

**PROPOSAL FOR INDEPENDENT LEGAL
REPRESENTATION FOR COMPLAINERS WHERE
AN APPLICATION IS MADE TO LEAD EVIDENCE
OF THEIR SEXUAL HISTORY OR CHARACTER**

Eamon P. H. Keane, Early Career Fellow at the University of Edinburgh, Solicitor

&

Tony Convery, Solicitor

Introduction

The Scottish criminal justice system’s approach to sexual offences cases has changed markedly in recent years and looks set to continue to do so in the future. At the time of the writing of this report, a review group, chaired by the Lord Justice Clerk is considering how to improve the management of sexual offence cases in Scottish courts.¹ The Scottish Sentencing Council has also announced that it is to prioritise the production of sentencing guidelines for various sexual offences.² Now, more than ever before, there is a recognition that sexual offending necessitates a distinct and appropriate response from all actors across the criminal justice system. The prevalence of sexual crime in Scottish society and courts underlines the importance of getting this response right.³ We hope that the core proposal contained in this report, that a complainer should have a right to be heard, and to be legally represented for that purpose, whenever an application is made under s. 275 of the Criminal Procedure (Scotland) Act 1995⁴ to lead evidence of character or sexual history, in order that they can make submissions in relation to whether that application should be granted, contributes in some meaningful way to the ongoing debate and discussion about progressive legal reform in this area.

In arriving at our proposal, we have sought to consider carefully the implications of our recommendation for every relevant aspect of the Scottish criminal justice system. In the first instance, we would highlight that we are *not* proposing that a general right of independent legal representation⁵ at trial be introduced for complainers in all sexual offence cases. We have avoided any discussion of the merits and demerits of such a fundamental change to Scots criminal procedure and would direct anyone interested in that topic to the literature that is available

¹ For further information see <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/03/20/improving-the-management-of-sexual-offence-cases>.

² For further information see <https://www.scottishsentencingcouncil.org.uk/news-and-media/news/sentencing-guidelines-to-be-developed-on-rape-sexual-assault-and-indecent-images/>.

³ In the period 2018-2019 13,547 sexual crimes were recorded by Police Scotland (see Recorded Crime in Scotland Bulletin for 2018-2019 available at <https://www.gov.scot/news/recorded-crime-in-scotland-2018-19/>). 1,502 individuals were prosecuted in Scottish courts in the period of 2017-2018 for sexual offences (the most recent figures available at the time of writing see Criminal Proceedings in Scotland 2017-2018 available at <https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/pages/4/>). In 2017 it was estimated that sexual offences cases amount to approximately 75% of the Crown Office and Procurator Fiscal Service’s High Court case load (see <https://www.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/>).

⁴ Hereafter referred to as the “the 1995 Act.”

⁵ Hereafter referred to as “ILR”.

elsewhere.⁶ Our proposal is, in our opinion, notably more moderate and, as a result, we would suggest, decidedly more realistic.

We argue throughout this report that complainers in sexual offence cases⁷ should be entitled to be heard, and to be legally represented for that purpose, at a hearing to determine whether an application to lead evidence prohibited by s. 274 of the 1995 Act should be granted or not. We have reached this conclusion in light of the especially private and intrusive nature of the questioning which follows a successful application in terms of s. 275 of the 1995 Act, and in recognition of the research which indicates the high risk of “re-victimisation” of complainers in sexual offence cases throughout the criminal process.⁸ Our proposal is also guided by the relevant case law on Article 8 of the European Convention on Human Rights, which we believe may provide a legal basis for the representation outlined.⁹ We consider our arguments to be consistent with the principles set out in the Victims and Witnesses (Scotland) Act 2014.¹⁰ We suggest that our proposal, rather than amounting to a radical rewriting of Scots criminal procedure, is in fact entirely consistent with the practice that already occurs when applications are made to obtain the sensitive records of complainers in criminal prosecutions.¹¹ It is worth stressing at this juncture that we are not proposing that the complainer’s independent legal representative be present during the leading of evidence at trial in the presence of the fact finder, be that the jury or judge. Rather, we envisage the right to legal representation suggested, to be strictly confined to s. 275 hearings, which should, in the vast majority of cases, occur pre-trial prior to the leading of evidence and which will, in every case, occur outwith the presence of any jury.¹²

The proposal in this report does not exist in a vacuum. We have sought to build upon and learn from the issues associated with legal representation for complainers in sensitive records cases in framing our conclusions. We have also gained an invaluable insight into how our proposal might

⁶ See, for example, Fiona E. Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010).

⁷ As defined by s. 288C of the 1995 Act.

⁸ See, for example, Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention* [2003] *Journal of Traumatic Stress* 159.

⁹ See, in particular, *WF v Scottish Ministers* [2016] CSOH 27 and *X & Y v The Netherlands* 1985 EHRR 235.

¹⁰ See Section 1 of the Victims and Witnesses (Scotland) Act 2014. Hereafter referred to as the “2014 Act”.

¹¹ See *WF* (n 9). From hereon the term “sensitive records cases” is used throughout this report to refer to actions to recover the private records of complainers.

¹² As per s. 275B(2) of the 1995 Act.

work in practice through time spent in Ireland speaking to various stakeholders where a right, similar to the one that we propose, already exists in relation to the offence of rape, as defined in that jurisdiction.¹³

In terms of the structure of our report, Section 1 begins by providing an overview of how ss. 274 and 275 of the 1995 Act operate. Section 2 examines the judgment of *WF v Scottish Ministers*¹⁴ and its implications in terms of Article 8. Section 3 outlines the argument for our proposal as it relates to the complainer's experience of the criminal justice system. Section 4 of the report contains our detailed proposal for how such the rights we propose might actually be introduced in Scotland and considers practical matters such as intimation and exercise of the rights, and potential funding implications. The report concludes with a summary of our key conclusions.

As regards terminology, we use the term "complainer" rather than "victim" or "victim-survivor" in recognition of the fact that at the stage of a s. 275 application, the issue of whether or not the complainer was a victim of the alleged conduct will not have been resolved. We have sought to use gender-neutral pronouns in a manner consistent with the law's neutrality.

As previously stated, our hope in publishing this work is to contribute to the ongoing debate about progressive legal reform in Scotland. We are not draughtsmen and accordingly have not attempted to make proposals on any particular legislative amendment which may be required were the key proposal in this work to be implemented. We note too that it may be possible to introduce the rights for which we advocate, not by way of legislation, but *via* a judicial ruling, as was the case in *WF v Scottish Ministers*.

We consider ourselves to have been extremely fortunate throughout the writing of this report to have been able to rely upon the generous support and time of so many individuals.

¹³ See s.4A of the Criminal Law (Rape) Act 1981 as introduced by s.34 of the Sex Offenders Act 2001. S.3 of the Criminal Law (Rape) Act 1981 provides that, in a prosecution for a sexual assault offence, as defined, evidence cannot be adduced or questions asked in cross-examination about any sexual experience of the complainant, other than that to which the charge relates, without the prior leave of the court. The entitlement in s.4A of the Criminal Law (Rape) Act 1981 of a complainant to be heard and legally represented during an application for leave does not extend to every sexual assault offence but is, instead, restricted to rape offences, as defined in the statute. "Complainant" is the term used in Ireland in this context to denote the witness who alleges they have been the victim of a rape offence.

¹⁴ (n. 9)

We owe especial thanks in this regard to Caroline Counihan of Rape Crisis Network Ireland, Peter McCormick & Susan Hudson of the Director of Public Prosecutions, Lily Buckley, Katherine McGillicuddy, Senator Ivana Bacik, Jean Tomkin, Robert Purcell, Frances McMenamin QC and Jade Swaby. We also wish to gratefully acknowledge the financial assistance provided by Rape Crisis Scotland to enable us to travel to Ireland. The recommendations and views expressed in this report (along with any errors) are however entirely our own and do not necessarily represent the views of our respective employers.

Eamon P. H. Keane & Tony Convery, Glasgow, May 2020.

Section 1

An Overview of the Operation and Practice of ss. 274 & 275 of the Criminal Procedure (Scotland) Act 1995

This section of the report will provide an overview of the origin and operation of ss. 274 & 275 of the Criminal Procedure (Scotland) Act 1995. It is essential to understand the operation of these provisions (and the associated common law on relevancy of sexual character and history evidence) in order to place our proposal in its proper context.

