

Research report summary

# The use of sexual history and bad character evidence in Scottish sexual offences trials

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## Executive summary

People who bring forward allegations of sexual crimes are protected in law to stop evidence about sexual history and bad character being used when it is not sufficiently connected to the facts of the case. These laws are known as ‘rape shield laws.’

A review of the relevant literature and cases conducted for the Equality and Human Rights Commission has found evidence of a potential ‘justice gap’ in Scotland and identified concerns about how effective the rape shield provisions are in practice.

We know that the number of sexual crimes recorded by the police is rising, with an increasing number of these cases going to court. However, conviction rates for sexual crimes remain much lower than for other crimes.

The legal framework that restricts sexual history evidence and bad character has been found to be compatible with the European Convention on Human Rights, as it properly balances the rights of the accused and the complainer. However, in practice there appears to be ample room for improvement, particularly with respect to protecting the dignity and privacy of the complainer.

Scrutiny of how the rape shield provisions operate is limited due to a lack of systematic data collection and research. Without this data we cannot fully understand how the law is being implemented or what needs to change.

The little evidence which is available suggests prosecutors rarely challenge the introduction of sexual history and bad character evidence. There is an urgent need to review how and when this evidence is introduced, and in particular, the extent to which it is challenged by prosecutors.

There is also a need to strengthen the protections for people who bring forward allegations of sexual crimes, through legal and procedural reform. These include developing a model of state funded independent legal representation for complainers in hearings about the relevance of sexual history and bad character evidence, and clear rules on the retention of digital data to ensure complainers’ rights to privacy.

# 1. Introduction

In March 2020, the Equality and Human Rights Commission commissioned a review of the use of sexual history and bad character evidence, and of other ‘private’ (for example, medical or counselling) data, in sexual offences trials in Scotland. This review sought to identify the main concerns about the use of sexual history and bad character evidence, and to have a better understanding of how the use of this evidence affects complainers’<sup>1</sup> access to justice.

The review analysed legislation, case law and research on the operation of what are often referred to as ‘rape shield’ provisions in Scotland – sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). It also reviewed the equivalent provisions, case law and research in England and Wales, and in Canada, to show how comparable issues to those arising in Scotland have been addressed in other countries which have a similar adversarial legal system. The literature review included all research relating to sexual history and bad character evidence from 2007 onwards.

This report provides a summary of the main findings, focusing specifically on Scotland. Chapter 2 provides a description of the current statistical and policy context of sexual offences in Scotland. Chapter 3 presents an overview of the legislative and common law rules, and judicial decisions, on sections 274 and 275 of the 1995 Act. Chapter 4 summarises findings from Scottish research studies. Chapter 5 identifies areas of good practice and Chapter 6 discusses areas of concern and gaps in knowledge.

The findings from the legislative overview, overview of cases and literature review, which accompany this summary report, are available on request, along with the original full review submitted to the Commission.

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<sup>1</sup>Since this report is primarily focused on Scotland, the terms ‘complainer’ and ‘accused’ are used to refer to the person making the allegation, and the person being proceeded against, in a sexual offences case. The report does not refer to victims or survivors, but witnesses and complainers. This is in line with language used to refer to cases being proceeded against in the criminal justice system, and in no way reflects the author’s belief or opinion about the veracity of a complainer’s account or the accused’s guilt.

## 2. Sexual offences in Scotland: the statistical and policy context

It is important to understand the whole picture of sexual offences in Scotland before focusing on the law on sexual history evidence.

### Recorded crime

While recorded crime is at one of the lowest levels since 1974, sexual crimes are at their highest level since records began in 1971. In the decade between 2009–10 and 2018–19, Police Scotland recorded crime statistics (Scottish Government, 2019a) show that **overall recorded crime rates steadily fell until 2017–18** (when a slight increase was partly explained by the inclusion of handling offensive weapons offences), **while sexual crimes increased steadily**. In particular, rape and attempted rape crimes have more than doubled in this period.

