in which previous or subsequent sexual behaviour of the complainer can be said to be relevant; and good practice in drafting s.275 applications.
- 2. Continued judicial training** on oversight of the implementation of rape shield laws. While recognising that judicial training is a matter for the Lord President, we recommend continued emphasis on empowering robust judicial oversight of the implementation of the rape shield laws to ensure protection of the privacy and dignity of complainers.
- 3. Trauma-informed practices** when communicating with complainers and obtaining their views on the s.275 application, and when giving information about the charges laid, the likelihood of the admissibility of the evidence sought in the s.275 application, and the possibility of allowing supporters to be present while complainers' views are taken. A key part of this will be the introduction of **Independent Legal Representation** for complainers.
- 4. Improved record keeping** for sexual offences cases that include a s.275 application. These should be **routinely 'tagged'** as such and information on grants, refusals and withdrawals of s.275 applications should be **clearly recorded** in a way that makes the data **easy to access for transparent auditing, and, ideally, research purposes.**
- 5. Resourcing of the criminal justice system** across all its phases and personnel (including the currently understaffed defence bar). **Resources must be sustainable and sufficient**, with effective systems to ensure training, good working conditions, and monitoring and transparency of practice. **Timely case progression, though not to be achieved at the expense of a just outcome, should be identified as an operational priority and a key indicator of trauma-informed justice practice.**

## Section 1: Introduction and Background to the Research

This report presents findings from a project on the use of complainers' 'sensitive private data' in rape and attempted rape trials in Scotland. It was funded by the Scottish Government Justice Analytical Services, and undertaken with the assistance of Rape Crisis Scotland and a Project Advisory Board.

For the purposes of this project, 'sensitive private data' means data about the character and previous sexual history of complainers. The rules that specify when a complainer's sensitive private data can be introduced during a sexual offences trial are to be found in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (referred to in this report as the 1995 Act) and in general 'common law' rules on evidence (that is, principles developed by courts when deciding cases). These statutory rules governing the admission of sexual history and character evidence are commonly referred to as 'rape shield' provisions.

Previous research, published in 2007, raised concerns about the number and kind of applications to introduce sexual history and character evidence that were being made and granted in sexual offences cases, and the limited Crown objection to, and judicial scrutiny of, applications to introduce potentially irrelevant information about complainers. Since then, there have been only partial glimpses of how the law in this area operates in Scotland. In the intervening period, there have also been two full-bench decisions by the Appeal Court giving guidance on how to apply the rape shield provisions, alongside the common law rules on evidence, as well as changes, particularly in Crown policy and practice, which have not yet been evaluated.

Drawing on an analysis of historical and contemporary cases and developing law and practice on the usage of evidence about complainers' sexual history and character, we aim to provide a better understanding of the nature and impact of problematic past practice regarding the rape shield provisions and to evaluate whether substantive change has been achieved on the ground. We aim to highlight positive changes and best practice, and make recommendations for reform that will further assist complainers in sexual offences cases in giving best evidence, recognising their European Convention on Human Rights ('ECHR') Article 8 right to private and family life, whilst respecting the accused's ECHR Article 6 right to a fair trial.

The study was conducted by researchers from the Universities of Edinburgh, Glasgow and Warwick, in partnership with Rape Crisis Scotland who played an advisory role and assisted with ethics and access. The study was also supported by a Project Advisory Board comprised of criminal justice and legal stakeholders, who met with the

researchers at key stages.<sup>18</sup> The Advisory Board was extremely helpful to the researchers in providing advice and facilitating access, which at times was challenging and required innovation and persistence. However, the work which follows has been produced entirely independently by the research team.

Alongside a review of relevant legal authorities, academic research and policy materials, we designed and conducted original fieldwork to examine existing processes and practices on the use of sexual history and character evidence in Scottish rape and attempted trials. We examined the current application of rape shield provisions, from the point of reporting to the police, through prosecution and preliminary hearings, to the substantive trial proceedings; and explored key stakeholders' perceptions, including those of complainers, regarding the adequacy of those existing laws and processes. In doing so, we have also explored the impact that current practices may have on adult rape and attempted rape complainers' experiences of the criminal justice system, and the Article 6 rights of accused individuals.

In this report, we present our key findings. In Section 2, we provide a more detailed discussion of the key legal provisions that apply in this area of practice, along with an account of the wider context in which those provisions have been and currently are interpreted, commenting briefly on proposed changes that may have an additional impact. In Section 3, we provide a short review of existing literature that examines the operation of rape shield provisions in Scotland. In Section 4, we outline the research methods and ethical considerations that underpinned this project and provide details of our data collection and associated issues around access and data protection, as well as reflecting on the practical – at times substantial – challenges faced in undertaking the study.

In Sections 5, 6 and 7, we discuss key findings in detail. We begin in Section 5 with a close reading of a set of 5 significant historical case proceedings and decisions that caused substantial concern and appeal court criticism, and have been significant in informing the development of the contemporary law and policy in this area. Sections 6 and 7 draw on data from 30 'live' proceedings from December 2021 onwards, and the case papers for 24 of these, which give significant insight into how the rape shield provisions currently operate in practice. In Section 6, we focus on our observations from 20 preliminary hearings at which s.275 applications to introduce character and sexual history evidence were made and considered, while in Section 7, we turn to a sample of 10 substantive rape and attempted rape trials during which matters were raised that fell within the parameters of a s.275 application. We contextualise our analysis and observations regarding these cases by reference to a series of 38

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<sup>18</sup> The group included representatives from: Police Scotland; Crown Office and Procurator Fiscal Service (COPFS); Scottish Courts and Tribunals Service (SCTS); the Faculty of Advocates; Rape Crisis Scotland; the Scottish Government; the judiciary; and the Law Society of Scotland.



stakeholder interviews in which participants reflected on their experiences of the current operation and adequacy of s.274 and s275. In the final section, Section 8, we present some concluding observations and offer recommendations based on our data and analysis.

Overall, we found evidence of a positive shift in approach, relative to that reflected in the historical analysis, towards a more restrictive interpretation of the law which, in many cases, delimited the introduction of sexual history and character evidence that would previously have been more likely to be a feature of Scottish rape or attempted rape trials. However, we also found that there is still some inconsistency regarding taking complainers' views on s.275 applications, and with respect to practitioners' and judges' approaches to s.275, with applications sometimes continuing to be made when they appeared unlikely to be granted, and upset caused to complainers in being required to give their views on those applications. On some occasions, we also saw material being introduced at trial that had not been subject to appropriate scrutiny and which, if it had been, would have been unlikely - in our view - to have been admissible. Professional training will continue to be essential to further improve drafting and scrutiny of s.275 applications.

## Section 2: The Legal Context

In this section of the report, we outline the key legal tests in common law and legislation which regulate the use of complainers' sensitive private data in sexual offences trials. We analyse the Scottish rape shield provisions, and consider the broader context in which these legal provisions have been developed, interpreted, and applied in Scotland. The legal analysis undertaken here contextualises and informs the key findings and recommendations that follow. This section aims to show how the courts have become increasingly robust in their oversight of the application of the legal rules about what can be admitted in evidence in sexual offences trials. The judicial and legislative development of the law in this respect reflects changes in wider societal views about sexual offending, autonomy, and consent.

### a. An Historical Overview of the Law

Understanding the admissibility of complainer's sexual history and character evidence in Scottish criminal trials requires an appreciation of the interplay between the common law of relevance and the operation of the rape shield provisions found in ss.274 and 275 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). Together, these largely set the legal parameters in which evidence relating to a complainer's sensitive private data can be legitimately admitted at trial.<sup>19</sup>

#### The Admissibility of Evidence: An overview of relevance at common law

Admissible evidence is evidence which a court can both receive and consider for the purposes of determining a case. No evidence can be used in a criminal trial unless it is considered to be admissible in law.<sup>20</sup> To be admissible, evidence has to be both relevant in law,<sup>21</sup> and its use must not be excluded by other legal evidential rules.

In law, evidence is said to be relevant when it either bears directly on a fact in issue at trial, or does so indirectly because it relates to something which makes a 'fact in issue' more or less probable.<sup>22</sup> In lay terms, this means that evidence is relevant when it can directly help to establish or refute that the accused committed the offence.

While the specific facts and circumstances of the charges and trials we analysed in this study naturally varied, in each case, in order to obtain a conviction, the Crown set

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<sup>19</sup> There are, of course, other legal tests which may impact upon the admissibility of such evidence depending on the circumstances of the individual case – for example, the law relating to evidence that has been obtained unfairly. We do not outline the details of such rules here for reasons of expedience, although see e.g. Margaret Ross, James Chalmers and Isla Callander, *Walker and Walker: The Law of Evidence in Scotland* (5<sup>th</sup> edn, Bloomsbury, 2020) paras 8.1 - 8.10.

<sup>20</sup> *Ibid.*, para 1.1.

<sup>21</sup> *CJM (No 2) v HM Advocate* [2013] HCJAC 22 at [28] citing, amongst others, Phillip Hamilton Grierson (ed) *Dickson, A Treatise on the Law of Evidence in Scotland* (3<sup>rd</sup> edn, T and T Clark, 1887).

<sup>22</sup> *CJM (No 2) ibid.*, at [28].

out to prove that the crime of rape or attempted rape had occurred, and that it was the accused who committed it. The Crown were required to prove via corroborated credible and reliable evidence that penetration (or attempted penetration) of the complainer's vagina, anus or mouth occurred by the accused's penis, without the complainer's consenting; and that penetration occurred without the accused having any reasonable belief that the complainer consented.<sup>23</sup> While some aspects of the requirement for corroboration in this context have recently changed, such a change did not affect the historical cases that we analysed.<sup>24</sup>

The court's determination of common law relevance in any given case is fact specific. It is a 'largely common sense' determination made by judges based upon "logic and experience."<sup>25</sup> It has also been identified as an area vulnerable to decision-makers applying gender stereotypes or prejudices.<sup>26</sup>

The type of evidence which bears directly or indirectly on a fact in issue at trial will vary according to the specific narrative of the charge and the evidence which has been led, or is proposed to be led. However, evidence which is irrelevant at common law is never admissible. Equally, evidence which is relevant but has too remote a bearing on the facts in issue, will also fall to be excluded in most instances on the basis it is 'collateral.'<sup>27</sup> A collateral issue is one which the court considers has some connection to proof of the offence, but exploration of which is prohibited because it will take up too much court time and may obscure the ultimate issue to be determined by the 'fact-finder' in the case that is, by the jury in solemn cases.<sup>28</sup>

### The Relevance of the Complainer's Sexual History and Character Evidence in Sexual Offences Cases: The Historical Context

A general understanding of the background context of the current legal position highlights some concerns about the dangers of prejudicial decision-making in this area that, in recent times, senior judges and legislators have sought to guard against.<sup>29</sup>

In Scotland, evidence pertaining to the character of a witness in a criminal trial is generally inadmissible at common law because it is collateral to the facts in issue at

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<sup>23</sup> See s.1 of the Sexual Offences (Scotland) Act 2009, *Graham v HM Advocate*, [2017] HCJAC 71 and *Maqsood v HM Advocate*, [2018] HCJAC 74.

<sup>24</sup> See *Lord Advocate's Reference (No 1 of 2023)* [2023] HCJAC 40.

<sup>25</sup> See *CJM (No 2)* (note 21, above), *CH v HM Advocate* (note 10, above) at [8] and *LL v HM Advocate* [2018] HCJAC 35.

<sup>26</sup> See e.g. the comments of Lord Turnbull in *CH v HM Advocate* *ibid* at [112] quoting the Canadian judgment of *R v Seaboyer* [1991] 2 SCR 577.

<sup>27</sup> See *CJM (No 2)* (note 21, above); *CH* (note 10, above)

<sup>28</sup> *Brady v HM Advocate*, 1986 JC 68 73. There has been a tendency to elide any distinction between collateral issues and matters of relevance in Scots law at times in criminal cases. The concepts, whilst related, are distinct. See further: Scottish Law Commission *Similar Fact Evidence and The Moorov Doctrine* Discussion Paper (no 145) (Scot Law Com, 2010), at para 2.8.

<sup>29</sup> See, further, the discussion relating to the development of the common law in *LL* (note 25, above) and *Moir v HM Advocate*, 2005 1 JC 102.

trial.<sup>30</sup> ‘Character’ in this regard is broadly defined and refers to a witness’s “known disposition from previous actions, but also their general reputation in society.”<sup>31</sup> There are, however, exceptions to this general rule. The accused may attack the character of a witness in a criminal trial, via cross-examination and the leading of evidence, if such a matter is relevant to the crime charged and appropriate notice has been given.<sup>32</sup> In sexual offences prosecutions, there was judicial authority, stemming from the 19<sup>th</sup> century, that the accused was permitted to lead evidence of the complainer’s bad character so as to establish that she was of ‘general bad repute’ and ‘unchaste’. Further, evidence that she had previous (recent) sexual intercourse with the accused, but not third parties, prior to or following the alleged incident was also permitted.<sup>33</sup>

The rationale for holding such evidence to be relevant at common law, as remarked upon by the Scottish Law Commission, was not always clear, but essentially amounted to an understanding that reference to a complainer’s general unchaste character allowed the jury to draw inferences about credibility in respect of the complainer’s account of the alleged sexual offence.<sup>34</sup> Evidence of prior recent sexual conduct with the accused was seen to be relevant to the matter of consent in respect of the charge, given that it affected the jury’s assessment of probability of whether the witness would offer resistance or not.<sup>35</sup> Throughout the 20<sup>th</sup> century, in Scotland, as elsewhere, concerns were increasingly expressed that these rationales were problematic, sexist and objectionable.<sup>36</sup> In particular, critics focused on the prevalence of the ‘twin myths’ – that a woman who has previously consented to sex is more likely to have consented on this occasion; and a woman who has previously had sex is less credible and reliable in her testimony when she says she did not consent on this occasion.<sup>37</sup>

With a view to protecting complainers, in 1983, the Scottish Law Commission recommended that, in cases of rape and other sexual offences, the court should not – as a general rule – admit defence questioning or evidence that showed or tended to show that a complainer had at any time been of bad character, associated with prostitutes or engaged in prostitution; and should not admit questioning or evidence that showed or tended to show that the complainer had at any time engaged with any

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<sup>30</sup> See *Brady* (note 28, above).

<sup>31</sup> A.B Wilkinson, *The Scottish Law of Evidence* (2nd edition, Butterworths, 1986), at p. 22.

<sup>32</sup> For further, see *Walker and Walker* (note 19, above) at 7.7.

<sup>33</sup> See *Dickie v HM Advocate*, (1897) 5 SLT 120 and the analysis by Lord Brodie in *LL* (note 25, above) at [16]-[20].

<sup>34</sup> See The Scottish Law Commission, *Report on Evidence in Cases of Rape and Other Sexual Offences* (Scot Law Com No 78, 1983) 3.11 and *LL* (note 25, above).

<sup>35</sup> See [84] and [87] *Dickie* (note 33, above), quoted in *LL* (note 25, above) at [17] and [18] by Lord Brodie.

<sup>36</sup> For further on the literature concerning the twin myths see, for example, Clare McGlynn, ‘Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence’ (2017) 81(5) *The Journal of Criminal Law* 367.

<sup>37</sup> See for discussion, Elaine Craig, ‘Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions’ (2016) *Canadian Bar Review* vol. 94, no. 1, pp. 45-84.

person in sexual behaviour not forming part of the subject-matter of the charge.<sup>38</sup> The Scottish Law Commission also recommended that any admission of such evidence against this general rule should be strictly regulated by courts who were to retain a discretion to admit such evidence, but only upon application by the defence, and only assuming that the evidence and or questioning was subject to certain defined exceptions.<sup>39</sup>

In 1985, the UK Parliament passed the Law Reform (Miscellaneous Provisions) (Scotland) Act, which largely implemented the Commission's recommendations. This came into force in 1986 and inserted the first iteration of the Scottish rape shield provisions into the Criminal Procedure (Scotland) Act 1975 (later to become the Criminal Procedure (Scotland) Act 1995).

### The Scottish Rape Shield Provisions: The Road to ss.274 and 275 of the Criminal Procedure (Scotland) Act 1995

In essence, these initial, and at the time ground-breaking, rape shield provisions turned the old common law exceptions relating to the 'unchaste' character and sexual history evidence of the complainer on their head. There was no longer a general presumption that evidence in respect of the complainer's sexual history and bad character in respect of sexual matters was admissible. Instead, such evidence was now admissible only upon application by the defence and only where it met certain standards in respect of specificity and probative value. The application required to introduce such evidence and questioning was to be made at the bar during the trial but in the absence of the jury and witnesses in solemn cases.<sup>40</sup> However, these initial provisions had some limitations. First, there was no limitation on attacks relating to the complainer's bad character more generally, rather the limitation related to character in respect of sexual matters specifically. The provisions also did not apply to the Crown.<sup>41</sup>

Empirical research conducted by Brown, Burman and Jamieson, published in 1992, was critical of whether the 1985 legislation was achieving its aims.<sup>42</sup> Its findings prompted the Scottish Executive's pre-legislative consultation exercise - '*Redressing the Balance*' - in 2000, which similarly suggested the schema under the 1985 provisions was inadequate, and directly referenced the acquittal rate in rape cases at

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<sup>38</sup> See The Scottish Law Commission (note 34, above) at 5.3 and 5.6. For further, see the comments of Lord Justice Clerk Gill on the historical background to ss. 274 and 275 in *Moir* (note 29, above) at [6] - [9] and *LL* (note 25, above).

<sup>39</sup> See The Scottish Law Commission (note 34, above) Part VI.

<sup>40</sup> *Ibid.* There was not a developed system of pre-trial case management in Scottish criminal procedure at the time.

<sup>41</sup> *Ibid.*

<sup>42</sup> Beverley Brown, Michelle Burman and Lynn Jamieson, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (Edinburgh: Scottish Office Central Research Unit, 1992); see also Beverley Brown, Michelle Burman and Lynn Jamieson, *Sex Crimes on Trial: Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (Edinburgh: Edinburgh University Press, 1993).

that time which stood at 78%.<sup>43</sup> The criticism advanced towards these provisions was summarised by Lord Justice Clerk Gill in *Moir v HM Advocate* as indicating that “the legislation was not achieving its aims and that there was a need to control subtle character attacks” on complainers.<sup>44</sup>

Following the Scottish Executive consultation, a Bill was published,<sup>45</sup> which aimed to strengthen “existing provisions restricting the extent to which evidence can be led regarding the sexual history and character of the complainer.”<sup>46</sup> The following extract from the policy memorandum which accompanied the Bill neatly articulate the political intention behind it:

“The Executive believes that there are a number of deficiencies in these [that is, the 1985 Act] provisions...They are sufficiently elastic not to strongly discourage the use of this type of evidence. Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak when compared with its prejudicial effect. This may include invasion of the complainer's privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer. The current provisions rely heavily on individual judges to achieve a proper focus on these matters, without providing clear guidance.”<sup>47</sup>

What followed was a set of updated provisions, brought into force by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, to form what we now know as ss. 274 and 275 of the Criminal Procedure (Scotland) Act 1995. These provisions have significantly changed the scope of protection for rape and other sexual offences complainers in Scotland by introducing more demanding procedural obligations on parties wishing to lead evidence that is *prima facie* prohibited by the Act. The new provisions apply to both the Crown and the defence. Further, in line with the Law Commission's earlier recommendation, which had not been implemented by the 1985 legislation, the rape shield now also protects against attacks on character more generally, and not only in relation to sexual matters. The 1995 Act, detailed further below, also requires that the probative value of any proposed evidence or questioning be significant and outweighs any risk to the proper administration of justice, which – importantly – includes consideration of a complainer's privacy and dignity.

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<sup>43</sup> The Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offences Trials a Pre-Legislative Consultation Document* (Edinburgh: Scottish Executive, 2000) 6.8.

<sup>44</sup> *Moir* (note 29, above) at [11].

<sup>45</sup> The Sexual Offences (Procedure and Evidence) (Scotland) Bill.

<sup>46</sup> Policy Memorandum accompanying The Sexual Offences (Procedure and Evidence) (Scotland) Bill, para 2.

<sup>47</sup> *Ibid.*, para 17.

## b. The Current Legal Framework

### The interplay between the common law of relevance and ss.274 and 275 of the Criminal Procedure (Scotland) Act 1995

As noted above, for sexual history and character evidence of a complainer to be admissible, it must be relevant at common law *and* admissible in terms of the statutory provisions.<sup>48</sup> Therefore, when considering an application under s.275 to introduce evidence of sexual history and character, it is to the common law of relevance that the court will turn first, and only if the evidence and / or proposed questioning meets the requisite standard of relevance at common law will the court move to consider whether it is admissible in terms of s.274 and s.275 of the 1995 Act. The common law of relevance has accordingly been described as “the touchstone” for consideration of an application under s.275 of the 1995 Act,<sup>49</sup> and indeed many of those interviewed for this study were at pains to remind us that often s.275 applications do not get past the first hurdle of relevance at common law.

### The Contemporary Common Law of Relevance in Sexual Offences Trials

Alongside the creation and development of legislative rape shield provisions, determinations by the courts of the relevance of sexual history and character evidence have also shifted drastically in modern times, reflecting changing societal views and the modernisation of sexual offences laws.<sup>50</sup> While the determination of relevance in any given case is always fact specific, judgments of the Appeal Court have sharply illuminated this development.

As the law currently stands, both pre- and post-charge sexual activity with the accused and others is, on the face of it, inadmissible, unless it can be said to have a bearing on a fact in issue at trial, in the sense of making a fact in issue at trial more or less probable.<sup>51</sup> Consequently, evidence that a complainer had sexual intercourse with the accused on a previous occasion, months prior to the incident forming the basis of the charge, was held in *LL v HM Advocate* to be irrelevant and inadmissible at common law, because the defence had not made specific averments in the s.275 application about how the two incidents were linked, nor made any compelling submission as to

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<sup>48</sup> A point made repeatedly by the Appeal Court – see, for example, the comments of Lord Justice General Carloway in *CJM (no 2)* (note 21, above) and *CH* (note 10, above).

<sup>49</sup> See *XY v HM Advocate*, [2022] HCJAC 2 at [44].

<sup>50</sup> As exemplified by the re-definition of the common law offence of rape in *Lord Advocate’s Reference No 1 of 2001* 2002 SLT 466 and the codification of the law of sexual offences in the Sexual Offences (Scotland) Act 2009. As Lord Brodie remarked in *LL* (note 25, above), the old common law authorities, relating to the complainer’s unchaste character and prior sexual conduct with the accused, ‘are unreliable guides’ as to what is relevant and admissible evidence in modern sexual offences trials.

<sup>51</sup> See the detailed consideration of the authorities in this area undertaken by the five-judge bench of the Appeal Court in *CH* (note 10, above) at [1] – [67].

how having consensual intercourse on one occasion was relevant to whether consensual intercourse occurred on a later occasion.<sup>52</sup>

Similarly, evidence that a complainer had consensual sexual intercourse with the accused some hours prior to the alleged incident in the charge, and again the following morning, was held to be inadmissible as collateral and irrelevant in *CH v HM Advocate*, where it was alleged that rape had occurred whilst the complainer was incapable of giving consent, due to her level of intoxication.<sup>53</sup> And in *XY v HM Advocate*, evidence that an accused was in a consensual sexual relationship with a complainer when she was 17, in the context of charges which alleged that he had raped her and committed other sexual offences against her when she was aged between 13 and 16, was also held to be collateral and irrelevant.<sup>54</sup>

The Appeal Court has recently, and repeatedly, emphasised that the sort of evidence considered in these cases only serves to distract the jury from the ‘real issues’ in the prosecution, that is, proof of the facts in issue.<sup>55</sup> A key ambition in the current project was to explore whether and how this understanding was being accepted and applied in first instance decision-making. Even though there have been two full-bench judgments of the Appeal Court (in 2013 and 2020) on the issue of the general approach to relevance and collateral issues in sexual offences trials in Scotland, close reading of the historical cases in our study demonstrates that the first of these cases did not have a significant effect on the approach of all first instance judges. Indeed, as the Lord Justice General remarked in 2020, in the later of the two cases, *CH v HM Advocate*:

it “is regrettable that, despite several clear opinions of the court over the years... some judges and sheriffs have continued to fail to apply what ought to be well known rules of evidence in favour of determining what they consider to be fair, looking primarily, if not exclusively, at the interests of the accused rather than, in addition to his Article 6 right to a fair trial, the wider interests of justice, including the rights of the complainer.”<sup>56</sup>

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<sup>52</sup> *LL* (note 25, above).

<sup>53</sup> Whether the accused had a reasonable belief in such consent was also queried. See *CH* (note 10, above).

<sup>54</sup> *XY* (note 49, above), although it is noteworthy that in both this case and in *CH* (note 10, above) there were dissenting judgments. A limited exception to the rule that collateral issues are generally inadmissible in this area exists where there is a previous conviction relating to wasting police time and the complainer has made false reports similar to those charged on the indictment: *CJM (no 2)* (note 21, above).

<sup>55</sup> *CH* (note 10, above).

<sup>56</sup> *Ibid.*, at [6].



## The Legislation

It is clear, then, that if character or sexual history evidence is irrelevant at common law, it cannot be admitted through a s.275 application.<sup>57</sup> However, even if evidence is considered relevant at common law, it is still prohibited by s.274 of the 1995 Act if it falls within the scope of that provision. S.274(1) states that the following sexual history and character evidence is inadmissible in sexual offences trials:<sup>58</sup>

- a) evidence that the complainer is not of good character (whether in relation to sexual matters or otherwise);<sup>59</sup>
- b) evidence that the complainer has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;<sup>60</sup>
- c) evidence that the complainer has at any time – except shortly before or after acts forming the subject matter of the charge (“those acts”) – engaged in behaviour other than sexual behaviour which might found the inference that they are likely to have consented to those acts or is not credible or reliable;<sup>61</sup> or
- d) evidence that the complainer has at any time been subject to a condition or predisposition which might found an inference that they are likely to have consented to those acts or is not credible or reliable.<sup>62</sup>

If evidence is prohibited by s.274, the Crown or the defence can make an application to the court, under s.275 of the 1995 Act, to have the evidence admitted, at the discretion of the court (a ‘s.275 application’). This application will usually be decided by a single judge at a ‘preliminary hearing’ some weeks or months in advance of the trial, although it may be decided after that stage on ‘special cause shown’. The court may grant a s.275 application to lead evidence prohibited under s.274 only if it is satisfied that:

- (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour,<sup>63</sup> or to specific facts demonstrating:
  - (i) the complainer’s character; or

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<sup>57</sup> *Moir* (note 29, above) and *CJM (no 2)* (note 21, above).

<sup>58</sup> Sexual offences are those to which s.288C of the 1995 Act applies including rape and attempted rape at common law, and contrary to s.1 of the Sexual Offences (Scotland) Act 2009.

<sup>59</sup> S.274(1)(a) of the 1995 Act.

<sup>60</sup> S.274(1)(b) of the 1995 Act.

<sup>61</sup> S.274(1)(c) of the 1995 Act. It should be noted that this does not extend to evidence of statements made by the complainer to third parties bearing on her credibility or reliability, nor does it exclude evidence of prior cohabitation between the accused and the complainer as per *DS v HMA* 2007 SC PC 1.

<sup>62</sup> S.274(1)(d) of the 1995 Act.

<sup>63</sup> This comma does not appear in the statute but was read into the provision as necessary so as to avoid an undue restriction on the accused's right to a fair trial in terms of Article 6(1) of the European Convention on Human Rights in line with s.3 of the Human Rights Act 1998 as per Lord Hope in *DS v HMA* (note 61, above) at [47].

- (ii) any condition or predisposition to which the complainant is or has been subject;
- (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged;<sup>64</sup> and
- (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.<sup>65</sup>

Significantly, the “proper administration of justice” is further defined in s.275(2)(b) as including “appropriate protection of a complainant’s privacy and dignity”, thereby explicitly directing the court to consider these factors as relevant to the operation of the test for the admission of sexual history and character evidence.<sup>66</sup>

The Act also allows for evidence of any relevant previous convictions of the accused to be admitted, following a successful application to lead sexual history or character evidence by the defence.<sup>67</sup>

The reference to a “condition or predisposition” in s.275(1)(a)(ii) refers to “something objectively diagnosable in medical, notably psychiatric, terms.”<sup>68</sup> General evidence that the complainant is untruthful will not be admissible as it does not refer to specific facts or behaviour.<sup>69</sup> Finally, the court retains discretion under the statute as to whether to permit parties to lead evidence of sexual character and history in any given trial.<sup>70</sup>

A clear description of the purpose and operation of these rape shield provisions was provided by Lord Hope in the Privy Council judgment *DS*, which was concerned with the compatibility of the legislation with the European Convention on Human Rights:

“The sections seek to balance the competing interests of the complainant, who seeks protection from the court against unduly intrusive and humiliating questioning, and the accused’s right to a fair trial. They lean towards the protection of the complainant. The protection is very wide. It extends to questions and evidence about the complainant’s sexual behaviour at any time other than

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<sup>64</sup> It should be noted, however, that this part of the test is arguably unnecessary given that the evidence in question must first be deemed relevant and admissible at common law prior to considering the operation of the statutory provisions.

<sup>65</sup> As per s.275(1)(a)(b) and (c) of the 1995 Act.

<sup>66</sup> S.275(2)(b)(i) and (11) of the 1995 Act. It also includes ensuring that the facts and circumstances of which a jury are made aware are relevant to an issue which is to be put before them and commensurate to the importance of that issue to the jury’s verdict.

<sup>67</sup> S.275A of the 1995 Act. There are grounds to object to such disclosure, as detailed in the section.

<sup>68</sup> *CJM (no 2)* (note 21, above) as per Lord Carloway at [46].

<sup>69</sup> *Mackay v HM Advocate* 2005 JC 1 and *Moir* (note 29, above).

<sup>70</sup> The breadth of this discretion has led to some arguably inconsistent judgments e.g. compare the decision in *Kinnin v HM Advocate*, 2003 SCCR 295 with that made in *LL* (note 25, above). The changing factor here is, of course, the development of the common law of relevance itself.

that which forms part of the subject-matter of the charge. It extends also to behaviour which is not sexual behaviour at any time other than shortly before, at the same time or shortly after the acts which form part of its subject-matter which might found the inference that the complainant consented to those acts or is not a credible or reliable witness. But the court is permitted, in the accused's interest, to admit such evidence or allow such questioning if it is satisfied that it passes the three tests which are set out in sec 275(1)."<sup>71</sup>

These "three tests" can be broadly categorised as:<sup>72</sup>

- 1) Specificity: does the evidence relate to a specific occurrence or occurrences of behaviour, or to specific facts which bear on the question of character or a condition suffered by the complainant?
- 2) Relevance: is this evidence relevant to the facts at issue that is, the guilt or innocence of the accused?
- 3) Balancing Exercise: does the probative value of the evidence outweigh the risk to the prejudice of the interests of justice?

In applying these tests, the court is to consider issues such as the nature of the facts that the s.275 application seeks to introduce and the lapse of time between those facts and the subject matter of the charge.<sup>73</sup> The Appeal Court has made clear that, whilst every decision will be fact specific, applications which seek to admit evidence that the complainant and the accused engaged in consensual sexual activity *after* the events libelled in the charge are likely to be collateral at common law; and, in terms of the Act, the relevance that such evidence may have "is so weak and remote that it cannot be said that it would have significant probative value or outweigh the risk to the administration of justice from its admission, specifically in respect of safeguarding the dignity and privacy of the complainant."<sup>74</sup>

In recent years, the Appeal Court has significantly restricted what is considered relevant and admissible evidence in this area. The law now deems inadmissible many types of evidence which featured regularly in sexual offences trials of the past. Applications that are premised on damaging the complainant's credibility, based on the argument that evidence precluded by s.274 should be admitted under s.275 because it presents the jury with 'the full picture' of the parties' relationship, or is required by

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<sup>71</sup> *DS* (note 61 above), at [27].

<sup>72</sup> The categorisation of the three tests that follows mirrors that outlined by one of the co-authors of this report, Eamon P. H. Keane, in an earlier report co-written with Tony Convery, see Eamon P. H. Keane and Tony Convery, *Proposal for Independent Legal Representation for Complainants where an Application is Made to Lead Evidence of their Sexual History and Character* (2020) p. 11 – 12. Available at: [www.law.ed.ac.uk/sites/default/files/2020-06/ILR%20Report%20Final%20Version%20June%200.pdf](http://www.law.ed.ac.uk/sites/default/files/2020-06/ILR%20Report%20Final%20Version%20June%200.pdf).

<sup>73</sup> *Wright v HM Advocate*, 2005 SCCR 389 and *Stewart v HM Advocate*, 2014 SCCR 1.

<sup>74</sup> *CH* (note 10, above) per Lord Carloway at [64].

the defence to rebut the complainer's account, have also been repeatedly rejected.<sup>75</sup> Whether evidence of pre- or post-charge sexual activity is even capable of demonstrating anything of relevance or value about the complainer's character has been questioned by the Appeal Court,<sup>76</sup> and although the court has not categorically stated that pre- and post-charge sexual activity with the accused will never be relevant and admissible, it has certainly reiterated that applications must specify the circumstances that demonstrate the connection between what are, on the face of it, unrelated events. Although his remarks were made *obiter* (that is, not part of the binding judgment), the Lord Justice Clerk noted in *CH* that an example of when sexual activity between the accused and the complainer within a very short time frame pre- or post-charge may be relevant and admissible was where it was suggested that it provided an alternative explanation for injuries, or the presence of scientific evidence such as DNA.<sup>77</sup> The legislation does not preclude the introduction of evidence of cohabitation between the parties, and an application is not required to lead evidence of this.<sup>78</sup> A s.275 application would be required where the special defence of consent is pled and the accused wishes to lead evidence of an account of the detail of the sexual activity that differs from that specified in the charge.<sup>79</sup>

A s.275 application is arguably also required to lead evidence of any other kind of sexual relationship between the parties.<sup>80</sup> Evidence of general sexual history of the complainer with unnamed third parties clearly falls to be excluded under the common law and the Act.<sup>81</sup> And while a s.275 application is not required to lead evidence of prior inconsistent statements made by the complainer about the incident specified in the charge,<sup>82</sup> it will be required where the prior inconsistent statement relates to something that is not the subject matter of the charge.<sup>83</sup>

As discussed below, the Crown have relatively recently taken the view that sexual behaviour spoken to by a complainer in a docket attached to the indictment also requires a s.275 application. A docket allows the Crown to lead evidence of matters related to a sexual offence that has been charged, including those that would not be competent for the trial court to hear if those matters were contained in a formal charge:

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<sup>75</sup> See e.g. *SJ v HM Advocate* (note 8, above) and *LL* (note 25, above).

<sup>76</sup> The Appeal Court has indicated that such an assertion ignores prior judicial authority about the appropriate construction of s.275(1). See the comments of Lord Turnbull in *CH* (note 10, above) at [137] and [138].

<sup>77</sup> *CH* (note 10, above) at [67].

<sup>78</sup> *DS* (note 61, above).

<sup>79</sup> *CH* (note 10, above) at [74]. See too Lord Matthews and Lord Beckett, *Preliminary Hearings Bench Book* (2020, Judicial Institute for Scotland) p.106. Available at [https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/preliminary-hearings-bench-book.pdf?sfvrsn=e0e66eef\\_2](https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/preliminary-hearings-bench-book.pdf?sfvrsn=e0e66eef_2)

<sup>80</sup> See the *obiter* remarks of Lord Gill in *MM v HM Advocate*, 2005 1 JC 102 and the discussion in the *Preliminary Hearings Bench Book*, *ibid.*, at p.104.

<sup>81</sup> *HMA v JG* (note 5, above).

<sup>82</sup> *CJM (No 2)* (note 21, above) at [45].

<sup>83</sup> *SJ* (note 8, above).

while the accused does not face any charges in respect of such matters, evidence in a docket can be of corroborative value.<sup>84</sup>

### Procedure in Respect of s.275 Applications

Any application under s.275 must be in writing and should clearly set out the nature of the evidence and any questioning proposed, the issues to which the evidence is considered relevant and the reasons for its relevance, and the inferences which the applicant proposes should be drawn from it.<sup>85</sup>

The application will not be considered by the court unless it is made at least seven clear days before the preliminary hearing if the matter is being prosecuted in the High Court and not less than fourteen clear days prior to trial in any other case, though an exception can be made to allow late applications if 'special cause' is shown.<sup>86</sup> Late applications may occur, for example, where an issue only becomes relevant because a complainant has unexpectedly given evidence on that issue at trial, or due to administrative scheduling errors made by counsel in advance of the preliminary hearing.<sup>87</sup> The party making the application must send a copy of it to the other party.<sup>88</sup> Further, following the case of *RR*, it is the duty of the Crown to ascertain a complainant's views on a s.275 application prior to the preliminary hearing that will decide on the application, and to present that position to the court.<sup>89</sup>

The court may decide on the s.275 application with or without hearing evidence.<sup>90</sup> In solemn prosecutions, the court can determine s.275 applications at obligatory pre-trial case management hearings (such as 'First Diets' or 'Preliminary Hearings') where parties' preparation for trial is assessed and preliminary matters are dealt with.<sup>91</sup> In the context of rape or attempted rape cases, the High Court can consider a s.275 application at a preliminary hearing unless it considers it would be inappropriate to do so,<sup>92</sup> or may postpone consideration of a s.275 application to a 'continued' preliminary hearing.<sup>93</sup>

The lack of opposition (from Crown or defence) to a s.275 application does not determine the outcome. For the application to succeed, the court itself must be satisfied that the evidence is admissible at common law and that the cumulative three tests discussed above have been met.<sup>94</sup> The importance of judicial oversight of

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<sup>84</sup> See s.288BA of the 1995 Act and *HM Advocate v Moynihan*, [2018] HCJAC 43.

<sup>85</sup> S.275(3) of the 1995 Act.

<sup>86</sup> S.275(B)(1)(a) and (b) of the 1995 Act.

<sup>87</sup> See *Doran v HM Advocate*, [2023] HCJAC 15 as to what constitutes special cause in this context.

<sup>88</sup> S.275(4)(a) and (b) of the 1995 Act.

<sup>89</sup> *RR v HM Advocate* (note 9, above).

<sup>90</sup> S.275(5) of the 1995 Act.

<sup>91</sup> See s.71(2A) and s.72(6)(b)(iii) of the 1995 Act.

<sup>92</sup> S. 72(6)(b)(iii) of the 1995 Act.

<sup>93</sup> See s.72(9) of the 1995 Act.