Background

In Scotland, evidence pertaining to the character of a witness in criminal proceedings is generally inadmissible at common law on the basis that such evidence is collateral to the facts in issue at trial, i.e. the commission of the offence libelled, by the accused.¹⁵ “Character” in this sense encompasses not only a witness’s “known disposition from previous actions, but also their general reputation in society.”¹⁶

A number of exceptions exist to this general exclusionary rule and, as is so often the case in the law of evidence, it is these exceptions that give rise to problems in theory and practice.¹⁷ Generally speaking, the accused may attack a witness’s character through cross-examination and the leading of evidence, if such a matter is relevant to the crime charged and appropriate notice has been given.¹⁸ Evidence is said to be relevant when it either bears directly on a fact in issue at trial or

¹⁵ Several justifications have been advanced for the existence of this rule over the years but perhaps the most compelling argument in its favour is that evidence of a collateral fact can only have, at best, an indirect bearing on the true matter at issue in a criminal trial and that to permit parties to lead evidence of these matters would not only significantly extend the length of proceedings but would also run the risk of obscuring the ultimate question to be determined by the fact finder i.e. the guilt or innocence of the accused. See *Brady v HMA*, 1986 JC 68 73. See also Margaret Ross & James Chalmers (eds), *Walker and Walker The Law Of Evidence in Scotland* (4th edn, Bloomsbury, 2015) 1-5 & 110-111. There has been a tendency to elide any distinction between collateral issues and matters of relevancy in Scots law at times in criminal cases. Further discussion of the matter is unnecessary for present purposes. See the Scottish Law Commission, Discussion Paper (no 145) 2010 on Similar Fact Evidence and The Moorov Doctrine at para 2.8 for further information.

¹⁶ A.B Wilkinson, *The Scottish Law of Evidence* (2nd edition, Butterworths, 1986) 22.

¹⁷ For example, the accused’s good character may always be proved by the defence. See Dickson, *A Treatise on the Law of Evidence in Scotland* paragraph 15. See also Eamon Keane & Fraser Davidson (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edition, W Green 2018) 235 – 260.

¹⁸ *Dickie v HMA*, (1897) 24 R (J) 82, *James Reid & Others*, [1861] 12 WLUK 52 & *Forsyth v HMA*, 1991 SCCR 861.

does so indirectly because it relates to a fact which makes a fact in issue more or less probable.¹⁹ Historically, in respect of rape and similar common law sexual offences, this exception to the general rule permitted an accused to attack a complainer's character so as to illustrate she was unchaste and of immoral constitution generally, on the basis that such evidence was relevant as it demonstrated a lack of credibility in relation to her account of having been raped or sexually assaulted by the accused.²⁰ The exception to the rule also permitted an accused to lead evidence that the complainer had engaged in sexual intercourse with them on previous occasions.²¹

While the common law developed to impose tighter restrictions on the use of sexual character and history evidence,²² the continuing emphasis placed upon these matters at trial was nonetheless subject to increasing academic and political criticism, as attitudes towards sexual offending and sexuality generally progressed in Scottish society.²³ The relevance of sexual character and history evidence to the question of consent became hotly contested. Concerns were also raised about the experience of witnesses coming to give evidence in sexual offence cases and the risk of re-victimisation.²⁴ By 1985, a combination of these factors led to the introduction in Scotland, in line with many other jurisdictions internationally, of legislative measures (often referred to colloquially

¹⁹ *M v HMA (no 2)* [2013] HCJAC 22 at [28]. For example, in *HMA v Kay*, 1970 JC 68, the accused was permitted to lead evidence of previous acts of violence committed against her by the deceased on the basis that such acts were relevant to the charge of murder she faced which labelled she had evinced previous malice and ill-will towards the deceased and given she was pleading self-defence.

²⁰ *Webster* (1847) Ark 269. See Ross & Chalmers, *Walker and Walker* 111.

²¹ *McMillan* (1846) Ark 209. See also Dickson, *Evidence* paragraph 13. It should be borne in mind that consent is frequently pled as a defence by an accused to charges of rape and sexual assault. See the Scottish Government, *Investigation and Prosecution of Sexual Crimes: Review* (2017).

²² Prohibiting the sexual history evidence if it related solely to unrelated third parties (unless it was possibly part of the *res gestae* see *Dickie v HMA* (1897) 2 Adam 331. The *res gestae* refers to things said which form part of what occurred at the time of the crime charged and are therefore intimately connected with proof of the offence itself. See Renton & Brown *Criminal Procedure* 6th edn 24 135.

²³ See for example, Aileen McColgan, *Common Law and the Relevance of Sexual History Evidence* 1996 16(2) *Oxford Journal of Legal Studies* 275 & Beverly Brown, Michelle Burman & Lynn Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (1st edition, Edinburgh University Press, 1993).

²⁴ See the Scottish Executive, *Redressing The Balance: Cross-Examination in Rape and Sexual Offence Trials* (2000). These concerns were exacerbated by the fact that accused individuals could dispense with their legal representatives and conduct cross-examination of complainers and other witnesses themselves. There was a common law power for the court to intervene to stop aggressive or inappropriate cross-examination, but concerns were expressed that the practice occurred nonetheless. There is now a statutory prohibition against the accused representing themselves in sexual offences cases as per s.288C of the 1995 Act. S.288D of the 1995 Act also empowers the court to appoint a solicitor to represent the accused if they have failed to instruct their own representation.

as “rape shield” provisions) which sought to prohibit the admission of sexual history and character evidence unless its relevance and probative value was clearly established.²⁵

Current law

The current “rape shield” provisions, contained in ss. 274 and 275 of the 1995 Act were introduced in 2002.²⁶ It is important to note that these provisions do not render admissible bad character evidence that would be inadmissible under the common law.²⁷ It therefore must be borne in mind, prior to considering the effect of the statutory provisions, that the common law test of relevancy and thus admissibility in respect of sexual character and history has now advanced significantly, in light of changing societal views and the modernisation of such offences.²⁸ The common law has developed to such an extent that the old authorities are a wholly unreliable guide as to the determination of relevancy and admissibility in the modern context.²⁹ While the determination of relevancy in any given case is always fact specific, recent judgments illuminate sharply the development of the law. For example, evidence that a complainer had sexual intercourse with the accused on a previous occasion a number of months prior to the incident forming the basis of the charge, was recently held to be irrelevant and inadmissible under the common law, standing the lack of any specific averments by the defence as to how the two incidents were linked or any compelling submission as to how having consensual intercourse on one occasion was relevant to the question of whether consensual intercourse occurred on a later occasion and whether the accused had a reasonable belief in such consent.³⁰ In another case, the fact that a complainer (a child) made a prior (allegedly) false allegation of being abducted by a third party and being asked to perform sexual acts was deemed irrelevant and inadmissible at common law in the trial of an accused charged with the repeated indecent assault of the same child over a number of years.³¹

²⁵ Broadly speaking, the provisions (and those that preceded them) are aimed at targeting the “twin myths” that sexually active women are less credible generally and more likely to consent. See Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence*, (2017) 81(5) *The Journal of Criminal Law* 367.

²⁶ As a result of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.

²⁷ *Moir v HMA*, 2005 1 JC 102. *M v HMA (no 2)* (n. 19).

²⁸ As exemplified by the re-definition of the common law offence of rape as per *Lord Advocate’s Reference No 1 of 2001* 2002 SLT 466 and the codification of the law of sexual offences as per the Sexual Offences (Scotland) Act 2009.

²⁹ See *LL v HMA* [2018] HCJAC 35 as per Lord Brodie at [13] – [21]. See also *M v HMA (no 2)* (n. 19).

³⁰ *LL v HMA* (n. 29).

³¹ *M v HMA (no 2)* (n. 19). It was noted in the judgment that the common law makes an exception for “instantly verifiable” information such as previous convictions but, again, said convictions must still be relevant to the matter at

These judgments stand in sharp contrast to the historical authorities on the relevance of “chastity” and prior intercourse with the accused.