**Table 1: Number of sexual crimes recorded by Police Scotland 2009–19**

Year	Rape / attempted rape	Sexual assault	All sexual crimes	Total crimes
2009–10	996	3,412	6,527	338,124
2010–11	1,131	3,220	6,696	323,247
2011–12	1,274	2,908	7,361	314,188
2012–13	1,462	3,008	7,693	273,053
2013–14	1,808	3,405	8,604	270,397
2014–15	1,901	3,727	9,557	256,350
2015–16	1,809	3,963	10,273	246,243
2016–17	1,878	4,281	11,092	238,921
2017–18	2,255	4,826	12,487	244,504
2018–19	2,426	5,123	13,547	246,480

Police Scotland recorded crime statistics are not a complete picture of the incidence of sexual offences. Crime surveys and other research findings show that most sexual assault is never reported to or recorded by the police.<sup>2</sup> The most recent Scottish Crime and Justice Survey (SCJS) statistics, which combine figures from 2016–17 and 2017–18, show that only around 23% of those who had recounted a rape, and 8% of those who had recounted an attempted rape, reported the incident to the police (Scottish Government, 2019b). The true figure is likely to be lower as not all of those who have experienced rape or attempted rape will have felt comfortable reporting it to the SCJS.

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## Numbers proceeded to court

Although the total number of people who have proceedings taken against them for any crime has been dropping steadily, from 136,303 in 2009–10 to 89,733 in 2018–19, the number of people proceeded against for rape or attempted rape has almost trebled, from 117 to 324 in the same period (Scottish Government, 2020). In addition, the Inspectorate of Prosecutions found that sexual crimes made up 75% of Crown Office and Procurator Fiscal Service (COPFS) High Court work, up from 50% in 2015 (Scottish Government, 2017, p. 3).

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## Conviction rates

The statistics on criminal proceedings concluded in Scottish courts show the conviction rate for all crimes in 2018–19 was 87% (Scottish Government, 2020). Conviction rates for sexual crimes are significantly lower. In 2018–19, of those 1,762 accused of sexual crimes whose cases reached trial, 316 (18%) were acquitted through a not guilty verdict, 152 (9%) were acquitted through a not proven verdict (NP), and 1,215 people were found guilty. **This is a conviction rate of around 69% of all those proceeded against for sexual crimes.**

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<sup>2</sup>Note that the 2017-18 Police Recorded Crime statistics cover crimes recorded in the 2017/18 financial year, but the 2017-18 SCJS includes crimes experienced by respondents over a 25-month 'recall period'. Therefore, the two sources are not directly comparable.



If we focus only on the rape and attempted rape proceedings, the rate is even lower. In 152 of the 324 cases proceeded against, the accused was found guilty. **This represents a conviction rate of 47% of all cases proceeded against, which is the lowest of any crime category** (the next highest is sexual assault at 56% followed by attempted murder at 66%), and a rate of almost half of that for all crimes (87%). If only the strongest cases make it through to trial, we might expect to see a higher conviction rate than this. In the 324 cases proceeded against, there were 168 acquittals: 100 (31%) not guilty, and 68 (21%) not proven. This is a comparatively high number of not proven verdicts.<sup>3</sup>

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## Recent initiatives in policy and practice

The National Sexual Crimes Unit in Scotland was established in 2009 and is based in the COPFS. This unit deals specifically with sexual offences, with dedicated prosecutors and training to enable sensitive treatment of complainers. More recently, the Scottish Government has initiated various reviews of specific features of sexual offences law and policy. This includes the judicial led review 'Improving the Management of Sexual Offence Cases', chaired by Lady Dorrian; the Victims' Taskforce, chaired by the Lord Advocate and the Cabinet Secretary for Justice; and the Scottish Sentencing Council's commitment to propose sentencing guidelines in some sexual offences cases. The first Scottish study of mock jury trials, commissioned by the Scottish Government, has also been published (Ormston et al, 2019).