<sup>94</sup> *RN v HM Advocate*, [2020] HCJAC 3.

applications and questioning on the matters raised in the application has been repeatedly emphasised by the Appeal Court.<sup>95</sup>

The effect of these provisions is that, under solemn procedure, the vast majority of s.275 applications are determined pre-trial, though as noted, late s.275 applications can be determined on 'special cause shown'.<sup>96</sup> Where an application is made late, during the trial, the 1995 Act directs the court to consider the application (and any associated submissions) outwith the presence of the jury, the complainer, any person cited a witness and the public.<sup>97</sup>

When the court decides on a s.275 application it must state the reasons for its decision and may make the decision subject to any condition, which may include compliance with specific directions.<sup>98</sup> Even after a s.275 has been granted, the court is empowered to limit the extent of such an application as it thinks fit at any time.<sup>99</sup> A court's decision may be appealed by the Crown or the defence.<sup>100</sup> Grounds for appeal include whether the judge who considered the application has erred in the exercise of their discretion, which is to be distinguished from whether the appeal court would have determined the application differently.<sup>101</sup>

## In Summary

The law and procedure in this area is complex and has been subject to intensive judicial development and political intervention in the last few decades. It has, at times, generated dissenting judicial opinion and judgments that are not easily reconcilable. The difficulties that have arisen for all stakeholders in the criminal justice system as a result is a theme that we explore in later sections of the report. It is clear that the Appeal Court has taken an increasingly restrictive approach in regard to assessments of relevance over time. What has remained unclear, though, is how that law has been operating in practice in trials at first-instance. Previous research, in Scotland and elsewhere, has identified problems 'at the coalface' with the application of rape shield laws. In the next Section, we provide a short overview of these research findings, before turning to our own methods, data and findings.

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<sup>95</sup> See e.g. *MacDonald v HM Advocate* (note 6, above).

<sup>96</sup> S.275B(1) of the 1995 Act.

<sup>97</sup> S.275B(2) of the 1995 Act.

<sup>98</sup> S.275(6) of the 1995 Act.

<sup>99</sup> S.275 (9)(a) and (b) of the 1995 Act.

<sup>100</sup> S.74 permits any party to appeal a decision taken at a preliminary diet prior to trial. Leave must be sought in terms of s.74(2A).

<sup>101</sup> See *Dunnigan v HM Advocate*, 2006 SCCR 398.

## Section 3: Literature Review

In recent decades, in Scotland as elsewhere, laws on sexual offences, and the criminal justice processing of those alleging and those accused of sexual violence, have been subject to review and reform. A long-overdue modernisation of the law culminated in the Sexual Offences (Scotland) Act 2009. Alongside this substantive law reform, a series of evidential and procedural changes have been introduced. These reforms were intended, amongst other things, to increase protections afforded to complainers through rape shield legislation (discussed in Section 2) and to assist vulnerable witnesses (including complainers in sexual offence trials) in the giving of testimony at trial through use of ‘special measures’, such as live-links, and now evidence on commission.

It is well-established, however, that changes to the law do not always lead to changes in practice, and they can bring additional, unintended consequences in their application. Thus, notwithstanding such interventions, academics, third sector organisations and independent reviewers have continued to identify various structural and practical obstacles to securing justice – both procedural and substantive – for rape complainers. For some, success in this arena requires increased reporting, prosecution and conviction of those who perpetrate sexual violence, and a focus on outcomes and attrition. In this context, concerns regarding the impact of corroboration rules, use of the ‘not proven’ verdict and jury reliance on gender stereotypes have all been raised as impacting negatively on the prospects for prosecution and conviction in Scotland.<sup>102</sup> On the other hand, the defence bar has often criticised some of the proposed reforms in the area of sexual offences, suggesting that fair trial rights are imperilled, or that there is a problematic over-emphasis on increasing the conviction rate *per se*.<sup>103</sup> Others have focused more on the traumatising effects of the justice process itself, for example the treatment of vulnerable witness-complainers by the police, the Crown Office and in court.<sup>104</sup>

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<sup>102</sup> See further, for example, Ilona Cairns, ‘Access to Justice for Complainers? The Pitfalls of the Scottish Government’s Case to Abolish Corroboration’ in P. Duff and P.R. Ferguson (Eds) *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh: Edinburgh University Press, 2017), pp. 41-66; James Chalmers, Fiona Leverick and Vanessa E. Munro, ‘The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials’ (2021) 48(2) *Journal of Law and Society* 226-249; James Chalmers, Fiona Leverick and Vanessa E. Munro, ‘Beyond Doubt: The Case Against Not Proven’ (2022) 85(4) *Modern Law Review* 847-878; Eamon Keane, ‘Scotland’s Not Proven Verdict: The Nightmare of History?’ in E. Keane and P. Robson (Eds.) *The Ian Willcock Collection on Law and Justice in the Twenty First Century* (Fairleigh Dickson University Press, 2023), 37.

<sup>103</sup> See e.g. *Response from the Faculty of Advocates to the Scottish Government Consultation on the Not Proven Verdict and Related Reforms* (The Faculty of Advocates, 2022,) and *The Law Society of Scotland Consultation Response Improving Victims’ Experiences of the Justice System* (The Law Society of Scotland, 2022).

<sup>104</sup> Isla Callander, ‘The Challenge of ‘Best Evidence’ in Rape Trials: The Victims and Witnesses (Scotland) Act 2014’ (2014) 18(2) *Edinburgh Law Review* 279-284; Oona Brooks-Hay, Michelle Burman and Lisa Bradley, *Justice Journeys: Informing Police and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (Scottish Centre from Crime and Justice Research

In recent years, the Scottish Government has put in place a number of reviews and initiatives to investigate specific features of sexual offences law and policy, including Lady Dorrian's judicial-led review *Improving the Management of Sexual Offence Cases*,<sup>105</sup> the Victims' Taskforce chaired by the Lord Advocate and the Cabinet Secretary for Justice,<sup>106</sup> the Scottish Sentencing Council's commitment to propose sentencing guidelines in some sexual offences cases.<sup>107</sup> In 2020 the Equality and Human Rights Commission (EHRC) Scotland also undertook a literature review on *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials*.<sup>108</sup> Most recently, in 2023, COPFS undertook a review of how its prosecutors deal with reports of sexual offences.<sup>109</sup> Of these, only the EHRC's review focused exclusively on the rape shield, although others have noted that the implementation of rape shield provisions could be more trauma-informed. In this context, the provision of Independent Legal Representation ('ILR') to complainers in Scotland – first suggested by Raitt in general terms<sup>110</sup> and then proposed by Keane and Convery specifically in relation to s.275 hearings<sup>111</sup> – has also been supported by the ECHR and the Dorrian Review, and now taken up by the Scottish Government in the Victims, Witness and Justice Reform Bill introduced in 2023.

### Empirical Research on the Implementation of the Rape Shield in Scotland

Limited empirical research on the implementation of the rape shield provisions in Scotland over the last two decades means that our understanding of the application and impact of these provisions has continued to rely on pre-existing, and now quite dated, research. Brown et al published the first comprehensive study of the statutory rules on introducing sexual history and character evidence in Scotland, then contained within the 1985 Act.<sup>112</sup> In this important study, the authors reported that around half of

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Report 4/2019, 2019) available at <https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report-Aug-2019-FINAL.pdf>; Mary Aspinall-Miles 'The Fundamentals of Mobile Phone Evidence' (2019) *Counsel Magazine*. Available at: <https://www.counselmagazine.co.uk/articles/r-v-e-and-the-great-disclosure-debate>.

<sup>105</sup> <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/03/20/improving-the-management-of-sexual-offence-cases>. The final report, published in March 2021: <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>, made a number of recommendations for consideration by the Scottish government including specialist sexual offences courts and piloting judge-only trials in sexual offences.

<sup>106</sup> See <https://www.gov.scot/groups/victims-taskforce/> for minutes and papers from the meetings.

<sup>107</sup> See the reports produced in 2021, analysing sentencing in sexual offences and people's perceptions of sentencing in these cases: <https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualitative-research-of-sexual-offences-final-july-2021.pdf>; and <https://www.scottishsentencingcouncil.org.uk/media/2086/20210203-sexual-offences-involving-rape-lit-review.pdf>.

<sup>108</sup> Sharon Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials* (2020) (Edinburgh: Equality and Human Rights Commission Scotland).

<sup>109</sup> See further <https://www.copfs.gov.uk/about-copfs/sexual-offences-review/>.

<sup>110</sup> Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) *Criminal Law Review* 729-729.

<sup>111</sup> Eamon Keane and Tony Convery (note 72, above).

<sup>112</sup> Brown et al (note 42, above).



all complainers in sexual offences jury trials were asked about their sexual history, with a half of those enquiries relating to sexual conduct with a third party (not the accused). They also found that in many cases where such sexual history evidence was introduced, it was done without any formal application to the court for prior approval to do so.<sup>113</sup> As discussed in Section 2, the findings of this research provided additional impetus to the Scottish Executive in pursuing reforms intended to tighten up procedures for introducing (and seeking permission to introduce) sexual history evidence. More specifically, as noted above, the Sexual Offences (Procedure and Evidence) Scotland Act 2002 resulted in new provisions under s.274 and s.275 of the Criminal Procedure (Scotland) Act 1995 that remain in place today. In addition, in 2002, a series of further reforms were introduced, mandating that s.275 applications were to be made in writing, and stipulating that s.274 prohibitions on admission applied to both the defence and Crown. It also extended the protection to the introduction of character, as well as specifically sexual history, evidence.

In the wake of these revisions, a further study was conducted by Burman et al.<sup>114</sup> It reported that the number of sexual history applications in Scottish courts had increased substantially since the time of the previous Brown et al study. This was, however, somewhat to be expected due to the expanded scope of the legislation: previously verbal applications were now in writing, with introduction of applications by the Crown and introduction of character evidence now also covered by the rape shield. More specifically, the study found that, of 231 sexual offences cases indicted to the High Court over a 12-month period (2004-05), 72% included a s.275 application (with 76% of rape trials involving such applications).<sup>115</sup> Just 7% of these s.275 applications were disallowed, and in all but a small number of cases, all evidence allowed in the application was introduced in the trial, usually through cross-examination of the complainer.<sup>116</sup> Burman et al also found that around 20% of the evidence sought in s.275 applications related to sexual history with someone other than the accused, who was not a third party to the offence libelled, including questioning and evidence about the extent of the complainer's previous sexual history, sexual practices (such as use of sex aids), virginity, contraceptive history and prostitution.<sup>117</sup>

Several of the legal practitioners interviewed in the Burman et al research reported that, in their view, notwithstanding the common law tests and protections under s.274, it was relatively easy to demonstrate sufficient relevance of sexual history or character evidence in order to secure permission for its admission,<sup>118</sup> with areas of focus in relation to character being particularly targeted around the complainer's use of alcohol

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<sup>113</sup> Brown et al (1992) (note 42, above) at p. 59-60.

<sup>114</sup> Burman et al (note 1, above).

<sup>115</sup> Ibid., at p. 2 and p. 115.

<sup>116</sup> Ibid., at p. 2.

<sup>117</sup> Ibid., at p. 60.

<sup>118</sup> Ibid., at p. 133.

or drugs.<sup>119</sup> In 14 of the 32 trials that they observed in detail, moreover, the authors reported that questioning was led that ought to have been captured by the provisions, but which had not been explicitly agreed in the application, with objections to the introduction of such material at trial by counsel or judges being infrequent. Based on these findings, Burman et al concluded that the aims of the 2002 legislation had not been met. Indeed, they suggested that “the 2002 Act, launched with ministerial hopes of curbing sexual history and character evidence...has had the largely unanticipated and unintended consequence of the introduction of *more* sexual history and character evidence,” albeit that 40% of this evidence would not have required an application under the previous provisions.<sup>120</sup> That said, they did also note that the higher numbers of applications under the new rules had at least “rendered this [practice of introducing sexual history and character] much more visible,” and they suggested that this could, as a result, “enhance the possibility of informed debate” about the regime’s operation in the future.<sup>121</sup>

The publication of Burman et al’s study in 2007 was followed by a long period where no further data on the operation of s.275 applications was publicly available, until figures on applications were released by Scotland’s Cabinet Secretary for Justice on 26<sup>th</sup> June 2016. These figures are set out in Table 1.<sup>122</sup> They showed that in the three-month period from January to April 2016, there were 57 s.275 applications (52 in the High Court and 5 in the Sheriff Courts). Of the 52 High Court applications, 42 were granted in full, 5 were granted in part, and 5 refused. Of the 5 that were rejected, 4 of them were not challenged by the Crown (that is, the judge rejected the application without Crown intervention). In fact, of the 57 total applications, only 6 were opposed by the Crown (4 in the High Court and 2 in the Sheriff Courts), while 51 were unopposed (48 in the High Court and 3 in the Sheriff Courts).

Table 1: Applications under s275 of 1995 Act between 11 Jan – 11 April 2016

	No. of s.275 applications	No. accepted (fully or in part)	No. rejected	No. unopposed by Crown	No. challenged by Crown
<b>High Court</b>	52	47	5	48	4
<b>Sheriff Court</b>	5	1	4	3	2
<b>Total</b>	57 (100%)	48 (84%)	9 (16%)	51 (90%)	6 (10%)

Although only a three-month snapshot, these figures suggest that Crown prosecutors were not routinely challenging applications to introduce sexual history evidence. The reasons for this cannot be gleaned from the statistics alone. Since COPFS did not

<sup>119</sup> Ibid., at p. 3.

<sup>120</sup> Ibid., at p. 6.

<sup>121</sup> Ibid., at p. 7.

<sup>122</sup> Letter from Michael Matheson to Margaret Mitchell, MSP. This is no longer available online, but was cached at <http://www.parliament.scot/General%20Documents/20160624CSfJtoConvenerILR.pdf>.

routinely collect data on s.275 applications at this time, the method used to collect the figures here is also unknown.

Later in 2016, a 3-month “monitoring exercise of the prosecution attitude to defence s.275 applications lodged at the time of the preliminary hearing and their outcomes” was undertaken by the Inspectorate of Prosecution in 2017 (12/12/16 – 12/03/17).<sup>123</sup> As part of this, 14 s.275 applications were reviewed, though the Inspectorate do not state how many cases these refer to, or how many potentially applicable cases there were in total during this period. Of the 14 applications selected, 5 were granted unopposed and without question; in 7 others, though the application was also unopposed, the judge did question some aspects of the application. In 3 of those cases, the judge ultimately granted the application in full or part, and in the remaining 4, the judge continued them for more information to be gathered. In the other 2 cases in the sample, both were opposed by the prosecution and ultimately held by the court to be irrelevant, with the applications thus refused. Though this sample suggests, in line with Burman et al’s findings, that there was a low incidence of challenge to applications, the Inspectorate concluded that there was limited value to this type of sampling exercise: “[o]ther than providing some re-assurance that the prosecution and court are questioning the relevance and scope of such applications, where appropriate, the exercise is of limited value to assess the effectiveness of the legislation.”<sup>124</sup> It is unclear on what basis the Inspectorate were reassured by their findings, but what is clear is that, in the absence of further context to what is provided in the report, or comparative data for other time periods, it is impossible to offer any nuanced analysis of these statistics and the outcomes in the sample.

Though not directly focussed on the scope and implementation of rape shield procedures, in 2020, Keane and Convery published a report proposing legal aid-funded legal representation for sexual offences complainers where a s.275 application was made.<sup>125</sup> The authors pointed out that such a right in Scotland would correspond with that of those whose sensitive records are sought by the defence, as set out in *WF v Scottish Ministers*.<sup>126</sup> They cited, in particular, the words of Lord Glennie in *WF*, which could apply equally to complainers in s.275 hearings: “If the complainer is not

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<sup>123</sup> Inspectorate of Prosecution in Scotland *Thematic review of the investigation and prosecution of sexual crimes*. (Edinburgh: Inspectorate of Prosecution, 2017). Available at: <https://www.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/>.

Applications made at trial (which may well have been a significant number) were not included in the monitoring exercise. A follow-up review was published in 2020, in the first wave of the Covid pandemic: IPS, *Follow-up review of the investigation and prosecution of sexual crime* (2020).

<sup>124</sup> Inspectorate Thematic Review, *ibid.*, at para 371.

<sup>125</sup> Eamon Keane and Tony Convery (note 72, above). ILR was also considered in 2014 by Chalmers as part of the Bonomy Expert Review Group – James Chalmers, ‘Independent legal representation for complainers in sexual offence cases’ in James Chalmers, Fiona Leverick and Elizabeth Shaw (Eds), *Post-Corroborator Safeguards Review Report of the Academic Expert Group* (Edinburgh: The Scottish Government, 2014), pp. 185-189; and in 2010 by Raitt - Fiona Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Edinburgh: Rape Crisis Scotland, 2010).

<sup>126</sup> *WF v Scottish Ministers* 2016 SLT 359.

given the opportunity to be heard, how is the court to carry out the balancing exercise required of it?”<sup>127</sup> This proposal was subsequently put forward as a recommendation by the Dorrian Review group in their 2019 report, and has now been taken up by the Scottish Government in their Victims, Witnesses and Justice Reform (Scotland) Bill 2023. As we discuss further below, however, it was clear in the context of the present research that, notwithstanding the arguments in its favour, given the pressures of work currently faced by the Crown and criminal defence bar, difficult questions remain regarding the implementation of this entitlement, including who would perform this role in practice.<sup>128</sup>

In 2020, the Equality and Human Rights Commission published *The Use of Sexual History, Bad Character Evidence and ‘Private Data’ in Scottish Sexual Offences Trials*.<sup>129</sup> This pointed to significant gaps in knowledge relating to: how COPFS make and respond to s.275 applications; current practice, following *RR* (discussed in Section 2) on communication with complainers about their views on s.275 applications; and broader management of sexual offences cases. It also highlighted the absence of robust statistical data on the number, content and grant-rate of s.275 applications, and the need for methodologically rigorous, qualitative and quantitative research on the use of sexual history and character evidence in rape trials. In response to this, in 2022, the Chief Inspectorate of Prosecutions initiated a review of the operation of s.274 and s.275 in cases between January and June 2021. This resulted in a sample of 179 High Court cases that included one or more s.275 applications. Of these, a statistically significant random sample of 123 cases were reviewed, which involved a total of 173 complainers in respect of whom 238 s.275 applications were made (5 of these applications were not available on file so the Inspectorate’s analysis is based on 233 applications). Analysis revealed that 38% of the applications were made by the Crown and 62% by the defence.<sup>130</sup> Of these, the Crown opposed 47% of defence applications in full or in part, whilst the defence opposed 7% of Crown applications. In terms of outcomes, 78% of the s.275 applications were granted in full or in part (85% of Crown applications; 74% of defence applications), 7% were withdrawn (9% of Crown applications; 6% of defence applications), and 15% were refused (6% of Crown applications; 20% of defence applications).

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<sup>127</sup> Keane and Convery (note 72, above) at p. 19, quoting from *WF v Scottish Ministers* 2016 *ibid.*, at para 39.

<sup>128</sup> Other jurisdictions, such as Ireland and Canada, have introduced similar schemes, where researchers have found some practical challenges in delivering Independent Legal Representation (ILR) to sexual offences complainers. These have included in relation to the perception that it unbalances the equality of arms between prosecution and accused; the risk of complainer ‘coaching’; and a hierarchisation of different sorts of vulnerable complainers. example, Mary Iliadis, Kate Fitz-Gibbon and Sandra Walklate, ‘Improving Justice Responses for Victims of Intimate Partner Violence: Examining the merits of the provision of independent legal representation’ *International Journal of Comparative and Applied Criminal Justice* (2021) 45(1): 105-114.

<sup>129</sup> Cowan (note 108, above).

<sup>130</sup> HM Inspectorate of Prosecution in Scotland (2022) (note 12, above), at para 41.

Table 2: Data from Inspectorate Review (2022)

Cases reviewed	No. of complainers with s.275	No. of s.275 Applications analysed	% made by Crown/ Defence	% opposed by Crown/ Defence in full or part	% granted Crown/ Defence in full or part	% refused/ withdrawn
123	173	233	38/ 62	47/ 7	85/ 74	15/ 7

The Inspectorate found some examples of good practice, including in relation to the drafting of s.275 applications and objections to irrelevant defence applications. They also identified improved communication with the complainer about the s.275 application. However, they stated that the short time-scales for contacting complainers allowed for within the current procedure was not in accordance with complainers' needs and was insufficiently supportive or trauma-informed. They recommended that COPFS provide staff with guidance on when it might not be "appropriate to engage the complainer about s.275 applications".<sup>131</sup> They also reported that, from their analysis, complainers were not routinely told about the outcome of the s.275 application, and that in being asked to give their views they were rarely given any indication by the Crown as to what they considered the likely outcome of the application would be. Noting that COPFS were unable to easily track which cases included a s.275 application, the Inspectorate's sample was identified manually by COPFS staff, alongside data made available from SCTS. The Inspectorate also observed that the numbers identified by COPFS did not match those recorded by SCTS, probably due to differences in data collection. This problem of identifying and tracking relevant cases and accompanying records was one we also faced in this research, as explained in the methods below, and improved record-keeping and record-management are central recommendations arising from our research.

### Empirical Research on the rape shield in other jurisdictions

Research on the effect of rape shield provisions in other common law jurisdictions has been conducted in recent years, which has illuminated similar challenges to those experienced in Scotland, the findings from which may thus also be instructive when considering potential reform. For example, in England and Wales, in 2017, the Ministry of Justice and Attorney General's Office issued a joint Command Paper on *Limiting the Use of Complainants' Sexual History in Sex Cases*.<sup>132</sup> This followed an analysis

<sup>131</sup> Ibid., at para 161. We understand from communications with COPFS that new (not publicly available) guidance from 2022 has a specific section on non-engagement with complainers in exceptional circumstances, which outlines some situations where engagement with the complainer may not be appropriate. This guidance also includes details of the appropriate process that should be followed in such circumstances.

<sup>132</sup> Ministry of Justice and Attorney General's Office, 'Limiting the Use of Complainants' Sexual History in Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on the Admissibility of Sexual History Evidence in Practice' (London: Ministry of Justice, 2017) Cm 9547.

undertaken by the Crown Prosecution Service (CPS) into the frequency and outcome of applications to introduce evidence or questioning about complainants' sexual history in a sample of 309 rape cases that finalised in 2016. That CPS analysis indicated that applications were made to adduce such evidence in 13% of cases, but that the bar for disclosure was high, with no such evidence ultimately being introduced in 92% of cases. From this, the CPS concluded that confidence in the process was high, notwithstanding earlier research indicating an over-expansive use of such evidence.<sup>133</sup>

Similar confidence-inspiring findings in England and Wales were also presented in an independent academic report conducted by Laura Hoyano on behalf of the Criminal Bar Association in 2018.<sup>134</sup> This study of s.41 of the Youth Justice and Criminal Evidence Act 1999 (the provision on the admissibility of sexual history evidence) found that, across a sample of 565 complainants from 105 Crown Courts, a relatively small proportion – 18.5% – faced questioning on their previous sexual history at trial, following the granting of an order under s.41. It suggested that most such successful applications related to narrow points that could be covered briefly and did not allow for wide-ranging cross-examination of complainants. Hoyano also reported that of the 140 barristers whose views were sought in the study, there were many who felt that the provisions were too complex and may not be operating in practice as intended; but none who considered the provisions to be operating in too permissive a manner or that supported the introduction of tighter restrictions on the admission of such evidence. However, these findings sit at odds with the findings from the Northumbria Court Observers Panel, published in 2017,<sup>135</sup> which found that in over one-third of the 30 trials observed over a 2-year period, there was questioning of rape complainants on matters appropriately falling within the ambit of rape shield protections, often in contravention or circumvention of the procedural rules. Hoyano addressed this divergence by noting that observers in the Northumbria study were not legally qualified and so not appropriately positioned to accurately determine the application of the rape shield to the case. However, Hoyano's study did not include observation of rape trials or assessment of case files, instead relying on surveys with members of the Criminal Bar Association about their last 10 'sexual' cases, meaning that the data relied on the memory and accurate recording of cases by barristers.<sup>136</sup> Moreover, asking barristers about their experiences of the operation of s.41 in the last 10 cases they handled only

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<sup>133</sup> See in particular Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (London: Home Office, 2006).

<sup>134</sup> Laura Hoyano, 'The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from the Barristers' Row – An Independent, Empirical Study Commissioned by the Criminal Bar Association' (Oxford: Wadham College, 2018); Laura Hoyano, 'Cross-Examination of Sexual Assault Complainants on Previous Sexual Behaviour: Views From the Barristers' Row' (2019) *Criminal Law Review* vol. 2, pp. 75–111.

<sup>135</sup> Ruth Durham Rachel Lawson, Anita Lord and Vera Baird QC, 'The Northumbria Court Observers Panel: Report on 30 Rape Trials 2015-16' (Northumbria: Northumbria Police and Crime Commissioner, 2017), available at <https://archive.northumbria-pcc.gov.uk/v2/wp-content/uploads/2014/08/Seeing-is-Believing.pdf>.

<sup>136</sup> Hoyano (2018) (note 134, above) at p.40.

tells us about their opinions of its recent operation and is, therefore, not the most robust way of fully assessing whether the law is achieving its purpose.

Debates over the operation of s.41 of the Youth Justice and Criminal Evidence Act 1999 in England and Wales have continued. Indeed, as Russell and Conaghan have recently summarised it, “at best the contemporary picture remains patchy, evidencing a clear need for more extensive, up to date data on the use of sexual history evidence in England and Wales. At worst, we confront a minefield of unresolved disagreement about the problem to be solved, the interests at stake and the underlying principles of justice that are, or ought to be, engaged”.<sup>137</sup> Intervening most recently into this “minefield” has been a Consultation Paper, produced by the Law Commission in 2022, which has posed questions regarding the need to simplify, and ensure a more consistent and robust approach to, current ‘gateways’ for the admissibility of such evidence. It has also proposed the introduction of Independent Legal Advice, and Representation, to complainants in respect of such applications.<sup>138</sup>

In Ireland, an application to introduce ‘sexual experience evidence’ can be made by the prosecution by or on behalf of the accused person before, or as soon as practicable after, the commencement of the trial.<sup>139</sup> A recent review of sexual offences by O’Malley recommended the introduction of preliminary hearings to adjudicate such applications and stricter time limits.<sup>140</sup> A small study conducted by Leahy, in partnership with Rape Crisis, which involved interviews with 12 court accompaniment workers and 16 legal professionals, reported a high degree of confidence that relevant rape shield provisions were being applied well, with judges actively and strictly enforcing its implementation. Nonetheless, Leahy remained cautious and concluded that more fine-grained research into case files would be required in order to be reassured that the current regime represents best practice, and noting that the current absence of a definition of ‘sexual experience evidence’ may be especially unhelpful.<sup>141</sup>

In Northern Ireland, the admission of sexual history evidence in criminal trials is governed by Article 28 of Criminal Evidence (Northern Ireland) Order 1999. Notwithstanding limited analysis of the substance of applications, research has indicated that applications to lead such evidence are often made “close to, or after the commencement of the trial [and] sometimes shortly before the complainant is due to

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<sup>137</sup> Yvette Russell and Joanne Conaghan, *Sexual History Evidence and the Rape Trial* (Bristol: Bristol University Press, 2023), at p.127.

<sup>138</sup> Law Commission for England and Wales, ‘Evidence in Sexual Offences Prosecutions: A Consultation Paper’ (London: Law Commission, 2023), Consultation Paper 259, available at <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/05/ESOS-CP-latest-version-1-1.pdf>.

<sup>139</sup> Criminal Law (Rape) Act 1981, s.4A(2) (as amended by section 34 of the Sex Offenders Act 2001).

<sup>140</sup> Tom O’Malley, ‘Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences’ (Dublin: Department of Justice and Equality, 2020).

<sup>141</sup> Susan Leahy ‘The Realities of Rape Trials in Ireland: Perspectives from Practice’ (Dublin: Dublin Rape Crisis Centre, 2021), at p. 25 and p. 28.

give evidence.”<sup>142</sup> The *Gillen Review Report into the Law and Procedure in Serious Sexual Offences in Northern Ireland* recommended, amongst other things, publicly funded separate legal representation for complainants from the point of reporting up to but excluding the trial (until further evaluation is undertaken), as well as the legal representation for complainants at hearings to object to the introduction of sexual history evidence.<sup>143</sup> In April 2021, the Northern Irish Government launched a pilot scheme in partial fulfilment of this aim where publicly funded independent legal advice was made available to complainants at the time of reporting an alleged offence to the police.

Meanwhile, in New South Wales, Australia, Julia Quilter and Luke McNamara in their study of the transcripts of 75 sexual offences trials between 2014 and 2020, have reported that ‘sexual experience’ evidence was raised in half the trials that they had full documentation for, and that there was little support for the claim often made (one also made to us during interviews, as we discuss further below) that the legislation was overly restrictive, since counsel were more often than not able to ask most or all of their intended questions.<sup>144</sup> The researchers also noted that, despite clear rules, defence counsel were often given discretion to ask questions across a wide terrain, underpinned by outdated gender stereotypes and myths about how ‘real rape’ victims should behave. We return to these themes in the Trial Analysis Section, below. We note here, though, Quilter and McNamara’s suggestion that the limits of possible law reform and procedural improvement within the general adversarial criminal justice system may have been reached, which prompts them to suggest that it is time to consider alternatives such as specialist courts, or restorative justice mechanisms.<sup>145</sup>

In New Zealand, in research on intimate partner rape, McDonald and her colleagues recently reviewed 30 rape trials that occurred between January 2010 and September 2015 in 9 courts across New Zealand, alongside 10 rape trials heard between November 2017 to November 2018 as part of a pilot of Specialist Sexual Violence Courts in two regional jurisdictions. The researchers concluded that, notwithstanding efforts at clarification and reform, there remained significant inconsistencies regarding which evidence was seen to fall within the scope of rape shield protections, with some evidence that clearly ought to have required prior approval being admitted at trial without appropriate scrutiny.<sup>146</sup> They also reported that irrelevant or insufficiently

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<sup>142</sup> Iliadis et al (note 128, above) at p.105.

<sup>143</sup> Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Northern Ireland Department of Justice, 2019) p. 187.

<sup>144</sup> Julia Quilter and Luke McNamara, ‘Experience of Complainants of Adult Sexual Offences in a District Court of NSW: A Trial Transcript Analysis,’ *Crime and Justice Bulletin* No 259 (Sydney, NSW: Bureau of Crime Statistics and Research, 2023), at p. 12. Available at <https://www.bocsar.nsw.gov.au/Publications/CJB/CJB259-Report-Transcript-Analysis-of-NSW-Sexual-Offences-Trial.pdf>.

<sup>145</sup> *Ibid.*, at p. 37.

<sup>146</sup> Elisabeth McDonald, ‘Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot’ (Canterbury: University of Canterbury Press, 2020), available at <https://ir.canterbury.ac.nz/items/70e38103-b65e-4b8f-9187-d1f756e4aca7>.



probative information about complainants' character or experience in sexual matters was sometimes admitted, in particular regarding their 'flirting' with another man or their relationship status at the time of the alleged rape. The research team found that, particularly in cases heard outside of the specialist sexual violence court pilot, decisions to admit sexual history evidence "exposed reliance on an impermissible link between consent on a previous occasion, with someone else, and consent to sex with the defendant."<sup>147</sup> They concluded that evidence regarding the sexual experience of the complainant with the defendant was often admitted despite it having – in their view – insufficient relevance to the issues of consent or credibility. Thus, while McDonald reported that specialist courts could reduce the admission of irrelevant evidence concerning information about the complainant or her family (such as employment status, number of children or educational qualifications), with some evidence of a more consistent approach to admissibility tests regarding other types of evidence, she noted there was no significant and sustained difference regarding decisions as to what was permitted by way of sexual history evidence under rape shield provisions as between these specialist and mainstream courts.

### Other relevant research findings

Returning closer to home, in Scotland, there have also been broader studies that, whilst going beyond the operation of s.274 and s.275, offer useful insights into its operation, and may shed light on why problems in the implementation of rape shield provisions in practice remain. For example, a survey on social attitudes, published in 2015, found that a degree of victim-blaming persists in society, with such attitudes closely linked to beliefs about appropriate sexual behaviour.<sup>148</sup> Just over half (58%) of those surveyed believed that a woman who wore revealing clothing was 'not at all to blame' for being raped, and 60% said the same of a woman who was very drunk. However, this leaves around 40% who believed that such women were to some degree to blame. What is more, 23% of respondents agreed with the statement that 'women often lie about being raped', with women, older people, and those not receiving higher education more likely to agree. Although the views surveyed here are not directly linked to the relevance of a complainant's sexual history, these members of the public are potential jurors in rape and sexual assault cases, and as we will discuss in the Trial Analysis Section, some questioning of complainants, whether allowed under a s.275 application or not, has the capacity to frame issues in ways that draw on these problematic beliefs about rape.

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<sup>147</sup> Ibid., at p. 196.

<sup>148</sup> Scottish Government, 'Scottish Social Attitudes Survey 2014: Attitudes to Violence Against Women in Scotland' (Edinburgh: Scottish Government, 2015), available at <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2015/11/scottish-social-attitudes-survey-2014-attitudes-violence-against-women-scotland/documents/scottish-social-attitudes-survey-2014-attitudes-violence-against-women-scotland/scottish-social-attitudes-survey-2014-attitudes-violence-against-women-scotland/govscot%3Adocument/00489760.pdf>.

Of further significance in that context are also the findings of a large-scale study on Scottish juries published by the Scottish Government in 2019.<sup>149</sup> One of the trial scenarios given to mock juries in that research involved parties who had previously cohabited in an intimate relationship, and an allegation of rape made in relation to a post-separation meeting. Researchers highlighted the role that dubious assumptions about rape appeared to play in jury deliberations.<sup>150</sup> More specifically, they reported that a substantial proportion of mock jurors thought that non-consensual sex would have been unlikely because there was no (documented) history of abuse between the parties, and so the complainer would have been able to express resistance sufficiently forcefully. Participants also often intimated that, given this prior relationship, the parties' emotions might have been 'complicated' following relationship break down, and that, in the midst of this, the accused might have had a reasonable belief in consent, despite verbal protests from the complainer, because of 'mixed messages' and the fact of previous intimacy. This was relied upon by some to suggest that the complainer may have made a false complaint because she was aggrieved that the accused did not want to resume their relationship after they had consensual sex together.

The transferability of findings from studies such as this, which rely on trial simulations, to the realities of the courtroom have been contested, with a contemporaneous study in England and Wales that relied on post-deliberation surveys with real jurors suggesting that concerns about stereotype and misconception within the jury room may have been exaggerated.<sup>151</sup> However, recent work in New Zealand, which has combined trial observation with post-deliberation interviews with serving jurors regarding their assessments of the evidence has produced findings that broadly align with the Scottish Jury Study,<sup>152</sup> as well as with emerging work using trial simulation methods in England and Wales to directly explore the impact on volunteer jurors of the admission of sexual history evidence in reconstructed rape trials.<sup>153</sup>

Against this backdrop of existing research, which has consistently highlighted that the pace of change on the ground is slow, despite reformist efforts, the authors proposed to carry out a detailed examination of the current operation of s.274 and s.275 of the

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<sup>149</sup> Rachel Ormston, James Chalmers, Fiona Leverick, Vanessa Munro and Lorraine Murray, 'Scottish Jury Research: Findings from a Large Scale Mock Jury Study' (Edinburgh: Scottish Government, 2019), available at <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/10/scottish-jury-research-fingings-large-scale-mock-jury-study-2/documents/scottish-jury-research-findings-large-scale-mock-jury-study/scottish-jury-research-findings-large-scale-mock-jury-study/govscot%3Adocument/scottish-jury-research-findings-large-scale-mock-jury-study.pdf>.

<sup>150</sup> Ibid. See also Chalmers et al (note 102, above).

<sup>151</sup> Cheryl Thomas, 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service' (2020) *Criminal Law Review* 987-1011.

<sup>152</sup> Yvette Tinsely, Claire Baylis and Warren Young, 'I Think She's Learnt Her Lesson: Juror Use of Cultural Misconceptions in Sexual Violence Trials' (2022) 52(2) *Victoria University of Wellington Law Review* 463-486.

<sup>153</sup> Charlotte Herriot, *Sexual History Evidence in Rape Trials – Is the Jury Out* (London: Routledge, 2023).

1995 Act in rape and / or attempted rape cases in Scotland. The focus here on High Court cases of rape and attempted rape is narrower than that of the Inspectorate<sup>154</sup> in their 2022 review of COPFS practice, which encompassed all sexual crimes in the Sheriff and High Courts. However, our study is more encompassing in that it includes observations of 20 preliminary hearings and 10 trials, as well as 24 case file audits, and 38 interviews with a broad range of criminal justice stakeholders. Although our case sample is relatively small, as described in the next section, we followed some cases through from preliminary hearing to trial, in order to track case progression, and were able to take account of the ongoing impact of changes introduced through case law (such as *RR*) as well as changes in Crown policy and operational procedure (for example, around the need for a s.275 application to introduce dockets). Our study provides analysis, through in-depth interviews and observations relating to policy and practice, of the understanding and attitudes of the police, Crown personnel, defence counsel, judges and Rape Crisis advocacy workers, as well as complainers, giving a holistic account of the historical and current operation of the legislative regime.

In the next section we will explain in more detail the research methods utilised in the study, our routes to accessing the underlying data, and the limitations thereof, and the processes that we undertook to secure and conduct the research in according with ethical review.

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<sup>154</sup> HM Inspectorate of Prosecution in Scotland (2022) (note 12, above).

## Section 4: Fieldwork, Data and Methods

This section describes the process for gaining permission to conduct this research as well as the methods employed, the access agreements that had to be negotiated, and the ethical review procedures required to be undertaken and complied with. We also reflect here on challenges encountered, including the obstacles faced when seeking to examine the operation of a criminal justice system impacted by Covid restrictions.

### a. Permission to Undertake the Research

All research work in the Scottish courts requires the permission of the Lord President (the head of the judiciary). This was facilitated through Scottish Government Justice Analytical Services (JAS) research protocols. We were given permission by the Lord President to attend trials in rape and attempted rape cases that included a s.275 application. On consultation with COPFS and Scottish Courts and Tribunals Service (SCTS), it was decided that the main gatekeeper and facilitator of access for this purpose would be SCTS. We entered into a Data Sharing Agreement and Data Protection agreement with SCTS, following their Data Protection Impact Assessment of our proposed project. SCTS also authorised access to the paper files [termed the 'book of adjournal'] associated with the cases identified as relevant for our project, which they held. Though there was some variability in file content, this typically included copies of the indictment, court minutes, preliminary hearing and trial papers, including any s.275 applications, and papers relevant to sentencing where appropriate.