Further even if it can be established that sexual character or history evidence is relevant at common law, s. 274(1) of the 1995 Act stipulates that the following sexual history and character evidence is now *prima facie* inadmissible in the trial of an accused individual charged with a sexual offence;³²

- a) evidence that the complainer is not of good character (whether in relation to sexual matters or otherwise);³³
- b) evidence that the complainer has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;³⁴
- 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 are not credible or reliable;³⁵ 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 are not credible or reliable.³⁶

hand and such evidence would still have to satisfy the requirements of s.275 of the 1995 Act. See *Thomson v HMA* 2001 SCCR 162 & Ross & Chalmers (eds), *Walker and Walker* 112.

³² An offence to which s. 288C of the 1995 Act applies which includes rape at common law and contrary to s.1 of the Sexual Offences (Scotland) Act 2009, sexual assault (contrary to s. 3 of the Sexual Offences (Scotland) Act 2009 and assault with intent to rape. See the provision for full details of all relevant offences.

³³ S. 274(1)(a) of the 1995 Act.

³⁴ S. 274(1)(b) of the 1995 Act.

³⁵ 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 their 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. It should also be noted that the House of Lords decision in this case appears to conflict with High Court authority.

³⁶ S. 274(1)(d) of the 1995 Act.

Evidence otherwise rendered inadmissible by s. 274 may, however, be admitted at the discretion of the court following an application to it by either the Crown or the defence.³⁷ The court may admit evidence prohibited by s. 274 if it is satisfied, in terms of s. 275 of the 1995 Act that;

- (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour,³⁸ or to specific facts demonstrating—
 - (i) the complainer’s character; or
 - (ii) any condition or predisposition to which the complainer 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 they are charged,³⁹ 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 it being admitted or elicited.⁴⁰

The “proper administration of justice” is further defined in the 1995 Act as including “appropriate protection of a complainer’s privacy and dignity” and 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.⁴¹ The 1995 Act also operates so as to allow for the disclosure of any relevant previous convictions of the accused, following a

³⁷ S. 275(3) of the 1995 Act. The circumstances in which such evidence might be admitted and the relevant procedure is considered below.

³⁸ 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*, 2007 SC (PC) 1 at [47]. The comma was originally read in by Lord MacFayden in *M(M) v HMA* 2004 SCCR 658. The comma operates so as to permit questioning or the leading of evidence relating to specific occurrences of sexual or other behaviour which do not necessarily relate to the complainer’s character, condition or predisposition.

³⁹ 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.

⁴⁰ As per s. 275(1)(a)(b) & (c) of the 1995 Act.

⁴¹ S. 275(2)(b)(i) & (ii) of the 1995 Act. Raitt concludes that the reference to a complainer’s “privacy and dignity” is directly influenced by Articles 3 and 8 of the European Convention on Human Rights. See Keane & Davidson (eds) *Raitt* 248.

successful application to lead sexual history or character evidence by the defence.⁴² The reference in the 1995 Act to a “condition or predisposition” refers to “something objectively diagnosable in medical, notably psychiatric, terms.”⁴³ Accordingly, unspecific general evidence that the complainant is untruthful will not be admissible as it does not refer to specific facts or behaviour.⁴⁴

The court retains a wide discretion under the 1995 Act as to whether to permit parties to lead evidence of sexual character and history.⁴⁵ Arguably the clearest exposition of the purpose and operation of the provisions was provided by Lord Hope of Craighead in a Privy Council judgment concerned with the compatibility of ss. 274 and 275 with the European Convention on Human Rights.⁴⁶ Lord Hope opined that:

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 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).

These “three tests” can be broadly categorised in the following way;⁴⁷

- 1) **Specificity**: does the evidence in question relate to a specific occurrence or occurrences of behaviour, or to specific facts which bear on the question of the character or a condition suffered by the complainant?

⁴² S. 275A of the 1995 Act. There are grounds to object to such disclosure, see the provision in question.

⁴³ *M v HMA (no 2)* (n 19) as per Lord Carloway at [46].

⁴⁴ *Mackay v HMA* 2005 JC 1 & *Moir v HMA* 2007 JC 131. See also Walker & Walker 112.

⁴⁵ The breadth of this discretion has led to some arguably inconsistent (and inexplicable) judgments e.g. compare and contrast the decision in *Kinnin v HMA*, 2003 SCCR 295 with that made in *LL v HMA* (n. 29).

⁴⁶ *DS v HMA* (n. 35).

⁴⁷ For the avoidance of doubt, the description of the three tests that follows is by the authors of this report and is not drawn from judicial dicta.

- 2) **Relevance:** is this evidence relevant to the facts at issue i.e. the guilt or innocence of the accused?⁴⁸
- 3) **Balancing Exercise:** does the probative value of the evidence outweigh the risk of prejudice to the interests of justice?

Lord Hope continued:

The important point to notice is that such questioning or the admission of such evidence will only be permitted if the court has been persuaded that it passes those three tests... The three tests are designed to achieve that purpose consistently with the proper administration of justice which, as sec 275(2)(b) makes clear, includes the appropriate protection of the complainer's dignity and privacy. A court which is satisfied that all three tests are met will have concluded that the questioning or evidence relates only to specific matters which are relevant to establishing whether the accused is guilty and are of significant probative value. To deny the appellant the opportunity of questioning or the admission of evidence which passes all three tests risks denying the accused a fair trial.⁴⁹

In the exercise of its discretion via the application of “the three tests” (i.e. specificity, relevance and the balancing exercise), the court requires to have regard to issues such as the nature of the facts sought to be put in evidence and the lapse of time between those facts and those forming the subject matter of the charge.⁵⁰ The closer in time the alleged sexual history or character evidence is to the facts at issue i.e. the alleged offence, the more likely the court will be to admit the evidence.⁵¹ Early appellate judgments relating to the provisions displayed an arguably regressive interpretation of the relevancy of sexual history and character evidence to sexual offending.⁵² Over time, much tighter restrictions have been imposed on the use of such evidence, with the High Court frequently concluding that applications fall at the first hurdle of relevancy under the common law while ruling that the evidence would also be inadmissible in terms of the statute.⁵³ A notable

⁴⁸ See the discussion of relevancy at the start of this section.

⁴⁹ *DS v HMA* (n. 35) [27] & [28].

⁵⁰ Ross & Chalmers (eds), *Walker and Walker* 113. *Wright v HMA*, 2005 SCCR 389.

⁵¹ *Stewart v HMA*, 2014 SCCR 1.

⁵² See, for example, the judgments in *Kinnin v HMA* (n. 45) & *Cumming v HMA*, 2003 SCCR 261.

⁵³ See, for example, *LL v HMA* (n. 29), *M v HMA (no 2)* (n. 19) & *Abbas v HMA* [2013] HCJAC 55.

feature of many of these judgments, to which this report will return in Section 2, is the lack of Crown opposition to the applications made by the defence.⁵⁴

Procedure

As noted, parties who wish to lead evidence prohibited by s. 274 must make an application to the court in terms of s. 275 of the 1995 Act. Said application must be in writing⁵⁵ and should clearly set out (i) the nature of the evidence and of any questioning proposed, (ii) the issues to which the evidence is considered to be relevant and the reasons for its relevance, and, (iii) the inferences which the applicant proposes to submit should be drawn from the evidence.⁵⁶ An application will not be considered by the court, in the absence of special cause shown, unless it is made not less than 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.⁵⁷ The party making the application requires to send a copy of it to the other party (i.e. the defence must send a copy of the application to the Crown or *vice versa* as the case may be).⁵⁸ There is currently no requirement for a copy of the application to be provided to a complainer.

The court may make a decision on the application without hearing evidence but may also hear evidence in respect of the application as if it were making a decision regarding the admissibility of evidence generally.⁵⁹ In respect of solemn prosecutions, specific statutory provision is made to allow the court to determine s. 275 applications at obligatory pre-trial case management hearings where parties' preparation for trial is assessed and preliminary matters are disposed of. Accordingly, where a solemn prosecution is occurring in the sheriff court, a s. 275 application may be determined at a first diet.⁶⁰ Similarly, the High Court may dispose of any application timeously made to it in terms of s. 275 of the 1995 Act at a preliminary hearing unless it considers it would be inappropriate to do so.⁶¹ In both instances the court may continue consideration of a s.