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<sup>3</sup>Although a few other crime categories have a high percentage of NP verdicts in 2018–19, some of those categories have relatively few offences and a very low acquittal rate, thus skewing the figures. For example, while proceeded rapes and attempted rapes have a high acquittal rate of 53% of 324 cases, homicide has an acquittal rate of 18% of 100 cases. Therefore, a 39% NP rate in homicide seems high, but in fact represents very low numbers – only 7 people received the NP verdict compared to 68 people receiving NP verdicts in rape and attempted rape proceedings ([Scottish Government Criminal Proceedings 2018–19](#)). The NP verdict is not a matter for this report, but it is worth noting, particularly in the context of the recent Scottish Government study of mock jury trials (Ormston et al, 2019). See also Munro (2020) and Duff (1996).

## 3. Legislation and case law on sexual history evidence

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### Legislative provisions

Restrictions on sexual history and bad character evidence were introduced in Scotland by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the 1985 Act), which amended the Criminal Procedure (Scotland) Act 1975. These legislative restrictions are in line with the common law that prohibits the introduction of bad character evidence if it is 'collateral', that is, it is not sufficiently connected to the facts that need to be proven. The 1985 Act provisions were re-enacted as sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. Section 274 restricts the introduction of sexual history or bad character evidence in a sexual offences trial, with exceptions that are laid out in section 275.

Section 274 has four distinct subsections:

- Section 274(1)(a) prohibits the leading of evidence or questioning that would show, or tend to show, that the complainer is **not of 'good character'** (whether in relation to sexual matters or otherwise).
- Section 274(1)(b) prevents the complainer from being questioned, or evidence being led, about any **'sexual behaviour not forming part of the subject matter of the charge'**.
- Section 274(1)(c) prohibits evidence that the complainer has at **any time 'other than shortly before, at the same time as, or shortly after'** the alleged offence **'engaged in behaviour, not being sexual behaviour'** that might be taken to suggest that the complainer consented or is not a credible or reliable witness.
- Section 274(1)(d) restricts evidence of **'any condition or predisposition'** to which the complainer is subject **that might lead to the inference being drawn that the complainer consented or is not a credible or reliable witness.**

Evidence about sexual history and / or bad character can be introduced if it is admissible at common law and falls within section 275 (see next paragraph). This allows the defence to make an application to introduce sexual history evidence, notwithstanding section 274.

Section 275 sets out a three-stage cumulative test, which must be satisfied before the trial judge can allow questioning or evidence to be led about sexual history or character.

- First, the evidence must relate to a **specific occurrence** or occurrences of behaviour, or to **specific facts** regarding the character, condition or predisposition of the complainer (s275(1)(a)).
- Second, the behaviour or facts must be **relevant to establishing the accused's guilt** (s275(1)(b)).
- Third, the **probative value of the material<sup>4</sup> must be significant and outweigh any risk of prejudice to the proper administration of justice** (s275(1)(c)), which includes the appropriate protection of the complainer's **dignity or privacy**, 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 (s275 (2)(b)).

These provisions were further amended by section 10 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which inserted sections 275A and 275B into the Criminal Procedure (Scotland) Act 1995. Where an application under section 275 to introduce evidence is successful, section 275A allows the previous convictions of the accused to be put before the judge or jury. Among other things, section 275B sets out the procedure for a section 275 application (including late applications). Applications must be in writing,<sup>5</sup> and the court must also give reasons for its decision on admissibility. A decision on admissibility under section 275 can be appealed by either party.

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## Case law

This section examines how the legislative provisions have been interpreted by courts. Further detail on these cases, including an analysis of the case law on the meaning of 'sexual behaviour' in sections 274(1)(b) and 275(1)(c), and 'specific occurrence' in section 275(1)(a), can be found in the supplementary reports.

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<sup>4</sup>That is, how useful the material is in proving the charge.

<sup>5</sup>The Act of Adjournment (Criminal Procedure Rules Amendment No. 3) (Sexual Offences (Procedure and Evidence) (Scotland) Act 2002) 2002 Schedule 3 provides the template to be used for section 275 applications.

