This briefing looks at legislative provisions which seek to restrict the circumstances in which evidence can be led regarding the sexual history and character of complainers in sexual offence trials.
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KEY POINTS OF THIS BRIEFING

- Various legislative provisions have sought to restrict evidence being led about the sexual history and character of complainers in sexual offence trials. Arguments for restrictions on this type of evidence generally fall within two main categories:
  - that such evidence is often of little (if any) true value in determining what occurred and can, if produced in court, divert attention from the real issues in the case
  - that the use of such evidence can amount to an unwarranted invasion of the privacy and dignity of a victim, effectively putting the victim on trial and discouraging other victims of sexual offences from reporting those offences and giving evidence in court

- In imposing restrictions on such evidence being led, one must also have regard to the need to protect an accused person’s right to a fair trial – which could be adversely affected by overly strict limitations on the leading of evidence

- Concerns that existing provisions did not provide adequate protection for complainers, led to legal reforms, in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, in relation to sexual history and character evidence. The reforms in the 2002 Act:
  - introduced restrictions on the use of evidence which are wider in scope than previous provisions (applying to the prosecution as well as the defence, and extending to history and character evidence which does not deal with sexual matters)
  - sought to introduce a somewhat stricter test for admitting otherwise inadmissible evidence than was previously the case
  - sought to make it more likely that any previous convictions which an accused has for sexual offences will be disclosed in cases where the defence is allowed to lead history and character evidence relating to the complainer

- Research commissioned by the former Scottish Executive, into the impact of the 2002 reforms on the use of sexual history and character evidence, concluded that the reforms had led to more, rather than less, use of sexual history and character evidence in court

- The Crown Office & Procurator Fiscal Service has noted that the legislation resulting from the 2002 reforms seeks to ensure that the accused’s right to cross-examine witnesses is weighed against the complainer’s right to privacy and public interest considerations. It has also highlighted the fact that applying the legislation in a way which prevents an accused from pursuing an important and legitimate line of cross-examination might imperil any conviction which ensues (on the basis that the accused was denied a fair trial)

- Rape Crisis Scotland is concerned that widespread questioning in court of rape complainers on their sexual history and character continues, despite legal reforms seeking to restrict the use of such evidence. Whilst noting that the Crown Office & Procurator Fiscal Service has issued new guidance on the issue which might improve the situation, it has argued that this aspect of the law must remain under regular review to determine whether or not further legislation is required
INTRODUCTION

The Scottish Law Commission (SLC) has noted that:

“It is a striking feature of sexual offence trials, and rape trials in particular, that there is often a sense of the victim being on trial as much as the accused. If the accused claims in defence that the complainer consented to the act, then questioning in court is focussed upon whether the complainer was likely to have consented. The complainer may face cross-examination aimed at showing that although she claims she did not consent, she did in fact consent or her behaviour was such that it was reasonable for the accused to believe that she consented. This is likely to involve adducing evidence which intrudes upon the complainer’s private life.” (SLC 2007, para 6.24)

Various legislative provisions have sought to restrict evidence being led about the sexual history and character of complainers in sexual offence trials. Arguments for restrictions on this type of evidence generally fall within two main categories:

• that such evidence is often of little (if any) true value in determining what occurred and can, if produced in court, divert attention from the real issues in the case
• that the use of such evidence can amount to an unwarranted invasion of the privacy and dignity of a victim, effectively putting the victim on trial and discouraging other victims of sexual offences from reporting those offences and giving evidence in court

There are, of course, competing interests which must be protected. In imposing restrictions on such evidence being led, one must also have regard to the need to protect an accused person’s right to a fair trial – which might be adversely affected by overly strict limitations on the leading of evidence.

Concerns that rules in Scotland did not provide adequate protection for complainers, failing to strike a fair balance between competing interests, led to legal reforms in 2002. However, concerns remain about the extent of use of sexual history and character evidence. For example, Rape Crisis Scotland has stated (on its website) that it is:

“gravely concerned about the widespread questioning of rape complainers in court on their sexual history and character, and has launched a postcard campaign protesting this issue. This follows recent research which revealed that the law is failing to protect women in this area, in spite of recent legislative changes designed to do just that.”