⁵⁴ Such as in *LL v HMA* (n. 29), *Kinnin v HMA* (n. 45); *Cumming v HMA* (n. 52). See also *Donegan v HMA* [2019] HCJAC 10 for another example of a lack of Crown opposition to prolonged cross-examination of dubious relevance.

⁵⁵ Schedule 3 of the Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Sexual Offences (Procedure and Evidence) (Scotland) Act 2002) 2002 provides a form of style to be used for s.275 applications.

⁵⁶ S. 275(3) of the 1995 Act.

⁵⁷ S. 275(B)(1)(a) & (b) of the 1995 Act.

⁵⁸ S. 275(4)(a) & (b) of the 1995 Act.

⁵⁹ S. 275(5) of the 1995 Act.

⁶⁰ S. 71(2A) of the 1995 Act.

⁶¹ S. 72(6)(b)(iii) of the 1995 Act.

275 application to a continued first diet or preliminary hearing as the case may be.⁶² Under summary procedure in the sheriff court, a s. 275 application may be determined at an intermediate diet.⁶³

The effect of these provisions is that under solemn procedure, the vast majority of s. 275 applications will be determined pre-trial, prior to the empanelment of the jury or the leading of evidence in the substantive cause.⁶⁴ That being said, as set out above, there is provision under the 1995 Act where a s. 275 application has not been made in accordance with the time period specified, to allow the application to be determined on special cause shown.⁶⁵ Late applications may occur, for example, on the basis that a matter only becomes relevant due to the unexpected nature of evidence given by the complainer at trial. Where an application is made during the trial, there is specific provision in the 1995 Act which directs the court to consider the application (and any submissions about potential consequences that flow from the application) outwith the presence of the jury, the complainer, any person cited as a witness and the public observing the trial.⁶⁶

When the court determines a s. 275 application it requires to state the reasons for its decision and may make its decision subject to any condition, which may include compliance with specific directions issued by it.⁶⁷ The court may impose conditions which limit the extent to which evidence to be admitted or elicited by permitted questioning may be argued to support a particular specified inference.⁶⁸ Where a court admits evidence or allows questioning following a s. 275 application, its decision to do so must include a statement of what items or evidence it is admitting, or lines of questioning it is allowing; the reasons for its conclusions that the permitted evidence of questioning is admissible; and, the issues at the trial to which it considers that the evidence is

⁶² See s.72(9) of the 1995 Act.

⁶³ S. 148(3) of the 1995 Act.

⁶⁴ We attempted to obtain official data in relation to the timing and determination of s. 275 applications prior to the writing of this report by freedom of information requests to both the Scottish Courts & Tribunal Service and Crown Office and Procurator Fiscal Service. Neither body was able to assist as both responded that they did not hold the information in question.

⁶⁵ S. 275B(1) of the 1995 Act.

⁶⁶ S. 275B(2) of the 1995 Act.

⁶⁷ S. 275(6) of the 1995 Act. The High Court has sharply criticised the failure of a sheriff court to record reasons for the grant of an application in terms of this section of the act by way of minute, see *MacDonald v HMA*, [2020] HCJAC 21 at para [36].

⁶⁸ S. 275(8)(a) & (b) of the 1995 Act.

relevant.⁶⁹ Notwithstanding a prior successful application in terms of s. 275 the court is empowered to limit the extent of such an application as it thinks fit at any time.⁷⁰

A court's determination of a s. 275 application may be appealed by either the Crown or the defence.⁷¹ Where the appeal relates to the discretionary exercise in terms of the Act, the question for the appeal court is whether the judge who considered the application at first instance has erred in the exercise of their discretion, and not whether the appeal court would have determined the application differently.⁷²

⁶⁹ S. 275(7)(a)(b)&(c) of the 1995 Act.

⁷⁰ S. 275 (9)(a)&(b) of the 1995 Act.

⁷¹ 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). It is also open to the defence to argue following conviction that a miscarriage of justice has occurred in terms of s. 106 or s. 175 of the 1995 Act on the basis of a decision made in respect of a s. 275 application. See *Moir v HMA*, (n. 44) for example. We believe serious consideration should be given to the introduction of a clear system of statutory pre-trial appeal for both the Crown and defence in relation to s. 275 applications in summary procedure.

⁷² See *Dunnigan v HMA*, 2006 SCCR 398.

Section 2

Article 8 of the European Convention on Human Rights and *WF v Scottish Ministers*

Article 8 of the European Convention on Human Rights (ECHR) provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” This right can be interfered with only with legal authorisation and in pursuit of certain specified aims.⁷³ Any interference requires to be to the minimum extent necessary to achieve that aim.⁷⁴ The United Kingdom is a signatory state to the ECHR and gives domestic legal effect to its substantive provisions in the Human Rights Act 1998. It is accordingly unlawful for a public authority (including the Lord Advocate, Crown Office and Procurator Fiscal Service, and the courts) to act in a way which is incompatible with a Convention right.⁷⁵

An interference with Article 8 of the European Convention on Human Rights

Article 8 is engaged by the disclosure of medical records in connection with criminal proceedings.⁷⁶ As well as their sensitivity and importance to each individual, the European Court of Human Rights (“ECtHR”) has held that the protection of confidentiality of medical records is essential to maintaining public confidence in health services.⁷⁷

Signatory states are under a positive obligation to have in place an adequate legal framework to ensure domestic law affords an appropriate level of protection for each person’s physical and psychological integrity.⁷⁸ This positive obligation may extend to the effective regulation of evidence given in criminal proceedings.⁷⁹ Prolonged and humiliating cross-examination of a witness may constitute a violation of their Article 8 rights.⁸⁰ The interests of the defence require

⁷³ In terms of paragraph 2 of Article 8.

⁷⁴ The legitimate aims that can be pursued when interfering with Article 8 are: the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.

⁷⁵ s. 6, Human Rights Act 1998.

⁷⁶ *WF* (n. 9).

⁷⁷ *MS v Sweden* [1999] 28 EHRR 313, paras 35 and 41.

⁷⁸ *X & Y v. The Netherlands* (1985) (n. 9) & *DS v HMA*, (n. 35) [95].

⁷⁹ *Y v Slovenia*, (2016) 62 EHRR 3.

⁸⁰ *ibid.*

to be balanced against those of witnesses or victims called upon to give evidence.⁸¹ The ECtHR has recognised the risk of secondary and repeat victimisation in criminal proceedings relating to sexual offences⁸² and has observed that justice systems should operate in a manner that “does not increase the suffering of victims of crime or discourage them from participating [in proceedings]”, while always having due regard to the rights of accused persons.⁸³ The ECtHR has also held that criminal proceedings should be organised in such a way as “not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention.”⁸⁴

The questions that follow in the context of the present work are whether Article 8 is engaged by an application under s. 275 of the 1995 Act, and, if it is, what does that mean?

In our opinion, not every s. 275 application will *necessarily* engage Article 8. Any justification for ILR based on Article 8 requires to be viewed with that qualification borne in mind. Nonetheless, in our opinion, the nature of many proposed lines of questioning contained in s. 275 applications are such that they are likely to engage Article 8. Evidence as to past sexual behaviour and medical diagnoses, (particularly of a psychiatric or psychological nature, as struck at by s. 274) might reasonably be said to represent a particularly intimate, sensitive and important aspect of a complainant’s private life.⁸⁵ Indeed, there is some recognition of this in the 1995 Act itself, given, as we have noted, that in determining a s. 275 application a court requires to have regard to the “appropriate protection of a complainant’s dignity and privacy”. These concepts and the balancing exercise required are familiar to Article 8 jurisprudence.⁸⁶

⁸¹ *ibid.*

⁸² *Mraović v Croatia* (30373/13), 14 May 2020 (unreported), para 49.

⁸³ *ibid.*, para 50.

⁸⁴ *ibid.*, para 45.

⁸⁵ See e.g. *MS v Sweden* (n. 77) para 35 & 41 which highlights the importance of confidentiality in medical records.

⁸⁶ See, for example, *Pretty v the United Kingdom*, (2002) 35 EHRR 1.

What does Article 8 require?