### b. Data and Methods

We adopted a multi-methods approach, combining semi-structured interviews with key stakeholders (including justice professionals and rape complainers) and observations of both preliminary hearings and substantive trials in rape and attempted rape cases (and one case of assault with intent to rape prosecuted in the Sheriff Court on indictment), alongside documentary analysis of accompanying case files. While this was a substantial undertaking, the scale of the sample is still clearly limited and, as such, we do not purport to provide generalisable findings or to capture larger-scale quantitative insight regarding the incidence and impact of current practices. Instead, the aim of this study was to learn more through close and textured analysis, using data triangulated across different aspects of practice, about how the relevant provisions are implemented, and their effects as experienced by stakeholders.

Table 3 below provides an overview of the number and types of data relied upon and subsequent discussion will explain further how these cases were selected, the material to which we had access during our fieldwork and the processes by which we analysed the data. In line with our ethical approval from the University of Edinburgh, and standard ethical research protocols, we have taken steps to protect the anonymity of

interviewees and avoid disclosure of identifying details in respect of the parties in trial proceedings. Interviews were recorded and transcribed for analysis, while case file notes were taken in a manner that enabled direct extracts to be recorded. However, it was clearly not possible for us to record live preliminary hearing and trial observations (though, in some cases, we did have access to court audio recordings and trial transcripts). In those live cases, contemporaneous notes were taken by the observing researchers, which included verbatim extracts and reflected the accuracy of proceedings, including court-room dynamics, to the fullest extent possible.

In total, we analysed case files (and audio where available) for **5 historical cases**, and **20 'live' cases** (made up of 30 proceedings), with **accompanying case files for 19 of these 20 cases**. We also interviewed **38 stakeholders**.

Table 3: Data sources

Data source	Number
<b>PROCEEDINGS</b>	<b>35</b>
Historical Cases	5
Live Preliminary Hearings	20 [14 attended 'live', 6 tracked from trial backwards]
Live Trials	10 [4 tracked from Preliminary Hearing forwards]
<b>CASE FILE ANALYSIS</b>	<b>24</b>
<b>INTERVIEWS</b>	<b>38</b>

To put our sample into context, publicly available data shows that there were 577 evidence-led trials in 2021-2022. It is not clear how many of these were rape / attempted rape trials, but figures show that in 2021-22, rape / attempted rape made up 43.8% of High Court of Justiciary indictments (that is, charges).<sup>155</sup> Moreover, in 2021-22 (the latest period for which there are statistics), 336 accused persons proceeded to trial on charges of rape / attempted rape,<sup>156</sup> whereas there were 10 accused (1 per trial) in the 10 trials we observed from 2021-2022. The number of convictions for rape and attempted rape increased by 105% from 78 in 2020-21 to 160 in 2021-22. The number of proceedings for these crimes increased by 123% over the same span, from 151 in 2020-21 to 336 in 2021-22. The conviction rate for rape and attempted rape fluctuates year to year and was 48% in 2021-22.<sup>157</sup> Figures released by the Scottish Government in April 2024 show that between the years 2018-2023, the average conviction rate in rape / attempted rape cases with a single charge was only 24%.<sup>158</sup>

<sup>155</sup> See: [https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/2022-2023/scts-quarterly-criminal-court-statistics---bulletin-q4-2022-23.pdf?sfvrsn=8f3e0cd5\\_2](https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/2022-2023/scts-quarterly-criminal-court-statistics---bulletin-q4-2022-23.pdf?sfvrsn=8f3e0cd5_2); and the Quarterly Criminal Court Statistics at: <https://www.scotcourts.gov.uk/official-statistics>.

<sup>156</sup> See the 'Main Bulletin Tables' available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/documents/>.

<sup>157</sup> <https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/pages/2/>.

<sup>158</sup> <https://www.gov.scot/publications/conviction-rate-data-for-rape/#>

## Historical Cases

To highlight changes in process and practice, and the impact of these on the implementation of rape shield provisions, we identified and analysed papers held on file by SCTS for **5 historical cases**, which featured charges alleging criminal conduct said to have occurred between 2016 and 2019. These were specifically selected on the basis that the cases had generated published judgments in which problematic practice in relation to s.275 applications, and related matters, had come to be the subject of adverse judicial comment in the High Court. Given the status of common professional knowledge regarding these cases and the resultant unfeasibility of effective anonymisation, we have referred to these cases by name in this report. They are: *Donegan v HM Advocate*, *MacDonald v HM Advocate*, *Oliver v HM Advocate*, *HM Advocate v JG*, and *SJ v HM Advocate*. As we discuss further in Section 5, the ability to ‘go behind’ these judgments through detailed analysis of the underlying case files and recordings of court proceedings has been important in clarifying the range of problems addressed by the High Court, and the changes – both procedural and cultural – that those problems have produced in response, as a precursor to our more contemporary analysis.

## ‘Live’ Preliminary Hearings

We analysed **20 preliminary hearings**, heard between December 2021 and March 2022. Of these, 14 were observed ‘live’ through virtual hearings, held online via Webex, due to Covid restrictions at the time of the fieldwork. Selection and access was facilitated by SCTS who sent us the list of forthcoming preliminary hearings a week in advance, and, with the assistance of Crown or defence counsel named on that list, we were then able to identify hearings that included an application under s.275 to introduce evidence relating to the complainant’s sexual history or character. These were then randomly selected on the basis of researcher availability. We were also able to track and examine associated paperwork held on file by SCTS for 13 of these cases. We identified the remaining 6 preliminary hearings as a result of observing live trials, identified by SCTS as relevant cases (see below); and having observed these live trials, we ‘worked backwards’ to find and analyse the details of the preliminary hearing(s) held on file. These 6 preliminary hearings were not observed in ‘real time’, therefore. In what follows, we refer to these 20 cases by a generic, number identified to support anonymity.

Across these 20 cases, there were 30 rape or attempted rape complainants, and 20 accused. All 30 complainants were female. As the definition of rape requires the accused to have penetrated the complainant with his penis, all 20 accused were men. In 6 of the 20 cases, there were 2 or more complainants. Some of the cases we sampled also involved child complainants, but our study focused only on the proceedings relating to adult complainants over the age of 16 years.

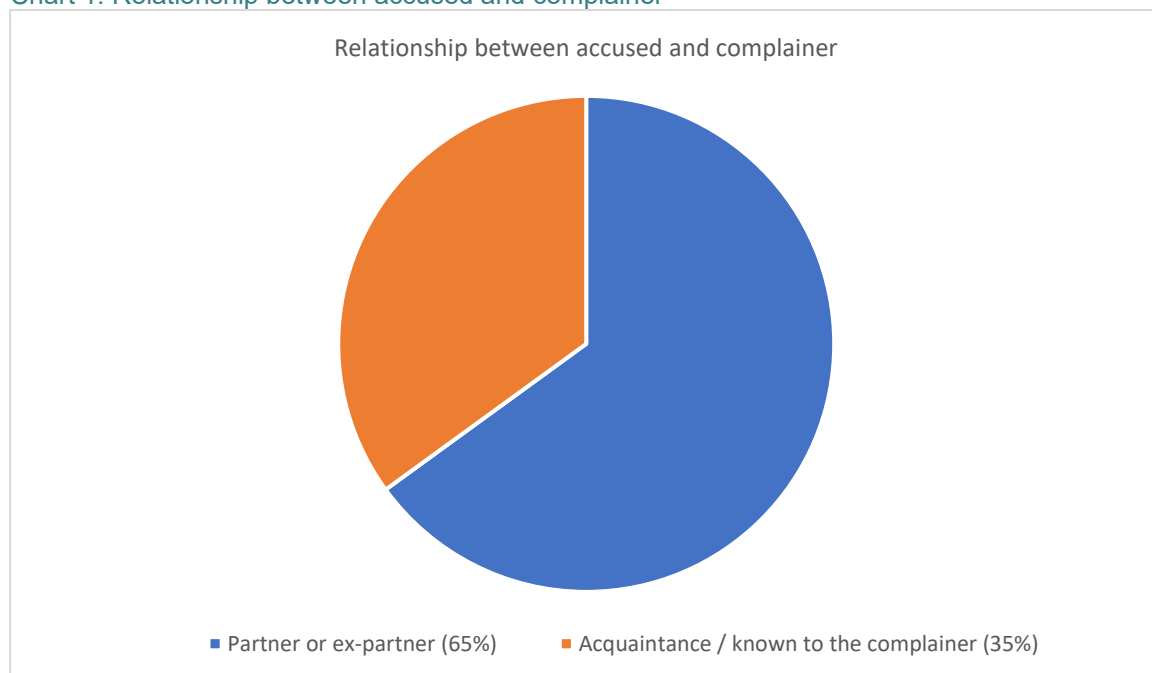
SCTS does not record the ethnicity of people involved in criminal cases. As far as could be identified from observations, interviews and paperwork describing the circumstances of the case, only 1 case involved both a complainer and an accused from a minority ethnic background and, as far as we could discern, in all other cases the parties were white. In 1 case, the accused was not a UK national and did not speak English. One of the complainers identified as being in a same-sex relationship at the time of the offence.

In 13 cases, the accused was the complainer’s partner or ex-partner, and in 12, as well as the rape or attempted rape charge, the indictment included charges of threats or violence, such as common assault, threatening and abusive behaviour (s.38 of the Criminal Justice and Licencing (Scotland) Act 2010), or coercive control (s.1 of the Domestic Abuse (Scotland) Act 2018). In 2 further cases, although the indictment did not include such charges, the accused had previous convictions for domestic abuse, threatening behaviour and other offences with previous partners. In 8 of the 20 cases, the rape or attempted rape charge was aggravated (Abusive Behaviour and Sexual Harm (Scotland) Act 2016). We note that in no cases in our sample were the accused’s previous convictions put before the court.

Table 4: Charges of violence accompanying rape/attempted rape charges

Number of cases	20
Number of complainers	30 (all female)
Number of accused	20 (all male)
Number of cases with other charges of violence (including DASA)	12
Number of cases with aggravated rape/attempted rape charges	8

Chart 1: Relationship between accused and complainer



## 'Live' Trials

**In respect of 10 of these 20 preliminary hearings, we were also able to observe and analyse the 'live' substantive trial**, which took place during the period from April 2022 to October 2022. In 4 of the 10, we followed proceedings through from the observed preliminary hearing all the way to substantive trial, including analysis of the relevant case papers held by SCTS. 3 of these 4 substantive trials were observed in real time by a member of the research team, while 1 was analysed after the fact by way of audio recording of proceedings. The remaining 6 'live' trials were, as noted above, identified for us by SCTS as including a s.275 application. Of these, 5 were observed in real time and the other analysed after the hearing through audio recordings of proceedings. After filtering to ensure the involvement of an appropriate charge, a s.275 application and an adult complainer, the trials were selected randomly on the basis of researcher availability. Though trial duration varied, on average, trials lasted around 5 days, with the longest within the sample being 17 days in duration.

As explained in the ethics section below, the complainer's evidence in rape and attempted rape trials in Scotland is given in closed court. Although we were present at 8 live trials, we had confirmed permission to be present in the courtroom during the complainer's evidence in 6 trials, and in the remaining 2 trials, we instead listened to audio recordings of the complainer's evidence following the conclusion of the trial. In relation to the other 2 trials in the sample, where we relied on audio recordings throughout, we were obviously also able to hear evidence given by the complainers through that route. Though there is, no doubt, a qualitative difference between direct observation and listening to trial audio, we were able through both mediums to extract important information about the substance and tone of proceedings, particularly but not only in relation to sexual history or character evidence.

## File Analysis

Having observed 14 'live' preliminary hearings, we were able to follow-up with SCTS and examine the paper files held by them in respect of 13 of those cases. Likewise, after observing 6 'live' trial proceedings, we were able to retrospectively track the accompanying paperwork for all these cases held on file by SCTS. This means that, in total, we analysed **files relating to 19 of the 20 cases** in the sample. We also analysed the papers for all 5 of the historical trials, making **a total of 24 case files**. As might be anticipated, these files were often extremely lengthy and provided rich insight; indeed, access to the papers was often crucial to fully understanding the context and content of proceedings. However, accessing and recovering data from files was extremely time-consuming, and they were variable in their content and coverage, as explained below. We visited the offices of Scottish Courts and Tribunals Service in Edinburgh between April 2022 and April 2023 to collect the file data relating to these cases.



## Interviews

To assist in contextualising our observations and file analysis, we also conducted a series of **38 semi-structured interviews** (lasting approximately 1 hour and conducted in a mix of online and in-person formats). Using purposive sampling where interviewees were selected because of their expertise and / or experience, we interviewed individuals from 6 stakeholder groups, many of whom had extensive practical experience. Our hope in doing so was to ensure as rounded a view as possible of how the legislation is working in practice, and its impacts across participants and on outcomes. Some of the Crown and defence counsel who helped us identify relevant preliminary hearings also agreed to be interviewed. Further interviewees from the defence bar were identified through snowballing, and personal contacts. Potential COPFS and police interviewees were identified by the relevant representatives on our Advisory Board. Complainer and advocacy worker interviews were facilitated by Rape Crisis Scotland, while the Lord President identified and allowed us to interview High Court judges (known formally as Senators of the Court of Session). While we do not claim that the views of these interviewees give us a representative picture of the views of the stakeholder groups to which they belong, we can say with confidence that, overall, we were able to gain a useful sense of the current (and historical) operation of s.274 and s.275. Across these interviews, which were conducted by different members of the research team depending on availability, we relied on an interview schedule specifying topics to be addressed, which was modified slightly to accommodate the experience and expertise of different stakeholders but was aligned sufficiently across core aspects of the research to allow for effective cross-analysis.

Table 5: Interviewees

Stakeholder Group	Number of interviews
1. Advocacy Workers	6
2. Complainers	4
3. Crown Office	10
4. Defence Counsel	7
5. Judges	5
6. Police Officers	6
<b>TOTAL INTERVIEWS</b>	<b>38</b>

Due to assurances of confidentiality and anonymity, in what follows, we refer to interviewees by a number identifier, such as '3:4', where the first number refers to their stakeholder group and the second to the number attributed to the interviewee within it; for example, interviewee '3:4' is Crown interviewee number 4.

## Freedom of Information Requests

In their 2022 investigation of COPFS management of s.274 and s.275, the Inspectorate had to request manual retrieval of data. Though, as the Inspectorate, they were entitled to this data, even their data set was incomplete, due to partial Sheriff

Court records submitted by SCTS. As part of establishing the background context of this research study, we made Freedom of Information (FOI) requests in September 2023 to COPFS and SCTS, to find out how many s.275 applications were made in rape and attempted rape cases from 2019 –2023 (the date range covered by the cases we analysed), and the number that were granted in whole or in part.

Since COPFS has not, until very recently, ‘tagged’ cases that have s.275 applications in a way that makes it possible for external researchers to identify them, figures were only available for applications made in the High Court from June 2022 onwards regarding the number of Crown applications, and from April 2023 onwards for the number of defence applications. The number of Crown s.275 applications in rape and attempted rape cases per month between June 2022 and August 2023 varied significantly, as is to be expected, with the lowest being 16 and the highest being 43, and an average of 30 per month. Likewise, the number of defence s.275 applications in rape and attempted rape cases per month between April 2023 and August 2023 varied between 8 and 34, with an average of 17 per month. COPFS were not able to provide data on how many applications were granted in whole or in part, and how many were refused, as this would have required manual assessment of all relevant cases. We will return to discuss these figures in more detail in the Preliminary Hearing Analysis Section.

An FOI request was also made to SCTS in September 2023, asking for information on how many s.275 applications were made each year for the last 5 years in rape and attempted rape cases, the number made by the Crown and by the defence, and the number that were granted in whole or in part. SCTS were able to provide headline figures for all s.275 applications, but it was not possible to provide a break down in respect of types of charge without accessing information contained in court records, which are exempt from disclosure under the FOI legislation. SCTS also indicated that they use a live case management system for processing court business that is structured for operational needs rather than statistical reporting or research purposes, and that the information provided was based on the best information available from this system. SCTS were able to provide the following information about the volume of s.275 applications in criminal cases in the period requested, and we present these here, in combination with information made available to the Inspectorate’s Review in 2022:

Table 6: Number of s.275 applications per annum, 2018-2023 (from SCTS FOI request)

<b>Court</b>	<b>2018-19</b>	<b>2019 – 20</b>	<b>2020-21</b>	<b>2021-22</b>	<b>2022-23</b>	<b>2023-2024 part year (April - September)</b>
High Court	286	311	227	289	366	176
Sheriff Court (solemn)	31	38	16	48	48	16

### c. Access Challenges

Our research grant was confirmed in September 2020. However, we were not able to navigate the complicated access process to begin the project in the timeline planned, amongst other things because of Covid restrictions and a temporary halt in court proceedings, as well as a short moratorium on all court-based research. We received formal approval from the Lord President to undertake the research in January 2022. At that point, we then began to navigate SCTS procedures, including completing a data management plan and access agreement. Details of this required to be mediated via JAS research protocols rather than directly between the researchers and the courts. As a result, we were unable to begin the trial-based part of the project until April 2022 (though we did conduct some interviews from May 2021, and attended preliminary hearings from December 2021 onwards, since it was confirmed to us by SCTS that this would not require any formal permission from the Lord President).

Even once access agreements were operative, we encountered further challenges. Achieving a sample of relevant cases was difficult. As explained above, identifying live rape and attempted rape cases that include a s.275 application had to be done manually, in our case by SCTS. This involved substantial challenges in identifying and attending relevant preliminary hearings and trials. Preliminary hearings are usually only heard in Glasgow, but since this research took place during a period of Covid restrictions, we were able to attend online hearings, through Webex. Pinpointing the relevant hearings was not straightforward, however. Neither SCTS nor COPFS had the resources to help us detect which of the scheduled preliminary hearings included one or more s.275 applications. SCTS were able to share the court listings, with names of counsel and Crown prosecutors, and from there the team had to find email addresses (via existing contacts) and write to them to explain about the research and ask if their forthcoming hearing fell within the remit of the project. Once in contact with a named person, who had indicated their case was relevant, we asked to be put in contact with the assigned court clerk, who then facilitated permission from the presiding judge for us to observe. This was a convoluted process that relied on the goodwill of legal personnel. Some upcoming hearings were continued at late notice, and some did not in fact fall within our parameters despite having had them identified as relevant. Through this rather disjointed method, we were able to identify and attend 14 relevant preliminary hearings between December 2021 and March 2022, 4 of which we were able to follow through to the trial stage.

We also faced problems in identifying and attending trials. We began our observation of trials in April 2022, and were contacted by SCTS when a rape trial was due to begin the following week. This method caused some difficulty, however, as due to court scheduling, floating trial diets, and Crown, defence and judicial availability, we were not typically informed of the start date until the Friday prior to the trial beginning the following Monday, and researchers were not always available at such short notice. Nonetheless, we were able to attend 6 live trials via this method, between April and

October 2022. Although we had the Lord President's permission to conduct this research, we also needed the consent of the presiding judge to be present during the trial. As we did not know which case we would be attending until the Friday prior, it was a scramble to find out who was the assigned clerk, obtain their email address from SCTS, and then contact them to explain about the research and ask if the clerk could facilitate permission from the judge. Clerks were extremely helpful and in only 1 case did the judge refuse permission for us to attend in person (and in this case, we were able to later listen to audio recordings of these proceedings). Given the short-notice nature of case identification and the challenges associated with identifying and contacting complainers in that timeframe, and in light of the fact that we had the consent of the Lord President as well as the permission of the presiding judge, the decision was taken at the start of the project not to additionally seek direct consent of complainers for our attendance. Although this approach was accepted as part of our ethical review process, and is not at odds with the practice of recent rape trial observation studies in other jurisdictions,<sup>159</sup> it was a decision that we were required to revisit during data collection, as explained further in the ethics section below.

Finally, as noted above, the case papers on file that we have analysed are those that were made available to us by SCTS, referred to as the 'book of adjournal'. Some of these files are held in Glasgow, and were ordered in advance for us, usually arriving at Parliament House the following day. Regarding the live cases, papers often had to be shuffled back and forward between researchers and the court, as proceedings were ongoing. Our access agreement allowed us only to take notes from these files while inside Parliament House, sometimes in a meeting room booked for us and sometimes in the busy, open plan office. Our agreement did not allow us to copy or remove files. Cumulatively, this meant that the process of identifying, retrieving and interacting with case files was a protracted one, and the task of copying out lengthy documents from large bundles was arduous and time-consuming. In addition, where it was necessary to listen to audio recordings (either of complainers' evidence, or the entire trial), we were able to do so only by way of a sole computer in SCTS offices. Listening to and transcribing trial proceedings took hundreds of hours of researchers' time; and overall, the completion of this part of the data collection took many repeated visits by the whole team to Parliament House, over the course of a 12-month period. Though we believe that the process has yielded important insights, it is only right to underscore the lack of sustainability associated with resource-investment on that scale in order to conduct research on this issue.

Moreover, it was not clear that the files that we had access to as a result of this process were always full records, and some files appeared to be more extensive than others. Indeed, in line with the findings of COPFS Inspectorate, in some instances, key

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<sup>159</sup> See, for example, Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (London: Palgrave Macmillan, 2018); Olivia Smith and Tina Skinner, 'How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social and Legal Studies* 441-466.

documents, such as the s.275 application (cases 17 and 19), or a record of the complainer's views on the application, were missing. In case 17, it was recorded in the court minutes for the preliminary hearing that counsel for the accused had sought, and was granted, leave to appeal the preliminary hearing judge's decision to refuse part of the s.275 application but no further record of this was found on the file. Researchers also noticed significant variability in the detail contained in court minutes, including the minutes of preliminary hearings where s.275 applications were heard, making it difficult in some cases to understand whether an objection had been made and on what grounds, and the reasoning for ultimately granting or refusing the application.

#### d. Analysis of Data

Notes of preliminary hearing and trial proceedings were coded for qualitative analysis. As discussed above, it was not always possible to ensure researchers' notes were verbatim but they did include verbatim extracts as well as detailed coverage of proceedings. Notes taken by the researchers contemporaneously to observations were supplemented each day at the close of proceedings with additional detail and reflections. So too were transcripts of trial audio produced by the research team, where we were unable to observe live proceedings, and transcripts of the interview discussions which were produced by a professional transcription firm (with appropriate confidentiality agreements in place). Observation notes were obviously lengthy, particularly in relation to live trials that lasted several days. To assist with managing this data effectively, we first produced summary documents that outlined key themes arising in the observation, with selected extracts of verbatim (or near verbatim) material to draw those themes out. For each case, one member of the research team produced a summary, which was then reviewed and cross-checked by a second team member to ensure consistency in recording and coverage, and to agree key themes. These summaries also included information drawn from the supporting case files, in relation to which we used a generic template to draw out consistent information across cases as much as possible.

Once agreed between the researchers, these summaries were imported into Nvivo, a qualitative data analysis software programme, alongside transcripts of stakeholder interviews. The team devised an initial coding frame, based on our literature review and key research questions, which was then used on an iterative basis during an initial 'trial period' of coding, where each researcher coded the same selection of transcripts and we compared results to ensure appropriate consistency across coding and clarity in relation to the content and parameters of each 'node'. This provided an opportunity for further refinement of the coding frame, which was left with sufficient flexibility for additional, emergent nodes to be added as the coding process was continued. We were supported in this coding task by a Research Assistant who worked under close supervision from the team throughout.

Alongside this thematic analysis of data, we also extracted ‘meta data’ across case profiles, and although the sample size is clearly too small to allow for detailed statistical analysis, we draw upon that meta data in the discussion below to provide some wider context and texture to our thematic observations. This allowed us, for example, to document the number of sole complainers, the extent to which parties to proceedings had been in a prior relationship, the lodging of a special defence of consent, or the presence of intoxication or incapacity.

### e. Ethics

The project was peer-reviewed and granted ethical approval by the University of Edinburgh on 5 March 2021. It was conducted throughout in accordance with the conditions of that approval as well as standard ethical conventions of socio-legal research. We also completed and complied with an additional data management plan to ensure secure storage of data.

Consent and confidentiality were paramount in this project, and all interviewees were given and signed an information and consent form, held on file by the research team. In this report, we have anonymised the legal personnel, complainers and accused involved in all of the preliminary hearings and trials we observed. Although the legal community in Scotland is small, we have endeavoured to ensure that, in our analysis, we have removed recognisable details such as places and times of offences and delimited any other unique or idiosyncratic characteristics that could be relied upon in order to identify participants. All individuals interviewed for the research, and members of the Advisory Group, were given access to a copy of the project report, and we have committed to working with Rape Crisis Scotland to ensure findings are appropriately shared with complainers and victim-survivors more generally.

Attending rape and attempted rape cases in the High Court is not a straightforward matter, since complainers give evidence in closed court, without members of the public present. Ethical consideration was given at the outset to the impact of our trial attendance on complainers. As discussed above, with the consent of both the Lord President and the presiding judge, we believed that it was possible to attend the trial with minimal impact on complainers, particularly where they had been granted special measures such as screens and live tv links. However, following the second trial that we observed, where both complainers had given evidence behind a screen, it was brought to our attention by Rape Crisis Scotland advocacy workers that – unbeknown to the researcher – the complainers had expressed discomfort with their presence during testimony, but the judge had nonetheless authorised continued observation. Had we been aware of the complainers’ concerns, we would not have remained in attendance, regardless of any formal permissions. To avoid any possibility of this recurring in future cases, the research team decided thereafter to only remain inside the court room for the complainer’s evidence when the Advocate Depute was able to confirm that this was with the knowledge and consent of the complainer. Where this

confirmation was not possible, we listened to an audio recording of the evidence after the trial had ended.

Having set out the legal and research context for the research, and having described the methods, access challenges and ethical considerations, we now turn to the analysis of the data. In the following three sections we present findings from our analysis of 5 historical cases (Section 5), 20 preliminary hearings (Section 6) and 10 substantive trials (Section 7). This is followed in Section 8 by a concluding discussion and some key recommendations.

## Section 5: Historical Cases

This section of the report refers to ‘historical cases’, that is, cases of rape or attempted rape, or assault with intent to rape, which concluded prior to 2021. As outlined above, 5 such cases were selected on the basis that they had been the subject of adverse judicial comment by the Appeal Court as a consequence of problematic practice in relation to s.275 applications and related matters. Some had also been criticised by researchers and third sector organisations, as cases where complainers had been subjected to defence or judicial questioning that appeared to run contrary to the applicable law.<sup>160</sup> In that sense, these cases may be among the more egregious examples of poor practice, but they certainly do not appear to be entirely isolated examples in this regard, as researchers such as Burman et al had previously shown.<sup>161</sup>

In the 5 cases analysed here (*Donegan*,<sup>162</sup> *JG*,<sup>163</sup> *MacDonald*,<sup>164</sup> *Oliver*<sup>165</sup> and *SJ*<sup>166</sup>), we had assistance from SCTS personnel to access to the ‘books of adjournal’ (the records of the High Court of Justiciary) as well as other papers relating to, and audio recordings of, the trial. The purpose of this close analysis of the first instance hearings was to illustrate how the law was misapplied by the court in these cases and, thereby, to shed light on how, and when, problematic legal practice was arising under previous practice. We analysed the issues that gave rise to the problems that the judgments and proceedings in these cases highlighted, and assessed whether, and to what extent, practice has changed in our contemporary sample.<sup>167</sup>

In this section of the report, we focus on the following issues arising from our analysis of the historical sample of cases: the substance and decision-making in s.275 applications; procedural matters; defence strategies; the approach to eliciting evidence from complainers; and inadequate record keeping. As explained above, we have referred to these cases by name as they are in the public domain and have already been subjected to judicial and academic commentary, such that efforts at anonymity adopted elsewhere are unnecessary. The analysis contained in this section allows the reader to understand both what the problems in this area of the law have

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<sup>160</sup> See Keane and Convery (note 72, above); Cowan, (note 108, above). See also Rape Crisis Scotland, Rape Crisis Scotland Calls for Radical Changes to Sexual Offence Trials <https://www.rapecrisisscotland.org.uk/news/news/rape-crisis-scotland-calls-for-radical-changes-to-sexual-offence-trials/>.

<sup>161</sup> Burman et al, note 1, above.

<sup>162</sup> *Donegan* (note 4, above).

<sup>163</sup> *JG* (note 5, above).

<sup>164</sup> *MacDonald* (note 6, above).

<sup>165</sup> *Oliver* (note 7, above).

<sup>166</sup> *SJ* (note 8, above).

<sup>167</sup> It should be noted that in one of these cases (*MacDonald*) proceedings occurred on indictment in the Sheriff Court. The case concerned a charge relating to penetrative digital sexual assault with an intent to rape aggravation. Although the case did not concern charges of rape or attempted rape (for which exclusive jurisdiction lies with the High Court of Justiciary), the case was selected for analysis given the adverse comments that were made about the trial proceedings in a published judgment of the Appeal Court.



been, and provides a baseline for whether and to what extent practice has indeed changed in more recent cases, which we discuss in Sections 6 and 7.

### a. Number of s.275 Applications

#### Statistics Relating to s.275 Applications in Historical Cases

In the 5 historical cases we considered, there were, in total, **9 s.275 applications made in relation to 6 complainers (almost 2 per case)**. All applications were made by the defence.<sup>168</sup> However, in one of the cases, a Crown s.275 application should have been made (*MacDonald*) given evidence of sexual history elicited from a forensic medical examiner during the trial.

Table 7: s.275 applications in historical cases

No. of cases	5 (with 6 complainers)
No. of s.275 applications (all made by defence)	9
No. applications granted (in full or in part)	9
No. of cases where Crown opposed application	4
No. of cases where application was late	3 (2 at trial)
No. of cases where defence appealed	2
No. of appeals allowed (in full or in part)	1

In all 9 s.275 applications, at least some aspects of the applications were granted by the court, although in 4 of the cases, some aspects of the s. 275 were also refused or limited (*Donegan, Oliver, SJ* and *JG*). In one case (*SJ*), the Crown also agreed with the defence before trial that they would try to limit the evidence that the complainer gave about her prior relationship with the accused by carefully choosing the questions they would put to her to avoid the defence having to explore the matter in her cross-examination or in questioning the accused.

In 4 of the cases (*Donegan, Oliver, SJ* and *JG*), the Crown opposed, to varying degrees, the grant of aspects of s.275 applications lodged by the defence. Indeed, in *JG*, the court refused aspects of the defence s.275 application despite a lack of Crown opposition. In two of these cases (*Donegan* and *Oliver*), aspects of the s.275 applications were refused *in hoc statu*, which means the court may allow them to be potentially revisited later in proceedings.

In 2 cases, there was an appeal lodged by the defence against the decision by the preliminary hearing judge on a s.275 application (*Oliver* and *SJ*), prior to the trial.<sup>169</sup> In *Oliver*, the Appeal Court upheld the majority of the preliminary hearing judge's decision with some limited additions made to the s. 275 permitted by the court. In *SJ*, the

<sup>168</sup> This may be because none of these cases involved dockets, and in none did the Crown want to lead evidence from the accused's police interview – typically Crown applications are made if they want to lead evidence from the police interview where the accused recounts sexual behaviour relating to the incident that is different from that specified in the libel.

<sup>169</sup> Under s.74(1) of the 1995 Act.

defence appeal was refused in its entirety and thus the preliminary hearing judge's decision on the application was upheld.

Three of the cases contained late applications (that is, applications that were made less than seven days prior to the preliminary hearing), in which the defence submitted, and the court accepted, that 'special cause' had been shown, such as to permit the application to be considered by the court (*Donegan, Oliver* and *JG*). In *Oliver* and *JG*, s.275 applications were made at continued preliminary hearings, the explanation being that further investigation of evidence by the defence was required, which might be relevant to the s.275 application they were considering making. In *Donegan* (the only case where the Crown objected to the defence submission that there was special cause to allow a late application), a s.275 application was made during the complainer's evidence at trial, prompted by the nature of the evidence that the complainer gave. Where this arises, the basis for the late application (and for establishing special cause shown) is that the complainer has given evidence about a matter that could not have been predicted, and that the defence now require the court's permission under s. 275 to put questions about that matter, exploration of which is otherwise prohibited by s.274, to her in cross-examination. Finally, in another case (*SJ*), an application for leave to appeal a decision made in respect of a s.275 application was made outwith the applicable statutory deadline because counsel had failed to advance the appeal in time.<sup>170</sup> The court accepted that it was in the interests of justice to excuse this irregularity and allowed the appeal of the s.275 to be considered. We analyse these issues further, below.

Of the 5 cases, 2 resulted in a conviction on one or more of the charges of rape or attempted rape (*Donegan* and *Oliver*). One case resulted in a conviction on a charge of digital vaginal penetration and sexual assault (with the deletion of an attempt to rape aggravation) (*MacDonald*), one in the acquittal of the accused following the withdrawal of charges and a successful defence submission of no case to answer at the conclusion of the Crown case (*JG*), and the remaining case resulted in the accused's acquittal by a not guilty majority verdict (*SJ*).

#### **To summarise this data, in the 5 historical cases:**

- There were **9 s.275 applications made in relation to 6 complainers** (in *Oliver* applications were made in relation to two complainers), all made by the defence (on average almost 2 per case).
- In 3 cases, the applications were late, and all 3 were heard on special cause.
- In 2 of these 3 cases, the application was made at trial.

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<sup>170</sup> An application for leave to appeal an interlocutory decision under s. 74 of the 1995 Act must be made immediately at the Preliminary Hearing to the court at first instance, following the decision in question (see para 9A.6 of the Act of Adjournment (Criminal Procedure Rules) 1996. An interlocutory decision is any decision in a case other than the final one.

- In only 1 of these 3 cases did the Crown submit that no special cause was shown.
- In 1 other case, a late application to appeal a refusal of s.275 was granted.

**Additionally:**

- **All 5 cases involved an application that was granted in full or in part.**
- In 2 cases, the defence appealed a preliminary hearing judge's refusal of the s.275 (1 was refused, 1 was partially allowed).
- In 4 cases, the Crown opposed the s.275 application (albeit to varying degrees).
- In 1 case, aspects of the application were refused despite the lack of Crown objection.

## b. Substance of, and Decision-Making in, s.275 Applications

As explained above in Section 2, where the accused pleads consent, and gives an account of the sexual behaviour that differs from the facts narrated in the libel, then a s.275 application is required to elicit this evidence, as this is considered to be sexual behaviour that does not form part of the subject matter of the charge (s.274(1)(b) of the 1995 Act).

Consent was pled in all 5 of our historical cases. One would expect, therefore, to see s.275 applications in these cases to allow the accused to provide an alternative version of events and for the complainant and other witnesses to be cross-examined on these issues. This was evident in 4 of the 5 cases (*Donegan*, *JG*, *SJ* and *Oliver*), and these aspects of the applications were granted by the court, unopposed by the Crown. In *Oliver*, *SJ* and *Donegan*, the accused gave evidence in support of their defence of consent, whilst in *JG* the accused was acquitted at the conclusion of the Crown case. In the fifth case, *MacDonald*, there was limited information on file, but there appeared to have been no s.275 application relating to the accused's version of events of sexual activity with the complainant to support of the defence of consent that was lodged, and the accused did not give evidence.<sup>171</sup> When considering this case on appeal, the Appeal Court remarked that the defence should, in fact, have been withdrawn from the jury's consideration given the lack of any evidence to support it.

### Sexual Conduct with the Accused

A notable feature of the 5 historical cases was the regularity of s.275 applications that sought (with varying degrees of success) to admit evidence related to sexual conduct with the accused prior to or after the alleged events, and / or sexual conduct with third

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<sup>171</sup> When considering this case on appeal, the Appeal Court remarked that the defence should in fact have been withdrawn from the jury's consideration given the lack of any evidence whatsoever to support it.

parties. Obviously, every case, and application, is fact-specific, and in some of these cases, the evidential position was complicated given that the Crown had libelled conduct spanning several years. Nonetheless, this aspect of the s.275 applications in the sample of historical trials warrants consideration; here, we reflect on s.275 applications related to sexual activity with the accused, before turning to applications relating to such activity with third parties.

In 4 of the cases (*Donegan*, *Oliver*, *SJ* and *JG*), the s.275 applications related to the complainant's sexual behaviour with the accused, where sexual behaviour included both direct physical sexual activity, including intercourse, and other forms of sexual conduct, such as e.g. sending sexual images to the accused at times other than those relating to the libel.

For instance, in *Donegan*, a s.275 application was made (and eventually granted mid-trial), which sought to admit evidence that the complainant had sent images of herself, described during an exchange (in the absence of the jury) between counsel and the presiding judge as "flirtatious" and showing her covering "her breasts with her forearm." It is not possible to fully understand from the paperwork held in this case what was the scope of the application and the reasons for its grant, but the rationale of the presiding judge who granted the application appears to be based on an understanding of relevance and sexual autonomy that was out of keeping with the interpretation of the law even at that time by the Appeal Court.<sup>172</sup> In particular, the application regarding these images appears to have been permitted on the basis that sending sexual images of oneself is capable of giving an 'indication' connected to sex, including the alleged sexual activity that occurred in the charge. The Crown did seek - unsuccessfully - to oppose the application in this case when it was made (at trial). And though the sending of *an* image did feature in one of the charges in this case, it is notable that cross-examination of the complainant was instead directed at the sending of "flirtatious images" (plural) to the accused generally, with counsel suggesting that this could be characterised as being indicative of someone looking for a sexual relationship. In the same case (*Donegan*), a s.275 application was also granted at the preliminary hearing, which permitted the defence to explore prior incidents of consensual sexual intercourse between the accused and the complainant. It is unclear whether this application was opposed by the Crown. It is also unclear, from the available paperwork, what the basis of that application and its granting was.

In the cases of *Oliver*, *SJ* and *JG*, we again encountered applications seeking to elicit evidence of the complainant's sexual behaviour with the accused, which did not relate to the special defence of consent. In *JG*, whilst most of a defence s.275 application was refused by the preliminary hearing judge, a paragraph which related to consensual sexual activity between the accused and the complainant 15 days after the incidents alleged in the libel was granted, unopposed by the Crown.

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<sup>172</sup> See *inter alia* *CJM (no 2)* (note 21, above).

In *SJ*, a defence application was refused at first instance and on appeal, which sought to admit evidence that the accused and complainer had sexual intercourse 11 days prior to the events libelled in the charge. The specific terms of that s.275 application were amended between the preliminary hearing and the appeal based on discussions between parties. The amended version of the paragraph was nonetheless rejected by the court. Submissions offered in favour of the application at both stages were based, not on the proposition that such an incident related to the issue of consent in respect of the matter detailed in the charge, but rather that exploration was required to establish the ‘true nature’ of the relationship between the parties. Whilst not granted by the court, this basis for seeking to explore sexual history between the parties had been, at that time, repeatedly rejected by the Appeal Court which calls into question why counsel would make a submission that runs contrary to applicable law.