This briefing looks at legislative provisions in Scotland which seek to restrict the circumstances in which evidence can be led regarding the sexual history and character of complainers in sexual offence trials. It includes consideration of the practical impact of changes to the law in this area.
LEGISLATION

Reform

The main provisions restricting the circumstances in which sexual history and character evidence is admissible in sexual offence trials are set out in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'). The current provisions were inserted into the 1995 Act by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 ('the 2002 Act').

The 1995 Act already contained provisions restricting the use of sexual history and character evidence prior to the changes made by the 2002 Act. However, there were concerns amongst some groups that these did not give adequate protection to complainers in sexual offence trials. Thus, the Sexual Offences (Procedure and Evidence) (Scotland) Bill ('the Bill'), as introduced in the Parliament by the then Scottish Executive in June 2001, included provisions to reform this area of the law. The Policy Memorandum published along with the Bill noted that one of the main policy objectives of the Bill was to strengthen existing legal provisions restricting the extent to which evidence can be led regarding the sexual history and character of complainers in sexual offence trials. It went on to argue that:

"Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak when compared with its prejudicial effect. This may include invasion of the complainer’s privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer." (para 17)

Scope of provisions

The current provisions in sections 274 and 275 of the 1995 Act apply to any trial where a person is charged with an offence to which section 288C of the 1995 Act also applies. Section 288C applies to trials involving various sexual offences listed within the section. The Policy Memorandum published along with the Bill indicated that the list of sexual offences was intended to be reasonably comprehensive. In addition, section 288C may be applied to trials involving any other offence where the court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated in the same way (eg where an alleged case of ‘stalking’ involving a substantial sexual element is charged as a breach of the peace).

In relation to the types of offences covered, the scope of the current provisions in sections 274 and 275 of the 1995 Act is broadly the same as previous provisions of the 1995 Act restricting the use of sexual history and character evidence. However, the scope of the current provisions is wider in two important respects:

- the current provisions apply to both prosecution and defence whilst earlier provisions only applied to the defence
- the current provisions apply to a wider range of evidence (see below under the heading of ‘Restrictions’)

\(^1\) Section 288C of the 1995 Act contains provisions prohibiting accused persons conducting their own defence in sexual offence cases.
In relation to the first bullet point, the Policy Memorandum stated that consideration had been given to continuing the prosecution exemption. However, the then Scottish Executive had concluded that it was right that decisions about admissibility of evidence should rest with the court regardless of which party wishes to lead the evidence. Thus, both prosecution and defence should be covered by the restrictions on leading evidence. The Policy Memorandum also stated that:

“The Executive does not anticipate that the Crown will in fact want or need to make applications in very many cases in practice, so treating prosecutors in the same way as the defence should not impose too heavy a burden.” (para 37)

Restrictions

Where a trial involves an offence covered by the restrictions, section 274(1) of the 1995 Act creates a general rule that the court shall not allow questioning which seeks to show that the complainant:

“(a) is not of good character (whether in relation to sexual matters or otherwise);
(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainant –
   (i) is likely to have consented to those acts; or
   (ii) is not a credible or reliable witness; or
(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.”

This general prohibition applies to a wider range of evidence than was the case prior to the changes made by the 2002 Act. The previous provisions had a much tighter focus on evidence relating to sexual matters. In seeking to justify this extension of the provisions, the Policy Memorandum published with Bill said that:

“Restricting the Bill’s provisions to evidence of sexual history or sexual character only was a possibility. However, concern was expressed that many subtle character attacks on a complainant, which might have sexual connotations, were not overtly sexual. The Executive believes there is a need to protect complainers from such attacks where their relevance to the issues cannot be clearly demonstrated.” (para 36)

Exception to restrictions

Section 275(1) of the 1995 Act provides that a court may allow questioning, which would otherwise be prohibited under the general prohibition considered above, if the court is satisfied that:
“(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour 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 he is charged; and

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

Section 275(2) of the 1995 Act goes on to provide that “the proper administration of justice” includes “appropriate protection of a complainer’s dignity and privacy”.