In *WF, Petitioner*⁸⁷, a judicial review of a decision of the Scottish Ministers was brought by a complainer in a criminal case. The accused had sought to recover the complainer's medical records in support of his defence.⁸⁸ The complainer consulted a solicitor and an application was made on her behalf for legal aid, under reference to Article 8 of the ECHR to enable her to be represented at a hearing to determine whether those medical records would be provided. The Scottish Legal Aid Board, and latterly the Scottish Ministers, had refused the application.

The case was heard in the Outer House of the Court of Session. Lord Glennie held that intimation to the complainer and the provision of an opportunity to be heard before an order for recovery of her medical records was made was required in order to avoid a breach of the complainer's Article 8 rights. His articulation of the distinct interests at stake is submitted to be instructive not only in relation to the recovery of medical records, but also where a s. 275 application is made. By reference to medical records, his Lordship observed that the defence could hardly be required to argue likely objections on a complainer's behalf to their own application.⁸⁹ We argue that the same critique can be advanced in the context of both defence and Crown s. 275 applications - the party making the application cannot reasonably be expected to argue on a complainer's behalf against their own s. 275 application.

In the determination of any defence s. 275 application it may be argued that the Crown adequately represents the interests of a complainer. We respectfully suggest that the Crown cannot and should not be expected to perform this function. Indeed, expecting the Crown to undertake this role can place prosecutors (who act in the public interest) in a difficult position and cause distress to complainers, where the Crown fails to oppose an application to which a complainer objects. As was noted by the Inspectorate of Prosecution in Scotland, "[m]any victims erroneously assume that their relationship with the prosecutor is comparable to that between the accused and his/her

⁸⁷ *WF* (n. 9).

⁸⁸ The procedure was a petition for commission and diligence brought in terms of s. 301A of the Criminal Procedure (Scotland) Act 1995. Such proceedings, which take place in the sheriff court, are distinct from, but brought in connection with the criminal prosecution. On general principles of commission and diligence in criminal causes, see *McDonald v HM Advocate* 2010 SC (PC) 1).

⁸⁹ *WF* (n. 9), para 39.

lawyer. This is not the case. The public prosecutor acts independently in the public interest. Assessment of the public interest involves consideration of competing interests, including the interests of the victim, the accused and the wider community. Prosecuting in the public interest prevents the prosecutor from discussing certain aspects of the evidence with the victim during the investigation or at any court proceedings.”⁹⁰

Further, as Professor Raitt notes:

“Prosecutors cannot press the complainer’s interests above the interests of others. They cannot take instructions directly from a complainer. There is no lawyer-client relationship between a prosecutor and a complainer – and thus none of the characteristics of that relationship based upon trust, confidentiality and legitimate partisanship. The Crown’s role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. Her interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge.”⁹¹

During our discussions with prosecutors in Ireland they outlined how, following an application by an accused for leave to adduce evidence or ask a question of the complainant in cross-examination about any sexual experience other than that to which the charge related, they could rely upon that complainant receiving independent legal advice and representation. This permitted prosecutors to focus on the terms of the application solely from the perspective of the prosecution. The prosecutors noted that often their submissions and the submissions made on behalf of the complainant would align but observed that this was not always the case. They considered that one of the major benefits of representation for complainants in this context was in ensuring the complainant was satisfied that their views were heard by the court deciding the application.

In the Scottish context, even if it were accepted that the Crown was, in principle, capable of adequately representing the interests of the complainer in the context of all s. 275 applications,

⁹⁰ Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes*, (2017), para 194.

⁹¹ Fiona E. Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010), 7.10-7.12.

case law shows that it cannot always be relied upon to do so. The case of *LL*, as discussed above, provides an example of the Crown, at first instance, failing to oppose an application by the defence to lead evidence of a prior sexual encounter. The Crown ultimately conceded upon appeal that the proposed line was “simply irrelevant to what were the issues in the forthcoming trial”.⁹² The High Court, on appeal, held that the proposed evidence contained within the application represented an “inappropriate intrusion into the complainant's dignity and privacy.”⁹³ Similar failures to oppose certain aspects of s.275 applications by the Crown, which have subsequently been deemed contrary to both the statutory scheme and the common law by the appeal court, can be observed in the cases of *MacDonald v HMA* [2020] HCJAC 21, *RN v HMA* [2020] HCJAC 3 and *HMA v JG* [2019] HCJ 71. In *MacDonald* at para [47] the appeal court went so far as to state that failings at first instance involving an unopposed s. 275 application contributed to a trial which was conducted “in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law”, leaving a complainant “extremely distressed”. The Court considered that, were such situations to be repeated, “the situation in sexual offences trials would be unsustainable.” We agree.

Against that background it is useful to return to Lord Glennie’s opinion in *WF*. He poses the question “if the complainant is not given the opportunity to be heard, how is the court to carry out the balancing exercise required of it?”⁹⁴. We consider that the same question must be asked in the context of s. 275 applications. We believe that it must be appropriate that a court, tasked with carrying out the balancing exercise required under s. 275, is able to fully appreciate particular sensitivities arising from any proposed line of evidence from the perspective of the complainant. Of course, in certain circumstances, a complainant might have no difficulty in the court being allowed to hear evidence that is struck at by s. 274. But without the complainant being allowed to properly participate in the process, the court is left relying on limited information from the Crown (with all the difficulties identified above arising from the context of that relationship), or no information as to the complainant’s attitude at all. Ultimately, of course, the decision as to whether to allow any application under s. 275 must remain one for the court, applying the statutory tests

⁹² *LL* (n. 29), para 12. In spite of the Crown’s position, the preliminary hearing judge refused the application, a decision later upheld by the High Court.

⁹³ *LL* (n. 29), para 22.

⁹⁴ *WF* (n. 9), para 39.

and relevant case law. Nonetheless, it is submitted that the court will be better placed to carry out that exercise with the benefit of submissions made on behalf of a complainer, should they wish to have them made.

Section 3

Complainer Experience

In addition to the legal justification for a system of independent legal representation where an application is made under s. 275, there are powerful arguments in our opinion, for the introduction of such a right in order to improve complainer experience of the criminal justice system.

In almost every criminal trial relating to a sexual offence the complainer will be a key witness for the Crown. The Crown will lead evidence from them in support of the charge(s) which it seeks to prove. In our adversarial system the defence has the right to cross-examine the complainer, usually in an attempt to show that they are not a credible witness or that their evidence cannot be relied upon. The aim of this exercise is to test the account of the complainer in line with the accused's instructions.

Cross-examination is not an opportunity to insult or intimidate a complainer (or indeed any other witness) and due regard must be had to the complainer's dignity and privacy.⁹⁵ The High Court has made clear that judges must be prepared, where appropriate, to intervene if cross-examination strays beyond the proper bounds of acceptable conduct.⁹⁶ It has made critical observations in respect of the cross-examination of both complainers⁹⁷ and accused persons⁹⁸ in recent years. The High Court has also recently been critical of the nature of an intervention from a presiding judge in a sexual offence case.⁹⁹ Notwithstanding the obligations of the court to ensure the protection of witnesses in this regard, both domestic and international research, over some decades, supports the view that complainers find the prospect of cross-examination in sexual offence cases

⁹⁵ *Dreghorn v HMA* [2015] HCJAC 69, para 39.

⁹⁶ *ibid.*

⁹⁷ *Donegan v HMA* (n. 54), para 54.

⁹⁸ See e.g. *KP v HMA* [2017] HCJAC 57, para 22.

⁹⁹ *Donegan v HMA* (n 54). See also the comments made in *MacDonald v HMA*, (n. 67) about the failure by a presiding sheriff to intervene in response to distressing lines of questioning which contravened the statutory provisions, at para [47].

frightening¹⁰⁰ and the experience of it particularly gruelling.¹⁰¹ Recent Scottish research highlights in particular the emotional distress and damage occasioned by the experience of giving evidence in courts in sexual offence cases.¹⁰² We do not seek to comment on current practices in cross-examination or whether an appropriate balance has been struck in this area. We are firmly of the view that independent research into these matters in our jurisdiction would be of considerable value in allowing an informed discussion of these issues. In this report we consign ourselves to the issue of sexual history and character evidence.