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## Challenges to the legislation

The compatibility of Scotland's rape shield legislation with the European Convention on Human Rights (ECHR) Article 6 rights to a fair trial was challenged in three cases (*Moir v HMA* [2005] 1 JC 102; *DS v HMA* [2007] SCCR 222; and *Judge v United Kingdom* [2011] SCCR 241). None of these challenges were successful. Importantly, in the latter case, the European Court of Human Rights (ECtHR) stated that the legislative scheme gave appropriate weight to protection of the public interest in excluding irrelevant evidence while protecting the accused's right to a fair trial.

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## Representation for complainers

In 2015, an amendment to the Criminal Justice (Scotland) Bill<sup>6</sup> would have inserted a provision specifically concerned with legal representation for complainers in section 275 application hearings. The amendment would have required the complainer to be told of a section 275 application, to be legally represented at the hearing, and would have allowed for their representation to be funded by legal aid. At stage 2 of the Bill, the Justice Committee, with two for and seven against, voted down the amendment.<sup>7</sup>

Following this, three cases have opened up the potential for complainers in sexual offences cases to be represented in court proceedings about section 275 applications: *WF v Scottish Ministers* [2016] SLT 359; *JC, Petitioner* [2018] HCA/2018/000013/XM; and *AR v HM Advocate* [2019] HCJ 81. Together these cases have found that applications for disclosure of medical records and mobile phone records engage a complainer's ECHR Article 8 rights (respect for private and family life), therefore the complainer has a right to legal representation to challenge, at a preliminary hearing, the relevance of such information.

However, it is not clear who should take responsibility for alerting the complainer to these sorts of applications.

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<sup>6</sup>Scottish Parliament Criminal Justice (Scotland) Bill 1st Groups of Amendments for Stage 2. See amendment 105 under the evidence relating to sexual offences: legal representation.

<sup>7</sup>Noted in the Scottish Parliament Justice Committee minutes of the 26<sup>th</sup> Meeting 2015 (session 4) under item 3 when the Committee considered the Criminal Justice (Scotland) Bill at stage 2 (day 2).

In JC, the court also held that if JC was entitled to be heard in proceedings to recover her medical records, she should also be able to challenge the decision reached in those proceedings, and if no appeal was open to her, a ‘Nobile Officium’<sup>8</sup> petition was competent.

As a result of WF, in 2017, the government drew up the Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 (SSI 2017 No 291), which allows complainers access to legal aid when challenging an application for recovery of medical or other sensitive documents. These regulations apply in any criminal hearing where there is an application for recovery of sensitive documents. By analogy this right could be extended to section 275 hearings (see Chapter 4).

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## Dignity, privacy and cross-examination

This is an area that has seen a flurry of recent High Court judgments. The five most recent cases are worth noting, where various concerns have been raised. The lack of respect for the dignity or privacy of a complainer in lengthy and problematic cross-examination was noted by the Lord President in *Dreghorn v HM Advocate* [2015] HCJAC 69, and by the Lord Justice Clerk in *Donegan v HM Advocate* [2019] HCJAC 10 and *RN v HM Advocate* [2020]. In these cases, the failures of the Crown to challenge inadmissible evidence, and the duty of the trial judge to intervene where proper balance regarding fairness to the parties is not struck by defence and Crown, was noted (particularly in *Dreghorn*, where the trial judge was said to engage in behaviour more akin to cross examination).<sup>9</sup> These issues were raised again in by Lord Turnbull in *HM Advocate v JG* [2019] HCJ 71, alongside the impact of lengthy delays, and administrative and communication problems, on the complainer’s privacy and dignity.

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<sup>8</sup>The ‘Nobile Officium’ is the ‘extraordinary equitable jurisdiction’ of the court. This means that the Court of Session and the High Court of Justiciary can, in a legal dispute, provide a remedy, either where no other remedy exists, or where there is a legal rule, but its application would be unduly excessive, oppressive or burdensome. It can be used to grant any remedy or make any order.