The Policy Memorandum published with the Bill stated that the reforms in this area were intended to:

“provide a greater degree of focus, requiring the courts to take time to consider in detail whether and how evidence is truly relevant and the extent to which it may divert attention onto issues which are not relevant. A relatively broad degree of judicial discretion remains, but decisions ought clearly to address these matters and should also enable a prompt stop to be put to any evidence or questioning which exceeds the stated limits of admissibility.” (para 20)

For questioning to be allowed under section 275 of the 1995 Act, a party wishing to lead such evidence must apply in writing to the court. Section 275B of the 1995 Act includes provisions on the timing of such applications. They should – “unless on special cause shown” – be made: (a) in High Court cases not less than seven clear days before the preliminary hearing; and (b) in other cases not less than 14 clear days before the trial diet. Prior to the changes made by the 2002 Act, applications to allow otherwise prohibited questioning were made orally during the trial.

**Disclosure of accused's convictions**

Section 275A of the 1995 Act contains provisions which may allow the disclosure, during the course of a trial, of any previous convictions for sexual offences which the accused might have. These provisions do not deal directly with the circumstances where sexual history and character evidence relating to a complainer may or may not be led. However the provisions only apply where a court has, under the exception set out in section 275 of the 1995 Act, allowed questioning by the defence relating to a complainer’s history or character. Thus, section 275A establishes a possible negative consequence for the defence if it does seek to lead sexual history and character evidence.

Where it applies, section 275A of the 1995 Act allows any previous convictions for sexual offences of an accused to be taken into account by the judge (summary proceedings) or jury (solemn proceedings), whilst considering the guilt or innocence of the accused. The accused may object to previous convictions being used in this way. Allowable grounds for objection include any argument that allowing such use of previous convictions would be contrary to the interests of justice.
Section 275A of the 1995 Act was one of the sections added by the 2002 Act. In doing so, it added to existing exceptions to a general rule prohibiting the prosecution in criminal cases leading evidence during a trial (ie before the sentencing stage) about any previous convictions that an accused may have. The justification for the general prohibition on leading such evidence is either that it is irrelevant or that it might prejudice the minds of a judge or jury against an accused (encouraging a tendency to judge an accused on past offences rather than on the basis of evidence directly relating to the present charge). In bringing forward its proposals on this topic, the then Scottish Executive stated that:

"Ministers believe that, where the accused has brought in material about the complainer’s past, the court should also receive relevant information about the accused’s previous convictions. This is needed to provide a balanced picture. Otherwise, there is a danger that the evidence the court hears will be biased in favour of the accused. (...) The accused should continue to be entitled to have his previous convictions kept secret, and to be tried purely on evidence about what happened at the time of the alleged offence. However, he ought to accept that this cuts both ways. Where the accused argues successfully that evidence of the complainer’s history is admissible, the prosecution should, in principle, be able to disclose the accused’s own past record”. (Deputy Minister for Justice 2001, p 2)

Further information on this issue is set out in the SPICe briefing ‘Sexual Offences (Procedure and Evidence) (Scotland) Bill: as amended at stage 2’ (McCallum 2002).

PRACTICE

As noted above, reforms made by the 2002 Act in relation to sexual history and character evidence:

• introduced restrictions on the use of evidence which are wider in scope than previous provisions – (a) they apply to the prosecution as well as the defence; and (b) they extend to history and character evidence which does not deal with sexual matters
• sought to introduce a somewhat stricter test for admitting otherwise inadmissible evidence than was previously the case
• sought to make it more likely that any previous convictions which an accused has for sexual offences will be disclosed (not generally something the defence will want to happen) in cases where the defence is allowed to lead history and character evidence relating to the complainer

The relevant provisions of the 2002 Act came into force in November 2002. Although some of the relevant provisions in the 1995 Act have been further amended since then, they remain broadly the same as inserted by the 2002 Act.

The rest of this section looks at evidence on the practical impact of the changes made by the 2002 Act in relation to the use of sexual history and character evidence.
Research commissioned by the Scottish Executive

Following the reforms made by the 2002 Act, the then Scottish Executive commissioned research into the impact of the reforms on the use of sexual history and character evidence in sexual offence trials. The research report, entitled ‘Impact of Aspects of the Law of Evidence in Sexual Offence Trials: an Evaluation Study’ (Burman 2007), was published in September 2007.

The research was carried out between September 2005 and December 2006. It included: (a) consideration of all sexual offence cases indicted to the High Court during a 12 month period in 2004 and 2005; (b) more detailed analysis of a sample of 30 sexual offence trials; (c) observation of 10 sexual offence trials; (d) interviews with relevant parties; and (e) comparison of findings with earlier research which had looked at provisions prior to the reforms made by the 2002 Act.