In his recent review into the law and procedure in serious sexual offences in Northern Ireland, Sir John Gillen interviewed complainers involved in sexual offence cases. He concluded that a key contributor to fear on the part of a complainer about the trial process was concern of their sexual past being publicly explored.¹⁰³ In Scotland too, the Thematic Review of the Investigation and Prosecution of Sexual Crimes by the Inspectorate of Prosecution concluded that “[the] ordeal of giving evidence is a concern for any witness but particularly for victims of sexual crimes. Undoubtedly, much of the anxiety relates to the use of questioning about sexual history and character.”¹⁰⁴ Many complainers who participated in recent research in Scotland also spoke negatively about their experience of engaging with the criminal justice system generally. A number indicated that the potential use of evidence relating to their sexual history had caused them particularly acute concern and distress.¹⁰⁵

In our view, the particular difficulties and sensitivities for complainers arising from evidence relating to their sexual history and/or character require a tailored and appropriate response in Scotland that is in keeping with the jurisdiction’s adversarial tradition. We consider therefore that a case can be made for a limited right of independent legal representation for complainers at s. 275 hearings, based not only on the Article 8 considerations outlined above, but also in pursuit of

¹⁰⁰ See e.g. L. Kelly et al, *A Gap or a Chasm*, Home Office Research Study 293, pp. 66 – 69.

¹⁰¹ See detailed discussion in M. Burman, *Evidencing sexual assault: Women in the witness box*, in particular pp. 4 – 7 and L. Kelly et al, *A Gap or a Chasm*, Home Office Research Study 293, p. 76.

¹⁰² O. Brookes-Hayes, M. Burman & L. Bradley, *Justice Journeys Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault*, The Scottish Centre for Crime and Justice Research (August 2019).

¹⁰³ Sir John Gillen, *Gillen Review Report into the law and procedures in serious sexual offences in Northern Ireland Part 1*, (2019) 8.59.

¹⁰⁴ Para 357.

¹⁰⁵ Brookes-Hayes, Burman & Bradley (n. 102) p 22.

improvement to the complainer experience of the Scottish criminal justice system, in respect of an especially intrusive aspect of criminal prosecution.

Within the system we propose, the complainer's legal representative would be able to explain to them the legal framework within which admissibility is assessed in light of s. 274 of the 1995 Act and the associated case law. As demonstrated above, this is a complex and constantly evolving area of the law which complainers cannot reasonably be expected to have a proper grasp of without the benefit of independent legal advice. The independent legal representative could give an informed professional opinion, based upon a proper understanding of the statutory provisions and case law, as to the possible outcomes of the application. They could take detailed instructions in relation to why evidence as to particular matters might be particularly offensive to the complainer's dignity or privacy, or indeed, why they might not.¹⁰⁶ And, as discussed above, they could vindicate complainers' interests at s. 275 hearings in a way no existing actor in the process currently does. In performing this role, the representative would assist the court in its determination of the s. 275 application. Finally, the representative would be able to properly explain the effect of any determination under s. 275, in order that a complainer was aware in advance of their evidence what could be asked of them and what could not. Those from the rape crisis movement we spoke to in Ireland stated that complainants felt that independent legal representation offered reassurance and support for them at an especially stressful stage of the prosecution. We believe that one should not underestimate the potential positive effect that the provision of limited, independent, qualified legal assistance could have on complainers' experiences of the criminal process here in Scotland.

We anticipate that some of those reading this report will respond that much of the work we have detailed above relating to the advisory role of the independent legal representative is currently undertaken by the Crown. In the first instance, we would note that our proposal in no way detracts from the Crown's capacity to engage with complainers, nor does it in any way hinder them from making whatever legal submissions they deem appropriate at s. 275 hearings. Indeed, when we conducted our interviews in Ireland, the prosecutors we spoke to indicated that they viewed the

¹⁰⁶ In our interviews with relevant legal practitioners in Ireland we were told that on occasion complainers gave instructions not to oppose the applications to lead sexual character or history evidence once the law and the purpose of the application had been explained to them.

system of legal representation in place in wholly positive terms as has been noted above. When one considers the significant weight of responsibility associated with prosecuting sexual offences it is not hard to understand why this is the case. Given that the Crown in Scotland requires to make an application in terms of s. 275 to lead evidence of its own (in contrast to the situation of prosecutors in Ireland) our proposal has an added attraction in that it enables complainers' views to be heard in a situation where presently their position may be contrary to the party seeking to lead their evidence.

We anticipate also that some may consider our proposal is unnecessary given that in the majority of s. 275 hearings any submissions the complainer seeks to make in respect of the application are likely to mirror closely those of the Crown. We would suggest that this criticism fundamentally misunderstands one of the main driving factors for introduction of the rights which is to enable complainers to receive impartial advice on the *process* and potential outcomes of the s. 275 hearing and representation of their interests by an independent legal professional.

It may be argued that the advice on process and the like need not come from a legally qualified representative, but instead could come from a non-legal advocacy worker.¹⁰⁷ Recent Scottish research has shown that advocacy workers can make a tremendous contribution in terms of improving complainer experience in the criminal justice system.¹⁰⁸ However, in our opinion, advocacy workers simply are not fully equipped to advise on the law and practice relating to s.275 applications and cannot reasonably be expected to be so. That is not their purpose. We note that Sir John Gillen has reached a similar conclusion in relation to equivalent provision in Northern Ireland.¹⁰⁹ We would suggest that an independent legal representative as proposed in this work would be able to complement the existing positive work done by advocacy workers.

Finally, we accept that those who advocate for a more expansive right of independent legal representation may consider our proposal to be unsatisfactory. We would respond by noting that

¹⁰⁷ "Non-legal" in that there is no solicitor-client relationship in existence between a complainer and their advocacy worker.

¹⁰⁸ See O. Brooks-Hay, M. Burman, L. Bradley and D. Kyle, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (2018).

¹⁰⁹ Gillen, 5.81.

our proposal seeks to address a particularly distressing aspect of the criminal justice system for complainers. It does so in a manner that is consistent with Scotland’s adversarial tradition and thus does not require radical or drastic reform.¹¹⁰ It is not suggested that this moderate proposal will act as a “fix” for the variety of issues identified as problematic for complainers across the criminal justice process. We do suggest, though, that its implementation would represent a small but significant step in the right direction, consistent with the principles relating to participation by complainers¹¹¹ and protection for victims from secondary and repeat victimisation set out in the 2014 Act.¹¹²

¹¹⁰ We are aware that the Office of the Police and Crime Commissioner for Northumbria is currently piloting the use of qualified solicitors as Sexual Violence Complainants’ Advocates (“SVCAs”) with a proposal that such SVCAs attend the trial as a silent party to ensure that no sexual history evidence is introduced without a successful application in terms of the English legislation. We note that this work is still at a very early stage and that SVCAs are yet to undertake this aspect of their work in practice. On occasion, a similar role seems to be being performed in Ireland without a statutory basis. Our view is that the presence of an ILR at trial in Scotland would represent a substantial departure from our adversarial tradition. Such a departure would require careful consideration prior to its implementation with an analysis of its potential effect on the fairness of the trial generally.

¹¹¹ S. 1(3)(d), 2014 Act.

¹¹² S. 1(A)(e)(i), 2014 Act.

Section 4 – Detailed Proposal

In light of the above policy and legal justifications, we propose that a complainer should have a right to be heard, and to be represented for that purpose, whenever an application is made under s. 275 of the 1995 Act to lead evidence struck at by s. 274 of same, in order that they can make submissions in relation to whether that application should be granted.¹¹³

By what means should the rights to be heard and represented be implemented?

The right of a complainer to be heard in sensitive records cases is notable for having been established by judicial decision in *WF*. It may be that an equivalent system for s. 275 applications is capable of being introduced by a judicial decision, perhaps upon receipt of an application from a complainer to the *Nobile Officium*. Alternatively, the rights we propose could be set out in legislation.

Whatever mechanism is ultimately used in order to establish these rights in Scotland, it is important that they are implemented by a system of detailed rules. This would ensure a consistency of approach in relation to matters such as service and information provision. We understand that a lack of clearly defined rules has affected consistent implementation of the right to be heard in sensitive record cases following *WF*.¹¹⁴

In what circumstances should there be a right to be heard and represented?