<sup>9</sup>Note that in *Y v Slovenia* [2016] 62 EHRR 3, the ECtHR said that ‘cross-examination should not be used as a means of humiliating a witness’, and Keane and Convery (2020) have noted that under Article 8 this may extend to the ‘effective regulation of evidence given at criminal proceedings’.

In the most recent case, *MacDonald v HMA* [2020] HCJAC 21, the Lord President, Lord Carloway, referred to the High Court's 'definitive guidance' and 'repeated efforts' to ensure that courts adhered properly to sections 274 and 275 of the 1995 Act, citing *Dreghorn* and *Donegan* as examples, and the importance of the proper administration of justice. He emphasised the Crown's duty to oppose applications that seek to bring forward inadmissible evidence, and the duty of the court to challenge inappropriate cross-examination. Lord Carloway emphasised the court's obligation to administer and determine the section 275 application thoroughly and carefully, and state its reasons (which should be clearly recorded) for admitting the evidence. He concluded that the trial had been 'conducted in a manner which flew in the face of basic rules of evidence and procedure' that, if repeated, would render 'the situation in sexual offences trials ... unsustainable'.

In these five cases, the High Court has raised significant concerns about the way that sections 274 and 275 are being implemented in practice by courts, Crown agents and defence solicitors. The two most senior Scottish judges in particular have noted the importance of a rigorous and fair process for all parties, the need to protect the dignity and privacy of the complainer, and the need to ensure good practice in preparing applications for court that adhere to the statutory framework. It is important to note that the practices identified as poor in these cases would not have come to light had there not been a reported appeal court decision, so we are unable to say with confidence that such practices are infrequent or minimal in their effects.

Without publicly available information about applications and decisions made under section 275, it is impossible to properly research, analyse and be confident in the implementation of legislation governing the introduction of sexual history evidence and bad character, and the cross-examination of witnesses.

## 4. Literature review findings

The appeal cases reported above have highlighted serious concerns about the implementation of sections 274 and 275. There is limited research in Scotland on how and when section 275 applications are made, whether they are challenged by the Crown, and what sorts of applications are successful.

This section examines the available research and what it tells us about the use of sexual history and bad character evidence.

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### How and when section 275 applications are made

In the first comprehensive study of the use of sexual history evidence in Scottish sexual offences cases, Brown et al (1992) found that complainers in Scotland were asked about their sexual history in around half of all jury trials for sexual offences, with over half of those relating to history with a third party. They found that in many cases sexual history evidence was introduced without a formal application.

Following the 2002 legislative reforms, Burman et al (2007) found an increase in sexual history evidence applications after the introduction of sections 274 and 275 (in part because the new framework required what would previously have been verbal applications to be made in writing). Over a 12-month period (2004–2005), 72% of sexual offences cases and 76% of rape trials in the High Court included a section 275 application. Only 7% of the section 275 applications were refused. In all but a small number of cases, all the evidence allowed in the application was introduced in the trial, usually through cross-examination of the complainer. Several of the interviewed practitioners considered it relatively easy to demonstrate the relevance of sexual history or bad character evidence. Evidence or questioning concerning the bad character of the complainer often concerned the complainer's use of alcohol or drugs.

These early findings are both surprising and worrying. There has been no further empirical research in Scotland that sheds light on these or other issues, including:

- whether the success of applications has remained at such a high level
- clarifying when applications are made
- the nature of the evidence that the defence wants to introduce

- whether and when applications are challenged by the Crown
- why they are not challenged, and
- whether evidence related to sexual history or character is raised during the trial despite the absence of a section 275 application.

At least some of this quantitative data could be collected and published electronically and routinely by the Scottish Courts and Tribunals Service (SCTS), and / or by COPFS (neither of whom do so currently). However, there would still be a need to study in-depth the more qualitative questions highlighted here to understand the complex reasons for section 275 applications not being challenged. This is particularly important in light of the recent dignity, privacy and cross-examination cases mentioned in Chapter 3 above, and because it is more than a decade since Burman et al's (2007) study was undertaken.

