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Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study

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**IMPACT OF ASPECTS OF THE LAW OF EVIDENCE
IN SEXUAL OFFENCE TRIALS: AN EVALUATION
STUDY**

Michele Burman, Lynn Jamieson, Jan Nicholson and Oona Brooks

**SCOTTISH GOVERNMENT SOCIAL RESEARCH
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EXECUTIVE SUMMARY

This Report presents findings from a study of the operation of the Sexual Offences (Criminal Procedure) (Scotland) Act 2002 (“the 2002 Act”) which was introduced in response to the perceived failure of sections 274 and 275 (hereafter s.274 and s.275) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).

SEXUAL OFFENCES (CRIMINAL PROCEDURE) (SCOTLAND) ACT 2002

The 2002 Act introduced new procedures restricting the use of evidence or questioning concerning the sexual history and character of the complainer in sexual offence trials. The Act also introduced a requirement that advance notification must be given to the Prosecution if the defence is one of consent.

A key difference between the 1995 Act and the 2002 Act is the scope of the otherwise prohibited evidence; whereas the earlier legislation focused on sexual history and sexual character evidence, the 2002 Act extends to more general character evidence.

In order to introduce sexual history or character evidence, it is necessary that a written application is submitted to the court, in advance of trial. This requirement applies to both the Prosecution and the Defence. That the requirement applies equally to the Prosecution makes this legislation unusual as, in other jurisdictions, “rape shield” provisions apply only to evidence or questioning by the Defence. A written application to introduce otherwise prohibited evidence or questioning must be submitted, ordinarily, not less than 7 days before the preliminary hearing in the High Court, to allow consideration at first or preliminary diet in solemn proceedings.

The application must specify: the evidence sought to be admitted or elicited; the nature of any questioning proposed; the issues at trial to which the evidence is considered to be relevant; the reasons why the evidence is considered relevant to those issues; and the inferences that the court should draw from the evidence.

The court can only admit such evidence where it is satisfied that it is relevant to whether the accused is guilty of the offence, and the probative value of the evidence is significant and is likely to outweigh any risk of prejudice to the proper administration of justice.

Where a Defence application to introduce otherwise restricted evidence is allowed by the court, the Crown is required to place before the judge any previous analogous convictions that the accused may have. The provisions for the disclosure of previous convictions are unique to Scotland, and are not found in rape shield legislation in other jurisdictions.

THE RESEARCH

The research was commissioned by the Scottish Executive and took place from September 2005 – December 2006. The research utilised a multi-method approach, and involved the mapping of all sexual offence cases indicted to the High Court over a 12 month period (1st June 2004 to 31st May 2005) using: court records; detailed analysis of a sample of 30 trials for sexual offences, using the taped proceedings of preliminary hearings and trials, and corresponding case Sitting Papers; attendance at court to observe 10 sexual offence trials; interviews with Judges, Advocates Depute, and Defence Counsel; and interviews with complainers in trials which had taken place since the introduction of the 2002 Act. Findings

were compared with research findings from an earlier baseline study which examined the use of sexual history and sexual character evidence under the 1995 Act.

THE FINDINGS

Sexual offence cases indicted to the High Court

Two hundred and thirty one sexual offence cases were identified in the period 1st June 2004 to 31st May 2005. Almost half (45%) of these contained a s.275 application to introduce sexual history or character evidence. Just over half (53%) of all cases called proceeded to trial.

The research identified all cases for all types of sexual offences covered by the 2002 Act that were indicted to the High Court over a 12 month period. The research therefore extends beyond rape cases, and included cases for attempted rape, assault with intent to rape, indecent behaviour, the age-related statutory offences, and sodomy. That said, 80 percent of all High Court sexual offence trials involved at least one charge of rape. Over half (55%) of the sexual offence trials had an advance intimation of a defence of consent.

The accused was acquitted of all sexual charges in just over half of sexual offence trials (51%), found guilty of all sexual charges in just under a quarter of trials (23%), and guilty to some charges in just over a quarter of trials (26%).

Cases with applications to introduce sexual history and/or character evidence

There has been a substantial increase in the numbers of trials with s.275 applications under the 2002 Act. Almost three quarters of High Court sexual offence trials (72%) now include an application, compared to just over one-fifth of trials (21%) in the base-line study. This represents an increase of almost 3 and half times that found in the base-line study.

The proportion of cases involving multiple applications has more than doubled. In the baseline study, just 8 out of the 66 trials with s.275 applications (or just over one in 10) involved more than one application, this has risen to 26 out of the 88 trials (or just under 3 in 10).

Whilst an increase in the use of sexual history and character evidence is the opposite of the intention of the legislation, comparison with the baseline study indicates that the increase is at least partially the consequence of the inclusion of questioning and evidence relating to matters of character in written s.275 applications which, prior to the 2002 Act, did not require to be the subject of an application.