As stated above, we propose that a complainer should have a right to be heard, and to be represented for that purpose, whenever an application is made under s. 275 of the 1995 Act to lead evidence struck at by s. 274 of same, in order that they can make submissions in relation to whether that application should be granted.

¹¹³ From hereon referred to as “the rights”.

¹¹⁴ For example, we understand that some complainers have been provided solely with a copy of the petition for recovery of the records, while others have been provided with additional further material, such as a copy of the indictment. We also understand there to have been difficulties with service, given that the defence do not ordinarily have access to a complainer’s home address.

We considered whether it was (a) practical and (b) desirable to restrict the rights we propose to applications relating to sexual matters only. We did so because we accepted that, on the face of it, the case for providing a right to be heard and represented where an application is concerned purely with bad character, not in relation to sexual matters, might be weaker than when an application concerned intimate sexual history.

In our view, attempting to “carve up” s. 274 to restrict the rights to “sexual matters” is difficult in practice, and could lead to complicated discussions as to whether the application did engage the rights at all. The question would then arise as to whether a complainer should be entitled to be heard on the issue of whether an application related to sexual matters or not. It is also possible that complainers would be in the confusing position of being able to make representations in relation to only certain parts of a s. 275 application.

In any case we have concluded that it is not desirable to restrict the rights so as to relate only to applications on sexual matters. The legislature specifically chose to place additional restrictions on the adducing of bad character evidence in sexual offence cases, because of a perception that the prior “rape shield” provisions had failed to adequately address “subtle character attacks” which, it was said, were used to attack the credibility of the complainer and to show that she was of “easy virtue”.¹¹⁵ Given the legislature has chosen to categorise all of these types of evidence together as generally prohibited, we consider it appropriate that the complainer is entitled to be represented whenever a s. 275 application, touching upon sexual matters or not, is being determined.

We consider that the rights should extend to both summary and solemn proceedings. There is in our view no reason to restrict the rights to solemn cases (where the allegations are likely to be more serious) given that, even at summary level, applications might be made under s. 275 which represent a significant intrusion into the private life of the complainer.

¹¹⁵ M. Burman, L. Jamieson, J. Nicholson and O. Brookes, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, (2007) 1.62.

What information should be provided to a complainer?

We would propose that the complainer is provided with as much information as is required to effectively participate in the determination of the s. 275 application (but no more than is required for that purpose). In our opinion, a complainer should be provided with: (i) a copy of the application itself, (ii) any documents referred to in the application,¹¹⁶ and, (iii) a copy of the charges on the complaint or indictment to which the application relates. We would also suggest that, alongside the above substantive materials, the complainer should be provided with some form of sign-posting, such as a leaflet with details of organisations that can assist them in the exercise of their rights. We believe this is particularly necessary because of the limited time that would be available to a complainer to vindicate their rights.

It may be argued that in providing a complainer with advanced warning of questions that they may be asked, they are given an unfair advantage compared to other witnesses. It is our understanding that it is already the Crown's practice in many cases to precognose a complainer on matters contained within a s. 275 application. Similarly, complainers are likely to be precognosed in relation to any notice of special defence lodged. We are not aware of this practice being regarded by accused persons or their representatives as objectionable. Therefore, our judgment is that there would be little, if any, further notice of likely lines of cross-examination provided to complainers if the system we are proposing was introduced than is already the case.

Timelines

As noted above, at present a s. 275 application must ordinarily be made not less than seven clear days before a preliminary hearing in the High Court, or in any other case, not less than 14 clear days before the trial diet. This application requires to be served upon other parties to the case. Under our proposal, this would include the complainer. Should government seek to implement this proposal it may be useful to consult on the matter of what time might properly be required for a complainer, in normal circumstances, to avail themselves of a right to legal assistance. Our own

¹¹⁶ Appropriately redacted where necessary.

view is that a requirement to give 14 clear days' notice, no matter the forum, would be preferable to allow time for a complainer to instruct a solicitor and, where appropriate, counsel.¹¹⁷

As discussed, there is provision to allow for a s. 275 application to be entertained later than these timelines on special cause shown. This is a high test for any party to meet in ordinary circumstances. We do not propose that this provision should be interfered with, although clearly it is undesirable for a complainer to be made aware in the immediate run up to or during the giving of their evidence that a s.275 application has been made.¹¹⁸ Where this situation does arise, in our view, there should be an obligation upon the court to adjourn proceedings *ex proprio motu* in order for a complainer to avail themselves of their right to legal representation. We are mindful of the undesirability of having an empanelled jury unable to sit during the court day and of the importance of preventing delays to trials.¹¹⁹ Nonetheless, we consider that these interests require to be balanced against those of the complainer, in particular their interest in properly vindicating their rights to be heard and represented. The Irish criminal justice system currently accommodates such delays ostensibly without significant difficulty.

We would be hopeful that any adjournment would not ordinarily require to last particularly long. It is relatively common for practitioners to require to represent individuals at short notice, for example, persons in respect of whom a finding of contempt of court is being considered. The procedural rules should allow for departure from the normal rules of service where a late application is to be considered. In our view, with the appropriate engagement on the part of the Crown and defence, the necessary delay to any trial could be kept relatively short, whilst still

¹¹⁷ Incidental to this, we would propose that where a s. 275 application is lodged at least 14 days in advance of a trial diet in the Sheriff Court, the court should assign a pre-trial hearing (if a First Diet or Intermediate Diet has not already been assigned) to take place prior to the trial's commencement. In our view, it is not desirable for a s. 275 application to be determined as a preliminary matter on the day of the trial itself with a complainer waiting to give evidence, unsure if they will be asked about matters struck at by s. 274.

¹¹⁸ Whilst there is a dearth of contemporary research on s. 275 applications, our own understanding is that "mid-trial" s. 275 applications are not the norm, certainly in the High Court, and rather that most applications are made in advance of the preliminary hearing, in line with the expectations of the legislation.

¹¹⁹ We note that should increased use be made of the taking of evidence on commission provisions as per the Vulnerable Witnesses (Criminal Evidence) Scotland Act 2019, then adjournment in order to allow a complainer to obtain representation after the commencement of their evidence would be a matter that could be dealt with prior to the empanelment of a jury.

allowing a complainer an opportunity to consider matters and, should they so wish, instruct legal representation.

As noted above, a judge is empowered, at any time, to revisit the issue of a previously granted s. 275 application in order to limit the extent of questioning or evidence allowed. We are aware of occasions when trial judges have exercised this right after the conclusion of a complainer's evidence-in-chief. We have considered whether it is necessary, or desirable for a complainer to have an entitlement to be heard in these circumstances. We have not reached a final view on this matter.

As a matter of principle, it would seem anomalous for the complainer to be entitled to make representations on the carrying out of the balancing exercise in the initial determination, but not to be entitled to do so in a later repeat of that exercise. On the other hand, a judge is not entitled to widen the scope of a previously granted application (our proposal already provides for representation where a fresh application is made mid-trial). If the judge already has access to the arguments advanced on behalf of a complainer at the initial determination of the application, and is satisfied that the circumstances in which those arguments were advanced have not been superseded (e.g. by unexpected parole evidence) we can see how they would feel properly able to restrict questioning without further representations from the complainer. We do not consider that there should be any right for a complainer to appeal against a decision to limit questioning or evidence in this way as any further limitation could not be said to be against their interests.

Appeals

We consider that a complainer should have the right to appeal against any decision to allow, in whole or in part, a s. 275 application. In order for this right to be effective, provision requires to be made which would permit the complainer to exercise their right of appeal prior to the leading of the relevant evidence in question.¹²⁰ We accordingly propose that the operation of the complainer's right of appeal in respect of the grant of a s. 275 application largely mirrors those granted to the Crown and defence in respect of appeals from decisions made at preliminary diets

¹²⁰ Obviously, once the evidence has been led, the question of whether the grant of the application was appropriate or not becomes practically redundant from the complainer's perspective.

under solemn procedure. In terms of procedure, we suggest that the complainer should require to seek leave to appeal from the first instance judge who has granted the s. 275 application immediately by way of oral motion.¹²¹ We also suggest that consideration is given to the introduction of a clear framework for statutory appeals in summary cases involving s. 275 applications.