Nonetheless, there are some glimpses of what may be happening. Keane and Convery (2020) note that, according to the response to a freedom of information request made by them to the SCTS in August 2019, there were 317 section 275 applications in 2018–2019. Of these, 286 were in the High Court, while 31 were in the Sheriff Court. It is not clear how or where these records are kept, and SCTS states that no further breakdown of figures is available because data is collected for 'operational data management' reasons on individual case files rather than collated systematically for statistical purposes.

Figures on section 275 applications were also released by Scotland's Cabinet Secretary for Justice on 26 June 2016, as shown below in Table 2.<sup>10</sup> In a three-month period from 11 January to 11 April 2016, there were 57 section 275 applications (52 in the High Court and five in the Sheriff Courts). Of the 52 High Court applications, 42 were granted in full, five were granted in part, and five refused. Of the five that were rejected, four of them were not challenged by the Crown (that is, the judge rejected the application without Crown intervention). Of the 57 total applications, only six were opposed by the Crown (four in the High Court and two in the Sheriff Courts) while 51 were unopposed by the Crown (48 in the High Court and three in the Sheriff Courts).

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<sup>10</sup>See the [letter from Michael Matheson to Margaret Mitchell MSP](#).



**Table 2: Applications under section 275 of 1995 Act between 11 January – 11 April 2016**

	No. of s275 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 indicate that Crown prosecutors are not challenging applications to introduce sexual history evidence. The reasons for this are not evident from the statistical data.

The Inspectorate of Prosecution also conducted a three-month ‘monitoring exercise of the prosecution attitude to defence 275 applications lodged at the time of the preliminary hearing and their outcomes’ (Scottish Government, 2017).<sup>11</sup> It is not clear how many cases in total there were during this period, but there were 14 applications. The Crown did not oppose 12 out of the 14 applications. The Inspectorate concluded that the exercise had provided ‘**some re-assurance that the prosecution and court are questioning the relevance and scope of such applications, where appropriate**’. It is not clear from the information presented in the Inspectorate’s report why they were reassured. Without more detailed information, it is difficult to offer any nuanced analysis of these sorts of statistics.

Section 149 of the Equality Act 2010 imposes a duty on COPFS and other public authorities to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act

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<sup>11</sup>Applications made at trial (which may well be a significant proportion of all applications) were not included in the monitoring exercise.

- advance equality of opportunity between people who share a relevant protected characteristic and those who do not, and
- foster good relations between people who share a relevant protected characteristic and those who do not.

This is referred to as the general equality duty and means that COPFS must place consideration of equality at the centre of the development of its prosecution policies and practices, including how prosecutors should respond to section 275 applications. COPFS must also carry out equality impact assessments of new or revised policies and practices.<sup>12</sup>

More transparency around COPFS policies and practices, including how they are complying with their equality duties, and the development of more systematic processes to collect and use information are needed to properly understand how the law is, and should be, implemented.

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## The content of section 275 applications

There is no systematic collection of information about the types of issues that are raised in section 275 applications. This is perhaps understandable, since the facts and evidential issues raised are so particular to each case. There is also no official record of which sorts of section 275 applications are refused or allowed. To understand the content of applications, research involving observation of hearings and scrutiny of written applications would need to be undertaken. For the proper administration of justice, it is crucial that we have a better, more up-to-date understanding of how the Scottish court processes and personnel, including judges, advocates, solicitors, and potentially others such as police officers, are dealing with sexual history and bad character evidence.

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<sup>12</sup>To enable better performance of the general duty, the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) imposes specific duties on listed authorities. COPFS is one of the authorities listed in the Schedule to the Regulations subject to the specific duties. For further information, see regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

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## Independent legal representation (ILR) and complainer participation

As noted, in *WF v Scottish Ministers* [2016] the court recognised the complainer's right to receive state-funded representation to challenge an application to recover her medical records. Some have argued that the right to be heard and represented through legal aid should be extended to complainers in section 275 hearings. In 2010, Raitt concluded, in her report for Rape Crisis Scotland, that: 'The most cogent argument for ILR in Scotland arises in response to breaches of the complainer's dignity and privacy.' As we have seen from the case law, a decade later, this question is still live.