In *Oliver*, a s.275 application was granted, which permitted exploration of whether the complainer had consensual vaginal sexual intercourse shortly after the events alleged to have taken place in charge 1 (a charge alleging rape, amongst other things). The Crown opposed this aspect of the application on the basis that the relationship was one in which the accused was violent towards the complainer and thus her potentially coerced behaviour did not reflect negatively on her credibility or reliability. While the preliminary hearing judge restricted this part of the application to remove any reference to consensual sexual intercourse, it was reinstated by the Appeal Court with the rationale that the jury may find assistance, when assessing the credibility of a complainer, from evidence as to his / her behaviour in the immediate aftermath of events which are alleged to have occurred. In the same case, a s.275 application was granted at first instance and upheld by the Appeal Court in relation to another complainer, which permitted limited exploration of comments purportedly made between the parties on a train the day prior to events libelled concerning parties’ desire to engage in anal sex. It should be noted, though, that the approach taken by the Appeal Court here was something of an outlier from the general shift towards a more restrictive interpretation evidenced in other concurrent appellate decisions. Indeed, it was also later expressly criticised by a five-judge bench in *CH*, indicating that, even at appellate level, the strict uniform approach to relevance and s.275 was not as firmly established as it may be now.<sup>173</sup>

As noted, this statement of the law in *Oliver* can no longer be considered to be accurate, with the legal relevance of post-incident sexual activity having been progressively further restricted since then.<sup>174</sup> Nonetheless, overall, our analysis of the historical cases indicates that s.275 applications seeking to elicit evidence of sexual behaviour with the accused, both prior and post incidents libelled in charges, were regularly advanced in cases as recently as 2019. These were evidently sometimes permitted, both at first instance and on appeal, in a fashion that is difficult to reconcile

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<sup>173</sup> See *inter alia*, *CH* (note 10, above).

<sup>174</sup> *Ibid*.

with aspects of the law then in force, prompting staunch critique from the most senior judiciary. Several of our interviewees indicated that this precipitated a watershed moment in the approach of the courts to assessing relevance and admissibility. One judge, for example, remarked that some of the defence conduct in previous cases would not be tolerated now: "I could lift innumerable volumes off that shelf of decisions that wouldn't be granted now that were granted then 20 years ago" (5:3). Another said,

"I remember as a defence lawyer submitting an application to cover post-incident contact and being told by the judge, a judge who now takes a very strict view of 274 that it wasn't required. So there's definitely been a change in judicial approach... I don't know any person who appears regularly who doesn't feel that there's been a marked difference in approach, both by the judiciary as a whole and by individual...in certain cases, individual judges" (5:2).

The same judge went on:

"I mean, the law has been, in inverted commas, clarified in about a dozen cases over the last couple of years...I think there's a general sense on both sides of the Bar that what's happened is that the court, if not changed the mind, clarified their position or there's now an unanimity of approach imposed by the Appeal Court, that was certainly not the view of judges as a whole. The Appeal Court have really clarified the position, imposed, you know, a quite strict line of authority."

Judge 5:2 suggested that this allowed trial judges, to have greater confidence in intervening to stop a particular line of questioning, because they knew that the Appeal court "had their back."

Other judges made it clear that, while still being mindful of the flow of the trial, they would intervene now regardless of whether or not the Crown objected (5:2, 5:4, 5:5), with one stating that they would even consider interrupting an accused person during their evidence if they were "breaking the rules" because, as two of them pointed out, the prohibition on evidence as set out in s.274 states that the "*court* shall not admit", rather than requiring the Crown to oppose (5:1, 5:2).<sup>175</sup> On the other hand, several of our interviewees reflected more negatively on the Appeal Court's direction of travel regarding their strict "enforcement" of s.275, suggesting a level of dissent or resistance amongst the defence bar, and even inside the judiciary. For instance, one defence counsel remarked: "I mean, it's no secret that there's quite a number of judges think that the way the Appeal Court's enforcing it is ridiculous... the Appeal Court I think is trying to browbeat all of the senators into having a uniformed approach on it" (4:3). Whilst we are not in a position to evaluate such claims, it is noteworthy that - in recent times - there have been instances of judicial dissent from the bench of the Appeal

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<sup>175</sup> Emphasis added.

Court itself in cases concerning s.275 applications.<sup>176</sup> Another defence interviewee suggested that some judges will intervene “to prevent anything which might assist the defence getting anywhere near the jury” and opined both that judges will intervene more readily in sexual offences cases, which indicated “special treatment,” and that they did so “as much in a way of self-preservation as in order to preserve the dignity of the complainer” (4:5).

We return to these issues of judicial intervention and stakeholders’ views regarding the merits and demerits of evolving approaches in case law and practice in the subsequent Sections. What we can conclude from the current analysis, however, is that there was a strong perception held by many of the stakeholders we interviewed that the more recent decisions of the Appeal Court, and in particular their candid critique of the approach taken in the sorts of historical cases discussed in this section, have had a significant impact on High Court judges deciding current sexual offences cases, and rape and attempted rape charges in particular.

### Sexual Activity and Relationships with Third Parties

In their research, Burman et al found that s.275 applications regularly sought to elicit evidence about the complainers’ sexual activity and relationships with people other than the accused, making up 24% of all evidence sought.<sup>177</sup> This was also a feature in 3 of the 5 historical cases examined in this research (*Oliver*, *SJ* and *JG*). In *Oliver*, the defence sought to lead evidence that the complainer was married to another man during the period of the libel and could have, if she so wished, left the accused and returned to her husband. This was permitted on the basis that such evidence was capable of undermining her account that the accused behaved as outlined (and thus spoke to her credibility and reliability). The charges in *Oliver* specified a range of sexual and physical behaviour that could only be described as extreme, including highly degrading physical and sexual conduct resulting in significant injury to the complainer.

In *JG*, an application alleged that the complainer was sexually active with multiple unspecified parties and posted pictures and videos of herself online as part of the BDSM community. This part of the application was refused, however, by the preliminary hearing judge as being irrelevant at common law and inadmissible in terms of the statute in any event because it failed to mention specific instances of sexual behaviour, as required by s.275.

In *SJ*, the application at first instance sought to introduce evidence that the complainer had had sexual intercourse with a third party shortly after the incident, but this was

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<sup>176</sup> See, for example, the opinion of Lord Glennie in *CH* (note 10, above) and Lord Malcolm in *XY* (note 49, above).

<sup>177</sup> Burman et al, note 1, above, p. 60. This figure is the % of evidence relating to third parties, both on the same occasion as the event libelled, and more generally.

again refused as irrelevant at common law. This application was advanced on the basis that the complainant had given a statement to a forensic medical examiner ('FME') stating that she did not have sexual intercourse with anyone in the prior ten days. This assertion was disproved by the results of the medical examination which revealed the DNA of a third party. It was argued by the defence that the fact that the complainant had lied to the FME was relevant to the jury's assessment of her credibility and reliability, and further that the jury may consider that if she had been raped and sexually assaulted by the accused it would be highly unlikely she would consent to sexual intercourse immediately thereafter with another man. By the stage of the appeal, new information had come to light in this case, which suggested that the intercourse with the third party in fact came before, rather than after, the alleged rape. The relevant paragraph of the application was thus deleted and substituted such that it now alleged only that the complainant was examined by a FME in respect of the investigation and gave a false answer. This substituted paragraph of the s.275 application was also refused by the court, however, as being entirely irrelevant and deemed to invite "meaningless speculation."

Applications for admission of evidence in relation to third parties thus featured in 3 out of the 5 historical cases we considered, and although in each case, these parts of the application were refused or significantly restricted by the court, the fact that defence counsel advanced such applications in the first place is itself a noteworthy finding, given the formally restrictive approach to such admissibility that was already set out in the rape shield provisions. As we illustrate below, this can be contrasted with our analysis of current cases where s.275 applications pertaining to this sort of evidence did not appear to be commonly advanced, let alone granted (albeit there were occasional instances where efforts were made nonetheless to introduce such evidence during trial proceedings). We suggest that this indicates a shift in legal practice towards greater compliance with the targeted intentions of the rape shield.

### Form of applications

Several s.275 applications in the historical sample were drafted in a superficial manner which obscured the factual and legal basis of the evidence that parties sought to introduce, and this was out of keeping with the requirements of s.275(3). This occurred in *JG* and *MacDonald* in particular, although in *MacDonald*, there were also wider related issues with record keeping, which we comment on below. In the 3 remaining cases (*Donegan*, *SJ* and *Oliver*), the standard and clarity of legal drafting was better, although in *Donegan* and *Oliver* applications still lacked detail when compared to contemporary applications. Judicial guidance on the drafting requirements under s.275(3) was issued in 2019 and reported in the first instance judgment given in the case of *JG*.<sup>178</sup> Although we still saw inconsistency and poor practice in drafting s.275 applications in some contemporary cases, there was a general improvement in quality

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<sup>178</sup> *HMA v JG* (note 5, above).



relative to these historical cases, which was also acknowledged by several of our interviewees.

### c. Procedural Matters: Special Cause Shown and Unnecessary Applications

A notable feature of the historical cases was the timing of the applications, and judicial interpretation of whether the late application (outwith the usual statutory time periods) had met the legal threshold of 'special cause shown'.<sup>179</sup> In 3 of the cases (*Donegan*, *Oliver* and *JG*), late defence applications were granted, and in 2 of these cases (*Donegan* and *Oliver*), during the complainer's evidence itself. The first thing for consideration here is that the meaning of special cause in the context of s.275 applications has been judicially ruled upon in the period following these cases, as we discuss further below.<sup>180</sup> It is important to bear in mind, too, that the change in practice that now requires complainers' views to be obtained and relayed to the court by the Crown, also occurred after these historical cases.<sup>181</sup> Unsurprisingly, therefore, analysis reveals instances of defence practice in respect of the timing of applications that sharply diverges from what we observed in the contemporary cases.

In *JG*, for example, a s.275 application was made a remarkable 6 months after the preliminary hearing and two weeks prior to a trial diet. In that case, the Crown were made aware of the prospect of a pending late application, and by the time the application was eventually made, had adopted a position that special cause had been established and that the application should be considered on its merits: a concession met with scepticism by the presiding trial judge, who did, however, ultimately hold that the legal test had been met. Similarly, an application was advanced late in *Oliver*. Here, however, the delay was due to the delayed disclosure of material by the Crown (and associated consequent expert analysis by the defence), who understandably accepted therefore that special cause had been established.

However, in *Donegan*, late applications were granted during the complainer's evidence. Here, the trial judge accepted, despite Crown opposition, that special cause was established on the basis that the complainer had given evidence, which amounted to a change in circumstance. He thereafter granted a s.275 application in relation to intimate images. An application in similar terms, also objected to by the Crown, had been explicitly refused earlier in the proceedings. The decision by the trial judge to grant the application in these circumstances is hard to understand. It was accepted in submissions by parties that the evidence that the complainer gave had not been unexpected and was in line with precognition pre-trial. The mere fact that a complainer has given evidence has nowhere else in our sample, or to our knowledge, amounted

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<sup>179</sup> S.275(B) of the 1995 Act.

<sup>180</sup> See *v HM Advocate* (note 87, above).

<sup>181</sup> *RR* (note 9, above).

to 'special cause' on its own, where the nature of that evidence was entirely as anticipated. In granting the application, having deemed special cause to be present, the trial judge in this instance overruled two prior decisions in the case pre-trial on the same matter, and the decision of the trial judge to consider the fact that the complainer had given evidence alone to be sufficient to establish 'special cause' appears to run contrary to the purpose of the test, and the legislative scheme, which seeks to give certainty to parties and complainers about the scope of evidence to be explored (in so far as that is possible).

### Unnecessary Applications

In 2 of the cases considered (*JG* and *Donegan*), s.275 applications were made to the court which were then judged to be unnecessary as they did not relate to any issues excluded by s.274. The nature of the evidence that the defence sought to elicit in these cases included, for example, general evidence that the complainer had given a prior inconsistent statement about factual matters in the charge (*JG* and *Donegan*),<sup>182</sup> and the fact that the accused and the complainer were in a romantic relationship when such a matter was already narrated in one of the charges themselves and thus not excluded by s.274(1)(b) in the first place(*JG*).

This can be read as a 'belt and braces' approach by defence counsel to the framing of applications, opting to (over) include material in a s.275 application rather than run the risk that, in the absence of an application, such evidence will be deemed to be prohibited at trial. As we discuss below, in the contemporary context, this practice of lodging unnecessary applications on a precautionary basis has been explicitly discouraged by the Lord Justice Clerk.<sup>183</sup> Nonetheless, our findings reveal that practitioners continue to express uncertainty about the parameters of what is excluded by s.274 and when a s.275 application is needed.

## d. Defence Strategies

### Post-Incident Behaviour

Whilst practice varied between the historical cases, the use of post-incident behaviour to undermine a complainer's credibility was a regular feature. In *Donegan* and *Oliver*, the issue of delay in reporting to the police was taken up in cross-examination in an attempt to undermine the complainer's account. Meanwhile, in *SJ*, cross-examination of the complainer also included questioning on their failure to mention the alleged incident to another individual in text messages. As we explain later in the report, defence counsel commenting negatively on delayed reporting remains a notable feature of contemporary legal practice, albeit in a context in which s.288DA of the Criminal Procedure (Scotland) Act 1995 mandates judicial directions in respect of this

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<sup>182</sup> Such a matter not requiring a s.275 application see *CJM (no 2)* (note 21, above).

<sup>183</sup> *MP v HM Advocate* [2021] HCJAC 48.

matter of delay. To an extent, this sort of defence strategy is perhaps unsurprising in an adversarial system where the Crown regularly leads evidence of the complainer's distress in the aftermath of an incident as an evidential matter of considerable importance, but as we explore in more depth in the Trial Analysis Section, this can continue to perpetuate problematic stereotypes about 'appropriate' victim behaviour.

### Character of the Complainer

Within the historical sample, it was also clear that that the complainer's character in general, and their sexual behaviour in particular, remained a prominent focus of defence attention at trial. In some respects, this is not altogether surprising given that, in sexual offences prosecutions, the common evidential position of the accused (that is, a denial of the offence and a plea of consent) and the limited independent eyewitness evidence of the facts of the libel, encourages scrutiny of the complainer's credibility and reliability. However, the means by which this was progressed at trial, despite rape shield provisions, calls for critical comment.

As noted above, 3 of the 5 historical cases included applications that sought, with varying degrees of success, to introduce evidence of sexual activity with the accused and / or third parties (*Donegan*, *Oliver*, *SJ* and *JG*). Often, it was difficult to ascertain from the paperwork in these cases what the connection between the evidence sought to be elicited and the complainer's credibility and reliability was, beyond an underlying assertion that someone who consents to sexual activity on one occasion with an individual, or a third party, was more likely to have consented to sexual activity at an earlier or later date (*JG* and *Oliver*) or that the jury required to understand a broader context to the case (*SJ*). The notion that someone who has consented previously to sexual activity is more likely to consent on a future occasion is one of the 'twin myths' rape shield provisions are intended to protect against, as discussed above.

In two of the cases (*JG* and *Oliver*), the defence attempted to lead evidence that the complainer had engaged in BDSM activities with third parties, whilst in *Donegan*, as noted above, a complainer was cross-examined on the basis that she had sent a sexualised image of herself to the accused prior to their meeting. The most egregious example of poor defence conduct in this respect, however, arose in *MacDonald*, where several lines were advanced by the defence (in the absence of an appropriate s.275 application, as far as we could discern from the paperwork), which had no obvious relation to the facts in issue in the libel. These included the suggestion that the complainer consumed illegal drugs, was wearing revealing clothing and took a shower with another woman on the night in question, prior to the incident. That such evidence was allowed to be elicited at trial reflects extremely poorly on not only the defence, but also the Crown and the presiding sheriff. Whilst problematic approaches to leading evidence of the complainer's character are still apparent from contemporary cases, which we will discuss further below, it is to be welcomed that explicit attacks of the

kind seen in the historical sample were not a regular feature in our dataset.

#### e. Inadequate Record Keeping and Technological Failures

It is important to note here that the standard of record keeping in some of the historical cases presented us with difficulties in terms of our analysis. In *MacDonald*, as was remarked upon by the Appeal Court, there was simply no information present which enabled us to conclude that the s.275 application in the file was judicially considered and determined, although it is obvious that this did occur given the matters discussed by the sheriff and parties. Similarly, we encountered problems in *Donegan* and *JG* with the quality of the audio recordings that were available, albeit the evidence was able to be heard. Perhaps most concerning, in *SJ*, the recording of the evidence on commission itself was of extremely poor quality, resulting in requests from the jury to turn up the volume. Technical problems such as these were witnessed also in the contemporary trials analysed for this research, as we discuss below.

#### f. Conclusion

Discussion in this section reveals that practice in the historical case sample that we selected was beset by considerable problems. There was often a clear divergence between the law, as articulated in the appeal court, and the practice of courts at first instance. Even where refused, applications were commonly advanced that ran counter to the law in operation at the time, suggesting a speculative approach to testing judicial interpretation. The rationale for doing so, even applications likely to be futile, was supported by the fact that, in one of the cases, the Appeal Court itself adopted an approach that was later criticised and disproved by a fuller bench.

To an extent, the occurrence of these problems is not surprising given that we specifically chose historical cases where we knew that there had been issues of concern, given the reported judgments of the Appeal Court. However, notwithstanding the criteria for selection of these cases, and the fact that the sample size was small, we know enough from previous research in this area to indicate that these problems relating to the operation of the Scottish rape shield provisions at the time were not isolated or exceptional occurrences. The problems identified here, and the nature of the applications advanced, and in some instances granted, provides a reference point for the work undertaken in the remainder of this research. These cases allow the reader to measure whether practice has changed in relation to the operation of the rape shield provision, and if so, to what extent. They also, along with the contemporary analysis of cases that follows, permit us to evaluate more robustly the concerns raised by various stakeholders about the law relating to sexual history and bad character evidence.

Having examined these 5 historical cases in which problematic aspects of practice in respect of the rape shield were identified in published judgments, we turn now to the

second data set in this research – 20 contemporary preliminary hearings in rape or attempted rape cases.

## Section 6: Preliminary Hearings

In this section, we present data from our observation of a sample of preliminary hearings where s.275 applications were heard, and from our analysis of case files and interviews with stakeholders. We shed light on how the rape shield provisions are currently being implemented at the pre-trial stage of the process, when the vast majority of s.275 applications are decided. This analysis reflects on the evolving nature of practice since both Burman et al's study in 2007 and the historical cases examined in the previous section. We highlight areas of identified good practice as well as areas where further improvement is needed.

As noted above, between December 2021 and 31 March 2022, this study followed the preliminary hearings for 20 rape or attempted rape cases, involving 30 female complainers and 20 male accused. Of these 20 cases, 14 involved a single complainer. All 20 cases involved a single accused, and included one or more applications under s.275 of the 1995 Act to introduce evidence about the complainer's character or sexual history.

We observed the 'live' hearings in 14 of the 20 cases (held virtually, due to Covid restrictions). In 13, we were also able to subsequently identify, and access, associated paperwork held on file with SCTS. We later added a further 6 preliminary hearings to the dataset; these were identified having observed the live trial proceedings, and we worked backwards to identify and analyse accompanying SCTS records of preliminary hearings (including court minutes). This gives a total of 20 preliminary hearings (with linked paperwork analysed for 19 of these).

In the analysis that follows, we focus, first, on explaining the number of s.275 applications in our sample, before examining whether and how complainers' views on s.275 applications were obtained and handled. Thereafter, we will turn attention to the content of these s.275 applications, the nature of argumentation and decision-making in relation to them that took place at the preliminary hearing(s), and issues arising in relation to any delays in the process.

While we recognise that this is a relatively small sample of 20 cases, analysis of these does illuminate important findings about the current operation of the rape shield provisions, including any shifting trends in how s.275 applications are being made and considered, and how recent changes, such as the taking of complainers' views, are being implemented.

## a. Number and Timing of s.275 Applications, and Responses To Them

### Number

The preliminary hearings, and subsequent trials, were selected for inclusion in this study based on having involved at least one s.275 application. For the purposes of our analysis, we have counted the total number of s.275 applications across all 20 cases, whether made before or at trial. In total, there were **39 s.275 applications made, 28 by the defence and 11 by the Crown**. In 17 of the 20 cases, the accused also pled a special defence of consent, though in 1 of these cases that defence was withdrawn mid-trial (case 2).

Of course, the fact that our selection criteria involved the existence of a s.275 application means that we are not able to assess whether our sample reflects the prevalence of such applications in the overall cohort of rape / attempted rape cases in Scotland. In line with the findings of previous research,<sup>184</sup> many of the judges, Crown and defence counsel interviewed in this study indicated that s.275 applications were extremely common, with one suggesting it would be an exceptional case that did not include one (Crown interviewee 3:10). As we discuss further below, moreover, legal personnel also commonly referred to what they identified as a significant increase in Crown applications, because of evolving practice.

### Timing

Of the 28 defence applications, 25 were made at the preliminary hearing. Only one of these was clearly submitted outwith the statutory time limit of 7 days (case 8) due to a scheduling error on the part of the defence (the application was granted at the preliminary hearing on special cause shown). A further 3 defence s.275 applications were submitted during the trial, with the defence averring special cause due to a change in counsel. In all 3 cases, the evidence related to statements that the accused had made during his police interview: in case 12, the application was refused, whilst it was granted in cases 3 and 19. We return to explore the effects of that decision-making further in Section 7, below. As mentioned, in only one case in our sample did the Crown make a late application, and they did so because by the time of the preliminary hearing, Crown practice had shifted to requiring a s.275 application for dockets.

These figures can be compared to Burman et al's findings in 2007, where they examined 47 s.275 applications (arising across 32 trials). They found that 8 applications were lodged at the start of, or during, the trial (that is, 17%), and of these 7 were granted.<sup>185</sup> In contrast, in this study, 3 out of 39 applications were lodged during the trial (10%), 2 of which were granted. While these are small numbers, this suggests

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<sup>184</sup> Burman et al (note 1, above); HM Inspectorate of Prosecution in Scotland (2022) (note 12, above).

<sup>185</sup> Burman et al (note 1, above), p. 78.

a reduction in s.275 applications being made during the trial itself, which correlates to the suggestion from several of our interviewees that the judiciary are becoming increasingly strict in their interpretation of what constitutes special cause for the purposes of late s.275 applications; while there were opposing views amongst Crown personnel about whether, for example, a change in counsel should constitute special cause, there was a broad consensus that the judiciary were becoming increasingly rigorous in their interpretation, including in relation to this type of scenario (3:5, 3:10). Moreover, some judicial interviewees were clear that, in their view, and notwithstanding recognised pressures facing the defence bar and solicitors, a change in counsel did not amount to special cause (e.g. 5:4). That position has been bolstered by recent case law, and in particular the statement in *Doran v HMA*<sup>186</sup> that cause had to be a “speciality” of the case at hand. As such, general pressures of business, whether caused by Covid or otherwise, do not suffice. Though this stance is doubtless intended to facilitate more efficient and predictable case progression, it highlights the importance of ensuring that appropriate resourcing is devoted to all parts of the criminal justice system (including defence lawyers). Without efficient case progression, the goals of trauma-informed practice in pursuit of substantive and procedural justice clearly cannot be achieved in sexual offences cases.<sup>187</sup>

Many of the preliminary hearings that we observed had to be continued to allow an initial or revised s.275 application to be prepared by either the Crown or the defence, for example: because they had been unable to contact witnesses, or witnesses were not well enough to be precognosed; because the Crown had decided to withdraw some of the charges, or had disclosed late that the complainant had a previous conviction; to allow edited or redacted documents to be agreed between the parties; or to allow for mobile phone or social media data to be retrieved. Due to the unmanageable workload of an appropriate technical expert, this latter issue arose in several cases, causing further knock-on delays. In case 15, for instance, where there was also a change in counsel, the compound effect of this was to delay the preliminary hearing by 11 months. Meanwhile, in case 2, delays were caused by a defence error, leading to the accused’s failure to turn up at the preliminary hearing, and the lack of agreement between the parties about the translation of a key evidential document.

### Opposition, Withdrawal and Grant Rates

Of the 28 defence applications, 18 were opposed fully or in part, and 20 were granted in full or in part. Defence objections were raised in relation to only 1 of the Crown’s applications, but the court granted it nonetheless; 10 of the 11 Crown applications were granted in full or in part, though in one case (different from the one mentioned

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<sup>186</sup> *Doran* (note 87, above).

<sup>187</sup> We note that in case 8, an administrative error made by the defence in noting down the preliminary hearing date *did*, according to the preliminary hearing judge, amount to special cause, when taken alongside the probative value of the evidence and the relatively lower risk of prejudice to the proper administration of justice, including the protection of the complainant’s dignity and privacy.



above where the defence raised an objection), it was revisited and refused on the first day of the trial, as we discuss below.<sup>188</sup> In a very small number of cases (n=2/39), the defence withdrew a part of the application at the preliminary hearing, and in one case involving 3 complainers, the defence withdrew one of their 3 applications altogether at this stage.

### **To summarise our data:**

#### *Preliminary hearings:*

- 20 cases, with 30 complainers (all women).
- 14 cases with single complainers, 6 with 2 or more complainers.
- 20 accused (all men, and all single accused cases).
- 17 of the cases included a special defence of consent.

#### *Number of s.275 applications across the 20 cases (at preliminary hearing or trial):*

- 39 s.275 applications.
- 28 by the defence (72%, 3 of which at trial), 11 by the Crown (28%).
- 7 cases (35%) featured an application by both the defence and the Crown.

#### *Objections, grants and refusals:*

- 30 of the 39 s.275 applications were granted fully or in part (77%).
- Of the 28 defence applications, 18 opposed by the Crown (64%) 20 granted fully/in part (71%).
- Of the 11 Crown applications, 1 opposed by defence (9%), 10 granted fully / in part (91%).

Though a small sample, this gives us an indication of who is currently making s.275 applications in rape and attempted rape cases, and of the rates at which they are being opposed, granted and refused. These figures broadly align with the 123 High Court cases analysed in the Inspectorate's 2022 review, which found almost 2 applications per case, although where the Inspectorate found the Crown opposed 47% of defence applications, in our sample that figure was 61%.<sup>189</sup> The defence also made a higher proportion of the applications in our sample (71%) than found by the Inspectorate (62%). To put this another way, the Crown in our study made more applications than has been found in previous research: they made almost a quarter of all applications in the Inspectorate's sample (which accords with Burman et al's findings in 2007), as opposed to almost a third in our sample. This also meant the percentage of joint applications in our sample was lower than in the Inspectorate review (35% as opposed

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<sup>188</sup> One Preliminary Hearing we observed was continued for discussion of the Crown's s.275 application and we do not know the outcome as it fell outside the date parameters of the research.

<sup>189</sup> HM Inspectorate of Prosecutions in Scotland (2022) (note 12, above).

to 44%). It is important to bear in mind, however, that with the size of our sample, one application can make the difference of several percentage points.

Our findings can also be contextualised against the backdrop of the statistics provided to us by COPFS following an FOI request, as mentioned in Section 4. It is clear from COPFS data that, in the months in 2023 for which COPFS hold data for both Crown and defence s.275 applications (April 2023 - August 2023), the Crown was significantly more likely than the defence to make a s.275 application. However, it is difficult to discern any pattern in applications from this brief 5-month period, and as we note below, quantitative data on the volume of s. 275 applications by itself does not present a full picture of how the law is being implemented.

Table 8: COPFS data on number of s.275 applications at the High Court in rape/attempted rape cases

Month	Crown Application	Defence Application
April 2023	32	18
May 2023	32	17
June 2023	32	8
July 2023	25	34
Aug 2023	28	9

Our data is broadly in line with the findings from Burman et al's previous research, which indicated that the volume of s.275 applications in rape cases was significant, and that applications were typically granted in whole or in part by the court. As noted above, however, volume of applications alone tells a partial picture, and in our sample we identified applications that were often different in kind to those observed by Burman et al. Our findings can be explained partially by an increase in Crown applications regarding evidence on dockets (the Inspectorate Review also found that a third of Crown applications related to dockets),<sup>190</sup> as well as increased applications from both sides about matters in the time period directly before, during or after the alleged events, which now also require a s.275 application where the accused pleads consent and his account differs from the sexual activity specified in the libel.

Importantly, as we explore below, defence applications which seek to lead evidence of unrelated sexual activity with either third parties or with the accused, which were more common in Burman et al's analysis, and an evident feature of the cases within our historical sample, also did not feature to the same degree in the contemporary s.275 applications that we saw. In addition, it was suggested to us by some interviewees that a further increase in the volume of s.275 applications might be anticipated in the future, as some prosecutors are beginning to charge conduct that amounts to rape as part of a course of coercive and controlling conduct under s.1 of the Domestic Abuse (Scotland) Act 2018 (Crown interviewee 3:10). Although not charged under the Sexual Offences (Scotland) Act, evidence of non-consensual

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<sup>190</sup> Ibid., para 106.

behaviour in this context is still covered by s.274 of the 1995 Act and would therefore require a s.275 application.<sup>191</sup> Such increases in s.275 application rates do not, therefore, necessarily mirror any increase in efforts by the defence to introduce character or sexual history evidence to undermine the credibility and reliability of the complainer, and may in fact reflect efforts by the Crown to provide a more contextualised understanding of the abuse that has been alleged. However, the fact that both the Inspectorate’s review and our study found that there were almost 2 applications per case suggests little change in the volume of s.275 applications since they began capturing data in January 2022.

More generally, many of the legal professionals that we interviewed suggested that – notwithstanding a continued prevalence of s.275 applications in rape and attempted rape cases – the types of evidence being sought to be introduced, and the motivations behind the applications, were more varied. In fact, it was suggested that, as a result of a stricter approach by the Appeal Court to what evidence can be admitted under s.275 (and the common law of relevance), fewer spurious applications were being made than in the past, with a general improvement in the quality and precision of drafting. One Crown interviewee described this shift as “seismic” and “dramatic” (3:9). Some also reflected that increased judicial scrutiny of s.274 and s.275 at the Appeal Court level had led to more legal clarity for defence, Crown and judges alike, a point that we will return to consider below.

In their 2007 study, Burman et al found that in two-thirds of cases, the Crown did not object to defence applications (that is, in only 10 of the 32 applications they studied in detail). Their interviewees indicated that this was mostly due to prior consultation on the application between the parties.<sup>192</sup> Our findings indicate a shift in this regard, in that, as noted above, in our study, the Crown *did* object in two-thirds of cases. Several defence lawyers that we spoke with suggested that the Crown now opposed all defence s.275 applications as a “knee-jerk” reaction, because it was “policy” to do so, and they did not want to be criticised for not doing it (4:1, 4:3, 4.5). This was not borne out in our data, given that in a third of cases, defence applications met with no Crown objection. It is likely that in some of the cases where the Crown did not object to aspects of the defence application, it was because they related to the accused’s account that these were consensual activities, or because the defence had taken a ‘belt and braces’ approach and included material that did not in fact require a s.275 application. We explore the issue of unnecessary applications, and legal practitioners’ uncertainty about whether a s.275 application was required, later in this section.

Defence counsel (such as 4:5) and prosecutors (such as 3:1) also told us in interviews that they sometimes met with Advocates Depute to discuss the content of s.275

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<sup>191</sup> By virtue of the interaction of s.274(1) and s.288C of the 1995 Act, which means here that s.274 applies in effect to any offence in which a court considers there to be a significant sexual element.

<sup>192</sup> Burman et al (note 1, above), at p. 3; p. 70.

applications, and occasionally the defence would agree to withdraw some parts after such discussion, or the Crown would agree not to object to other parts, which might explain why some of the more “controversial” aspects of s.275 applications can be “lost along the way” (3:1). And while, of course, the court makes the final decision, as one defence counsel put it, “the reality is that it’s easier to persuade a judge if the Crown’s not opposing... the judges know that the Crown look at things very carefully now” (4:6). Thus, although the Crown did not object to all defence applications in our sample of contemporary cases, they did so substantially more often than was reported by Burman et al, with a complex picture underlying decisions not to object.

This research aimed to explore how s.274 and s.275 are operating currently, as well as the impact of recent changes in practice, procedure and law since the Burman et al study in 2007, bearing in mind, in particular, the authoritative guidance from the Appeal Court in recent years that a more rigorous application of the law was needed. Alongside changes in Crown practice regarding the need for applications, another significant change in this period has been the requirement, where a s.275 application has been made, for the Crown to obtain the complainant’s views.

## b. Complainers’ Views

One important change in the last few years is that complainers’ views on the s.275 application now need to be obtained and presented to the court. All of the 20 preliminary hearings in our sample should have complied with this requirement, brought about by the decision in *RR*.<sup>193</sup> In practice, regardless of whether the application is made by the Crown or defence, views are obtained by way of a precognition taken from the complainant by a Crown case preparer, who explains the content of the s.275 application and asks for the complainant’s views on it (case preparers also typically draft Crown s.275 applications). These views are then fed back to the Advocate Depute assigned to the case, who has a responsibility to impart them to the court at the preliminary hearing. It was noted by many of those interviewed in this study that the timescales for obtaining complainers’ views in this way were extremely tight, and we explore this point further below. Once the s.275 application is determined, it appears to be the responsibility of the Victim Information and Advice service (VIA) at COPFS to communicate this to complainers, though interviewees in this study gave different responses on this, with some indicating that case preparers would generally take on this role in practice.

### Data on when Complainer’s Views Taken and Substance of Views

Although the Crown operating instruction 13/20 states that a detailed record of complainers’ views should be taken, this new practice of relaying the complainant’s

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<sup>193</sup> In case 11, the Preliminary Hearing for the original s275 application was heard before *RR* (note 9, above); the Preliminary Hearing we observed included an application by the defence about which the Crown ascertained the complainant’s views.

views to the court could be implemented by the Crown reporting them orally at the bar. However, **in only 13 of the 20 preliminary hearings that we observed (65%), was there an indication either during court proceedings or in the accompanying paperwork to suggest that the views of complainers had been sought or ascertained at all.**<sup>194</sup> In three cases (cases 2, 3 and 20), it was clear, either from the observation of proceedings or the file, that complainer's views had been taken at some point, but not necessarily fully captured or recorded. In case 2, for example, the complainer's views were obtained on a previously drafted defence s.275 application that was now being amended, but there was no record of her views having been taken regarding the revised application granted at a later continued preliminary hearing (although the revised changes were minimal). Meanwhile, in case 20, papers held file showed that views had been taken from the complainer on the defence s.275 application, as they had been in case 3 in respect of the Crown's s.275. In neither case, however, was there substantive detail on file as to what those views were. In fact, in case 3, a late defence s.275 application was made during the trial, which was granted despite the Crown's objection as to special cause. Here, the complainer's views required to be taken during an adjournment, but notably only *after* the judge had already granted the application. Rather than ask counsel about the nature of the complainer's views when the court resumed, the judge simply asked counsel to confirm that nothing of what the complainer said was likely to be of relevance to his decision to grant the application.

Though, as noted, this practice of conveying the complainer's views to the court could be satisfied through oral communication at the bar, there are shortcomings to doing so, in terms of ensuring their views are conveyed accurately and clearly. In 4 cases in our sample, while there was no record of views in the paperwork accompanying the preliminary hearing, either the Advocate Depute, defence counsel or both stated orally during the observed proceedings that the complainers' views had been obtained and gave some sense of the substance of those views (cases 1, 6, 7 and 11). In 2 further cases, there was a brief written intimation in the file that views had been sought from complainers regarding both Crown and / or defence s.275 applications, with a note that they had expressed "no objection" (cases 9 and 16). In only 2 of the cases, were there detailed written records of the complainers' views on file, taken during precognition by the Crown (cases 4 and 18).

Of course, since in this study access to case files came via SCTS, it is possible that there were additional records held with COPFS that we did not see, in which some further information about the views of complainers may have been recorded. That would certainly be in keeping with what we understand to be the expectation within the Crown Office's (unpublished) operating instruction 13 of 2020 (OI 13/20), referred to

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<sup>194</sup> Cases 5, 10, 12, 13 (re complainer 2), 15, 17, 19. An updated version of the guidance in OI 13/20 is now to be found in Chapter 9 of the (unpublished) COPFS Sexual Offences Handbook (note 17, above), Part 5.4.3.

by the Inspectorate in their 2022 Report, which states that careful note should be made of what the complainer was told and what the complainer said.<sup>195</sup> However, the analysis of the data that we had access to certainly raises concerns about the efficacy of the process of taking, recording and conveying complainers' views to the court in line with the procedure imposed by *RR*.

Table 9: Complainers' views on s.275 application mentioned in preliminary hearing / case file.

No indication that complainer's views taken	7
Noted on file that complainer's views taken but no content	3
Noted on file that complainer's views taken with minimal content	2
Content of complainer's views noted orally at hearing but not on file	4
Hearing proceeded in absence of complainer's views (attempts made)	2
Detailed records of complainer's views on file	2
<b>Total number of preliminary hearing cases</b>	<b>20</b>

In the preliminary hearing cases where some detail of a complainer's views was known, the complainer sometimes refuted the accused's assertions of fact in whole or in part (cases 6, 7 and 18), or accepted the factual premise but sought to dispute the meaning or detail of the evidence (case 1). In some situations, however, they welcomed at least part of the evidence sought to be elicited which, they appeared to feel helped to explain aspects of their conduct, for example, a delayed report (cases 7 and 14). As we discuss further below, complainers' desire to explain their conduct may speak to a wider theme regarding the ability to 'tell their story', and the ways in which s.275 could be experienced by some as reducing their opportunity to present a coherent and contextualised narrative of events – a criticism also made by defence interviewees in respect of the effect of the law on the accused's position.

In 2 cases in our sample, it was clear from the file or the hearing that unsuccessful attempts had been made to contact the complainers, but there was either no record of how the court responded to the absence of her views (case 8) or the Advocate Depute suggested that the trial could proceed without them, as all reasonable avenues had been exhausted (case 13). Reasons recorded for delayed or thwarted attempts at contact with complainers across our sample included their poor mental health or complexities with access due to child-care issues.

### Challenges in Implementing the New Practice

As we can see, this data shows patchy implementation of the practice of ascertaining complainers' views. It was also clear from our interviews that there are ongoing challenges in operationalising this process, relating particularly to timescales for obtaining complainers' views, and the amount of information and extent of the

<sup>195</sup> HM Inspectorate of Prosecutions in Scotland (2022) (above, note 12), paras 151-153. See also the updated version of the guidance in Chapter 9 of the (unpublished) COPFS Sexual Offences Handbook (note 17, above), Part 5.4.3.

communication between complainers and the Crown, as well as the question of the weight that should be given to their views.