We propose that complainers should also be entitled to seek leave to appeal from the Sheriff Appeal Court or the High Court directly (depending on the forum in which the prosecution is raised) where leave is refused by the presiding judge at first instance.¹²² We consider that the complainer should be granted this additional opportunity to seek leave on the basis that unlike the accused, the post-trial vindication of their grounds of appeal in respect of the s. 275 application would be largely meaningless. We recognise that this would be a development in Scots criminal procedure but consider that it is warranted in the circumstances.

In our view, the complainer should not be deprived of their right to appeal against a decision to grant a s. 275 application because the application is being determined at a late stage, even where the circumstances for the lateness are unavoidable. There should therefore be provision for an expedited appeal procedure for circumstances in which a s. 275 application is granted during a trial. Whenever an application for leave to appeal is made in these circumstances the court should, irrespective of its own decision on leave, adjourn to allow the complainer to pursue the appeal process.¹²³ We accept that this will cause delay to the progress of a trial.¹²⁴ We consider though, that in the circumstances described above, the interests of justice justify that delay. Once seized of the matter, the High Court or, where appropriate, Sheriff Appeal Court should be empowered to determine appropriate further procedure as it sees fit.

¹²¹ In line with para 9A_6 of the Act of Adjournment (Criminal Procedure Rules) 1996.

¹²² In terms of s.74 of the 1995 Act.

¹²³ I.e. in order to allow the relevant appeal court to determine the appeal should leave have been granted at first instance, or for the relevant appeal court to receive and determine an application for leave to appeal from the complainer, should leave at first instance have been refused.

¹²⁴ See however comments made at footnote 119. In addition, we note that a not wholly dissimilar procedure already exists under s. 107A of the 1995 Act, for Crown appeals against, *inter alia*, decisions at first instance to uphold a 'no case to answer' submission.

The grounds upon which it would be open to a complainer to appeal against a determination under s. 275 should be the same as those which are available to the Crown or defence. Therefore where the appeal relates to the exercise of discretion, the complainer would require to show that the discretion was wrongly exercised by the first instance judge as a matter of law, not simply that a different decision could have been reached on the application.¹²⁵ Where the appeal relates to a decision upon a point of law, the complainer would require to show that the first instance judge had erred in law. We suggest that the test in respect of the grant of leave should be whether the grounds advanced are arguable.¹²⁶

Service

Whilst standard practice is that the party making any application to a court serves a copy of same on all other parties, we suggest that this is not appropriate in the context of this proposal, at least for the purposes of s. 275 applications by the defence.

The defence typically do not have access to the address of a complainer and so would be unable to serve any application upon them at present. It is not desirable for this information to be provided to the defence.¹²⁷ We are aware of difficulties relating to service having arisen in the context of applications to recover sensitive records. We understand that, in some cases, these difficulties have frustrated the right of complainers to practically and effectively exercise their right to be heard on whether the records should be released to the defence. It is therefore imperative that the manner in which a complainer is informed that a s. 275 application has been made is given careful consideration.

In sensitive records cases, the Inspectorate of Prosecution, in their Thematic Review of the Investigation and Prosecution of Sexual Crimes, suggested that on receipt of an application, the

¹²⁵ See *Wright v HMA* (n. 50) & *Dunnigan v HMA* (n. 72).

¹²⁶ We recognise that our suggested test is lower than that which an accused requires to meet at the time of an appeal from a preliminary hearing but consider this is justified, for the same reason as we propose a right for a complainer to seek leave directly from the High Court / Sheriff Appeal Court, namely that a complainer will have no opportunity to effectively exercise appeal rights post-trial. The test of whether an appeal is “arguable” is the same as an accused person would require to satisfy in any appeal post-conviction, per s. 107 of the 1995 Act.

¹²⁷ This is not to question the integrity or professionalism of defence practitioners, whom we have no doubt would, if provided with address information of a complainer, handle matters sensitively.

court should “provide intimation of the application, together with sufficient information to enable the person, whose records are being sought, to effectively implement their right to be heard.”¹²⁸ We can see the force in this suggestion and consider that it could apply equally in the context of s. 275 applications. An alternative may be to task the reporting officer¹²⁹ with intimating the application to the complainer.

Representation

We propose that the complainer should automatically be entitled to be represented, free-of-charge, by a legal representative whose rights of audience are commensurate with the forum in which the application is being heard. This would require amendment to the relevant legal aid regulations.

We are conscious of the financial constraints on the legal aid budget at present. In our view, however, any means-testing of eligibility for representation is inappropriate. The complainer is a Crown witness undertaking a public duty to attend court to give evidence. We would be extremely concerned were a complainer to be asked to contribute to the cost of funding their own representation in the circumstances outlined above. Such an approach would also be inconsistent with the approach adopted in respect of applications for the recovery of sensitive records.¹³⁰

We envisage that a complainer should be automatically entitled to be represented by a solicitor where the application is to be heard in the Sheriff Court¹³¹ and to representation by solicitor and counsel (or solicitor advocate) where the application is to be heard in the High Court. Similar automatic entitlement should exist for advice and representation for a complainer to bring and argue an appeal.

¹²⁸ Para 356.

¹²⁹ Each police investigation will have a designated reporting officer who is responsible for submitting a report to the Crown. Defence precognition requests are often conveyed to a complainer via the reporting officer.

¹³⁰ On which, see The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017. The Scottish Legal Aid Board still requires to be satisfied that representation is required to allow the client to participate effectively in the proceedings.

¹³¹ This should apply equally to the JP Court, although it would be surprising if the Crown were to seek to prosecute a sexual offence in that forum.

There may be circumstances in which the issues arising from the s. 275 application are of sufficient complexity such as to require the instruction of counsel to conduct the hearing in the Sheriff Court. There should be provision for a solicitor acting for a complainer to seek sanction from the Scottish Legal Aid Board to instruct counsel for such a hearing.

Financial Implications

We have not attempted to analyse in detail the overall financial implications of implementation of our key proposal. To give some indication of scale, however, we have sought to obtain information in relation to the volume of s. 275 applications in the courts. According to the Scottish Courts and Tribunals Service there were 317 s. 275 applications in 2018-2019.¹³² Clearly allocation of adequate resources would be imperative for the various actors involved in implementation of a system of independent legal representation to adequately perform their role. It seems likely that the most significant increase in spending would arise from funding the work of representatives themselves, given that the processes within which they would operate (i.e. s. 275 hearings) already occur.

¹³² Freedom of information request submitted by authors. Of these, 286 were in the High Court of Justiciary, whilst 31 were in the Sheriff Court.

Key Conclusions

1. Where a s. 275 application is being determined, neither the Crown nor the defence are well-placed to represent the interests of a complainant.
2. A court will be better placed to carry out the s. 275 balancing exercise having been addressed on behalf of the complainant as to their attitude to the application.
3. Often, Article 8 of the ECHR may require a complainant to have a right to be heard on a s. 275 application.
4. Anticipation of, and the experience of giving evidence for complainants in sexual offence cases is particularly gruelling. The fear of being subject to questioning relating to their sexual history and character is a key source of anxiety for complainants.
5. An independent legal representative would be well-placed to provide informed, expert advice for complainants on the law relating to sexual history and character. They would be better placed to advise in this regard than the Crown or an advocacy worker.
6. A complainant should have a right to be heard, and to be represented for that purpose, whenever an application is made under s. 275 of the 1995 Act to lead evidence struck at by s. 274 (of a sexual nature or otherwise) in order that they can make submissions in relation to whether that application should be granted. These rights should apply in summary and solemn proceedings.
7. The rights should be confined to the hearing and determination of a s. 275 application and should not intrude to any extent upon the hearing of evidence.
8. However the rights are established, it is important that they are underpinned by a system of rules governing matters such as service and information provision.
9. Representation for a complainant should be by a solicitor, or where appropriate, counsel.
10. A complainant should have a right to appeal against the determination of a s. 275 application but should require to obtain leave from either the first instance or appellate court.
11. Where a mid-trial s. 275 application is made, the court should require to adjourn to allow the complainant to obtain representation, be heard and, if necessary, exercise their appeal rights.
12. Non-means-tested funding should be made available for complainants to exercise these rights.