The research found that, following the changes made by the 2002 Act, there was a substantial increase in the number of applications (under section 275 of the 1995 Act) to allow questioning relating to the sexual history and character of complainers. It also found that most applications to lead such evidence were allowed by the court (although a significant proportion of applications were modified in some way).

The researchers noted that some of the above increase in applications was due to the wider scope of the current provisions: (a) the prosecution was responsible for one quarter of the applications in the cases studied; and (b) many of the applications related (at least in part) to general character evidence which would not have required an application under previous legislation.

The researchers concluded that the reforms made by the 2002 Act had led to more, rather than less, use of sexual history and character evidence in court. They deduced that:

“Although much of the debate preceding the legislation regarded a complainant’s past sexual history as likely to be largely irrelevant in a sexual offence trial, in practice sexual history evidence is generally regarded as relevant to establishing the guilt of the accused, particularly when it concerns a past history between the complainant and accused. Application decisions and the legal practitioner interviews indicate that sexual history evidence is seen as relevant by the Crown, the Defence and the judiciary.” (Burman 2007, p 4)

They went on to conclude that some of the main aims underlying legislative reform in this area had in practice been undermined by existing views amongst legal practitioners on the requirements of fairness to the accused:

“Legal practice has weakened the reform intent. The legal reform has not only not had the intended effect but could be said to have moved in the opposite direction. The intent of the reformers to limit sexual history and character evidence in sexual offence trials has not been realised, although arguably, it has had the effect of rendering common practice much more visible. (…) The outcome of various strands of legal practice has had the unfortunate and unintended consequence of undermining the intention of the legislators. In conducting sexual offence trials, lawyers are not just ‘interpreting’ the law but are implementing it through legal practice in ways that ‘fit’ with legal constructions and understandings of fairness, and this is in apparent tension with the legislative intent.” (Burman 2007, pp 134-135)
In relation to the new provisions on disclosure of any previous convictions for sexual offences which an accused may have, the researchers stated that:

“we remain sceptical that practice follows legislative intent in relation to the disclosure of any analogous previous convictions of the accused following a successful Defence application [to allow sexual history and character evidence]. Whereas practice may ensure the accused is protected from having potentially damaging information disclosed, the anticipated increased protections for complainers have not been forthcoming.” (Burman 2007, p 5)

On the basis of their findings, the researchers made a number of recommendations. These included recommendations concerning the balance between fairness to the accused and fairness to the complainer in sexual offence cases:

“The legislation would be more effective in protecting victims if greater weight was placed on the rights of the victim. This may mean that there may be, at times, a need to exclude evidence notwithstanding that it may be of some relevance to the credibility of the complainer. There should be some recognition that such an approach can be adopted while maintaining a fair trial;

The court should consider resisting the view that any relevance to a complainer’s credibility is adequate grounds for admission under ‘fair trial’ considerations”. (Burman 2007, p 136)

**Scottish Law Commission report**

In 2004 the then Scottish Executive asked the Scottish Law Commission (SLC) to examine the law relating to rape and other sexual offences, and the evidential requirements for proving such offences. The SLC’s final report was published in December 2007 – ‘Report on Rape and Other Sexual Offences’.²

In light of the fact that the Scottish Executive commissioned separate research into the impact of reforms made by the 2002 Act on the use of sexual history and character (discussed above), the SLC’s final report contains relatively limited discussion of sexual history and character evidence. The SLC did note that:

“There is no doubt that the rules introduced by the 2002 Act were intended to find an appropriate balance between the complainer’s right to dignity and privacy and the accused’s right to a fair trial.” (SLC 2007, para 6.33)

However, it went on to suggest that the aims of the legislators may not have been fully achieved. For example, in relation to measures seeking to restrict the use of evidence concerning the sexual history and character of a complainer, the SLC noted that early case law:

“seemed to suggest that the courts were still reluctant to refuse to admit evidence if it appeared to be pertinent to the accused’s defence”. (SLC 2007, para 6.32)

² Following publication of the SLC’s report, the Scottish Government published a consultation paper seeking views on the proposals in the report (the period for responding to the consultation ended on 14 March 2008). The Government is expected to introduce a bill based on the SLC proposals later this year.
Crown Office & Procurator Fiscal Service review


In relation to sexual history and character evidence the COPFS report noted that:

“It has been reported to us frequently in the course of the Review that the prospect of cross-examination is something which victims dread and is considered to be one of the major barriers to reporting sexual offences. Victims report particular concern that they will be questioned about their sexual history and character.” (COPFS 2006, para 10.32)

It went on to note, in connection with the reforms made by the 2002 Act, that:

“The probative value of the evidence is to be weighed against its potential prejudicial effect in relation to the privacy of the complainer and the administration of justice. The legislation seeks to ensure that the accused’s right to cross-examine witnesses is weighed against the complainer’s right to privacy, as well as public interest considerations. These public interest considerations include: complainers not being deterred from reporting crimes; juries not being distracted by irrelevant material; and the prevention of acquittals arising not from the evidence but from prejudice.

Relevant evidence which goes to the heart of the issues at trial is always likely to be admitted. The less directly relevant the evidence is, the less likely it will be deemed admissible in terms of the provisions. It is important to underline that the Crown must play its part in ensuring the accused has a fair trial, and this must inform the interpretation of the legislation and the Crown’s response to defence applications [to lead sexual history and character evidence]. Preventing the accused from pursuing an important and legitimate line of cross-examination might imperil any conviction which ensued. The approach of the Appeal Court appears to be that this is largely to be treated as a matter for the discretion of the trial judge.” (COPFS 2006, paras 10.46-10.47)

The COPFS report also made a number of recommendations (COPFS 2006, pp 162-163) relating to:

- the approach which should be adopted in taking statements from victims (during the course of investigation) where the evidence suggests that sexual history and character evidence might be raised by the defence
- the provision of detailed guidance to aid prosecutors in situations where either the defence is seeking to lead sexual history and character evidence or where the prosecution might seek to lead such evidence (eg when should the prosecution object to a defence application?)
- the information which should be provided to victims where sexual history and character evidence might be raised at trial

The COPFS has confirmed that it has now implemented the above recommendations through the issue of guidance to all prosecutors and the delivery of training.
In a speech at a conference in March 2008 (organised by Rape Crisis Scotland) the Lord Advocate stated that:

"It would be easy to avoid public criticism and to be regarded as guardians of the victim’s right to be protected from irrelevant questioning by opposing routine applications by the defence to have prohibited questioning admitted. But not only would that betray the prosecutor's duty to act independently and always in the public interest, an overly restrictive approach by prosecutors and the court also carries a risk that any conviction will be overturned on appeal. Lord Marnoch commented that the provisions: ‘require a value judgement to be made by the court, usually in advance of trial, as to the probative value or importance of evidence (...) the operation of these provisions is on any view a matter of great delicacy since the risk of prejudicing a fair trial is an obvious one’. (...)"

The task of applying the legislation requires a delicate balance to be struck but our work with the advisory group and our close links to the research to evaluate the provisions – undertaken by Michelle Burman and Lynn Jamieson, has allowed us to develop a sound statement of policy and practice; making it clear to all prosecutors that the provisions should be applied with rigour – and providing prosecution staff with comprehensive guidance which should support them in adopting a consistent approach which will protect the dignity and privacy of victims while allowing relevant questions to be asked." (Lord Advocate 2008, pp 7-8)

**Rape Crisis Scotland**

As noted earlier, Rape Crisis Scotland is concerned that widespread questioning of rape complainers in court on their sexual history and character continues, despite legal reforms seeking to restrict the use of such evidence. It has recently said that:

"It remains unclear whether it is the law itself or the way it has been implemented which is at fault. The Crown Office has issued new guidance on this issue, and it may be that this improves the situation. What is crucial, however, is that this aspect of the law remains under regular review, to determine whether or not further legislation is required. We strongly recommend that a further evaluation of the impact of the legislative provision relating to sexual history and character evidence is carried out in 2009 to ascertain whether or not there has been any improvement in the ability of the law to protect women from intrusive, humiliating and irrelevant questioning. We cannot overstate the importance of this issue: this type of questioning significantly adds to the distress experienced by complainers, it is potentially highly prejudicial for juries and it acts as a deterrent to women coming forward to report rape in the first place. Often one of the reasons that women give us at rape crisis for not reporting their experience to the police is the prospect of giving evidence in court and their past history being under scrutiny. We would also argue that it represents a breach of women's human rights to be subjected to this type of treatment." (Rape Crisis Scotland 2008, pp 1-2)
SOURCES