First, there are issues of timing. Interviewees mentioned a potential tension between ensuring compliance with timelines set to ensure effective case progression and scheduling a supportive, trauma-informed discussion with complainers in an environment that was conducive to facilitating their input. This was reflected in a high degree of variability in practice as to whether meetings were held online, by telephone, or in person, partly because of changed working practices in the aftermath of Covid restrictions. While one Crown interviewee said they would always, as a matter of good practice, conduct the meetings with complainers in person (3:7), as interviewee 3:6 also told us, they might be held online or by telephone as a way of trying to accommodate the needs of a complainer who lived a long distance away from the office. It was also suggested that such telephone or online meetings were often required due to a lack of sufficient time to arrange for a case preparer to visit the complainer before the preliminary hearing (much less, to enable the complainer to speak to an advocacy worker about the s.275 application). Crown interviewees often spoke of the rush to get complainers' views before the hearing (3:4), or having, in some instances, to telephone complainers with whom they had had no prior contact to seek their views on the content of applications lodged "very last-minute", ahead of the trial commencing, with pressure on complainers to respond near-instantaneously (3:8). Others highlighted the unacceptability of this, and the current tendency for "scheduling of those meetings around the needs and agenda of the court and the Procurator Fiscal staff as opposed to really considering the needs of the survivor" and for "rushed" meetings to address the requirement to obtain complainers' views without "much space to allow for questions and time to really explain what this means", as one advocacy worker put it (1:6). This was reinforced too by one judge who remarked:

"it's an anxious thing, not all complainers want to just, at the drop of a hat, have to speak about the case at a time that's convenient to the court and the Crown. So, understandably, it's not always quickly and easily done, there are sensitivities about that. It's probably a necessary procedure but it can have unfortunate effects from a complainer's point of view, it can cause delay and it can cause a complainer being hassled when she may not want to be hassled" (5:1).

The potential for some of these problems to be ameliorated through the extension of the period within which a s.275 application requires to be lodged (from 7 to 21 days) in advance of the preliminary hearing, as proposed by the Victims, Witnesses and Justice Reform (Scotland) Bill, is noteworthy and potentially helpful. Equally, given our findings about the stress the criminal justice system is currently under, questions as to viability remain.

Secondly, there are unresolved questions about the extent to which it is appropriate to offer information or guidance as to the likelihood of s.275 applications being granted (a point also noted by the Inspectorate in their 2022 review). One Crown interviewee said that there has been an “evolution”, such that Advocates Depute do now give an indication of the Crown’s view about the admissibility of the s.275 application, communicated to the complainer via the case preparer (3:2), while another noted that, in one recent case they had involvement in, the complainer had found the Advocate Depute’s views helpful in understanding why there was a defence s.275 application (3:6). At the same time, some Crown interviewees expressed concerns about the possibility of being accused of “coaching” complainers by providing this information, a concern that extended to avoiding preparing complainers for questions that might be asked relating to the s.275 application (3:3). This fear of being accused of coaching, or of compromising the evidence in a way that affected the justice outcome for the complainer, sometimes had a negative effect on the amount of information and support given to the complainers, which in turn affected their overall experience of the process. For instance, fear of coaching or leading the complainer was mentioned by Crown interviewee 3:3 as an explanation for not telling the complainer the specific charges on the indictment, a practice that another Crown interviewee (3:1) described as “old fashioned”. Not giving the complainer this information was something that several interviewees, including complainers, mentioned as distressing or confusing, or that left them feeling “neglected” (advocacy worker 1:3, complainer 2:2, Crown interviewee 3:1), particularly when the same information is available to the press, and can be found by “googling”, as one complainer pointed out (2:4).

Similarly, there were different responses given by Crown interviewees about whether complainers were allowed to have someone support them during the precognition with the case preparer, with some saying complainers would never be precognosed with someone else in the room for fear of affecting the evidence (3:8), whilst others said that they had never met with the complainer without a supporter in the room (3:10). The Inspectorate of Prosecution Report in 2022 also noted inconsistency in practice in this regard.<sup>196</sup> A previous (unpublished) COPFS operating instruction in 2020 (OI 13/20) stated that while the complainer can be accompanied to the meeting by an advocacy or support worker or another person if they wish, the person attending should *not* generally be present during any substantive precognition.<sup>197</sup> However, more recent guidance (not publicly available) suggests that a complainer can be supported during the precognition.<sup>198</sup> It is important that Crown personnel apply this guidance consistently. A trauma-informed approach, such as the one proposed by the Victims, Witnesses and Justice Reform (Scotland) Bill, would also suggest that it would be beneficial for a complainer to be supported throughout the precognition, if they so wished.

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<sup>196</sup> HM Inspectorate of Prosecution in Scotland (note 12, above), paras 190-193.

<sup>197</sup> *Ibid.*, para 193.

<sup>198</sup> Chapter 9 of the COPFS Sexual Offences Handbook (note 17, above), Part 5.4.3.



Thirdly and relatedly, interviewees raised further difficulties about how trauma-informed the meetings were. One issue here was about decisions to alert complainers to all the matters that the defence were seeking to bring evidence in relation to at trial, in a context in which their prospects for success at any s.275 hearing may have been remote given evolving interpretation of caselaw. As one Crown interviewee put it: “At the moment, it seems to me that we speak to them about everything and then we whittle it down from there” (3:1). There were different attitudes expressed about this: one Crown interviewee spoke about the need to go through the entire s.275 application (3:8) while another described a situation where the Advocate Depute decided not to put “inappropriate” content to the complainer (3:4), and another spoke about a decision not to precognose a vulnerable witness about the s.275 at all (3:8). A further Advocate Depute said they would “resist” re-precognosing a complainer about a late s.275 application during trial if it was “yet more distressing or lurid allegations” that would have no additional impact on her privacy and dignity (3:5). This sentiment was echoed by a complainer we interviewed who described being “hit” with all the information and being “put through more distress” by hearing about multiple parts of the s.275 that were refused (2:1). While the COPFS OI 13/20 states that the complainer should be advised of the full content of the application, there may be some instances where doing so is more traumatising than not. We note too that if a complainer is not given information on whether an application is likely to be granted, this has the potential to cause further distress.

Clearly any distress that complainers might experience when learning of the content that the defence will seek to raise at trial, and when providing a response to the Crown, must be weighed against the opportunity it provides for them to be informed about the process. The provision of ILR may well alleviate some of these issues, but there is also a need for flexibility, sensitivity and balance in communication with complainers, a point underscored by advocacy worker interviewee 1:6 who said that holding conversations with complainers about the content of s.275 applications could compound the intrusion of the trial process: “there’s definitely a sense of ‘oh god, there’s so many people who know the intricate details of this horrific thing that’s happened to me, this really private thing...all these people have looked at the case, they know my name’...[T]hat sense of loads of people knowing that information can feel quite humiliating and exposing.” On the other hand, several complainers we interviewed emphasised why it was important for them to receive as much information about proceedings as possible: as one put it, “you’ve already had your consent disregarded in the worst possible way, so an understanding of how you get to a trial and have as much information as possible and know why things are being done would just be such a great help.” (2:2).

It was clear from our observations and interviews that there is currently a lack of clarity and consensus amongst legal practitioners regarding the weight to be given to the complainer’s views, even where they had been ascertained and relayed to the court. Three judges emphasised that complainers’ views are of interest, not decisive (5:1,

5:3, 5:4), one of whom said it was “not entirely clear in *RR* what the Court of Criminal Appeal expects first instance judges to do with the view of the complainer, other than simply take it into account”. A Crown interviewee reinforced this, saying they had not seen complainers’ views change anything in the application or affect its outcome (3:9). One defence counsel remarked “I just really don’t know what weight the court should and does actually take of the complainers... I’d be interested to hear what a sheriff or a judge makes of that because I don’t know” (4:1). The same counsel suggested it was pointless in cases where it was obvious from the complainer’s statement that she did not agree with the accused’s account of the events. Thus, though the view was also expressed that taking complainers’ views does fulfil a participatory function, to allow them to “have their say” (judge 5:1) and “be heard” (defence 4:1), and enable the court to reflect in a fuller way on the extent to which the evidence sought to be adduced affects their dignity and privacy (judge 5:4), the risk that this could be tokenistic was highlighted. This was something that complainers directly reflected upon: as advocacy worker 1:6 put it:

“there’s a sense of, like with the whole justice process, of survivors being made to feel really insignificant...Okay, you’re asking my view because you need to tick a box and say that you have but at the end of the day, you’re just going to make your decision. I think there’s definitely a sense of that.”

It is again possible that funded provision of ILR to complainers in respect of s.275 applications, as recently proposed by the Scottish Government, will be of assistance here, although as noted above there will be logistical challenges still to be overcome – particularly in the initial implementation period – to ensure sufficient availability of legal expertise, and to accommodate the process of seeking and obtaining legal advice in anticipated timelines for the lodging and determination of s.275 applications. It is also important to highlight the parameters of the current ILR proposals: it is not intended to create full standing for complainers as parties to proceedings, but rather to provide them with representation through the preliminary hearing process. This means that issues of access to information, disclosure and the availability of good quality representation at this early stage will still require careful management.

In summary, there is evidence of some evolving good practice in obtaining complainers’ views and conveying them to the court, in line with the change brought about by *RR*. This indicates that an important element of complainers’ dignity and privacy is being respected during the process of determining s.275 applications. However, implementation is variable as to whether and how these views are recorded. This means that complainers are not ensured a consistent experience, and the practice of taking and conveying views may be perceived as tokenistic. Further, given the variable quality and incidence of the provision of information to complainers, it is questionable whether aspects of the current practice are, in fact, in keeping with the general principle that the Crown should, as far as is appropriate, ensure effective participation of victims and witnesses, as required by the Victims and Witnesses

(Scotland) Act 2014. It also does not appear to fully meet the requirements of good practice in record-keeping, and may make it impossible to discern what, if any, impact a complainant's view on s.275 has on its determination. Those complainants who are most vulnerable or do not have the capacity (emotional or practical) to interact with COPFS seem to be least likely to engage with processes designed to include them, and the often short timescales in which views require to be taken further impede participation and inhibit trauma-informed practice. ILR may help here, but delays in evidence-gathering have a further knock-on effect in that complainants who may want to give their views are sometimes not asked until very late in the process. In short, the implementation of this new practice needs to be kept under review.

### c. The Substance of s.275 Applications, and Responses To Them

Examining the content and determination of s.275 applications in our contemporary sample allows us to assess how rape shield provisions are being implemented. Across the 20 preliminary hearings, there were 39 s.275 applications – 11 from the Crown and 28 from the defence. Some s.275 applications were commented on by the preliminary hearing judge as being poorly drafted, including comments related to bad grammar or a lack of understanding of the law (cases 3, 6, ,9 and 12). As we discuss in the Trial Analysis section, there was also an instance where the judge presiding at trial revoked an application granted in an earlier preliminary hearing (case 3), in advance of any evidence being led, and others where the parameters of the s.275 had to be revisited (and amended) during the substantive hearing.

In this sub-section, we begin by examining the content and framing of s.275 applications made by the Crown in our sample of preliminary hearings, before going on to examine those made by defence counsel. We draw on interviews with stakeholders at key points to help us contextualise and reflect on that analysis. While, as might be expected, some similar issues arise across applications made by either party, presenting our data in this way helps to illuminate the different roles and duties of the Crown, defence and judiciary. This, in turn allows us to assess how the rape shield provisions are being applied in practice by all the relevant parties, and to consider apparent shifts in that practice since the time of the Burman et al research and the historical cases that we discussed in some detail in the previous section.

#### (1) Crown applications

In some cases, parties will seek to have admitted contextual information that both agree is relevant to the incident, but which raises issues of sexual behaviour not libelled or (bad) character, for example, evidence that drugs were being ingested prior to the offence. We observed some such applications from both the Crown and defence in our sample (for example, case 8). However, where the Crown make a s.275 application, it is usually intended to assist in providing what they consider to be relevant and helpful context to the complainant's account. As noted above, it was clear

that many of our interviewees felt there had been a significant increase in applications by the Crown in recent years and that this reflected a change in approach from the past when the evidence they sought to lead would not have been considered to require a s.275 application, because, for example, it related to material on a docket, or to something the accused said in their consent defence about the complainer's sexual behaviour not specified on the indictment. On the one hand, some interviewees thought this was an indication of an overly expansive approach. One Crown interviewee said that having to submit a s.275 application to lead evidence of what the accused said about his defence of consent in his police interview was an "unintended consequence" of the legislation. On the other hand, some thought more Crown applications was a good thing; rather than indicating an inappropriate level of intrusion into the complainer's privacy and dignity, it showed that "the legislation is working properly" (4:4). This defence interviewee also said it sometimes allowed the complainer to "tell the whole story"; this is a complex issue that we will return to, below.

### Unnecessary Applications

The Inspectorate's 2022 Report found that, when the Crown was uncertain about whether a s.275 application was necessary, they tended towards caution and made the application.<sup>199</sup> Similarly, in the present study, it was not clear in every preliminary hearing where the Crown made a s.275 application that it was necessary, even taking account of evolution in case authority and practice which, as noted above, now require applications to lead evidence about the accused's account of sexual behaviour not libelled, or related to material on a docket. Echoing comments from our interviewees on this issue, during our observations, we identified confusion amongst Advocates Depute as to whether specific aspects of context required a s.275 at all. For example, in case 13, the Crown initially submitted a fulsome application including details of the high level of alcohol and drug intoxication of the two teenage complainers, as well as the existence of a relationship between the first complainer and the accused and the fact of consensual kissing between them immediately before the alleged offence. They did so to explain key aspects of that complainer's allegations. However, the Crown later accepted that underage or teenage drinking did not necessarily indicate bad character and those parts that did not relate to the kissing were deleted as unnecessary before the preliminary hearing, where the rest of the s.275 application was then granted.

One COPFS interviewee described a level of confusion amongst judges and Advocates Depute alike about when an application was necessary, including in situations when the parties were in a "non-cohabiting" relationship (3:9). One judge described the question of whether an application is needed to elicit evidence about non-cohabiting partners as a "huge grey area" that has "divided the judges" (5:1), adding that to some extent the Crown is solving the issue "on the ground" by either

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<sup>199</sup> HM Inspectorate of Prosecution in Scotland (2022) (note 12, above), at p. 32.

coming to an arrangement with the court about utilising descriptors that do not refer to sexual behaviour (e.g. they had “feelings for each other”) or by adding a domestic aggravation charge to the indictment under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. Again, we observed this approach in our contemporary sample, where in 8 of our 20 preliminary hearing cases, the rape or attempted rape charges were aggravated in this way (in 2 other cases where the charges might have been aggravated, the alleged offence occurred before the 2016 Act). Interestingly, while the matter has not yet been authoritatively clarified by the Appeal Court and remains a point of apparent confusion amongst practitioners, this issue is covered in the Preliminary Hearings Bench Book,<sup>200</sup> which advises that it should be assumed that a s.275 application would be required to introduce evidence of any other kind of sexual relationship (outwith cohabitation) between the complainer and the accused.

### Relevance of Contextualising Detail

Similar uncertainty also arose about the appropriate level of contextual detail to introduce in respect of the incident, even where a s.275 application was more confidently recognised as being required. Across interviews and observations, it was clear that there remained divergence in practice amongst Crown counsel on this matter, with some parties – and judges – appearing cautious as to the relevance of details of sexual activity before or after the acts libelled, and others seeming to regard the admission of such evidence as unproblematic.

In case 3, the original Crown s.275 application referred to consensual oral sex with the accused immediately before the alleged offence. At the preliminary hearing, the Advocate Depute repeatedly argued that showing the jury the distinction between the consensual and non-consensual was important, notwithstanding the fact that such reasoning had previously been explicitly rejected by the Appeal Court<sup>201</sup> and would almost certainly have been objected to by the Crown were the defence to raise it. Interestingly, the preliminary hearing judge in this case granted the Crown’s application but referred to the privacy and dignity of the complainer in restricting questioning to the fact of a “consensual sexual encounter” but not its nature. However, as discussed below, this permission was, in turn, revoked by the trial judge on the first day as irrelevant at common law, with the (different) Advocate Depute stating that they struggled to defend it having been sought by the Crown in the first place.

Likewise, in case 14, the Crown initially made a s.275 application to adduce evidence to explain why the first complainer had not reported the alleged rape at the time of the offence over a decade ago. This included details of her having been “rescued” by a second man with whom she very soon afterwards engaged in sexual activity, and whom, she maintained, she had not wanted to involve at the time by reporting it.

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<sup>200</sup> *Preliminary Hearings Bench Book* (note 79, above) at p. 103.

<sup>201</sup> *CJM* (No. 2) (note 21, above).

Unsurprisingly perhaps, the defence did not object to this application, but more surprisingly, in our assessment, it was granted at the preliminary hearing, where the judge specifically noted that their initial reluctance to grant the application was overcome following Crown submissions that the complainant wanted to be able to explain why she had delayed so long in reporting. These examples demonstrate not only a lack of consistency in approach between judges, and Crown counsel, but also the flexibility of potential interpretations of how the privacy and dignity of the complainant should be assessed in the context of determining admissibility.

### Relevance of Prior or Later Sexual Behaviour

A particular problem that our data suggests arises for the Crown is where the accused does not plead consent in respect of the incident, and instead asserts that there was no sexual contact whatsoever. Where this occurs, the Crown will try to introduce evidence to the degree that is necessary for understanding the complainant's version of events, but without opening up issues for jury speculation on irrelevant matters. For example, in case 18, in which the accused denied that sexual intercourse had taken place on the date in question, both the accused and complainant agreed that they had consensual sexual intercourse 2 days previously, and a s.275 application was made by defence counsel to adduce this evidence to support the accused's statement that he knew that the date of their last sexual contact had been prior to the events libelled. Although the application was made by the defence, when her views were taken, the complainant made a distinction (similar to that made in case 3) between the consensual act and the non-consensual act, and so did not object to this part of the s.275 application. Nonetheless, the Crown opted to oppose the application in full. The application was refused by the preliminary hearing judge, appealed by the defence, and refused again. This demonstrates that, even where the complainant does not disagree with the facts averred, the Crown and court retain an important function in refusing to admit evidence that is collateral. But it also highlights the complexity of how to best determine what role the complainant's views – which were consciously overridden in this case – do, and should, play in this context.

There are also difficulties raised by the fact that some complainants may value being able to give more detailed contextual or background information when narrating their own account of the incident. While doing so might assist the jury's understanding of their (and the accused's) conduct before, during, and after the offence, it may require the introduction of evidence that would ordinarily be excluded under the rape shield and which likely would be refused by the court. For example, in case 7, the Advocate Depute did not object to the defence counsel's s.275 application (which was granted), which sought to elicit evidence that the complainant slept in the accused's bed after the alleged offence, because the complainant had stated she wanted to give her own account of where she slept, and why. While context can have explanatory power, it can also introduce irrelevant and collateral evidence that may distract a jury and / or play into existing prejudicial stereotypes about (un)deserving victims, thereby

undermining the protection afforded by s.274. It can also run counter to the dignity and privacy interests of complainers, which is one of the things that the court must consider, alongside other factors, when it reaches a decision on whether, in the interests of justice, a s.275 application should be granted. The issue of how to achieve balance is important here, and was often reflected upon by interviewees. As one advocacy worker put it, “sometimes it’s kind of the opposite, where a survivor’s really keen to give the prosecution absolutely everything that could possibly help.....that gives me the fear because I don’t think they appreciate... what the impact of that can be” (1:6). Equally, it was emphasised by one defence counsel that, in their view, restrictions which prevented the introduction of contextualising information could – ironically – undermine the privacy and dignity of complainers because it may be an “easier account for a complainer to give” if they are able to explain something of the context that led them to be in the circumstances set out in the libel (4:7). Thus, it was suggested by some interviewees that a more restrictive interpretation of the common law of relevance and the rape shield provisions might risk “disembodying” a narrative that then makes it more difficult for jurors to understand or “treats jurors like they are idiots” (4:7), not only in respect of the account that the accused wishes to give but also that of the complainer. In this sense, though it is often presumed that a narrower approach to admissibility will reduce the trauma associated with testimony-giving for complainers (and in many cases it *will* do so), it could also curtail complainers’ ability to fully narrate their account, damaging their sense of voice and participation in the process. We return to the issue of the impact of rape shield provisions on parties’ ability to ‘tell their story’ in our discussion of live trials, in Section 7.

### Crown Strategies and Prosecution in the Public Interest

A final issue that we identified relating to current Crown practice regarding the rape shield provisions relates to their duty as a public prosecutor, and is well-illustrated by case 9. Here, in the pre-trial period, it became clear that there was CCTV evidence of the accused and complainer, in which the complainer appeared to willingly engage in intimate contact in contradiction to her police statement, inviting the accused into the locus where two of the alleged offences (rape and sexual assault) took place. The Crown then withdrew the charges relating to these offences at a preliminary hearing. Defence counsel not only opposed that motion to withdraw the libel but lodged a revised s.275 application to allow evidence relating to those incidents (that is, relating to sexual behaviour no longer the subject matter of the charge, but occurring within hours of the alleged offences) to be adduced. The defence’s application to admit such evidence was rejected at the preliminary hearing and again on appeal. While the Crown, as ‘master of the instance’,<sup>202</sup> has the authority to make decisions as to how and whether to proceed on a particular charge, this example shows how incidents in close proximity can be compartmentalised and deemed (ir)relevant, not through

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<sup>202</sup> In Scotland, the Crown decide who to prosecute, on what charge, and in which court. On the role of the Crown and the police see *Smith v HMA* 1952 JC 66. On the Lord Advocate’s exclusive title to prosecute on indictment as the public prosecutor see *HMA v Cooney*, [2020] HCJAC 10.

judicial oversight and scrutiny but through Crown charging practice. We were not privy to all the factors that were taken into consideration by the Crown in this case, but the court concluded the material was clearly irrelevant once the charge had been withdrawn. Prosecutorial decision-making in this area (which is practically unfettered, albeit subject to a duty not solely to seek to secure a conviction<sup>203</sup>) is an area almost completely unexamined in recent times. But this case throws into sharp relief the fact that it can have determinative influence on the evidence led.

### Crown Applications: Summary

In comparison to Burman et al's 2007 findings, there is now an increasing number of s.275 applications from the Crown, partly due to changes in practice (for example, with respect to dockets) and because the Crown must – even if there is a mirror defence application – make an application to raise evidence about incidents related to the accused's defence of consent if this differs from the behaviour libelled in the charge, and they intend to lead evidence about the accused's version of events as recounted in the police interview. Echoing the findings of the Inspectorate in their recent review, within our sample we also saw the Crown sometimes make an application, even when they accepted that it might not be necessary, to be on the 'safe side', because they are not always clear on the current requirements and parameters of s.275. Where Crown applications are intended to give wider context to the complaint, this raises a potential difficulty in being able to determine how to present the complainer's experience to the jury in a way that does not run counter to the aims of s.274, and does not artificially compartmentalise events and relationships, rendering them unintelligible.

Some of these difficulties are also experienced by the defence, who must balance the rights of the accused alongside common law and legislative constraints on providing evidence of context and detail, as we shall now explore.

## (2) Defence applications

### Unnecessary Applications

As with *Advocates Depute*, there was a level of uncertainty amongst defence interviewees in this study about when a s.275 application is required, and what it should cover: as defence interviewee 4:7 put it, for example, "I've been doing this for decades and I don't know how to do [s.275 applications] any more...I am at a loss...I literally sit with my head in my hands...I don't know whether or not to make an application and just see if I get this in at trial because it might technically not be covered." Another defence interviewee described this as "the paranoia of practitioners not trusting their own judgement as to what requires an application and what doesn't"

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<sup>203</sup> *KP v HM Advocate* [2017] HCJAC 57.



(4:3). However, as they then went on to explain, in *MP v HMA*,<sup>204</sup> Lady Dorrian was clear that this was “absurd”, noting that counsel should not make applications that they consider unnecessary as they take up court time on matters that are redundant, and that s.275 applications that are identified as such should be refused as incompetent.<sup>205</sup>

Across our sample of preliminary hearings, some applications lodged by the defence were refused by the judge as unnecessary (some were also withdrawn by the defence). Indeed, several of the cases we observed included a s.275 application that did not, in our assessment, appear to be necessary, as the evidence the defence sought to elicit was not struck at by s.274. In case 5, the Crown questioned the necessity of a defence s.275 application that aimed to introduce evidence of one of the teenage child complainers moving back into the family home as a way of countering her allegation of prior sexual assault by her father. The application was “technically refused” by the preliminary hearing judge who said they thought it was unnecessary. Similarly, in case 4, the defence s.275 application included evidence of there being a long, loving family relationship between the accused, the complainer and their children, with no prior complaints about the accused’s behaviour. The Crown submitted that none of this was struck at by s.274, and the court minutes of a continued preliminary hearing noted that the vast majority of the remaining application was deemed collateral and inadmissible by the judge.

Although the Appeal Court has made it clear that applications should not be made where counsel considers they are not required, it seems that genuine confusion amongst counsel on both sides of the bar continues.<sup>206</sup> For example, in case 6, an extremely experienced defence counsel told the judge that they struggled to know where the correct parameters of s.274 and s.275 were. Judges also diverged in their responses to such applications. In case 1, defence counsel intimated during the preliminary hearing that, following an earlier discussion with the Crown, they would withdraw one of three applications as unnecessary. The Crown opposed the other two applications for the remaining two complainers as also unnecessary, but the judge ultimately determined to grant them as “the safer course”. In case 8, the judge took a similar view and allowed the application “for the avoidance of doubt” despite suggesting the behaviour – the complainer’s consumption of a bottle of wine – was not caught by s.274.

These examples like the findings of the Inspectorate’s Review, illuminate ongoing confusion amongst counsel, and an inconsistency in approach across judges, regarding the need for s.275 applications and how best to respond in situations where an application is made that is likely not required, notwithstanding Appeal Court guidance on the issue.

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<sup>204</sup> *MP v HMA* (note 181, above).

<sup>205</sup> *Ibid.*, at [16].

<sup>206</sup> *Ibid.*

## Uncertain Parameters

The rape shield legislation permits courts to issue directions and conditions in respect of the granting of a s.275 application, permits applications late on special cause shown, and allows courts to subsequently restrict the terms of, or revoke, s.275 applications previously granted.

In practice, this means some applications can be rather ‘open-ended’. For example, in case 19, the judge granted the s.275 application in part, leaving open for discussion, should it arise in the trial, issues relating to the complainant and accused’s body language earlier in the evening, that is, smiling and talking about their respective romantic histories. They did so, even though the term “romantic histories” does not necessarily connote sexual behaviour and may, therefore, not have required a s.275 application. Meanwhile, in case 10, the complainant’s alleged words – that she wanted to have sex with the accused to get back at her partner – were the subject of a defence s.275 because they were about sexual behaviour that would be relevant were the Crown to submit that she would not have had sex with the accused because she had a (same-sex) partner. When the Crown objected, they also intimated that they had considered making their own s.275 to allow this evidence to be led but decided it was irrelevant because the charge labelled two sleeping rapes, and so whether the complainant was in a relationship with someone else (irrespective of their gender) was irrelevant. The judge did not allow this part of the application but left it to be re-opened at trial if the complainant raised her relationship as an explanation for why she would not have had sex with accused. Likewise, in case 6, the preliminary hearing judge, in granting the defence application, stated that sexual conduct four hours prior to the alleged rape would only be relevant and permitted at trial if the Crown continued to lead evidence that the complainant disliked the accused.

In this context, we can see how ongoing judicial consideration is required to ensure fairness to both the Crown and the defence, given the somewhat uncertain nature of evidence in criminal proceedings. We note also the distress likely to be experienced by some complainants given uncertainty as to whether issues will be revisited at trial some months (or years) later. Indeed, whilst decisions such as these may be understandable from a legal perspective, they inevitably raise difficult questions from the perspective of trauma-informed practice.

In some cases where this approach of preliminary hearing judges refusing applications, but explicitly stating that some aspect of the s.275 may be amenable to re-examination at trial depending on evidence led, was taken, this seemed to increase the incentive for counsel to pursue lines of questioning that would be more likely to re-open the matter (for example, case 4). Likewise, we also observed judicial comments stating they would take it “on trust” that defence counsel would not overstep at trial the strict parameters of s.275 applications that had been granted. In case 11, for example, the evidence in question related to the complainant’s previous conviction for wasting

police time in making (and later withdrawing) a report of an assault committed against her by her son, and the court was clear that it would not be possible to go behind that conviction and explore her reasons for withdrawing the report.

In the Trial Analysis Section below, we will return to this issue of the relationship between the decision at preliminary hearing and the extent of faithfulness or flexibility in relation to it that was demonstrated at the substantive trial. What it is important to observe here is that, though the possibility to reopen an assessment at trial may be necessary in a context where the admission of evidence prohibited by s.274 may be contingent on the evidence led or elicited, it can introduce uncertainty, and possibly distress to complainers who have been precognosed on their views on the s.275 application, and who may have a false sense of confidence, following the s.275 decision, about lines of questioning or evidence to be explored at trial.

### Relevance of Contextualising Detail

Where the accused pleads a special defence of consent, and his version of events in respect of the sexual conduct differs from the facts narrated in the libel, counsel will need to make a s.275 application to introduce evidence of any contextualising sexual behaviour that is not the subject matter of the charge. In 17 of our 20 cases, a special defence of consent was lodged. The need to provide evidence to narrate the accused's defence of consent, where this differs from the events in the charge, goes some way to explaining the incidence of defence s.275 applications. The challenge then is for the court to establish the appropriate parameters of evidential inquiry, including the *level of detail* in the context that is said to be relevant and *the appropriate time frame* of any background or contextualising information that the defence want to include in their applications. We deal with each of these points in turn.

### Level of Detail

We can see the problem of how much detail to include aptly demonstrated in case 6, for example. Here the defence s.275 application included information about 3 issues: (1) the complainer's behaviour towards the accused around 7 months prior to the alleged offence; (2) kissing and walking back to the complainer's house (which were witnessed) in the 4 hours prior to the events libelled; (3) behaviour during the alleged events, including a claim that the complainer had positioned herself on her hands and knees to facilitate penile-vaginal penetration. At the preliminary hearing, the Crown objected to all parts of the application, except part 3 – that is, those most closely related in time – thus not objecting to the detail on how the complainer had allegedly sexually positioned herself vis a vis the accused. The judge allowed all but point (1), however, determining that the details of the complainer's sexual position in the context of the accused's defence of consent was relevant at common law and satisfied the tests of specificity, relevance and sufficient probative value in terms of s.275.

Similarly, at the preliminary hearing in case 7, the defence – after discussion with the Crown – withdrew para 1(1) of their s.275 application, which related to alleged kissing and cuddling 5 days prior to the events libelled. They also withdrew (as unnecessary) the part of the application relating to their friendship or that the complainer slept in the accused’s room in the days leading up to the events. However, the part-allowed s.275 application included details of the complainer’s alleged actions during the event, including her sexual position on top of the accused. The sexual position of the complainer was also mentioned in the s.275 application in case 10 (where she was said to have asked the accused to go ‘on top’). Here, defence counsel explicitly suggested at the preliminary hearing that this part of the application was potentially “too controversial”, but there was no discussion at the hearing about whether it was controversial or what the relevance of her sexual position was, with the application being allowed. In case 12, the defence s.275 application averred there had been a conversation, after sex, in which the complainer said she orgasmed. This was deleted by the defence during the preliminary hearing. Despite this, details from the case file indicate that this matter was inadvertently returned to at trial by the (different) defence counsel who asked the complainer a question about the orgasm. At this, the judge sent the jury out and asked the defence counsel to explain why he had raised the issue, whereupon they apologetically explained that they did not have a copy of the – heavily revised – s.275 that had ultimately been determined at the preliminary hearing, only the original in which this matter was still included. Meanwhile, the defence s.275 application in case 13 mentioned two different sexual positions of the second complainer (on top, and with the accused behind her), and while it was opposed by the Crown, their objection was not on the basis of this detail.

We can see from these cases that the degree of detail about the sexual interaction included in the s.275 applications has prompted a variety of approaches and responses from Crown and defence counsel, and judges. Issues such as the sexual position of the complainer, in particular, seem to be treated on the one hand as central to the accused’s defence, but may also be considered “controversial” (case 10). Given that that defence is permitted to explore the details of the incident in putting their case, it is arguable whether adducing this sort of evidence is *legally* controversial (and to this extent, counsel’s comments here may show, again, a level of uncertainty amongst practitioners as to the bounds of s.274). Anything that denies an accused the opportunity to put their case could contravene Article 6 of the ECHR.

At some point, however, specific details that are not necessary to put the accused’s account before the court – such as the complainer’s alleged level of enjoyment – can become gratuitous and potentially run up against the relevance requirement and the rape shield provisions. It is certainly the case that the accused’s evidence of a conversation about orgasms in case 12 was one such example, and it is regrettable that this was inadvertently put before the court despite the preliminary judge’s refusal of a s.275 application on that issue. The difficulty the law must address here is the significance of the probative value of the evidence when weighed against the risk to

the proper administration of justice, which includes consideration of the complainer's privacy and dignity. In practice this can mean assessing whether the evidence is relevant, digresses into unnecessary detail or invites unwarranted speculation. Evidence of sexual enjoyment in alleged consensual conduct falls foul of that test.

### Time Frame: Relevance of Prior or Later Sexual Behaviour

As well as detail, the timing of alleged sexual contact between the parties before the acts libelled can also play a part in framing s.275 applications, particularly where there is a special defence of consent. Again, however, there was evidence of variable practice across our sample of preliminary hearing cases. In some instances, it was clear that the evidence sought to be adduced was connected in time to the incident libelled. In case 19, for example, the preliminary hearing judge allowed both Crown and defence applications that referred to the accused's police interview, and messages between the complainer and the accused, where the accused said that the complainer was grinding against him in bed and so could not have been asleep. This was said to be sufficiently close in time to be relevant to the accused's defence of consent. For the same reason, evidence of sexual behaviour immediately before the incidents charged was allowed in case 20. But the relevance of alleged earlier sexual behaviour is more likely to be contested and deemed inadmissible where there is a longer period between it and the libelled offence. In case 13, for example, there was a discussion between the Crown and preliminary hearing judge as to what counts as sufficiently 'recent'. The Crown submitted that the (intoxicated) complainer and accused were having consensual sex after which she fell asleep, and the accused returned 15 minutes later and penetrated her while she was sleeping. By contrast, the defence submission was that the accused had never left and this was a continuing act. The judge remarked that while it could be a "diversion" for the jury if the time delay spanned "hours, days or weeks before or after," they could not see how a jury would be able to reach a reliable conclusion based on the "snapshot in time" that the Crown sought to rely on. Although the Crown argued, citing *CH* and *LL*,<sup>207</sup> that the application should be refused because the complainer's account was not moment to moment but included a 15-minute break, meaning that there were two separate encounters, the judge was unpersuaded, and allowed the application, concluding it would be "artificial to seek to dissect a single episode".

A debate as to timing and relevance was also seen in case 15, where the preliminary hearing judge refused parts of a defence s.275 application that referred to discussions between the accused and complainer, who had been married but separated over the period of the alleged incidents. The discussion, just before one of the alleged rapes, was said to refer to sexual intercourse that they were continuing to have, even though the relationship was over; and to the fact that on the night of one of the alleged rapes, the complainer had asked for sex "one last time." The Crown objected to the former,

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<sup>207</sup> *CH* (note 10, above); *LL* (note 25, above).

not the latter, but both parts were refused by the judge (with other parts of the defence s.275 application that related to the events at the time being allowed). Meanwhile, in case 3, as discussed above, though the preliminary hearing judge allowed a Crown s.275 application to show that there was consensual sexual activity directly before the alleged rape (albeit delimiting detail regarding its nature), this was revoked by the trial judge, who felt that it could not meet the threshold for relevance.

Some types of evidence of earlier sexual activity are clearly relevant to the accused's ability to put their case. In case 16, for example, the judge granted a defence s.275 application that sought to lead evidence of an alleged occurrence of consensual oral sex a few hours earlier because it was essential to the accused's defence to be able to present an alternative explanation for the complainant's DNA on his penis. On the other hand, some evidence of earlier sexual behaviour is clearly irrelevant: this was so in 4 cases in the preliminary hearing sample. In case 18, a defence application to introduce previous consensual sex two days before the events libelled was refused, as was a later application to review the decision. Likewise, in case 15, part of the defence application referred to evidence that, as stated by the accused in his police interview, the complainant had been having an affair that had led to the end of their relationship, but the accused and complainant had continued to have consensual sex occasionally; this part of the application was refused at the preliminary hearing. And in case 7, the original s.275 application referred to how the accused and complainant had become friendly, and from time to time engaged in "kissing and cuddling" in the days leading up to the alleged rape. At the preliminary hearing, counsel intimated that, having discussed it with the Crown, they were withdrawing that part of the application. Finally, in case 17, the complainant alleged she had been bound by the accused to his bed and raped several times over the course of some hours. The preliminary hearing judge refused as irrelevant the part of a defence s.275 application that referred to the complainant having previously consented to being restrained during sex with the accused (although, at trial, these issues were tangentially referred to, without objection, as we discuss in Section 7, below).

Notwithstanding the judicial scrutiny and refusal of such applications, the fact that these – arguably obviously – irrelevant applications were lodged by defence counsel in 4 out of our 20 sample cases indicates either a lack of clarity as to how the criteria of relevance and the rape shield will be applied, or a strategic decision by the defence, where despite applications being clearly likely to be refused, they are lodged anyway. Bearing in mind that, where such applications are lodged, they now require to be discussed with complainants and their views ascertained, even where the prospects for admission of the evidence is remote, making s.275 applications to adduce this latter sort of evidence can in itself cause additional distress.

## Defence Conduct and Attitudes: Character, Reliability and Credibility

With respect to wider character evidence, whether granted or not, it was common in our sample of case for defence counsel to submit s.275 applications that included material designed to cast doubt on the complainer's credibility, character and / or reliability. The focus here was often on the purported 'wrong-doing' or 'bad character' of the complainer, with a common suggestion being that she had fabricated a rape allegation to detract from said wrong-doing, such as "cheating on her lad" (case 12).