Over three quarters of rape trials (76%) involve s.275 applications, as do just over half of trials (52%) for sexual offences other than rape. The type of sexual charge involved is a factor affecting Defence decisions to challenge the credibility of a complainer through the use of sexual history or character evidence.

Application decisions

A total of 118 s.275 applications were made in 88 sexual offence trials. As in the base-line study, almost all applications were successful; just 8 (7%) were disallowed, although partial refusals, amendments and restrictions on questioning mean that a significant proportion of applications are modified by the court. In all but a few exceptions, all evidence allowed in the application was subsequently introduced in the trial, usually during cross-examination of the complainer. The evidence or questioning tended to be in more detail than outlined in the written application.

It is considered relatively easy to construct a case demonstrating that sexual history or sexual character evidence has some relevance to issues in the trial.

Who is making applications?

The majority of applications were made by the Defence, although the Crown were responsible for one quarter of applications made (22 out of 88). Just under one fifth of trials (17 out of 88) involved (separate) applications by both Crown and Defence. Applications by the Crown only were rarer, occurring in just 5 trials.

Nature of questioning and evidence sought

Written applications seek to introduce evidence or questioning about a wide range of sexual history and general character issues, over 40% of which concerned matters that were likely to have been asked without an application being regarded as necessary prior to the 2002 Act.

Reasons given for proposed questioning on sexual history and character were relevance to consent; credibility; and the complainer's character, in particular, dishonesty or motive for false allegation. Evidence or questioning concerning the character of the complainer featured in approximately one quarter of cases (24%). A common type of such proposed questioning concerned the complainer's use of alcohol or drugs. This type of questioning also occurred without any application.

Crown applications were typically made to introduce sexual history evidence that is required to enable a jury to make sense of subsequent evidence or to provide context for the alleged events.

Complainers are not routinely informed by the Crown that an application to introduce sexual history or character evidence has been submitted or allowed, however this is to be changed as a result of the recommendations made by the recent COPFS Review of the Investigation and Prosecution of Sexual Offences (2006).

Deciding whether or not to admit the evidence or questioning sought

The requirement to make a written s.275 application to the court, and for this to be discussed and decided at a preliminary hearing, provides the opportunity for much closer attention to be paid both to the probative value and possible prejudicial effects of any evidence sought.

Communication between Defence and Crown at case preparation enhances the likelihood of agreement concerning the contents of applications. The majority of Defence applications are not challenged. In court Advocates Depute tend to take a neutral view on Defence applications, and interviews with practitioners indicate that this neutrality often reflects prior consultation between Defence and Crown. Challenges by the Crown are most often in relation to general character evidence and in particular to allegations of dishonesty on the part of the complainer.

Whilst the court decides each application on its merits, and is more likely to refuse applications that are seen to be poorly specified or of weak relevance, the position taken by the Crown is a factor affecting the likelihood of an application being allowed by the court. Judges are more likely to restrict or disallow Defence applications where the Advocate Depute registers opposition.

If duly enforced, the procedures introduced by the 2002 Act can remove some of the excesses of questioning on sexual and character matters that characterised sexual offence trials pre-2002 but, as the opportunity for detailed discussion of relevance and prejudice is not taken up, the possibility of tighter enforcement is not acknowledged.

Requiring applications in writing has resulted in greater transparency concerning the reasoning behind applications but it does not typically result in discussion of the relevance of evidence by the Court. Most preliminary hearings are characterised by a lack of discussion of relevance. Only a few cases where the relevance of questioning is challenged by the Crown provoke lively debate. The court disallows questioning or evidence which it considers to be too loosely phrased, too wide-ranging, lacking in specificity, or simply too speculative but applications which are loosely phrased and wide ranging or may be speculative are not always challenged.

Although much of the debate preceding the legislation regarded a complainer'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 complainer 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.

The court tends to take the view that where what is included in the application can be demonstrated to have some relevance to the issues in the trial, in particular credibility and/or consent, then what might be termed "fair trial" considerations seem to outweigh the rights of the complainer. This approach sets aside the need to weigh up the probative value of evidence against the invasion of the privacy or dignity of the complainer, or the possible prejudicial effects on the jury concerning their views of the complainer, because any relevance of evidence to the issues in the trial is sufficient for its admission.

Most applications are decided by the court at one preliminary hearing, although several are continued to subsequent hearings before a court's final decision. The Judge and Advocate Depute at the preliminary hearing are usually different to those at the trial. Continuations occur due to lack of time or unavailability of relevant information, or where the application is refused or restricted, and the applicant amends or re-submits the application.