Keane and Convery (2020) have argued for the right for a complainer to be heard, and to be legally represented for that purpose, at section 275 hearings in Scotland. They point out that this would correspond with the right of those whose sensitive records are sought by the defence, as set out in the recent sensitive records case, *WF*, discussed above. They also suggest that the argument for ILR is supported by a legal analysis of relevant Article 8 ECHR case law (domestically and at Strasbourg)<sup>13</sup> and the Victims and Witnesses (Scotland) Act 2014, and from the views and experiences of stakeholders in Ireland, where a similar right has been introduced successfully (section 4A of the Criminal Law (Rape) Act 1989). State funded legal representation in sexual history evidence hearings has been available in Ireland since 2001.<sup>14</sup>

Keane and Convery (2020) also conclude that complainers should be notified, either by the court or by the reporting officer in the police investigation, that a section 275 application has been made and that they are entitled to legal representation. The Inspectorate of Prosecution (2017) has suggested that the 'case preparer' should inform the complainer (even though they suggest that the court should inform the complainer of an application to seek recovery of sensitive records). Importantly, there are competing accounts as to whether a complainer is told about a section 275 application. There is a clear research gap around if, when and for what purpose complainers are advised of section 275 applications.

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<sup>13</sup>*WF v Scottish Ministers* [2016] SLT 359, *Y v Slovenia* [2016] 62 EHRR 3 and *X & Y v The Netherlands* [1985] EHRR 235, respectively.

<sup>14</sup>Section 34 of the Sex Offenders Act 2001. For critiques of the Irish system in practice see Mary Illiadis (2019).

The 'Nobile Officium' case, JC Petitioner 2018 HCA/2018/000013/XM, also raises issues of complainer participation. Here the court noted that the complainer's representative could not tell the court whether or not a statement taken from the complainer's doctor had been taken with or without her consent, and neither could the advocate depute appearing for the Crown. Nor could the Crown say whether anyone had told the complainer that they intended to speak to her doctor. The judge, making explicit note of these issues, drew attention to whether the complainer was able to properly participate in proceedings, including the possibility of them not having been given timely and correct information, or having given appropriate consent. The Inspectorate of Prosecution has highlighted that it may not be possible for the defence to inform the complainer of the intention to apply for sensitive records as they may not know the complainer's address, and that for the accused's solicitor to contact the complainer in this way would not be in line with a victim-centred approach (Scottish Government, 2017). In the view of the Inspectorate, it is also not the role of the prosecutor to do so, as they are not acting on behalf of the complainer. The Inspectorate recommended that this task be undertaken by the court. There is no publicly available evidence that this has been implemented.

Reed (2020) also revealed concerns about a lack of full informed consent from complainers before their documents are recovered. COPFS (no date) does have a policy on obtaining and disclosing sensitive records from 2014. The policy makes explicit reference to complainers' Article 8 right to privacy. But, in his research, Reed examined medical record requests made to one Scottish Health Board and found that, over a six-month period, there were no cases in which Crown requests were seen by clinicians, no redaction of files took place, and records were released by managerial NHS staff. Healthcare professionals were often unaware of when or how records were requested, or who had sanctioned their release, until arriving in court to give evidence. Similarly, two complainers he spoke to were unaware of the extent of disclosure their consent had permitted until questioned in court.

It is difficult to see how these gaps in process can be reconciled with the statutory obligation in section 275 to ensure the proper administration of justice or appropriately protect the complainers' dignity and privacy. It is possible that the IRL of complainers may address some of these concerns, but maintaining (and monitoring) a transparent and ethical process for obtaining and disclosing sensitive records is crucial.

## 5. Areas of good practice

This review of the use of sexual history and bad character evidence paints a mixed picture of how evidence relating to sexual history, bad character, and 'private' data are treated in contemporary Scottish sexual offences trials. There are areas of significant concern, as summarised in Chapter 6 below. However, there are also areas where progress is being seen.