This sort of defence strategy was evident in many of the applications, and of course is most likely to have been a reflection of the accused's instruction. Reference was made, for example, to the amount of underage sex the complainer had engaged in (case 14); to the complainer being jealous of the accused giving sexual attention to, or forming a relationship with, another woman, and acting for revenge on this basis (cases 4, 15 and 16). Although these aspects of defence applications were refused, in case 4, as we discuss below, defence counsel elicited evidence from the complainer during cross-examination which allowed him, outwith the jury, to argue that he should be allowed to raise the revenge motive, and was ultimately able to do so. In case 11, the application related to a complainer's prior conviction for wasting police time (this was the only application of this sort granted by the court at preliminary hearing).

Malice against the accused was present as a reason for collusion between the multiple complainers in cases 1 and 3: in the former, the preliminary hearing judge allowed the s.275 applications even though it was thought they were not strictly necessary; and in the latter the application was refused. Meanwhile, in case 10, the complainer was said to be "getting back at her partner" and while evidence to this effect was refused under the s.275 application, it was left open for trial if related evidence came to be led. And in case 18, the accused responded to DASA charges accompanying the rape charge by maintaining that the complainer had made the allegations out of spite and she, in fact, had been jealous and controlling towards him; permission for this was refused. Here, the s.275 application also included reference to the complainer's drug taking, as well as her history of poor mental health and self-harming (some of which was allowed as it related to the events surrounding the acts labelled when the complainer admitted to self-harming). While some kinds of evidence about a complainer's character and / or their mental health status may be relevant to establishing their reliability and credibility, in many cases, this 'wrong-doing', character or medical evidence relied upon by the defence was superficial and appeared to us to be framed in such a way as to take advantage of existing stereotypes or norms about 'deserving' as opposed to 'undeserving' complainers. As we will explore further in Section 7, some elements of these applications – whether granted or not – also reappeared during the substantive trial as part of ongoing challenges to complainers' credibility and reliability, and were met at that stage with variable judicial responses. In line with Burman et al, then, we continued to find evidence in our sample of a practice, in defence s.275 applications, of reliance on dubious assumptions about a malevolent motive to report

rape when challenging the character or credibility of complainers. This is perhaps not surprising given that this position is commonly advanced by accused individuals. However, the extent to which courts were prepared to allow such questioning varied across the sample of preliminary hearing cases we observed.

### Defence Conduct and Attitudes: the Rape Shield Provisions More Broadly

Our analysis also raises wider questions about defence counsels' attitudes to the s.274 and s.275 provisions, and the effects of the rape shield more generally. Ahead of the preliminary hearing in case 4, in which very lengthy s.275 applications were made, defence counsel lodged a compatibility minute with the court, averring that the Crown's opposition to the s.275 on the basis that it was irrelevant and collateral was inconsistent with the accused's right to a fair trial. In particular, it was said to be inconsistent with equality of arms between the accused and the prosecutor, under which each party must be afforded a reasonable opportunity to present their case under conditions that do not place either at a disadvantage. Citing Article 6 of the ECHR, defence counsel argued that, while the prosecutor would be able to lead evidence in support of the allegations without any permission or control similar to that set out under s.274 and s.275, if the Crown's opposition to the s.275 application were to be upheld, the accused would not be able to lead evidence of matters which were essential to his defence. Counsel asked for an opportunity to make submissions on this at a continued preliminary hearing because of their concern about the scope of s.275, despite acknowledging that "by and large the law is against me in relation to some of the content of these applications". As counsel acknowledged here, this position does seem to be out of step with guidance from the Supreme Court, which has made it clear that the legislative framework is compatible with Article 6 of the ECHR.<sup>208</sup> As explored in Section 2 above, the Appeal Court in Scotland has also explicitly narrowed s.275 in an attempt to set clear parameters for the exclusion of problematic forms of evidence and to improve accuracy in fact finding.

However, these shifts in approach were described to us by many interviewees (and not only defence counsel) as the "pendulum" having swung "right through the sweet spot" and going too far in favour of complainers (4:2). The perceived problem was phrased in this way by several interviewees who thought the law had "gone too far" (Crown 3:1, defence 4:2, 4:3), with defence counsel 4:7 describing the current approach to s.274 and s.275 as "out of control". The same counsel described this shift as a "race to the bottom" by a judiciary who are "a shadow of their former selves," which, they suggested, has "crushed" defence counsel into "not applying for anything" because you "can't get anything in" through s.275. Another said: "I don't know a practitioner, you know, on the defence side of things, and any right-minded ones on

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<sup>208</sup> *Judge v United Kingdom* 2011 SCCR 241. The defence counsel later withdrew the minute at a subsequent preliminary hearing.



the prosecution side, who thinks that the current system's right" (4:3). A further defence counsel intimated that some Crown counsel and some judges felt the same:

"some...perhaps many, I can't say many because I've not appeared before most judiciary, but a number that I appeared before, which is not an insignificant number, feel frustrated by how tight the law is. Because it is a question of fairness and I think that people...I think that those working in the fiscals can often see that it would be fair to ask certain questions albeit in a limited way" (4:6).

There also seemed to be a variety of views amongst the judiciary on this matter, with two judges we interviewed saying forthrightly that they did not believe the law had gone too far, but another stating that, while there were other judges who might think so, they themselves did not consider the law had gone too far, even though the implementation of the rape shield provisions "can make it difficult to get a flow going and to lead the evidence" (5:3).

As discussed above, there has certainly been a shift, led by the Appeal Court, towards a more robust approach to ensuring legislative protections for complainers under s.274 and s.275 are implemented. Some of our defence counsel interviewees were, however, worried about this shift – termed an "undemocratic creep" by interviewee 4:2, and with some mentioning the likelihood of it leading to wrongful convictions (4:2, 4:6), or interfering with the fair trial rights of the accused (4:1, 4:5). Some believed that the independence of the prosecution had been "eroded" (4:3), or that the court had allowed itself to "become a vehicle for trying to get more convictions" (4:5). Indeed, some blamed the Appeal Court for an overzealous approach, stating, for example, that the court has blurred the boundaries between the executive and the judiciary (4:3), with others mentioning the disproportionate influence of "pressure groups" or "special interest groups" with a "megaphone" (4:2), particularly Rape Crisis Scotland (4:3). Of course, such "pressure groups" are far from alone in highlighting ongoing concerns about the prospects of justice for rape complainers in Scotland; academics, as well as law and policy makers, have continued to point to the ways that the criminal justice system as a whole needs fundamental reform, and the Scottish Government's Victims, Witnesses and Justice Bill currently before the Scottish Parliament reflects many of those concerns.

In summary, notwithstanding evidence of improved practice with respect to the drafting and content of s.275 applications, and the increased oversight and scrutiny of these by the judiciary, we have observed across our sample uneven levels of good practice with respect to implementing the law and procedural rules relating to s.274 and s.275 both from the Crown and the defence. Some defence counsel are also extremely critical of the recently more robust approach of the Appeal Court to this area of law. Finally, we found that complainers' experiences throughout the process of rape and attempted rape trials reflect a system that is still not sufficiently trauma-informed, and

this extends to how they are currently informed about and able to communicate their views in relation to the content of s.275 applications.

In the final part of this Section, we discuss the significant problem of protracted delays in the criminal justice system, and sexual offences cases particularly. We examine how long-standing issues relating to delays have been compounded by Covid, technological failures, and pressures of work, as well as, importantly, how these impact on complainers in rape and attempted rape cases.

#### d. Delays in the Process

We know that criminal justice processes are lengthy and that this can prolong the distress for all parties. With particular reference to complainers, delays can significantly exacerbate trauma or mental ill-health, as well as (relatedly) the sense, as two of our advocacy workers put it, of being in “limbo” (1:3) and at the “mercy of the system” (1:2). Existing delays have been further intensified by Covid,<sup>209</sup> and although the practice of obtaining complainers’ views on s.275 applications is positive in the sense of increasing their participation, it can extend proceedings further. All but one of the 14 ‘live’ preliminary hearings we observed (case 3) had been previously delayed and many of the preliminary hearings where s.275 applications were due to be heard were continued, as noted at the start of this section.<sup>210</sup> It was also clear from our observations and the accompanying files that all 20 cases were affected at some point in the process by Covid – for example, due to juror, witness or court personnel illness, or indeed technological failures. We also witnessed late lodging of one s.275 application (case 8), as well as other court documents such as Vulnerable Witness Applications, before the preliminary hearing; and in 3 cases (cases 3, 12 and 18), the s. 275 application was made at trial. In every case observed, we saw multiple s.67 notices from the Crown when lodging evidence late. Some trials were delayed due to lack of judicial or courtroom availability (for example, case 12), while case 5 was delayed by the accused falling ill during the trial.<sup>211</sup>

Across the sample of cases, the reasons given for late applications varied from pressure of work (case 8) or – in cases 3, 12 and 19 – a change in counsel. In cases 12 and 15, the delay in the submission of the defence application was for compound reasons: for the main part due to delays in obtaining telephony and social media

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<sup>209</sup> Michelle Burman and Oona Brooks-Hay, ‘Delays in Trials: the implications for victim-survivors of rape and serious sexual assault,’ Scottish Centre for Criminal Justice Research Briefing (2020) (Glasgow: SCCJR) at p. 3. Available at: [https://www.sccjr.ac.uk/wp-content/uploads/2020/08/Delays-in-Trials-SCCJR-Briefing-Paper\\_July-2020.pdf](https://www.sccjr.ac.uk/wp-content/uploads/2020/08/Delays-in-Trials-SCCJR-Briefing-Paper_July-2020.pdf). See also Burman and Brooks-Hays (note 13, above) and Brooks-Hay et al (note 104, above).

<sup>210</sup> All 14 of the ‘live’ preliminary hearings observed in this study occurred during Covid restrictions and therefore were heard online, observed by the researchers via WebEx.

<sup>211</sup> This trial lasted 17 days in total as there were multiple complainers, 2 accused, and multiple charges of rape, attempted rape, assault, amongst others, between 1984 and 2020. The presiding judge was replaced by another judge for 2 days during jury deliberations.

records, but also because of Crown errors and unavailability of technological support to retrieve the records. In case 11, the defence s.275 application had to be made at trial because the Crown had not previously disclosed (or indeed realised) that the complainant had a relevant previous conviction (the trial was abandoned and rescheduled for this reason).<sup>212</sup> Pressures of work can also cause mistakes: in case 7, a mistake by the Crown resulted in the wrong (that is, unredacted) version of the complainant's evidence in chief being played to the court on day 1 of the trial; this could have resulted in the collapse of the trial given that it contained information about the accused's previous convictions. In case 2, the defence failed to translate the letter asking the accused to come to the hearing into his own language and he did not appear, delaying matters considerably.

More generally, delays were also evident throughout case progression, sometimes caused by concomitant delays or disruptions in other parts of the system. Arranging evidence on commission for vulnerable complainants / witnesses appeared to cause difficulties, with interviewees particularly highlighting challenges in relation to legal scarcity amongst counsel (judge 5:5). The obtainment of evidence on commission was granted in 6 of our 20 cases (2, 5, 6, 7, 14 and 17), though it may also have been warranted in others, due to mental health or vulnerability concerns that were clearly noted in the file (cases 8, 15, 20).<sup>213</sup> Moreover, in case 2, the file showed that the wait for a commission date delayed the trial by 6 months (resulting in a wait of 2.5 years from reporting to trial). This was caused, at least partly, by the defence solicitor's error, discussed above, in failing to send the accused notice of the commission hearing in his own language. Meanwhile, in case 13, a long procedural history involving repeated adjournments and continuations was caused by a poor-quality audio in the joint investigative interview and in one evidence on commission that required to be transcribed, edited and redacted; as well as difficulties in reaching one of the complainants, and a broader problem of lack of court time. In case 11, the Crown's s.275 application was said to be late because – as discussed above – intervening changes in practice meant that they now considered use of a docket<sup>214</sup> to engage s.274(1)(b). The Crown submitted that this amounted to special cause, and the application was thus considered (and granted).

Delays, of course, have knock-on effects on counsel availability. In some cases, we saw extensively delayed proceedings which necessitated a change in defence counsel (for example, case 9). This, in turn, impacted on the timing and content of s.275 applications with some being delayed until the trial diet itself (for example, in case 3). The scale of this pressure on counsel was also evident in other cases. The late lodging

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<sup>212</sup> The Crown understandably made no objection here, and ultimately allowed this admission of fact by Joint Minute of agreement between the parties, but this is interesting in itself because it might in fact be helpful to the complainant if the reasons for pleading guilty to the charge convicted of could be explained to the jury.

<sup>213</sup> Although it is possible complainants did not want to give evidence in this way.

<sup>214</sup> The charges on the docket were originally on the petition but subsequently time barred.

of defence documents in case 8 (also a case involving dockets), which was ostensibly due to an administrative error, may well also have been due to pressures of workload (counsel forgot to schedule the date for the hearing). Meanwhile, during the preliminary hearing for case 2, defence counsel observed that chronic underestimation by the Crown of the length of trials meant that “the criminal bar is stretched to limit with trials extending beyond the floating diet and no slack for people to pick things up – trials are being put off for months.” The Crown also had last minute changes. In case 18, for example, they notified a change in counsel only a few days before the trial started. These concerns were also voiced during stakeholder interviews. As Crown interviewee 3:10 put it, “a lot of counsel are sort of firefighting” with pressure of business making it difficult to “be in a position to frame a sensible s.275 application” in a timely manner, given the need to “have the case at your fingertips and mastering the facts of it.” Meanwhile, Crown interviewee 3:1 acknowledged that, at the prosecution side, “we often run up to the wire just because of the volume of work and it’s all just a wee bit disorganised, to be honest sometimes.” In turn, a defence counsel interviewee spoke of having to “go into overdrive to try and get the thing cobbled together in time to submit” in a context in which they felt that the statutory time periods afforded to investigate and lodge a s.275 application was “not enough time” (4:3). A judge added to this that, in their experience, the defence will often wait for everything to have been submitted by the Crown first before they decide whether to make a s.275 application (or enter a special defence of consent), and this has the consequence of shortening the timescales for ascertaining the complainer’s views (5:5).

Some delays were also caused, in turn, by difficulties in contacting the complainer to ascertain her views (cases 2, 8 and 13), or in some cases to gather evidence about medical or social work records that would then lead to s.275 applications (cases 1 and 4). The mental health or vulnerability of the complainer or other witnesses also delayed proceedings in some cases, such as in case 18, where a complainer was deemed medically unfit to give evidence because of poor mental health (it was also delayed because of defence counsel availability and later judicial availability). In case 9, described above, where the Crown were permitted at the preliminary hearing to desert charges 1 and 2 on the indictment, this also caused a delay as defence counsel were then granted a continuation to submit a s.275 application to adduce evidence of the activities that had previously formed the basis of the deserted charges.

Other sorts of problems were evident in case 12, where the preliminary hearing was discharged 5 times because of the challenges in obtaining telephony records from a mobile phone seized from the accused. Administrative errors by the Crown in this case included repeatedly searching for the wrong date range, but a more significant problem here appeared to be the absence of personnel conducting this type of forensic work. Likewise, in case 15, the preliminary hearing was delayed by 6 months to allow the overcommitted technological expert (described as the “last man standing”) to produce a useable social media report on retrieved mobile data. This case was also delayed by a further 4 months due to a late change in defence counsel who needed time to

consult with the accused and draft a s.275 application on which the complainant could then be precognosed (in total, this case took 2 years 4 months from reporting to trial). Retrieving, disclosing and reviewing a huge number of text or social media messages also delayed preliminary hearing proceedings in case 20. Evidence from stakeholder interviews indicated, moreover, that these were far from isolated examples; as one police officer put it, “things are taking a long, long time once we seize things from complainants, whether its intimate samples, their mobile phones, electronics from suspects. There is a long wait...and that’s really difficult, especially if you’ve got a complainant that’s kind of withdrawn from the procedure, it’s very easy for them to say this is taking too long, I don’t want to engage anymore” (6:1).

Clearly, then, there is a complex and compounding interaction of various sorts of delays, for different reasons, that can affect when a s.275 application is lodged, when complainants’ views are taken, and when preliminary hearings are scheduled, continued and heard. All of these factors are likely to contribute to the distress of complainants who, research has established, often feel that they are poorly communicated with in respect of the progression of their cases, with delays and unpredictability in the timeline for trials compounding their trauma.<sup>215</sup> Complainants in this study often specifically emphasised the damaging effects of what one described as “loads of back and forth, loads of [trial] dates coming and then saying ‘sorry, it’s been pushed forward’” over a period of several months (2:4). Such delays also, of course, extend periods of remand for those accused who are not given bail, with significant effects.

Analysis of the cases in this sample clearly evidences wider problems in progression due to internal pressure on the resources within the criminal justice system, particularly the lack of available counsel, administrative pressures and failures, and inadequacy technological support. The significance of this in undermining policy ambitions to develop effective, sustainable and trauma-informed processes for complainants should not be understated. We also identified the low morale of many of those that we spoke to from the defence bar, which gives rise to concerns about conditions and future sustainability of that arm of the profession. We note that these concerns have recently also been aired by the Lord Justice Clerk,<sup>216</sup> and we will return to the issue of delay and resources in our recommendations section below.

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<sup>215</sup> See, further, Brooks-Hay et al (note 100, above). See also Rape Crisis England and Wales, ‘Breaking Point: The Re-Traumatisation of Rape and Sexual Abuse Survivors in the Crown Courts Backlog’ (2023) (London: RCEW, 2023). Available at: <https://rcew.fra1.cdn.digitaloceanspaces.com/media/documents/RCEW - Breaking Point report - March 2023 E4uqKBL.pdf>.

<sup>216</sup> Lady Dorrian, ‘The Birkenhead Lecture 2023: The Future of the Legal Profession’ (London: Grays Inn, 2023).

## e. Conclusion

In this section we have presented findings from our analysis of 20 preliminary hearings, focusing on the number, timing and substance of applications, and in what circumstances they are opposed, granted and refused, as well as the impact of delays on the system as a whole and on complainers in particular. We identified some marked progress since both the Burman et al's 2007 study and the historical cases that we analysed in Section 5. For example:

- There are new processes for taking and relaying complainers' views to the court, even though implementation of these processes could be more consistent and more trauma-informed, and more clarity is needed about whether the complainer can have a supporter present when being precognosed about these views as part of the process.
- There are significantly fewer s.275 applications being lodged late and applications appear to be drafted to a higher standard. Though there has been an increase in the volume of s.275 applications, this has been in part due to changes in practice which now require applications to be made more frequently by the Crown. It also appears to reflect a cautious 'belt and braces' approach by Crown and defence counsel alike to the content of s.275 applications, and anticipation of a higher degree of scrutiny of the relevance of evidence at trial. In addition, where defence s.275 applications are lodged to seek to introduce evidence that aims to discredit complainers, there is evidence that they are being more readily objected to by the Crown and more rigorously examined by the judiciary overall.
- Moreover, defence applications which seek to lead evidence of unrelated sexual activity with either third parties or with the accused, which have been more common in the past, did not feature to the same degree in the s.275 applications that we observed.

On the other hand, there are areas of practice which require further review and improvement, notwithstanding the advances that have recently been made. In particular:

- There remains confusion about when – and with what level of detail – a s.275 application is required. There is also uncertainty as to how to apply the legislation, and particularly the defence continue to make what are likely to be unnecessary and irrelevant applications. This wastes court time and causes additional distress to complainers.
- Although the sorts of spurious claims about complainers' credibility and character that were presented in the historical cases were not prevalent in our sample, some

defence counsel do still rely on gender stereotypes and dubious assumptions about a complainers' motive to report rape when challenging the character or credibility of complainers.

- Some defence counsel are also clearly critical of the Appeal Court's more robust approach to the rape shield, and have questioned the independence of the prosecution in applying the rape shield. This raises a question about the sustainability of improvements, and their ability to make enduring changes in courtroom practice, if they are not supported sufficiently.
- Finally, the resource pressures faced by all parts of the criminal justice system continue to cause significant delays and other difficulties for all complainers (and accused) in rape and attempted rape cases, which presents a particularly complex context for making, processing and hearing s.275 applications in a timely and trauma-informed way.

In the next section, we move on to discuss our findings in relation to 10 substantive trial proceedings, again drawing on interview data where relevant.

## Section 7: Trial Analysis

Having identified the sample of 20 preliminary hearing cases at which s.275 applications were considered, we were able to follow 4 of those cases through to their substantive trial, to track how matters of sexual history and character evidence ultimately featured in proceedings, and the extent to which this appeared to comply with previously granted or refused s.275 applications. In addition, we identified another 6 substantive rape trials which had involved a s.275 application, and we observed these proceedings before ‘tracing back’ to the associated case file, which we also analysed. In total, this generated **a sample of 10 rape / attempted rape trials**, on which we collected data through a combination of in-person observation at trial (with the researcher taking contemporaneous notes) and retrospective listening to and transcription of audio recordings, alongside supplementary case file analysis.

In contrast to the historical cases discussed in Section 5, in these ‘live’ trials we identified greater protection being given, overall, to complainers regarding the admissibility of character and sexual history evidence – both with the accused and third parties. This is perhaps unsurprising, given that, as discussed above, those historical cases were identified as particular exemplars of problematic practice, with the Appeal Court criticism thereof being pointed to by commentators (and several of our interviewees) as marking a watershed moment in the judicial management of s.275 applications. Equally, it was clear that variability in the interpretation and application of rape shield provisions, which we identified at preliminary hearing stage in Section 6, often persisted to the ‘live’ trials, with practitioners indicating in interviews that they struggled to understand and apply the law in this area.

As we discuss in more detail below, though the sample size is a small one, across our live trials we saw some evidence being admitted in circumstances where the basis for its authorisation was unclear, and some situations in which the parameters set within s.275 rulings regarding admissibility appeared to be breached during substantive proceedings. Though there was evidence of judges often being alert to this, and performing a strong interventionist role when required, this was not always the case. This resonates with complainers’ experiences, relayed to us in interviews, with one stating that although cross-examination lasted 3 days, the judge had intervened only once, simply to say that she had already answered the question (2:2). Though the complainer here was not legally qualified and so could not say with confidence whether and when greater judicial intervention would have been merited, they were clear that their experience of cross-examination had been long and re-traumatising, and that they had been asked questions that intruded significantly on their privacy and dignity.

We also observed instances within this live trial sample where the coherence of parties’ narratives appeared impacted by the operation of the common law and rape shield provisions, a matter commented upon by several interviewees, including those



from both sides of the bar. Moreover, in the wider context of the adversarial trial, we observed several ways in which counsel deployed strategies that targeted the character and behaviour of witnesses, often by relying on problematic assumptions about rape or gender stereotypes.

In this section, we will explore these findings in more detail. While our findings do demonstrate a recent positive shift in practice towards a more restrictive interpretation of what counts as relevant evidence, under both the common law and the statutory regime, we will suggest that these shifts are incomplete. We saw some examples of poor or inconsistent practice, as well as potential for evidential inadmissibility to have unintended consequences for complainers, as well as accused parties, to be able to 'tell their story' as they may wish.

### a. Case Profiles, Case-Handling and Outcomes

#### Case Profiles

Across the 10 live rape and / or attempted rape trials that we analysed, there were **13 complainers, and 10 accused**. In 7 of the cases, there was 1 complainer, and in the remaining 3 cases, there were 2 or more complainers. There was a pre-existing relationship between the parties in all 10 cases, and 7 cases involved an accused who was a partner or ex-partner. These latter cases typically also included allegations of complainers being subject to additional forms of assault, threatening behaviour or domestic abuse: in 6 of these 7 cases, charges were aggravated under Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (the 7<sup>th</sup> related to behaviour before 2016); in 2, the charges were accompanied by charges under s.1 of the Domestic Abuse (Scotland) Act; and in 5, there were additional common law assault and / or threatening and abusive behaviour charges.

In 7 cases, the complainers had, according to the evidence, consumed alcohol and / or drugs in the immediate period prior to the incident. Though non-consent by reason of incapacity was not argued in any of those cases, the degree of intoxication that complainers alleged they were operating under was often substantial. In 5 cases, there were allegations of rape when the complainers were asleep (sometimes overlapping with intoxication).

The pace at which cases proceeded to trial across the sample varied significantly, with the longest period from reporting to trial being 5 years. This can be compared with figures released by the Scottish Government that show the longest criminal justice journey times between April – December 2022 (which aligns with the period when data was collected for this project): for accused persons charged with at least one sexual crime and prosecuted in the High Court, the median time from reporting to trial was

around 4 years.<sup>217</sup> As with the preliminary hearings analysed for this study, there was evidence of substantial delays in some cases and the impact of this for all parties was significant, with some complainers being increasingly reluctant to support prosecutions as time progressed, particularly due to their worsening mental health.

Across the 10 cases, 12 of the 13 complainers involved gave evidence via special measures, most commonly involving a live video-link (n=7), but in some cases giving their evidence-in-chief in the courtroom with the assistance of screens (n=4). In 1 case, the complainer provided evidence-in-chief and cross-examination via evidence on commission.

### Case-Handling

Overall, judges took appropriate steps to put complainers at ease during testimony-giving, on some occasions offering them an opportunity to take a break to compose themselves, for example. However, there were also cases in which, while it was in the judge's discretion to do so, they failed to offer the complainer a break, even where the complainer was exhibiting significant distress (case 17); and in one case, the judge asked the complainer not to take so many breaks, so that the trial could maintain momentum (case 18). We also observed a failure in some cases to reflect on how judicial tone towards, and engagement with, counsel during proceedings might have been interpreted by complainers. In case 4, for example, the judge repeatedly interrupted the Advocate Depute's questioning of the complainer to seek clarity, urging them to also slow down the pace. The judge emphasised that this was not them "giving the witness a row" and that they were "not blaming the witness for giving the whole account." However, their repeated insistence that counsel "needs to try to get the witness to slow down" might well have come across to the complainer as judicial frustration with her failure to 'perform' as expected. We appreciate the difficult job that all parties are performing in the context of these cases, and the acute pressures of time and resources. However, in our view, comments such as these may have been better delivered in the absence of the witness, albeit that this needs to be balanced carefully against any additional distress caused to complainers by being asked to leave the court during their testimony, which not only generates disruption but could be interpreted by them as an indication of having done something 'wrong.'

In only 1 of our 10 trials did a complainer give her testimony in the courtroom in real time and without use of screens, or even a supporter (case 19). This complainer was also the only one, as far as we are aware, to have stayed in the courtroom to observe the rest of proceedings.

There were not infrequent difficulties with technical equipment over the course of the trials observed, and this included where live-links or video-recorded evidence were

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<sup>217</sup> <https://www.gov.scot/publications/journey-times-scottish-criminal-justice-system/>

utilised. The most striking illustration of something going awry in respect of the use of special measures came in case 2. From the outset of the complainer's testimony in this case, it was clear that she was upset and anxious, and her records indicated a history of vulnerability. It was recorded on file that she had previously stated she did not wish to attend the trial and had requested, and been granted permission, to give her evidence on commission. However, as noted above, due to an error in case management, that commission was held over for many months, meaning that the ultimate trial date preceded it. Rather than waiting for the delayed commission, the Crown opted to proceed with the complainer giving her evidence via live video-link. As her evidence progressed, however, it was apparent that she was becoming increasingly distressed: inconsistencies and uncertainties were introduced into her account, and it was difficult to determine whether this was due to error or fabrication in her previous accounts or to the distress caused by testimony-giving. At the end of the first day of the trial, the complainer intimated that she did not want to come back and asked the judge to "just let him off." When the judge indicated that the trial's progression would require her to return and continue her evidence, she began to cry, explaining loudly "I am not doing this anymore. I just want it over and done with....I have got enough stress. I am not going through this again."

There is a further feature in this case that it is worth pausing to briefly reflect upon here, since it was echoed across other observations. This was the way in which, amidst this display of distress on the part of the complainer, there was sometimes an air of flippancy amongst the legal professionals involved, often in the presence of the accused, and potentially the public. After the complainer left the witness suite in case 2, the judge and counsel surmised that "life takes unexpected turns every now and again" with the judge making a joke, in response to which both counsel laughed, about what the term for "unexpected turn" would be in the native language of one of the parties. The judge also commented that they would have "loved" to have said that the collapse of the trial was due to defence counsel's "spell-binding mastery of the law" but "couldn't go that far", prompting laughter from all lawyers present. Such atmospheric incongruities were apparent in other cases. For example, in case 4, the judge's mobile phone rang just as the Advocate Depute was about to commence questioning the complainer about the detail of the rape; and then later, during her cross-examination, when proceedings had to be interrupted because a member of the public had inadvertently entered the court. Inevitably, the courtroom is a space in which professionals (who act under enormous pressure) will have prior familiarity and the mundanity of proceedings for them as regular participants will be a qualitatively different experience than the distress and anxiety that often characterises the trial for witnesses, complainers and accused. However, these ruptures can be dehumanising and inconsistent with trauma-informed practice.<sup>218</sup> Where they occur in the presence

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<sup>218</sup> See, further, Anna Carline, Clare Gunby, Vanessa Munro, Yvette Tinsley, Kirsty Duncanson and Heather Flowe, 'From Emotional Labour to Affectual Bodies: Moving Towards an 'Affective Ethnography' of the Criminal Court Space' (forthcoming).

of trial parties, they can also undermine their confidence in the process and its outcomes. An example of that came in case 4, where the judge, who thought that they were “getting confused” in relation to a line of questioning, had interrupted defence counsel. Counsel replied that “no, you were on the ball there”, to which the judge retorted, with a laugh, that “flattery will get you nowhere” and “I am not always on the ball, nowadays”.

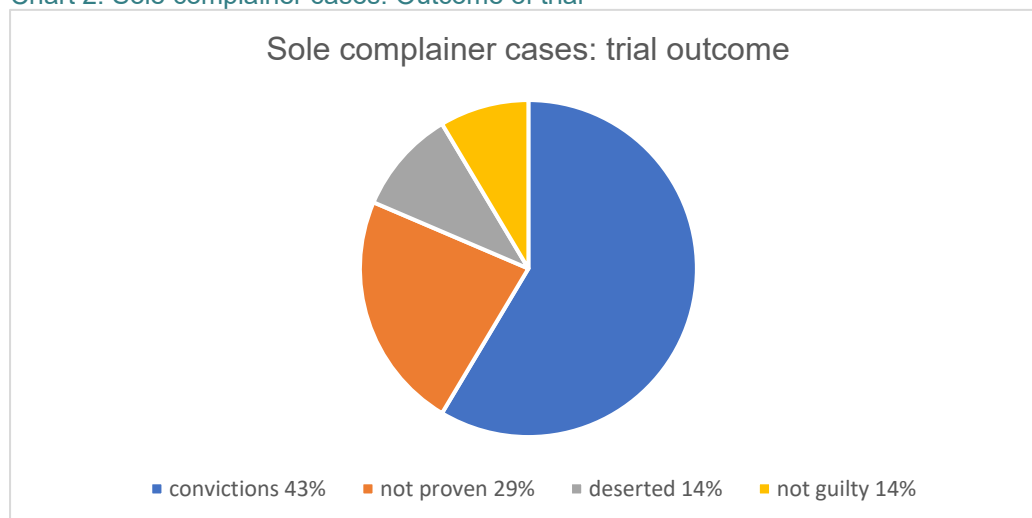
## Outcomes

Any commentary in relation to verdict outcome in these ‘live’ trials must be treated with caution, given the small sample size and distinct nature of each case. However, to give some context, across the 10 trials, 6 resulted in the conviction of the accused in relation to at least one complainer and / or at least one charge. Of the 7 cases where there was a sole complainer, 3 resulted in a conviction (albeit in one case only in relation to 2 of the 3 incidents alleged, with a third rape charge resulting in a ‘not proven’ acquittal), while 1 case was deserted after the trial had commenced, resulting in an acquittal. In the remaining 3 sole complainer cases, 2 resulted in majority ‘not proven’ acquittals and the third in a majority ‘not guilty’ verdict. Meanwhile, in the 3 cases where there were two complainers, only 1 resulted in convictions against the accused in relation to both sets of allegations. In the remaining 2 cases, juries returned mixed verdicts, on both occasions convicting by majority in respect of one complainer but returning a majority ‘not proven’ acquittal in respect of the other.

Table 10: Complainers and Convictions

Number of cases	10
No. of cases with one or more convictions	6 (60%)
No. of cases with sole complainers	7 (70%)
No. of cases with 2 or more complainers	3 (30%)
No. of sole complainer cases with one or more convictions	3 (43%)
No. of cases with 2 or more complainers and one or more convictions	3 (100%)

Chart 2: Sole complainer cases: Outcome of trial



These figures should be read in the context of data, released by the Scottish Government following a FOI request, which suggested a potentially disproportionate reliance on the 'not proven' verdict in relation to rape and serious sexual assault cases. The Government confirmed that from 2015 to 2020, while 17.5% of all acquittals were 'not proven', this accounted for 31.9% of acquittals for 'sexual crimes' and 35.8% of acquittals for such crimes following the process of a contested jury trial.<sup>219</sup> Against that background, it is worth noting that, across the 15 rape charges that generated jury verdicts in this sample of 10 'live' trials, 5 (33%) were returned as 'not proven' acquittals, with not guilty being used in respect of only 2 (13%) charges. We note that the Victims, Witnesses and Justice Reform Bill, currently making its way through the Scottish parliament, if passed, would abolish the 'not proven' verdict. The practical consequence of such abolition on case outcomes at trial remains to be seen, however.

### b. Operationalising s.275 During Trial

In this sub-section, we explore the range of approaches that we identified across the live trials, in terms of the oversight and management of previously granted s.275 applications. We consider the extent to which judges appeared to have given advance consideration to the parameters of any s.275 and the degree to which they intervened to preserve those parameters by restricting lines of questioning that might otherwise overreach. We explore situations in which, during the trial, judges permitted late s.275 applications to be considered, or took the decision to review and revise the terms of a previously granted application. We report on instances in our sample where evidence that ought not to have been admitted was ultimately allowed to be introduced at trial, notwithstanding the protection of the rape shield.

In what follows, we provide some key examples across different types of evidence: in relation to the complainant's sexual history with the accused; their sexual history with third parties; and their wider (sexual) character. In respect of each of these, we found evidence of a shift in approach, relative to that reflected in the historical cases. This shift was largely towards a more restrictive interpretation of the legislative framework which, in many cases, delimited the introduction of sexual history and character evidence that would previously have been more likely to be a feature of rape trials. At the same time, however, we also found evidence of ongoing inconsistency regarding practitioners' and judges' approaches to s.275, with applications continuing to be made at trial that appeared unlikely to be granted, and upset being caused to complainants as a consequence when asked to give their views on those applications. In addition, we continued to see some material being adduced at trial that had not been subject to appropriate scrutiny and which, if it had been, would have been unlikely in our view to have been considered admissible. To this extent, our findings indicate that there is still some way to go in ensuring consistent best practice amongst

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<sup>219</sup> See Scottish Government, 'Data relating to not proven verdicts and guilty pleas: FOI release' 10 June 2021 at <https://www.gov.scot/publications/foi-202100199803/>.

practitioners, with a need for ongoing vigilance at the judicial level to enforce due faithfulness to key rape shield tests.

### In Relation to the Complainers' Sexual History with the Accused

Case 3 provides a prominent example of a case in which the trial judge took the opportunity, prior to the leading of evidence, to query and ultimately set aside the preliminary hearing judge's decision to grant a Crown s.275 application to lead evidence that the complainant had engaged in a "consensual sexual encounter" with the accused immediately before the incident libelled. At trial, when asked by the presiding judge to explain the Crown's reasoning in making such an application, the Advocate Depute (who had been appointed after the application had been made), intimated that even they were struggling to explain the rationale, suggesting that the most likely reason was about perceived "narrative ease" in presenting the complainant's account.<sup>220</sup> Here, the trial judge not only took issue with the preliminary hearing judge's assessment of relevance, but with their efforts to mitigate intrusion into the dignity of the complainant by restricting the Crown to use of what was described as a "coy" euphemism ("consensual sexual encounter") rather than giving details about the nature of that activity (oral sex). The trial judge opined that asking questions at that level of detail was likely only to encourage jurors to "fill in the blanks...probably with something that is far more lurid." Thus, the court determined to review the s.275 application and ultimately refused it in its entirety. Though perhaps unusual, our interviewees were clear that such practice was far from unheard of. Judicial, defence and Crown participants alike explained that they had, in other cases, witnessed a trial judge revisiting a previously granted s.275 application, often because the time-lag in cases coming to court meant there had been an intervening development which necessitated a change in practice (3:3, 3:10, 4:1, 4:5, 5:2).

This "wide untrammelled power" of a trial judge to revisit a s.275 application (5:1) is authorised by the legislation and can be important in ensuring ongoing protection of witnesses. It requires to be matched, however, with an equally strong commitment by the judiciary to rigorously enforcing the parameters of the common law rules and appropriately determining s.275 applications, to ensure that protections put in place are faithfully adhered to throughout the adversarial process. The challenges that this can present were well-illustrated within our sample by case 20 which, in many respects, was a particularly egregious example in which the boundaries and aims envisaged by the s.274 and s.275 regime were tested by defence counsel and required to be repeatedly reaffirmed by the trial judge.

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<sup>220</sup> While this was not the only case where information of this sort was allowed via a s.275 application, in case 16, the court allowed evidence that the complainant had consensual oral sex with the accused earlier in the evening exceptionally in that case to address the matter of DNA transfer. See also *CH* (note 17, above).

In that case, we observed repeated efforts by counsel to introduce evidence regarding the nature of the complainer's previous relationship with the accused, for which no s.275 application had been made or granted. Much of the focus here was on portraying the complainer as more sexually experienced than the accused; but the sexual nature of the parties' prior relationship and whether they were behaving in an "exclusive" manner or as "friends with benefits" was also sought to be introduced, despite the fact that the parameters of the s.275 previously granted were – as appropriate – more tightly constructed around interactions close to the time of the incidents. The judge in case 20 was required to become increasingly interventionist in the face of counsel's efforts, removing the jury a number of times, reminding counsel of the need to remain faithful to the s.275 application, and noting that the questions went beyond its boundaries and were "not appropriate". Despite this, counsel appeared undeterred. They submitted that their questions to the complainer were necessary for "context" and, in seeking to make this case to the judge, specifically complained that, in their view, s.274 and s.275 had ensured defence counsel's "hands had been tied" in being able to explain this background. Unmoved by this, the judge responded that the explicit purpose of the common law of relevance and s.274 was to "tie hands", denying counsel permission to pursue such questioning further. Nonetheless, in leading evidence from the accused, counsel again introduced an account that "by the beginning of [month] you are regularly having sex" with the complainer. Though some latitude in exploring the parties' relationship was permissible given the terms of the charge, such evidence – in our view – clearly was not. While the conduct witnessed here was not representative of that generally seen in the trials that we observed, it does raise questions about standards of professional behaviour in this space, and illustrates the importance of active judicial management.

On this latter point, it was noted by many of our interviewees that there were differences in judicial approach to s.275 (sometimes described as "personality-driven" as defence counsel 4:2 put it), with some judges being more proactive and likely to intervene to query or stop a line of questioning. One judicial interviewee described it: "you're better to be safe than sorry and stop it... so you have to be on the ball all the time" (5:4). The need for this was also emphasised by an advocacy worker interviewee: as they put it, if the judge does not challenge "that line of questioning or the manner in which that line of questioning is being asked, then why would the jury? Because they're being told that this is an acceptable way of behaving, an acceptable line of questioning and, therefore, acceptable knowledge to be considering" (1:3).

In this context, there is no question that, in our sample, case 20 represented not only the most sustained example of defence counsel seeking to introduce evidence about the sexual nature of parties' relationship that appeared to go beyond the parameters set by the s.275, but also the most robust and repeated sequence of judicial interventions in response. Equally, case 20 was not an isolated example in which the defence sought to introduce information about the sexual nature of parties' relationship, and it was clear even within our small sample of trials that those efforts

did not evoke a consistent judicial response. In case 1, for example, the accused attested during examination-in-chief that one of the complainers had tried to reignite their relationship after it had ended, and they continued having sex together for some time. There was no objection to this, notwithstanding that there was nothing in the terms of the s.275 application that would appear to have made it permissible to introduce evidence about an ongoing sexual relationship. Although neither the Crown nor the defence can fully anticipate what a witness might say in answer to an open question, and asking a jury to disregard something said in evidence that would be considered irrelevant may paradoxically draw even more attention to it, the judge could have intervened in this instance, given the potentially significant prejudicial effect of the jury having this allegation put before them.

Similar situations also arose in other observed cases in respect of the behaviour of the complainer towards the accused earlier in the evening during which the alleged assault took place. In case 19, for example, a s.275 application was lodged late by the defence, and granted on the first day of the trial, which allowed for the introduction of evidence from the accused's police interview about conversation earlier in the evening during which the parties discussed their previous romantic histories as well as "the accompanying body language, smiling and laughing of both parties." The complainer was then asked about this during her evidence. Later, in the same case, the Crown led evidence of the suspect's police interview and played extracts from the interview video where the accused alleged that the complainer had been "quite flirty" in the hours preceding the incident. This appeared to go beyond the terms of the s.275 application, which had allowed evidence to be elicited of generic (and mutual) "smiling and laughing" whereas the police interview extract referred to alleged (one-sided) flirtation. Though this did prompt a legal discussion outwith the jury, it was not out of concern that the questioning had gone beyond the bounds of the granted s.275 application. Instead, it was due to the judge's concern that manually stopping and starting the recording to ensure that parts of the interview were redacted was making it difficult for the jury to follow. The judge sent the parties away to agree a Joint Minute about which parts of the police interview should be redacted and what could be played to the jury, with instructions to ensure that the stopping of the recording was minimal. However, the agreed content now also included the accused's statement to the police that the complainer had performed a striptease for him on a dance pole in her bedroom before they went to bed and fell asleep (some time prior to the alleged rape). This was not part of the s.275 application and inclusion of this evidence appeared to come about largely as a knock-on effect of the late s.275 application submitted and granted on day 1 of the trial, which meant that the Crown's pre-prepared redacted police interview had to be quickly revised mid-trial. During this process, it seems that the Advocate Depute failed to properly implement the granted s.275, allowing detail (e.g. about the pole) that went beyond its terms. In fact, in cross-examination of the complainer in this case, the defence also went beyond the terms of the granted s.275 application by asking her about the existence of this "strip pole" in her bedroom. Notably, neither the Crown nor the trial judge intervened to prevent this.



Meanwhile, in case 17, during the accused's evidence-in-chief, defence counsel asked an open question about what the accused and second complainer had been doing a couple of hours earlier on the night of the alleged rape, and the accused responded "talking, drinking, kissing and playing about". When the defence went on to ask "so you said kissing and things happened, did it involve you doing something..." the judge interjected, telling the accused not to answer, and querying whether the Crown were going to object, to which the Advocate Depute replied yes, and the defence counsel moved on. Although neither the judge nor Advocate Depute specified what the grounds for objection were here, presumably it was because that line of questioning overreached the boundaries of the granted s.275, which was more tightly bound to events immediately surrounding the incident on the libel. On the one hand, this can be seen to illustrate the effective implementation of the rape shield provisions by the judge, who intervened to ensure faithfulness to s.275. On the other hand, it also reflects an ongoing practice amongst some defence counsel to test the boundaries: while counsel may not have anticipated the accused mentioning kissing in response to the first question, they followed it up with a question relying precisely on that evidence, notwithstanding the absence of any s.275 to authorise it. Had the judge not intervened, it is an open question as to what potentially irrelevant evidence might have been introduced.

Case 15 also highlights the fine distinctions that can be argued for by counsel during trials to create scope for the introduction of evidence that might, at least at first glance, appear to have been ruled out. Here, a telephone conversation between the complainer and accused, recorded shortly after a second rape was alleged to have occurred, was played to the jury. In it, the accused appeared upset and the conversation involved him telling the complainer that if she said she didn't want to have sex in future, then "that's it now, if you say no, it's fine, it's no." The Crown's case was that this supported the complainer's account. However, the defence's position was that the conversation was not related to a specific sexual interaction but to a history of prior discussions between them as their relationship was breaking down, in which the accused had pestered the complainer to have sex. During cross-examination of the complainer, defence counsel asked her about prior situations in which the accused had asked for sex, and she had refused. At this, the judge – rightly – paused proceedings, concerned that such questioning breached the parameters of s.274, with a prior s.275 application to adduce evidence regarding conversations between the parties about sexual matters in a different time period having already been refused. In response, defence counsel maintained that the questioning envisaged was not directed at sexual conduct of the sort caught under s.274, but only at the existence of such discussions, which would provide an alternative explanation for the content of the recording. In response, the Crown highlighted concerns about admissibility, given the inference that might be drawn from it by the jury and the fact that previous occasions of consent or non-consent had no relevance. The Advocate Depute highlighted too that the complainer had been led to believe, following the outcome of the s.275 applications, that she would not be asked about other occasions

and that, were the line of questioning to encroach into this territory, she “has a right to be advised.”

Again, it is to be welcomed that the judge was vigilant in case 15 to the risk of breach, and intervened to pause proceedings while the matter was discussed; it is also positive to see the Crown draw attention to the legitimate expectations of the complainer regarding anticipated lines of questioning. At the same time, it is notable that this matter was resolved, not by subjecting a fresh s.275 application to measured scrutiny, as might have been anticipated, but by the judge navigating matters in the moment, allowing the defence to ask the complainer about how she had interpreted the call, but refusing permission to ask her about the content of prior conversations that the accused would later suggest provided an alternative explanation. Given that this alternative explanation for the post-incident exchange was always likely to have been central to the accused’s defence, and given the refusal of counsel’s previous s.275 application to adduce evidence relating to similar conversations, case 15 raises questions about why – in light of a clear ambiguity regarding its being caught by s.274 – this evidence was not also included in the s.275 application lodged by the defence ahead of trial.

Overall, then, in respect of evidence regarding the complainer’s sexual history with the accused, our analysis of the live trial sample provides a mixed picture. Relative to the cases that featured in our historical sample, we identified increased, and more robust, scrutiny to determine the relevance of any evidence sought to be adduced, particularly where it related to matters that were not proximate in time to the events libelled. However, there remains a ‘patchiness’ to this scrutiny, both in terms of the consistency with which questions of admissibility are resolved in advance of trial through appropriate s.275 applications and in terms of the scale of objection and judicial intervention encountered in substantive proceedings where attempts are made to introduce evidence that ought not to be allowed.

### In Relation to the Complainer’s Sexual History with Third Parties

While our observations indicate that the position in relation to determining and enforcing the admissibility of evidence about complainers’ sexual history with the accused during substantive trials remains somewhat mixed, in respect of complainers’ sexual history with third parties, we found clearer indicators that practice on the ground is evolving in line with recent senior judicial authorities, which insist that such evidence be subjected to the most robust scrutiny, and that, in most instances, it ought to be considered to be inadmissible. This conclusion was also supported by several interviewees who commented that such applications were in marked decline following a clear steer from the higher courts that they would rarely be granted. At the same time, even in our small sample of 10 live trials, we did encounter cases in which efforts were still made by some defence counsel to introduce this material, irrespective of the absence of any s.275 application that would enable this; and the fact that this was so

demonstrates that, while there has been this positive improvement in the implementation of the provisions, there can certainly be little scope for complacency.

Again, this was most clearly illustrated in case 20 where a s.275 application had been successfully lodged by the defence (unchallenged by the Crown) at the preliminary hearing, but it was limited to evidence about sexual activity between the parties at the time of the alleged offences. Despite this, at trial, defence counsel repeatedly attempted to characterise the relationship between the parties as one in which the complainant was sexually experienced, with a history of promiscuity. When this was belatedly objected to by the Advocate Depute, the judge agreed that counsel was “not entitled to go just as far as you have been going”. Nonetheless, this narrative continued to dominate the defence’s case, resulting in a closing statement that presented the complainant as provoking the accused’s jealousy due to her unfaithfulness. As noted above, whilst the repeated efforts by defence counsel to pursue this course generated increasingly frequent and strident interventions from the judge, exposure of the jury (and complainant) to such assertions is significant and troubling.

Meanwhile, in case 15, the defence pursued a line of questioning with a prosecution witness, a friend of the complainant, who testified that she had disclosed the rapes to him. During this, the witness was directly asked “were you not in fact in a relationship” and “have you ever been in a relationship,” on both occasions prompting a denial. This was also put to the complainant, albeit more indirectly, through an exchange in which defence counsel sought repeated clarification that she and the witness were “close”. It is noteworthy that this effort to introduce evidence of sexual conduct with a third party was not challenged by the Crown or the judge, despite appearing to breach s.274 and no evidence on file of any s.275 application that would have allowed it.

There were also some situations in our sample where it was the complainant themselves who, during their testimony, veered into territory that had previously been determined to be – or would clearly be – irrelevant. In both case 18 and case 19, this related to their sexual history with someone other than the accused, and specifically to prior experiences of sexual violation. In case 18, the complainant mentioned having been sexually assaulted as a child in answer to a question from the Advocate Depute about why she got back into bed after the alleged rape. The complainant in this case also mentioned, several times, the accused’s history of previous convictions for violence and threats, admission of which is prohibited by s.101 of the Criminal Procedure (Scotland) Act 1995. Similarly, in case 19, the complainant sought to explain her dissociative reaction to the alleged assault by referencing how “in my previous times of reacting it didn’t end too well for me”. On this occasion, this prompted the judge, albeit only on the second mention, to interject: they explained to the witness that “we have some rules” and expressed concern to counsel about adherence to s.274. On the one hand, it is positive that this judge intervened to ensure adherence to the legislation and restrict the complainant’s disclosure. On the other hand, this speaks again to a theme noted in the discussion above regarding the ability to

contextualise parties' behaviour and the need to balance a desire to 'tell one's story' with the protection of the rape shield.

### In Relation to the Complainers' Character (Sexual or Otherwise)

Section 274 prohibits the introduction of evidence about the wider sexual and other character of the complainer, unless permission is granted under s.275. While our analysis of live trials indicated there has been clear improvement in the interpretation and application of these protections, our data indicated that these prohibitions were still not always being adhered to.

For instance, in case 4, a series of s.275 applications lodged by both the Crown and defence had already been made and abandoned, or refused, at the preliminary hearing stage. However, questioning about a series of text messages sent by one of the complainers to the accused and his new partner, which the defence had sought to adduce under s.275, had been refused *in hoc situ* (where the court allows the application to be potentially revisited later in proceedings) with the possibility held open that their content could become admissible at trial. The content of these texts, which were described by the defence as "harassing", "abusive", "threatening" and "offensive", were purported to go to the motive and credibility of the complainer in making the rape allegations libelled, and more broadly to her character, since within them the complainer expressed feeling "humiliated", "angry" and "bitter". During the trial, defence counsel engaged in repeated questioning of the complainer regarding how she felt about the accused's new relationship, which ultimately provoked her to deny that she was angry or seeking revenge. At this point, he requested an audience with the judge, seeking to introduce the text messages to dispute this claim. In contrast to some of the judges that we interviewed who said that the first thing they do when they get a case is to check the indictment and the minute as to whether there has been a s.275 application (5:4 and 5:5), in case 4 the judge intimated that they do not typically receive papers with sufficient time to either review them fully, or develop a detailed familiarity with the boundaries of any s.275. After hearing representations, the judge took the view that, without "being judgmental," it was hard to interpret the language used by the complainer in the texts as indicating anything other than a potential desire for revenge and so their content could be put to the jury. The question remains here, however, as to whether – if the judge had greater familiarity with the existence of these texts and the prior (unsuccessful) efforts of the defence to bring them into evidence – they might have been more alert to the line of questioning that provoked this denial: a line of questioning pursued persistently by counsel in what appeared to be a deliberate strategy to give rise to the re-opening of the s.275.

Case 20 also provides a striking illustration of this sort of defence strategy. Here, defence counsel suggested (without any apparent diagnostic evidential basis) that the complainer's allegedly unpredictable behaviour towards the accused was due to her suffering from a psychiatric condition. The judge quickly intervened when this was

raised during the trial, stating that pursuing this line would require the defence to lodge a s.275 application, which he was not willing to entertain since the claim appeared to be “without foundation”. However, it was returned to in counsel’s closing speech, with the suggestion then put in front of the jury. More broadly, across this trial, sensitive information about the mental health of both parties was introduced in ways that appeared to be unnecessary and devoid of a trauma-informed lens. In relation to the complainer, though she volunteered the fact that she had a history of mental ill-health during her evidence (which had not been covered by any prior Crown s.275 application), this was expanded upon further by defence counsel during his examination of the accused. In particular, the accused was asked about his knowledge of her mental ill-health, prompting disclosure of her self-harming. Despite deliberately pursuing this line of questioning, defence counsel then purported to manage this unauthorised information by noting “I don’t want detail” – but, again, only after the information was before the jury.

In other cases, we identified inferences about the character of the complainer being introduced which spoke less to their stability and reliability, and more to their sexual proclivity. For example, in case 1, evidence was put before the jury by the defence about the complainer’s prior engagement in swimwear modelling and working as a ‘grid girl’ in motor racing, without that being addressed at all within any s.275 application. Though it is true that the Crown had raised the fact of the complainer’s prior modelling to provide context to some of the accused’s alleged jealousy about her past, and his associated controlling behaviour, the fact that this involved swimwear modelling specifically – with its sexualised connotations – was only introduced by the defence, while her work as a ‘grid girl’ was first mentioned by the accused. Though not formally relating to ‘sexual behaviour’ and therefore not likely caught by s.274, it is clear in our view that such evidence was introduced to create an impression in the mind of the jury as to the likelihood of the complainer’s engagement in sexual activity.

Meanwhile, as we saw above, in case 19, the alleged flirtatiousness of the complainer towards the accused on the evening in question was permitted into evidence, reflecting an apparent slippage from the more circumscribed parameters of the (late) s.275 application that covered “body language, smiling and laughing”. Evidence of the complainer having a “strip pole” in her bedroom was also – and as far as we can tell, inadvertently – introduced by the Crown when a partially redacted police interview with the suspect was played, again in the absence of any s.275. Described by the complainer as a “fitness pole” during her cross-examination but termed a “strip pole” by the accused during his examination-in-chief, her engagement with this past-time was highlighted by the defence in this case, implicitly positioning the complainer as confident with, and outgoing in relation to, her sexuality. Indeed, during his testimony, the accused explicitly conjoined his claims regarding her flirtatious behaviour with the existence of the pole in her bedroom where the rape had allegedly taken place.

In case 17, more explicitly sexualised aspects of the complainer’s character and behaviour also made their way into the trial. As discussed in Section 6, the preliminary hearing judge had refused as irrelevant the part of a defence s.275 application that referred to the complainer allegedly having previously consented to being restrained during sex with the accused, but allowed the defence to explore evidence related to the accused’s defence that the conduct libelled was consensual on this occasion. Photographic productions of the scene showed black straps attached to the bed. The complainer briefly confirmed, during her evidence-in-chief, that she had been restrained using those straps during the assault, but was asked no other questions regarding their purchase or prior usage. In her cross-examination, defence counsel returned to this matter, putting it to her that on the accused’s bed “was a set of 4 bondage restraints”. Thereafter, counsel embarked on a series of questions that required her to confirm that the straps had been purchased around the 14<sup>th</sup> February, and that it was not the accused who had bought them. Counsel asked the same questions of the accused, who replied in similar terms. They also put the issue to the police officer who had found the restraints, speculating: “some people might like bondage and the location of straps might be consistent with that?” At no point did the Crown or judge object to these questions. Whilst exploration of the incident was clearly allowed by the granted s.275, questioning on the matter of when the restraints were bought – in advance of the offence libelled and implicitly by the complainer for the accused as a Valentine’s day gift – arguably strayed too close to the boundary of what was refused as inadmissible in the original defence s.275, namely that the complainer and accused had previously engaged in consensual BDSM sex.

Framing the evidence of general character in the ways outlined here can, of course, encourage the jury to make mental connections, even where the connection itself is not explicitly stated. Thus, one of the arguments that defence counsel is prohibited from openly making – that the complainer is more likely to have consented to sex on this occasion because she has voluntarily engaged in similar or other overtly sexual behaviour in the past – can be subtly and implicitly presented to the court. As previous work has shown, such insinuations have purchase because they build on tacit, background assumptions, beliefs or norms about gender, and about how women, and men, should behave sexually. While this way of presenting evidence does not necessarily fall foul of s.274, it may invoke tenacious but often unfounded or outdated gendered perceptions that can powerfully inform jurors’ assessment of, and decision-making in, rape cases.<sup>221</sup> In the final part of this section, we return to consider the implications of these framing techniques in the wider context of the adversarial criminal trial, but what this demonstrates most clearly for current purposes is the need for close

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<sup>221</sup> See, for example, Louise Ellison and Vanessa Munro, ‘Better the Devil you Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence and Proof* 299-322; Chalmers et al (note 102, above). For recent discussion, see also Sharon Cowan and Chloë Kennedy ‘Feminist Approaches to Legal Argumentation’ in Luís Duarte d’Almeida, Ruth Chang, Euan MacDonald, Fábio Perin Shecaira, and Lilian Bermejo-Luque *Research Handbook On Legal Argumentation* (Edward Elgar Publishing Ltd, forthcoming).

scrutiny in relation to more subtle inferences around complainers' character and sexual proclivities, and ongoing vigilance from opposing counsel and judges alike to ensure that the boundaries of what is permitted under s.275 are carefully and robustly monitored at trial.

In contrast to these attempts to lead character evidence which may, or may not, escape objection, in other cases where a matter arose during trial that was not covered by a previously granted s.275 application, counsel sometimes took positive steps to lodge a late application during substantive proceedings, on special cause shown. In case 3, for example, an additional s.275 application was lodged by the defence and granted at trial on special cause shown. The substance of the application was regarding alleged collusion between the complainers. The Crown objected here because questioning as to the motivations for one complainer contacting the others was speculative. The judge was unpersuaded, however, noting that it was not possible to determine the evidential foundation without allowing the question to be at least tentatively put, and reflecting that "these matters do not impinge terribly much on dignity and privacy", opined that counsel is "mature enough to know that they can't speculate." This late application also provoked an extensive discussion about what would constitute 'special cause', and it was ultimately granted by the judge out of concern that otherwise the accused would be deprived of his defence, with the complainer's views regarding the application taken during an adjournment. A change in legal counsel was the justification here, as it was in case 19, where a late application on the first day of the trial was also granted. By contrast, a rather different approach to the interpretation of special cause shown was taken in case 12, where it was clear from court minutes that the newly appointed defence counsel's s.275 application on the first day of the trial was refused by the judge on account of its lateness.<sup>222</sup>

Though case 3 was not the only one in our sample in which a new s.275 application was lodged during the trial, it was the only one in which specific mention was made of the need, following *RR*, to ascertain the complainers' views. Having lost the argument against the s.275, the Advocate Depute appeared unpersuaded as to "what purpose" seeking the complainers' views would have, and after a brief recess the judge simply confirmed that counsel had consulted with them and if he now had anything to add that might impact on the decision. Without referring to the content of the complainers' views, the Advocate Depute merely said no, and the trial proceeded. This formalistic approach to ascertaining complainers' views was also noted in the preliminary hearings, and reflected on by interviewees, as discussed in Section 6.

### In Relation to Records or Other Private Data

Debate over the admissibility of private third party or media records, or efforts to introduce such evidence without approval under a s.275 application, were not

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<sup>222</sup> Special cause not being established in terms of s.275B of the 1995 Act.

particularly prominent features of this sample. One notable exception to that, however, was case 4, where – as discussed above – the defence were able to introduce text message evidence during the trial that had previously been ruled inadmissible at the preliminary hearing. Counsel in this case also continued to make efforts to challenge the credibility of the second complainer on the basis of sensitive records that had likewise been held to be inadmissible. Though the existence of such records had not been put to the second complainer during their evidence on commission, counsel sought to introduce them at trial by asking the first complainer about her knowledge of their existence. Accepting that this was unorthodox, and effectively an attempt to rely on hearsay statements to question the credibility of the second complainer, defence counsel was denied permission to do so by the judge. This can be seen as an example of the legislation working effectively to ensure appropriate protections, and of proactive judicial intervention to ensure that no breach is permitted, although counsel continued to make a further (unsuccessful) effort to take a similar approach in the questioning of a later witness.

Equally, however, case 4 also illustrates the risk of mis-using medical records that have been admitted legitimately under a s.275 application for another purpose. Here, the complainer's records were accessed by the defence, in relation to the complainer's diagnosis of being prone to bruising (relied upon by the accused to challenge claims of a background context of domestic abuse). However, other medical information was also referred to in passing by defence counsel to suggest that the complainer had additional vulnerabilities, something which the complainer said that she was unaware of when it was suggested in court. The complainer's medical history was also used to question her credibility because she had failed to disclose any abuse when directly asked about it as part of standard prenatal and antenatal screening.

In respect of social media or text messages, it is important that the disruption and distress caused to complainers who might otherwise be without their phones for a long period is limited. Previous research has suggested that complainers' phones can be taken for long periods – sometimes years – in order to download messages and other data.<sup>223</sup> Complainer interviewees described the trauma they experienced through this process: one, for example, shared her distress about having handed over her phone and not knowing who was going to be looking at it and how much unrelated personal content they would see (2:2); while another described the feeling of being forced to share material they would not otherwise choose to with an untold number of unknown people. This was encapsulated in the distressing and inappropriate comment from a police officer who “randomly said in conversation” with her, “oh, yeah, I saw that picture of you naked in the shower, covered in bruises” (2:4).

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<sup>223</sup> Aspinall-Miles (note 104, above). See also <https://victimscommissioner.org.uk/news/pcsc-amendments/> discussing what became s.37 of the Police, Crime, Sentencing and Courts Act 2022.



In our trial sample, we saw limited evidence that police are now routinely taking phones from complainers for significant periods to obtain full downloads, instead relying on screenshots of relevant messages; and this was supported by Police Scotland interviewees. Although there was little debate over relevance, inclusion and parameters of this data in the trials that we observed, where screenshots had been used this had the potential to open the door to speculation. In case 20, for example, it was put to the complainer that the order of the messages may have been different from that which she had intimated in her evidence since they could not be time-stamped or sequenced independently. Meanwhile, in case 1, defence counsel highlighted the potential selectivity of screenshots by putting it to the complainer that she “went through [her] phone and did your best to give them [police] what you think they wanted” but emphasising that this was different from what happens in other cases where “the police take the phone away and their technical boffins sift through.” It is inevitable that defence counsel will wish to interrogate the integrity of evidence that comes in this more selective form, but requiring full device downloads is clearly disproportionate in terms of infringing privacy and dignity, and practically untenable. Moreover, while complainers are always going to be asked to state their position on such messages, the process of admitting them into evidence – by reading out messages displayed on a screen – is time consuming and may also be particularly distressing. This can compound the general upset and trauma expressed to us by some complainers when describing their experience of the trial process.

### c. Speculation about the Fairness of Section 275

Much of the discussion above has focussed on situations in which counsel sought to revise or test the boundaries of what was permitted under prior s.275 applications, sometimes through bringing additional applications or submissions and sometimes by introducing evidence notwithstanding formal restrictions. While this was most often done within the parameters of the common law and the rape shield provisions, we observed a strategy in relation to s.275 that merits mention, whereby the very fact that they were prevented from asking certain questions of the complainer was relied upon by defence counsel to position her as less sympathetic and ultimately less credible. As noted above, a recurring theme in case 20 was the extent to which defence counsel considered their “hands to be tied” by rape shield provisions when constructing a coherent and fair narrative of events for the jury. Indeed, they submitted to the judge that the ability of the complainer to “give speeches” in response to questioning, and to talk about the accused’s sexual behaviour when she knew she could not be asked in return about her own, created a “complete imbalance.” Significantly, this submission met with little judicial sympathy. However, counsel proceeded in their closing speech to make several remarks about the existence of restrictions on what they were able to ask the complainer, and the fact this meant there were a number of unknowns, tied at one point directly to what the complainer might have done with “other guys under the state of intoxication”. While counsel explicitly emphasised the importance of jurors *not* speculating about what questioning might have brought into evidence had it been

allowed, the inevitable consequence of this was an encouragement for the jury to speculate.

This highlights the need for some reflection regarding unintended consequences of rape shield provisions designed to assist in ensuring a fair and focussed evaluation of the charge. Not only can those restrictions be presented by the defence as disempowering the accused, they can also invite jury speculation where accounts are, or are presented as, curtailed or compartmentalised. Apparently cognisant of this, the judge in case 20 took the unusual step in this case of seeking to mitigate it as the first issue considered in the charge, directing the jury to disregard such “wholly speculative comments” and not to be “distracted by any loose use of evidence that might suggest things have happened in this trial that should not.” Defence counsel in this case was particularly vocal in expressing (both before and in the absence of the jury) their concern, if not frustration, regarding the restrictions on admissibility that they felt were being imposed, and it is to the judge’s credit that they made repeated efforts to manage this at trial. Nonetheless, clearly this strategy of pointing to evidence that is not before the jury during trial proceedings can be a powerful framing device, especially so bearing in mind what the trial judge in case 3 had acknowledged to be the propensity for jurors to “fill in the blanks.”

As discussed above, some of our interviewees also observed that s.275 can be seen, on the one hand, as providing protections for complainers, but on the other as resulting in the problematic decontextualisation of parties’ narratives, thereby constraining the ability of both parties to ‘tell their story’ to the jury. While some interviewees went so far as to say that the “pendulum” had swung too far “in favour” of the complainer, others were clear that the current operation of the regime did not impact detrimentally on the rights of the accused, and to the contrary addressed historical unfairness (as well as distress) to complainers. As 3:10 put it, “I can’t say that I’ve walked away from a case where somebody’s convicted and I’ve thought to myself ‘that person didn’t get a fair trial because of 274, 275...[but] I can think of examples before when lines of cross examination were taken and weren’t objected to ... and acquittals resulting in things where that line would not be allowed today and may have had a bearing on the jury’s verdict, so I think we are striking a far better balance now than we ever have.” A number of interviewees also highlighted that framing the issue as requiring a ‘balance’ between the rights of the accused and the privacy or dignity of the complainer was in itself unhelpful. As judge interviewee 5:5 put it, “it doesn’t feel right describing it as a balance...I’m not sure that balancing is really what we’re doing...It’s an area where principle and pragmatism do get bound up together to an extent and trying to decide whether it’s the dignity of the complainer or a fair trial, and the two can coexist in harmony.” Though there are other legislative regimes in which this notion of balancing may be more apt, it is potentially significant that in the Scottish provisions, consideration of the privacy and dignity of complainers is specifically built into the legislation in a way that potentially offers more nuanced and holistic considerations of what due process and justice require in this context. Indeed, it is this relatively unique

feature of the Scottish regime that has facilitated the judge-driven demand in recent years for more careful, targeted and robust scrutiny of admissibility.

#### d. Adversarial Strategies Beyond s.274 and s.275

For many participants who raised concerns about ‘excessively swung pendulums’ in the context of the contemporary interpretation and application of rape shield provisions, there was an allied concern about what they suggested was a (politicised) shift in thinking whereby rape complaints were more readily given an increased degree of credence, with a reduced tendency to subject complainers to scrutiny, in turn risking the fair trial rights of the accused.

This sort of view was often reflected within our trial sample in closing speeches by defence counsel: indeed, in 4 of the 10 cases, those speeches referenced anxieties about groups campaigning for more rape convictions, or asserted that it was currently a particularly “dangerous time to be a man accused of rape” (case 1), urging jurors to exercise particular caution. In case 17, for example, defence counsel told the jury that: “there are pressure groups who have the ear of the executive branch of our government that say no woman can be wrong, mistaken or lie. Such a statement would be tantamount to heresy. But we in a trial do not act in accord with pressure groups – you act in accord with deciding on evidence.” Similarly, in case 16, counsel suggested the “MeToo Campaign” had created an expectation that those who disclose an allegation of rape “must be believed”; but reminded jurors that this is “not the approach you take in a criminal trial”, where evidence must be tested. In case 1, jurors were asked to imagine the scale of the decision in the lives of their sons, daughters or friends, and to resist what was described as the “clamour outside to increase the conviction rate in rape cases”. And in case 19, the defence, relied on a pseudo-scientific analysis to position rape as too convoluted an explanation of events to be credible: “in science there is a thing called Occam’s Razor – the simplest of competing explanations is usually the right one” (that is, that the sex was consensual). Like his counterpart in case 1, counsel in case 19 emphasised that the law has been designed “after many long years to achieve fairness and balance” and reminded the jury that “if your son were [in this position] you would expect the jury to behave fairly.”

The suggestion that certain campaign groups may have wielded undue influence on the public and professional consciousness regarding rape complaints was sometimes accompanied in the courtroom by a narrative that invoked, at least implicitly, a long-standing image of complainers as untruthful, and the stubborn notion that false allegations of sexual abuse are frequently and easily made. It remains open to the Crown to counter this by highlighting the difficult and prolonged nature of the prosecution process in rape cases, and the lack of likelihood, in that context, that the complainer would have subjected herself to that process to fabricate a rape allegation. However, this was not commonly done in the trials we observed, and in any event such a counter-claim is somewhat problematic since it hinges complainer credibility

on the fact that the prosecution and trial process is something of an ordeal, which sits strategically at odds from a commitment to victim-centred and trauma-informed reform.

Notwithstanding a lack of empirical evidence in its support, this theme of rape allegations being likely to be unfounded was also echoed by several of our interviewees: as defence counsel 4:2 put it, “it’s such an emotive subject but...the prospect of defending innocent people is a real prospect in these cases” because “everything is grey and insubstantial” and unlike cases of alleged physical assault where there would be injuries that it would be difficult to self-inflict in order to fabricate a complaint, “it’s possible to do that in these cases.” Meanwhile, judge 5:2 reflected on cases they had recently dealt with in which, as they put it, “teenage boys got themselves into horrendous situations” with female friends who “made advances” whilst intoxicated and “next morning, decided she’s been raped.” Scotland, like many other jurisdictions, has implemented reforms designed to challenge myths and stereotypes in the handling and determination of rape complaints, which include use of judicial directions in specific contexts such as delayed reporting (which we discuss further below). However, the fact that the spectre of false allegations not only remained at the fore in so many of our observed cases and interviews, but was presented by defence counsel as an elevated risk precisely *because of* wider, progressive shifts in social understanding of sexual violence was noteworthy.

In addition, irrespective of shifts in the interpretation and application of rape shield provisions, and despite evolving understandings and a formal commitment to trauma-informed justice processes, defence strategies in our live trial sample often continued to rely on tenacious myths and misconceptions about rape, rapists and rape victims. Indeed, we found that questioning of complainers at times still relied on regressive conceptions of gender roles that normalised a threshold of male possessiveness, short-temperedness and / or jealousy, and questioned the propriety of complainers’ behaviour in response to sexual abuse.

In what follows, we focus on defence counsel’s handling of matters relating to three issues: (1) delay and reporting; (2) abusive relationships, submission and consent; and (3) capacity and intoxication. We illustrate the extent to which, in respect of each of these issues, tactics were sometimes used by the defence that targeted complainers’ credibility by relying on assumptions related to gender stereotypes. Though these matters do not directly engage the rape shield protections, they reflect the wider context in which those provisions are interpreted and applied, and the ways in which restrictions on the availability of evidence about complainers’ sexual history or character might increase scrutiny of her other behaviours.

### Delay and Reporting Behaviour

Understandings of the reasons why a victim of sexual violence might delay reporting, or exhibit an array of behaviours in that disclosure process, have improved amongst

legal professionals and the general public in recent years. Scotland has also introduced jury directions on delayed reporting intended to counter unthinking assumptions about this issue. Nonetheless, across the trials, reference to the timeliness of reporting was common. Delayed reporting was often relied upon by the defence to question the veracity of complaints, whilst conversely, the fact of a speedy report was sometimes suggested by the Crown to bolster its credibility. In both instances, there is an assumption about the connection between the timing and manner of reporting on the one hand and the likely truthfulness of the allegation on the other that has little reliable foundation in either knowledge or human experience.

In case 1, though defence counsel was largely gentle in his questioning towards the complainers, insisting “I am not disputing what you have said” or “you conducted yourself perfectly properly, there is no suggestion from me about that,” his closing speech assumed a different tone. Cautioning that this was a dangerous time for a man to be accused of rape and insisting that the verdict returned by the jury must not be based on “prejudice or solidarity with one gender or another”, he suggested “there is a fundamental shadow of dishonesty about one of the complainers, which maybe leeches out in the true colours of the others as well.” Central to this assertion was that the complainer had delayed making a report. While accepting there can be good reasons” why people delay or avoid reporting crimes, counsel maintained that if the complainer wanted to be “saved from a domestic monster” as she had depicted, she could have called ‘Crimestoppers’ or the police. Counsel emphasised that the complainer knew the police take domestic abuse seriously, “not like the 1970s or whenever you look back” and that, in this context, her “actions and inactions speak louder than words”.

Similarly, in case 18, disclosure the following day to two people, but with a delay in reporting to the police for another 5 days, was commented on negatively several times by defence counsel. In case 15, too, although the complainer had disclosed the two alleged incidents to both a close friend and her mum on the day, or day after, they occurred, the fact she delayed reporting to the police for few months was highlighted repeatedly by the defence. Counsel not only questioned the credibility of the complainer’s explanation that she had been reluctant to report because of a desire to protect her daughter, but put it to the complainer’s mother that, if the disclosures had been made to her at that time and she had believed them, she would have taken it upon herself to report to the police irrespective of the complainer’s wishes. This latter suggestion was addressed by the Advocate Depute in their closing speech: “there might be parents who would get involved in an adult daughter’s life, but I suggest not all parents would react that way, and that is not unreasonable.” However, the scrutiny that the defence placed on the post-assault behaviour of the complainer was less directly challenged. And in their closing speech, despite acknowledging that “it would offend your common sense to say to you that because she didn’t leave [the marriage], the rape wasn’t true,” counsel in case 15 reminded jurors about the delay and emphasised that, having left the home, the complainer returned to collect her

belongings (at which point the second assault took place). Counsel asked jurors to consider whether it was “likely that she would go back there, having left the marriage?” Meanwhile, in case 4, as discussed above, the fact the complainer had not told social workers about the abuse and sexual violence she now alleged took place on a sustained basis over many years was also highlighted by defence counsel as being suspicious, as was the fact that, whilst receiving midwifery support, she had checked boxes on a form indicating that there was no history of such domestic abuse to be disclosed.

An adversarial process entails that defence counsel must, in line with instructions from the accused, test complainers’ accounts, and this might include raising questions about the circumstances of and motivations for their disclosure. Equally, where the bare fact of delay is relied upon to suggest a lack of credibility, this substantially underestimates the barriers to disclosure that victims of abuse encounter, and relies on assumptions about expected behaviour that research on the complex dynamics of abusive relationships has shown to be contrary to the experience of many victim-survivors.<sup>224</sup> That there is no compelling basis for asserting such a connection between the timing – and manner – of reporting and the veracity of the complaint has already been acknowledged by the Scottish courts in their jury directions.<sup>225</sup> Thus, it was disappointing to see this continue to be a feature in the trials we observed, regardless of whether delay was deployed to undermine the complainers’ account or timeliness was relied upon to bolster it. In addition, it might have been hoped that more and better use could have been made of expert knowledge on reasons for delayed reporting by the Crown in their efforts to respond to this where it was relied upon by the defence.

It was not only the timing and tone of reporting by complainers that drew such inferences, but also the language used by complainers during disclosures, and in particular whether the term ‘rape’ was used. In case 16, for example, the complainer was pushed by defence questioning to acknowledge “I might not have said the exact words ‘I was raped’.” Meanwhile, in case 1, when asked by defence counsel about her language choice when disclosing, the complainer explained “what he done, he hurt me, but to me, honestly, it is not rape, I would never have described that as rape, he hurt me, I am just being honest...I wouldn’t use those words.” The defence also focussed on this in case 4, putting it to the complainer that “as far as you were concerned you were not aware that you had been raped in any way until you spoke to the police.” In a context in which there is considerable evidence that victims of sexual violence, especially within intimate relationships, may fail to recognise what has been done as abuse, let alone rape, this preoccupation with language choice feels particularly misplaced.

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<sup>224</sup> Charlotte Bishop and Vanessa Bettinson “Evidencing domestic violence\*, including behaviour that falls under the new offence of ‘controlling or coercive behaviour” (2018) *The International Journal of Evidence and Proof*, 22(1), 3-29.

<sup>225</sup> S.6 of The Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

## Abusive Relationships, Submission and Consent

The latter point links to another theme we identified in our sample, namely the use of counter-allegations by the accused of abuse and control, and different approaches to what constitutes an abusive relationship. In cases 20 and 4 alike, the account provided by the complainer of an abusive accused was challenged by defence counsel who positioned her as the more empowered and controlling partner. This is in tension with another defence strategy that we observed, however – of trivialising the severity of the alleged abuse. In case 3, it was put to the complainer that she was “exaggerating” about the abuse and associated fear of the accused when she intimated that she thought she was going to die as he squeezed her neck; and that, in fact, “there might have been pushing and shoving but it was by both of you”.