Complainers can access legal aid for representation to challenge an application to recover their medical records and other sensitive or private data. This is an important right that was recognised by the High Court, and subsequently through statutory regulations, and that provides access to justice and increases complainer participation.

Unlike some other jurisdictions, such as England and Wales, the Scottish 'rape shield' legislation explicitly mentions the need to consider the dignity and privacy of complainers (section 275 (2)(b)(i)). This has allowed senior judges in appeal cases to censure COPFS, defence lawyers and judges in the lower courts who do not adequately protect complainers, and develop clear judicial guidance on how to interpret sections 274 and 275 correctly.

The Scottish Government has recently directed reviews of aspects of sexual offences law and policy, such as Lady Dorrian's review, 'Improving the Management of Sexual Offence cases', and the Victims' Taskforce, chaired by the Lord Advocate and the Cabinet Secretary for Justice.

## 6. What needs to change

The findings of this review of the use of sexual history and bad character evidence also point to areas where action needs to be taken.

Four distinct areas require urgent attention, to understand the extent of the 'justice gap' in this area, to ensure a clear, fair process for both the complainer and the accused, in accordance with ECHR rights, and to bring meaningful change.

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### Review

There is an urgent need for an independent review of how COPFS responds to the introduction of sexual history and bad character evidence in sexual offences trials, including:

- **current practice on the opposition of section 275 applications**, appeals against successful section 275 applications, and challenges to the introduction of evidence during cross-examination that has not been subjected to an approved section 275 application
- **communication with complainers, including the timing and content of communication**, on matters relating to sexual history evidence and recovery of sensitive records, and
- **management of sexual offences cases** from reporting to trial. A review here could be similar to the Crown Prosecution Service review in England and Wales (Attorney General's Office and Ministry of Justice, 2017).

There is also a need to review how COPFS ensures that it complies with its equality duties when it is developing, revising and monitoring its policies for managing sexual offences cases, including responding to section 275 applications.

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## Records and rules

There is an absence of robust and transparent official statistical data, published regularly, on how sections 274 and 275, and accompanying procedural rules, operate in practice. Without this sort of data, there is little we can say with confidence about basic aspects of how the current legislation is working. Specific changes that could be implemented include:

- Developing a **digital platform for recording, producing and monitoring accurate statistics** on the use of sexual history evidence, similar to that proposed by the Ministry of Justice in England and Wales. This would include the number of section 275 and recovery of sensitive records applications made, the number that are and are not challenged by the Crown and the number that are accepted by the court.

It is crucial that there is a transparent and ethical process governing how COPFS and the police obtain, store and share sensitive data / records and that there is public confidence in this process. Information should be published about COPFS, Police Scotland and other relevant public authorities' policies for managing the recovery and storage of sensitive data, including medical records, digital records and specifically phone and other personal data.

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## Research

Scotland is behind other jurisdictions in generating rigorous research findings that illuminate the more qualitative aspects of operating the rules excluding sexual history and bad character evidence that would give context to the quantitative data referred to above. Required here are:

- A **programme of methodologically rigorous, qualitative and quantitative research** on the use of sexual history and character evidence in trial courts, examining, among other things:
  - Practices in relation to **making and challenging** section 275 applications and applications for recovery of sensitive records, **the content** of such applications, and **the reasons given** (if any) for allowing the applications.
  - Judicial practice, particularly at trial level, relating to **the treatment of sexual offences complainers in court** by defence and Crown solicitors / counsel, as well as judicial treatment of complainers.

## Reform

There is a need for consideration of further legal and procedural reform, in particular:

- Exploring the benefits and costs, and possible models, of **state funded independent legal representation** for complainers in section 275 hearings.
- Creating **clear and fair rules on the recovery, disclosure and retention of digital data**, particularly relating to mobile devices, which ensure complainers' ECHR Article 8 rights to privacy.



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