Sometimes the abusive behaviour was described by defence counsel in such a way as to contrast it with ‘properly’ criminal behaviour. For instance, in case 1, behaviour characterised by the Crown as abusive and controlling was presented by the defence as a more common and less problematic, if undesirable, manifestation of male jealousy. Meanwhile, in case 18, where the accused was charged with rape as well as an offence under s.1 of the Domestic Abuse (Scotland) Act 2018, the defence suggested that the accused’s demand that the complainer wear “women’s clothes” rather than tracksuits was indicative of his “trying to help her”, “giving her compliments” and “wanting her to look nice”. The defence’s depiction of the dynamic of this relationship may well have reflected how the accused perceived – or at least presented – matters, and the way he gave his instructions to counsel. Nonetheless, the way that domestic abuse is understood, portrayed and normalised in these presentations – and at times, in our observations, without adequate efforts by the Crown to counter them – tell us something significant about how the harms associated with such victimisation can continue to be trivialised by perpetrators and justice professionals alike.

There was also some evidence in the observations of a failure to properly engage with the complexity of the dynamics of domestic abuse, including the ways in which incidents or periods of intense violence and control can sit in tandem with a cycle of apology, reparation and ‘love-bombing’, and can co-exist alongside an external appearance of a ‘happy’ and non-abusive relationship. In case 17, for example, the accused’s violent and threatening behaviour was clear from voicemails played back during the complainer’s evidence-in-chief, and the accused agreed he was jealous and at times “horrible”. Still, in his final question to the accused, defence counsel relied on a photograph of the complainer and the accused arm-in-arm, taken earlier in the evening of the alleged attack, which he suggested to the jury established that the complainer was clearly not “trapped” in an abusive relationship. Likewise, in case 4, though the complainer highlighted the dubious nature of what could be gleaned from a photo given that “when someone tells you to smile to take a picture, you are doing that for the picture, despite how you feel inside,” defence counsel devoted a substantial section of the cross-examination to putting a ‘happy’ – or at least ‘happier’

– family narrative to the complainer, in order to challenge her claims that rape took place against a context of sustained abuse. He required her to confront a series of 15 family pictures and asked her to confirm, for each, if everyone looked happy and if there were any visible bruises. Again, though defence counsel are likely operating under instruction from clients who deny the perpetration of abuse in the relationship, or at least deny the scale of allegations being put, the juxtaposition between an outwardly ‘happy’ family and one in which abuse is perpetrated relies on an outdated understanding of domestic abuse that has been widely discredited.<sup>226</sup>

At other times, in cases where domestic abuse formed part of the background relationship (even if not the charges on the indictment), the relationship between consent and submission was poorly interrogated. In case 1, for example, one of the complainers testified that they did not say anything to the accused to indicate refusal in relation to sexual intercourse because, in the context of their abusive relationship, “it felt like I should just do it to, I had done wrong so I had to sit and take it...I thought I deserved it to happen because I had upset him so much.” Though another complainer in the case later indicated that this was a feeling that she also had in relation to numerous sexual interactions with the accused, that “if I never wanted sex it didn’t matter because I knew we were having it anyway,” the serial nature of this was not included on the libel, the implication being that such interactions were consented to.

This failure to unpick the complexities of abusive relationships, and the role of consent therein, was particularly notable in case 4 where the complainer, who claimed to have been so ground down by abuse as to no longer consider it possible to avoid intercourse with the accused, ultimately came to agree with the defence that these were not in fact situations of rape. The complainer explained that “it was an everyday thing of him wanting to have sex and I didn’t want to have sex...but I would end up having to have sex with him because I didn’t want to start an argument.” Nonetheless, when asked by the Advocate Depute if she consented, she replied “I ended up actually having sex with him, so I think that would have been consent because I went and done it even though I didn’t want to...I didn’t want conflict.” Here the Crown failed to help the complainer more effectively articulate what she meant by ‘wanting to avoid conflict’ and situate that in the context of what that daily conflict would have looked like for her. The Crown thus left it open for the defence to dismiss the rape claims, as succinctly illustrated by counsel’s question during the complainer’s cross-examination that “I just want to be clear as it will save us a lot of time, do you accept that you did consent on those occasions?” to which she simply replied, “correct”. Of course, there may well be evidential matters we were not privy to in this case, but this seemed a poignant illustration of a lack of trauma-informed understanding and questioning by counsel on

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<sup>226</sup> Evan Stark *Coercive Control: The entrapment of women in personal life*. Oxford University Press, 2009; Michele Burman and Oona Brooks-Hay “Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control” (2018) *Criminology and Criminal Justice*, 18 (1), 67–83.



the nexus between abuse and rape, and one not exposed to an appropriate degree of judicial scrutiny.

### Capacity and Intoxication

A final theme related to intoxication and its effects, particularly on complainers' recall. It was common for complainers in this sample of 10 trials to have consumed at least some alcohol and / or drugs (n=7), though in none of the cases was it raised by the Crown as a level of incapacity that undermined consent. It was, however, common for the fact of this intoxication to be relied upon by the defence to question the reliability of the complainers' allegations.

In case 19, for example, though defence counsel was at pains to cushion questions to the complainer with language of being "fair" to her, they consistently raised the issue of whether "did it not happen or is just that you do not remember" given the level of her intoxication. The complainer provided a robust response, noting "I may have an incomplete memory, but not of knowing I did not consent to having sex with him that night." However, the defence continued to focus on the fact that she could only recollect "parts of the night" and, as such, the accused's claim that she woke up and encouraged his advances was credible. Meanwhile, in case 16, the ways in which the complainers' intoxication may have impacted on behaviour and memory was also underscored repeatedly by defence counsel who put it to them several times during cross-examination that they would have been "pretty wasted." In case 1, claims about the impact of alcohol on the complainer were likewise made by defence counsel, including the assertion that "drink doesn't help with laying down of accurate memories." To the extent that intoxication impacts on the imprinting and recall of memories, it is understandable that defence counsel will seek to make the jury aware of it, and draw upon this to introduce doubt regarding the accuracy of the complainer's account. Equally, what was notable in our trial sample was the duplicity of how the fact of intoxication operated at trial, with complainers being positioned variously as conscious and capable but also "wasted". In addition, though the relationship between intoxication and recall is complicated, often context-specific and influenced by the nature – traumatic or otherwise – of the incident being encoded, there was a resoluteness to counsels' assertions regarding the underpinning science that one might have hoped could have been better countered by the Crown.

Related to the handling of the complainer's account in case 19, what also emerged was the extent to which cases involving complainers who claimed to be asleep during the incident (intoxicated or otherwise) could face additional challenges to credibility. This was most clearly demonstrated in case 4 where the complainer's account of being raped routinely whilst asleep was suggested by defence to be incredible because she would have inevitably woken up during the accused's efforts to manoeuvre her into a position to have sex, or if she really had been so deeply asleep as to have not woken up, there would have been what was referred to as "natural resistance" without

lubrication that would again have prompted her to wake up or to have sustained some injury. Directly putting it to the complainant that her description of waking up to find the accused penetrating her was “a pack of lies”, defence counsel maintained that “there is a penetrating object and an object that is being penetrated, there is a degree of resistance involved...there inevitably has to be a degree of force used” and yet “you slept throughout.” Though case law and judicial directions alike could not be clearer that there is no requirement for injury or force to be present to substantiate an allegation of rape, the approach taken here effectively invoked that empirically unsupportable and antiquated assumption. It is troubling, moreover, that counsel was able to do so without challenge or counter from the Crown, and that this required the complainant – who was arguably additionally vulnerable and appeared at times to struggle to decipher the meaning of questions – to offer a response to questions that, if capable of being put at all, should properly have been the subject of expert testimony in relation to claims of force and injury.

#### e. Conclusion

Overall, then, our analysis of this sample of 'live' trials indicates that there has been some improvement relative to the position reflected in the historical analysis above. We observed cases in which evidence regarding the sexual history of the complainant – whether with the accused or third parties – that one might not have been surprised to see feature in rape trials in the past was deemed inadmissible. This was also supported by the comments of many interviewees who had identified a marked shift in approach, tied in particular to evolving jurisprudence from the Appeal Court. At the same time, as we outlined above in relation to preliminary hearings, we identified a lack of clarity amongst some professionals regarding the parameters of s.274 and the appropriate drafting of s.275 applications, which could have consequences within substantive trials. On some occasions, material was being introduced at trial that had not been subjected to advance scrutiny in respect of its relevance when it is certainly arguable that it ought to have been. We also identified inconsistent practice in judicial insistence upon s.275 applications being made in such cases, as well as in relation to decision-making on s.275 applications where they were made during trial proceedings.

Likewise, there was variability in terms of the rigour with which the boundaries of s.275 rulings were monitored during trial proceedings. Though our sample is a small one, it was not uncommon for matters to be re-opened at trial, on one occasion to rule out material that had previously been authorised by the preliminary hearing judge, but more frequently to allow into evidence material that had previously been determined to be inadmissible. We also found examples in which lines of questioning that, on the face of it, appeared to require prior authorisation from the court to be put to complainants were pursued by counsel despite the lack of such approval, and it was clear that such tactics were not consistently challenged by opposing counsel or the judge. In some cases, we also saw evidence of the reliance by counsel on problematic stereotypes, for example, regarding post-assault reporting behaviour, as well as the

use of certain norms and stereotypes that minimise the impact of gender-based violence, to challenge the credibility of the complainer. In these respects, our findings indicate that, notwithstanding a more restrictive approach to the interpretation and operation of rape shield protections, the adversarial trial retains its potential to be a site for re-traumatisation. As one advocacy worker interviewee put it, it remains a “deeply exposing” process (1:1).

To the extent that the positive shifts that we have identified in the implementation of ss. 274 and 275 continue to emerge as partial and potentially precarious, in the next Section, we set out additional recommendations that would enhance the operation of existing protections.

## Section 8: Reflections and Recommendations

In this report, we have analysed data from: 5 historical cases that include charges of rape, attempted rape or assault with intent to rape; 30 live proceedings, made up of 20 preliminary hearings and 10 trials for rape or attempted rape; and interviews with 38 stakeholders.

We have highlighted some clear examples of positive attempts at, and improved practice in relation to, implementing s.274 and s.275 of the 1995 Act, and accompanying policies and processes, that are designed to exclude evidence of sexual history and character evidence where its admission fails to meet the requisite standard in respect of the three statutory tests in the rape shield legislation of specificity, relevance and the balancing exercise. However, we have also identified areas where practice could be strengthened and where further reform and review are likely to be required. In what follows, we first present what we believe are the most positive and clear examples of improved practice. We then outline some areas where we believe the changes to law, policies and practice are having a positive effect, but further positive change could be realised. Finally, we point to the areas where there is more substantial work to be done to appropriately regulate the use of complainers' sensitive data whilst ensuring the ability of the accused to present their defence. Throughout this discussion we refer, where relevant, to changes proposed by the Victims, Witnesses and Justice Reform (Scotland) Bill, and examine how they might meet our concerns and recommendations.

### a. Evidence of Improved Practice

The areas where we saw the clearest improvement within preliminary hearing and live trial samples, relative to the historical cases baseline that has precipitated concerted efforts at change, were in relation to: the volume and drafting of s.275 applications; the substance of submitted s.275 applications; and the role of complainers' views on s.275 applications.

- **Volume of s.275 applications**

Across our 20 contemporary preliminary hearing cases, there were 39 applications made under s.275 of the 1995 Act.

Our purposive sampling of only cases that included one or more s.275 application means, of course, that we cannot offer insight into the proportion of rape or attempted rape cases overall that include a s.275 application. The value of doing so is limited, however, to the extent that it is impossible to say in the abstract what a 'desirable' number of s.275 applications would look like, given the variability in the nature, scope and origin of such applications and their relationship with the common law rules of

evidence as well as s.274. As noted above, there have been changes in judicial guidance and in Crown policy that have resulted in the Crown submitting applications where they previously would not have been required to do so (such as mirror applications or with respect to dockets), and therefore the conventional assumption that s.275 applications are being lodged by the defence to adduce evidence that complainers would often prefer not have disclosed no longer gives an accurate picture.

Equally, it is important to note that applications lodged by the Crown still only made up 28% of the 39 s.275 applications that were made in our sample, a statistic that sits somewhat at odds with those provided by COPFS for the months of April – August 2023, as noted in Section 6, above. Some of the applications by the defence were also accounted for by mirror applications (7 of the 20 cases involved an application from both Crown and defence), but for the most part they were made in the context of adducing evidence related to the accused’s special defence of consent (which was lodged in 17 of our 20 cases), and related to the accused’s account of sexual activity where that differed from that specified in the charge.

Some of our interviewees indicated that the significant number of s.275 applications made in rape and attempted rape trials demonstrates that the legislation is working as intended, by ensuring more robust scrutiny of the evidence that is adduced. We agree that the legislation is largely being more effectively implemented and that, as a result, there will continue to be a substantial number of applications. However, it is clear that defence counsel still sometimes attempt to introduce evidence, with and without s.275 authorisation, that is irrelevant. As such, there can be no scope for complacency regarding operation of the current regime.

- **Drafting of s.275 applications**

The legal drafting of s.275 applications in the cases that we considered in our historical sample was heavily criticised by the Appeal Court in their reconsideration of those cases. Against that baseline, there has certainly been some improvement in the quality of drafting as exemplified in the contemporary cases that we reviewed. This is likely, at least in part, due to judicial guidance on the drafting of applications issued in 2019, the publication of the Preliminary Hearing Bench Book and ongoing professional training.<sup>227</sup> At the same time, we did continue to observe occasional judicial criticism of the framing and the standard of drafting of s.275 applications. Several practitioners told us candidly that they often struggled to determine where the parameters of s.274 lie. Given that complainers now require to be consulted on the terms of applications by the Crown, it appears to us that the utmost care and thought needs to be given to the drafting of applications on both sides of the bar. This underlines the need for professional training to ensure a consistent approach, and one that does not waste

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<sup>227</sup> See for example, the comments of Lord Turnbull in *JG* (note 5, above) at [33] to [36] and the publication of the *Preliminary Hearings Bench Book* (note 79, above).

court time with ill-founded applications, given the pressure that the criminal justice system is under. Greater care here will reduce distress to complainers in respect of avoiding them being consulted on applications being lodged that are clearly unnecessary or unlikely to be granted.

- **Substance of s.275 applications; and Opposition, Grants and Refusals**

Our analyses of the historical cases, and the trajectory of law reform in the last forty years, demonstrate that, in the past, s.275 applications that were speculative and designed to elicit prejudicial evidence were not uncommon. The ameliorative effects of improved legislative provisions, a strong interpretive steer from the Appeal Court, and corresponding shifts in policy and practice on both sides of the bar are evident in the content of the s.275 applications reflected in our contemporary case sample. Indeed, our data shows that, by and large, the substantive content of s.275 applications was less conjectural and usually (though not always, as we note below) related to the accused's position of the events libelled.

Our data also reflects a higher incidence of objections to defence s.275s by the Crown than was reported in previous research (64% as opposed to 47% in the Inspectorate's 2022 review and 33% in Burman et al's study in 2007). While we note the small numbers in our sample, this appears to show that the Crown are now more likely to object to applications, perhaps because of the more rigorous application of the legislation by many judges, and the practice that has formed around that, as reflected upon by many of the legal professional interviewees in this study.

We also found that judges were more likely to subject applications to heightened scrutiny in our sample of cases than has been indicated previously; and while the grant rate of s.275 applications – in full or in part - was still high (77%), this can be explained to a significant degree by the fact that, in 17 of the 20 cases, the accused pled consent and wished to lead evidence of a differing account of sexual behaviour than that libelled in the charge, necessitating a s.275 application (potentially from both Crown and defence) to adduce evidence relating to their position. When broken down, the grant rate was notably higher for Crown applications (91%) than those made by the defence (71%). Some kinds of evidence of sexual behaviour that defence counsel sought to adduce were clearly more relevant than others (for example, to explain the presence of DNA) and s.275 applications in those circumstances were granted; other evidence of prior sexual behaviour (such as kissing and cuddling days before the alleged offence, or previous consensual BDSM sex), which was clearly irrelevant, was refused; and in one case, the trial judge exercised discretion in scrutinising and refusing a s.275 application that had been granted at the preliminary hearing.

- **Complainers' views**

Following *RR*, the Crown is required to obtain the complainer's views on any s.275 application made, and to relay these views to the court. In 13 of the 20 cases in our sample (65%), it was clear that complainers' views had been sought, and were, in varying degrees of detail, conveyed to the court. Complainers sometimes said that they had no objection to such evidence being elicited, either because it was true and / or because they wanted the opportunity to speak about these matters to narrate a coherent 'whole story', as they experienced it. Most interviewees who spoke about this practice of ascertaining complainers' views regarded it as a positive step that was working to increase the amount of information provided to complainers, to prepare them for questioning at trial, and to enhance their sense of participation in the process.

At the same time, though, there were some areas where further improvements clearly require to be made in the implementation of the law. We turn to those now.

## b. Work in Progress and Recommendations

Our findings indicate that there are a number of ongoing issues that will require further attention if the rape shield provisions are to operate fully as intended. In addition to the need for ongoing training to refine and improve the consistency, quality and detail provided in s.275 applications, we also identified a significant variability in respect of how the provisions are being interpreted and applied. Here we focus on the following 4 issues that require attention: interpreting and applying the rape shield provisions; the treatment of complainers; record keeping; and, finally, case progression. To address these 4 issues, we make 5 key recommendations for further improvement.

### 1. Interpreting and Applying the Rape Shield

#### Good Faith Interpretation

Though the practice is doubtless less common than it has been in the past, we continued to identify cases in our contemporary sample in which defence counsel lodged s.275 applications that included evidence which appeared to be clearly inadmissible – for example, that the parties had engaged in consensual sexual behaviour in the days before the alleged offence. Although, in these circumstances, we saw judges actively question the defence about that part of the application, and, for the main part, refuse it, defence counsel still saw fit to seek to introduce such evidence in the first place. The accused's right to put forward a defence is key to his right to a fair trial, but there is clear Appeal Court guidance about the irrelevance of sexual behaviour that is not libelled, is clearly prior or subsequent to the subject matter of the charge and that does not relate, for example, to the presence of injury or DNA.

In addition, in the contemporary trial analysis, we found situations in which defence counsel pushed at the boundaries of what had previously been authorised in order to introduce material that, in our view, would have most likely been refused if scrutinised in the parameters of a s.275 preliminary hearing (and, in some cases, had already been refused through this process). Whilst sometimes the evidential position at trial may necessitate a fresh s.275 application, some of the practice we observed in this respect was troubling. We also observed counsel seeking to introduce material, in respect of which there had been no related s.275 application, that clearly related to matters that were inadmissible in terms of the common law of relevance and s.274. In these situations, the extent to which either the Crown objected or the judge intervened was variable, indicating again the need for ongoing training and vigilance to ensure appropriate enforcement of the rape shield provisions.

Moreover, though egregious references to, for example, the clothing worn by the complainant to infer sexual consent were not evident in our contemporary sample, we continued to identify instances where counsel sought to undermine the credibility, reliability and respectability of the complainant through reference to questionable gender norms and assumptions regarding how victims of domestic abuse and sexual violence would and should behave. In some cases, this was more explicit and, therefore, more readily amenable to challenge, but in others, it was more subtly connected to inferences regarding sexual experience and proclivity, as demonstrated, for example, in the cases discussed above where evidence was introduced of the complainant's "strip" pole-dancing, swimwear modelling, or purchase of "bondage" restraints as a Valentine's gift. While not contravening s.274, these allusions can frame the issues in such a way as to take advantage of existing stereotypical beliefs, which research has suggested may often be held by jurors in sexual offences trials.

### Clarity and Scope of the Law

We noted in the historical analysis a level of confusion about the proper parameters of s.275 and have shown in the discussion above that this has persisted into current practice. Many of the legal personnel we interviewed (on both sides of the bar) still recounted a lack of confidence and clarity about whether there was a need for a s.275 application. We also observed variability in practitioners' and judges' evaluation of whether an application was necessary, and if not, whether it should be withdrawn, refused, or accepted "to be on the safe side". In particular, there were difficulties around discerning the relevance of previous and subsequent sexual behaviour, and the surrounding context for the behaviour libelled, where too wide a scope falls foul of s.274 and the common law of relevance but too narrow a scope constrains the Crown and defence in what narrative they can elicit in evidence. Although many interviewees felt that some narrative detail was being lost during the trial, introducing evidence to allow for context, as demonstrated in different ways across our analysis, can produce unanticipated consequences; and the fact that individual complainants may prefer more context does not, of course, obviate its potentially prejudicial effects.



## Conduct at trial

Defence practice has improved relative to that demonstrated in the historical cases we analysed, and since the Appeal Court has strenuously challenged particularly poor practice. Some interviewees described this shift as “seismic”. Nonetheless, even in this small sample, we were still able to identify instances where counsel conducted trials in a manner that appeared to us to be professionally inappropriate, including by referring in jury speeches to matters not led in evidence and directly attributing the exclusion of such evidence to the rape shield provisions. While the judges observed and interviewed for this project largely intervened to prevent the worst examples of this conduct, there were cases where judges could have been more proactive in their oversight of the common law of relevance and s.274. And while the Crown do now appear to be more confidently opposing defence s.275 applications, we did continue to observe instances where Crown counsel, in particular, appeared reluctant at trial to object to lines of irrelevant questioning prohibited by s.274, necessitating active judicial intervention instead in order to ensure appropriate legal boundaries were adhered to.

### RECOMMENDATION 1: PROFESSIONAL TRAINING

Further professional training is required for both sides of the bar on the circumstances in which there is a need for, and proper drafting of, s.275 applications. This obviously must be in line with the advice provided in the Preliminary Hearings Bench Book and should help to minimise unnecessary applications that take up court time and require to be put to the complainer, even though unlikely to be granted. Whilst every case in which a s.275 application is advanced is fact specific, professional training should be put in place to emphasise the boundaries of what constitutes relevant evidence for the purposes of a s.275 application, clarifying as far as possible the time periods in which previous or subsequent sexual behaviour can be said to be relevant. Additionally, while it is common and appropriate for both parties to seek to rely on the behaviour of witnesses in the aftermath of an incident, they should avoid resorting to assumptions about the existence of any ‘typical’ response to sexual violence, particularly in the context of abusive relationships. Crown counsel require further training to encourage appropriate objection to questioning that falls foul of the law.

### RECOMMENDATION 2: JUDICIAL TRAINING

Related to Recommendation 1, while recognising that judicial training is a matter for the Lord President, we recommend continued emphasis on empowering robust judicial oversight of the implementation of the rape shield laws to ensure protection of the privacy and dignity of complainers, and to prevent overreach beyond the boundaries of a granted s.275, or where there is no s.275 but the evidence is struck at by the common law of relevance and s.274.

With respect to these three areas – good faith interpretation of the law, clarity of the law, and conduct at trial – it is also useful to look to the changes proposed by the Victims, Witnesses and Justice Reform (Scotland) Bill. A key reform proposed is to introduce a specialist sexual offences court, grounded in trauma-informed practice, as well as placing a statutory obligation on certain criminal justice agencies (including COPFS, SCTS and Police Scotland) to act in a trauma-informed manner. Though the resourcing, training and cultural challenges associated with embedding this at all levels of operation should not be underestimated, there is clearly potential to tackle some of the remaining problems around interpretation and application of rape shield provisions through this approach. Alongside new jury directions on rape myths and stereotypes recently added to the Jury Manual, a specialist sexual offences court led by specially selected judges could, it is hoped, develop its own good practice and working culture around the parameters of the law of relevance and the rape shield provisions, which may go some way to ensuring a more consistent approach that may alleviate the remaining examples of problematic conduct.

Whilst detailed consideration of the Victims, Witnesses and Justice Reform (Scotland) Bill is beyond the scope of this report, we also note here the juryless pilot proposal in single complainer rape cases, which has a potential bearing on some of the issues that we have identified in previous discussion. We have suggested above that subtle framing of certain matters by counsel at trial can invoke problematic stereotypes relating to gender and sexual behaviour, notwithstanding rape shield legislation and other procedural reforms aimed at disavowing reliance on such matters in assessing evidence.<sup>228</sup> If the juryless pilot proceeds, it has been suggested that this may encourage some shift in advocacy strategy, given that the audience of persuasion is now exclusively a legally qualified judge rather than lay jurors. Equally, it may be naïve to conclude that the judiciary, even with increased training and selection for the proposed specialist sexual offences court, will be immune from some of these stereotypes, and research elsewhere has generally indicated that the removal of the jury does not generate wholesale shifts in trial advocacy, including efforts by counsel to cast doubt over complainer credibility by relying on problematic stereotypes.<sup>229</sup>

## 2. Treatment of complainers

### Communicating with Complainers and Recording their Views on s.275 Applications

The shift to requiring that the views of complainers about s.275 applications be sought, recorded and relayed to the court by the Crown is an important and welcome one.

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<sup>228</sup> See ss. 34, 35, 38, 39, 40 and 65 of the Victims Witnesses and Justice Reform (Scotland) Bill 2023. For further discussion of the Bill's proposals, see also James Chalmers, Eamon Keane, Fiona Leverick and Vanessa E Munro, 'Putting Victims and Witnesses at the Heart of the Justice System? The Victims, Witnesses and Justice Reform (Scotland) Bill' (2023) *Criminal Law Review* 706-727.

<sup>229</sup> Elisabeth McDonald, *In the Absence of a Jury: Examining Judge Alone Rape Trials* (Christchurch: Canterbury University Press, 2022).

However, we observed patchy implementation of this practice, in so far as we could tell from the paperwork provided to us: in only 13 of 20 cases was there an indication that the complainant's views had been sought. It is imperative that complainants' views be routinely and reliably taken and provided to courts. The introduction of ILR for complainants at s. 275 hearings, as envisaged in the Victims and Witnesses and Justice Reform (Scotland) Bill, will no doubt improve the situation. In the meantime, another way of improving practice in this area would be for complainants' views to be recorded clearly in writing and provided to courts. This would help the court ensure that the right provided to complainants is being effectively realised.

Some of our interviewees raised concerns about the extent to which protections under the rape shield regime might be experienced as disempowering by some complainants, since it prevents them from bringing sufficient context to the court that would enable them to frame their account. Complainants also recounted to us their sense of being "a bit of evidence in the process", for example, not being told basic information about the charges that the accused was facing or feeling that their decision to rely on special measures meant they could not then remain in the court to hear the rest of proceedings, and so had little sense of how the arguments related to evidence introduced via s.275 applications ultimately played out.

There is a balance to be struck between a number of factors in this area: involving complainants and ensuring they are informed and enabling their participation; determining the level of detail to be disclosed in relation to s.275 applications so as to avoid unnecessary distress; the need to avoid an accusation of coaching; and providing helpful responses to questions such as the charges faced by the accused or the likelihood of the success of the s.275 application at the preliminary hearing. It is clear that the Crown need to be prepared to engage consistently with victim participation, as envisaged through s.1(3)(d) of the Victims and Witnesses (Scotland) Act 2014, in a trauma-informed way. A careful and nuanced exercise of professional judgment, in combination with, as far as possible, fulsome communication with complainants, is needed when the Crown are preparing cases for trial. The correct balance is yet to be properly determined, and is likely context specific, but currently the system operates in very tight timelines and appears to have limited resourcing to permit appropriately trauma-informed engagement, and legally informed dialogue with complainants. In line with the recommendations of the Dorrian Review, The Victims, Witnesses and Justice Reform (Scotland) Bill proposes to permit complainants a right to be heard at hearings to determine s.275 applications. It also grants associated rights of appeal, as well as an entitlement for the complainant's legal representative to be provided with the application, charges and certain evidence in respect thereof (only with the authority of the court, following an application by the Crown). Importantly, the statutory time limits in respect of making a s.275 application are proposed to be extended to 21 days in advance of a preliminary hearing (from 7 days).<sup>230</sup> In addition,

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<sup>230</sup> Victims, Witnesses and Justice Reform (Scotland) Bill s.64(4).

if complainers are to see this process of seeking their views as more than a ‘tick-box’ exercise, it may be necessary for there to be clearer judicial guidance on the weight that such views are appropriately to be given.

### Better Handling of Complainers’ Testimony

We saw evidence of complainers not always being offered a break during their testimony when they became distressed at trial, as well as instances in which the tone of courtroom dialogue between legal personnel was exclusionary and potentially upsetting to both the complainer and the accused. What this demonstrates is that, notwithstanding the frequent use of special measures, the process of preparing for and giving evidence continues, for many complainers, to be an exposing and distressing experience.

During our research, we saw a small number of complainers who had the opportunity to give their evidence on commission, saving them the potential distress of appearing in court. Notwithstanding the very real issues of capacity and backlog that had a serious impact on complainers’ experiences of the process, we recommend that consideration be given to broadening the cohort of complainers to whom this option is available. In this respect, the Victims, Witnesses and Justice Reform (Scotland) Bill proposal that there be a presumption in favour of pre-recorded evidence for all complainers in sexual offences trials is to be welcomed, though its implementation will require substantial and sustainable investment, care and review, and should be informed by further Scottish specific research on the topic.<sup>231</sup>

A pilot study of Video Recorded Interviews (VRI) was also being conducted by Police Scotland during the period in which we completed this research, though none of the cases included in our sample were part of this pilot. We note that police interviewees were broadly supportive of the shift, and if modelled on best practice, this could be part of a raft of measures to reduce distress to serious sexual offence complainers.

However, we also saw several examples of errors or problems during the playback of pre-recorded evidence in court, such as: playing the wrong (non-) redacted version of an interview; attempts to redact a recording while it was being played; or disagreements about redaction taking up a significant amount of court time. Any move towards the increased use of pre-recorded interviews across the criminal process must be properly resourced to ensure a product of appropriate quality is captured and presented to the court, within timescales that do not hinder case progression.

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<sup>231</sup> Work has been undertaken in England and Wales which suggests that the use of pre-recorded examination hampers the prospect of convictions in rape cases but further research is needed in Scotland. See Cheryl Thomas’s oral evidence to the Justice Committee: *The use of pre-recorded cross-examination under Section 28 of the Youth Justice and Criminal Evidence Act 1999* (26<sup>th</sup> June 2023). Available at <https://committees.parliament.uk/event/18576/formal-meeting-oral-evidence-session/>.

### RECOMMENDATION 3: TRAUMA-INFORMED PRACTICES

Continued development and refinement of consistent, clear and trauma-informed processes for communicating with complainers, obtaining their views on s.275 applications, and handling complainers' testimony. Independent Legal Representation for complainers with respect to s.275 applications will alleviate some of the distress relating to the introduction of sexual history and character evidence, and we recommend that this be taken forward. Careful thought should also be given, however, as to how this is to be provided, particularly given pressures of resources, including at the defence bar. Crown processes for routinely seeking, recording and relaying to the court complainers' views on s.275 applications need to be better formalised, with written records retained and provided to the court regarding what was put to complainers and the nature of their responses. There should be clear and consistent practice regarding the presence of supporters at the meeting where complainers' views are taken. During this meeting, complainers should be given accessible information on the general legal context in which they are being asked to discuss their views on s.275 applications and the thresholds governing admissibility, including the charges on the indictment that relate to the complainer. Assessments regarding the level of detail to be provided to complainers about the content of the s.275 application may require to be made on a case-by-cases basis, in line with advice from an Advocate Depute about which parts of the application are unlikely to be granted. It is also important for those who solicit the views of complainers in relation to s.275 applications to be informed about and mitigate any vulnerabilities that might impact on complainers' ability to receive and respond to claims contained in the application. In most cases, however, the starting presumption should be to respect the entitlement of the complainer to be a fully informed participant. Complainers should also benefit from a clearer indication as to the weight that their views, once taken, are likely to carry in the preliminary hearing.

Key tasks such as transcription, redaction and preparation of evidence for presentation to the court should be properly resourced with appropriate and competent technological support and time allowed for pre-trial consideration. Without this, there cannot be a trauma-informed and timely process for ensuring best evidence. Given the unique nature of how pre-recorded interviews are operationalised in Scotland, particularly under the process of giving evidence on commission, Scottish-specific research should be carried out to assess and review whether this would improve complainers' experience of the process, without infringing upon the accused's Article 6 ECHR rights and without undermining the prospects of rightful conviction.

### 3. Improved Record Keeping

Across this report, we have referenced the substantial logistical and resource challenges associated with accessing data. Although records are kept for the purpose of the efficient disposal of court business by SCTS and the judiciary, this is likely to prevent others from easily conducting similar analysis. The difficulties involved in undertaking this kind of research are detrimental to the understanding and scrutiny of key parts of the criminal justice process that impact significantly on complainers and accused individuals. In the context of ongoing substantial criminal justice reform, this is an important concern. We have also noted the specific problems we encountered in relation to poor or inconsistent record-keeping in case files, including missing (key) documents. We were not alone in this experience; it was also a matter highlighted in the COPFS Inspectorate Report in 2022. Improved record keeping in this area is vital to allow for more effective and informative auditing processes. This must involve, amongst other things, ensuring that cases involving a s.275 application are always tagged for easier identification and better record management to ensure consistent and full documentation, and that clear and fulsome records are kept on s.275 application grants, refusals and withdrawals, and on complainers' views about the s.275 application.

As discussed above, a robust system for recording – in writing – the views of complainers in relation to s.275 applications is also needed, which can be readily accessed by the court as they conduct their business during preliminary hearings and substantive trials. This ensures more effective complainer participation and avoids unnecessary re-traumatisation if the complainer's views had previously been taken but not recorded in a way that reflected this.

#### RECOMMENDATION 4: IMPROVED RECORD KEEPING

Sexual offences cases that include a s.275 application should be routinely 'tagged' as such and information on grants, refusals and withdrawals of s.275 applications should be clearly recorded in such a way that makes the data easy to access for transparent auditing and research purposes. Clear, consistent and effective systems for taking, recording and relaying the views of complainers on s.275 applications should be ensured: these should be in writing, with copies available to the complainer. A note of complainer's views should be provided to the court so that judges can have a clear indication of this in assessing s.275 applications.

### 4. Case Progression, Delays and Resourcing

A further recurring theme was the presence and impact of (often protracted) delays on the progression of cases to trial. While there have certainly been efforts in recent years to impose timeliness more effectively in regard to the making of s.275 applications, it

was clear that in many instances in this sample applications and other court documents were still being lodged late – more commonly by defence counsel, but also by the Crown – and often without a compelling explanation other than changes in counsel or general pressures of workload. It is worth stating that the unavailability of counsel is neither the accused's nor the complainer's fault, and there is no doubt that a decrease in the number of available counsel and lack of resourcing are acute concerns in the criminal justice system, with pressures of work becoming increasingly significant. However, the extent to which this ought to provide 'special cause shown' for late applications, in a context in which this can have serious knock-on effects upon the evidence and the complainer's opportunity to respond thereto, is debatable. It was clear from our sample that the judiciary at least are keen to ensure that this does not become accepted as an inevitability with late applications being allowed too readily. We also identified other aspects of case progression that appeared to be apt to generate significant delays, particularly in relation to accessing specialist technical knowledge for download and analysis of media devices, and the scheduling of evidence on commissions. In all cases, such delays can have a very negative effect on the trial process, leading to increased time on remand for some accused individuals as well as exacerbating the distress of complainers. This is clearly a concern that hinders any possibility of a truly trauma-informed justice system.

As noted above, the statutory time limits in respect of making a s.275 application are proposed to be extended to 21 days in advance of a preliminary hearing (from 7 days).<sup>232</sup> The findings from our data show that there are often compound, multifactorial delays throughout the criminal justice system that may mean that even this aspiration of 21 days is currently unrealistic. And while the introduction of independent legal advice and representation to complainers in this context will doubtless assist in their participation and understanding and their views being heard, it will not be a panacea, and particularly not unless careful planning and appropriate resourcing is given to the operation of any such scheme and the skillset and availability of counsel. This latter point is a crucial one given the pressures of work we observed and that were reported to us by interviewees, with several noting specifically the current challenge of legal scarcity.

The Victims, Witnesses and Criminal Justice Reform (Scotland) Bill proposes that the criminal justice agencies in Scotland should pay regard to the principle that "during and after the investigation and proceedings, a victim or witness should be treated in a way that accords with trauma-informed practice," and that the judiciary are to take trauma-informed practice into consideration in the scheduling of criminal court business.<sup>233</sup> These proposals have considerable transformative potential given the capacity for increased training of both the judiciary and profession. It is important to acknowledge, however, that - as things stand - certain aspects of the implementation

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<sup>232</sup> Victims, Witnesses and Justice Reform (Scotland) Bill s.64(4).

<sup>233</sup> Bill s.24(2). The Bill amends the Victims and Witnesses (Scotland) Act 2014 to achieve this aim.

of s.274 and s.275 cannot be said to be trauma-informed, even where they are designed to facilitate increased complainant participation. It is currently unclear what the identified criminal justice agencies 'paying regard' to the principle that a witness or victim is treated in a trauma-informed way will actually amount to in the context of a criminal justice system where sexual offences cases are taking an intolerable time from reporting to trial, and where hearings are beset by lengthy delays because of the (lack of) availability of counsel, technological failures, human error, often due to pressure of work, amongst other things. Thus, while we welcome the direction of travel here, we wish to highlight that there are significant structural issues relating to resourcing that will make meaningful change in respect of trauma-informed provision difficult to achieve in practice.

#### **RECOMMENDATION 5: RESOURCING OF THE CRIMINAL JUSTICE SYSTEM**

Across all its phases and personnel, resourcing of the criminal justice system must be sustainable and sufficient, with effective systems to ensure training, monitoring and transparency of practice. Timely case progression, in respect of preliminary applications and substantive trials, though not to be achieved at the expense of a just outcome, should be identified as an operational priority and a key indicator of trauma-informed justice practice.





THE UNIVERSITY *of* EDINBURGH  
Edinburgh Law School



University  
*of* Glasgow

This Report was written by Sharon Cowan, Eamon P.H. Keane, and Vanessa E. Munro.

The views expressed in the Report are those of the authors and they cannot be ascribed to any supporting organisations.

For further information, contact:

**Professor Sharon Cowan**

Professor of Feminist and Queer  
Legal Studies

Edinburgh Law School

**[s.cowan@ed.ac.uk](mailto:s.cowan@ed.ac.uk)**

[www.law.ed.ac.uk](http://www.law.ed.ac.uk)

**Mr Eamon Keane**

Lecturer in Evidence and Criminal  
Procedure (Law)

University of Glasgow School of Law

**[Eamon.Keane@ed.ac.uk](mailto:Eamon.Keane@ed.ac.uk)**

<https://www.gla.ac.uk/schools/law/>

**Professor Vanessa E. Munro**

Professor of Law

Warwick Law School

**[V.Munro@warwick.ac.uk](mailto:V.Munro@warwick.ac.uk)**

<https://warwick.ac.uk/fac/soc/law/>