Previous analogous convictions of the accused

S.275A of the 2002 Act allows for the disclosure of the accused's relevant previous convictions following a successful Defence application to introduce questioning or evidence about the complainer's sexual history or character. The presence of analogous previous convictions does not appear to deter the accused from pleading not guilty, and the case proceeding to trial.

All 162 rape cases were examined for the presence of previous convictions. In 3 cases where the accused had an analogous previous conviction, a successful application was made by the Defence. The relevant previous convictions of the accused were not placed before the court as the legislation intended.

In 4 of the 7 rape cases in which an application was made by the Crown only, and not by the Defence, the accused had previous convictions. Although caution should be exercised in drawing conclusions from such a small number of cases, there is nevertheless some evidence

from transcripts of preliminary hearings where the consequences of a Defence application were discussed, where it was acknowledged that submission of an application by the Crown allows the introduction of sexual history evidence into the trial, without the need for a Defence application, which could result in the accused's relevant previous convictions being disclosed to the court. It should be noted, however, that this was not a view fully endorsed by the legal practitioners interviewed.

In 8 rape cases, the accused had a previous conviction for assault, assault to injury, or assault to severe injury in the context of domestic abuse. Under the 2002 Act, these convictions are not defined as relevant convictions since they do not involve a substantial sexual element. Yet, prior convictions relating to domestic abuse on the part of the accused may well be considered relevant in a sexual offence case in that they demonstrate a previous history of violence against a woman. Even more so where the history of violence evidenced through the previous convictions is against the same woman as in the current trial (as it was in at least one of the 8 cases identified here) where, arguably, this is as much a part of the facts of the case as the previous relationship itself.

The "chilling" effect on applications of the potential disclosure of analogous previous convictions, which some practitioners anticipated, has not occurred. Although the numbers are small, 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. Whereas practice may ensure the accused is protected from having potentially damaging information disclosed, the anticipated increased protections for complainers have not been forthcoming.

Straying beyond boundaries set by the court

Just less than half (14 out of 32) of the observed trials involved some evidence or questioning being led which had not been explicitly agreed in the application. Objections by the other party and/or interventions by the court occurred infrequently.

Judges tended to allow evidence once it was before the jury, even if the nature of the evidence was such that it required an application. The 2002 legislation has not reduced the amount of sexual history and character evidence that is introduced through straying beyond the permissions given following an application, indeed it has led to an increase in such evidence being introduced in sexual offence trials.

Although, again, numbers are small and should be viewed with caution, the Crown was more likely than the Defence to introduce sexual history evidence without application. However, character evidence, and particularly questioning concerning alcohol consumption, continued to be introduced by the Defence without application.

Complainers' views

A number of common themes emerged from interviews undertaken with 4 complainers who had given evidence in sexual offence trials since the introduction of the 2002 legislation. Due to the small numbers, the findings expressed here are illustrative rather than representative.

Cross-examination on character was reported to be particularly distressing, and some complainers had difficulty in understanding the relevance of specific issues which had been raised (e.g. marital status, self harming behaviour).

The level of relevant information provided to complainers about the general process of giving evidence in court, and more specifically about the 2002 legislation, particularly whether or not an application had been successfully made to pursue questioning about sexual history and/or character, were highlighted as areas of particular concern. All complainers felt inadequately prepared for the process of giving evidence, and expressed the view that it would be helpful to meet the Advocate Depute prior to giving their evidence. The COPFS Review of the Investigation and Prosecution of Sexual Offences (2006) has made a number of positive recommendations in this regard. However, as yet, it is too early to evaluate their implementation, and the impact they may have on complainers' experiences

Impact of the 2002 Act

The amount of sexual history and character evidence introduced in the court room has increased markedly under the 2002 Act. The proportion of trials with applications has increased substantially; applications to pursue questioning on sexual history and character is now sought by both the Crown and the Defence; the extent of questioning has increased; and, the numbers of trials containing multiple applications has doubled.

The clear increase in applications has to be set against the fact that approximately 40 percent of the evidence or questioning sought would not have required an application under the 1995 Act. Questioning concerning the complainer's character figured in approximately one quarter of applications (24%), whereas it was not necessary to submit an application to introduce such evidence prior to the 2002 Act. The admissibility, or otherwise, of such evidence was determined under law. One reading of the increase in applications therefore might be that it simply reflects a channelling of questioning that was previously asked without an application, into an application. This interpretation, in turn, suggests a general compliance, by those seeking to introduce such evidence, with the requirements of the 2002 Act. It is, to some extent, an indication that the rules were being followed.

On the other hand, it is clear that the legislation has not had the effect of decreasing the kind of evidence that was previously prohibited, that is, questioning about the complainer's sexual history and sexual character. Moreover, character evidence is introduced in the absence of an application and again it seems clear that this type of evidence has not been reduced by the 2002 Act.

Questioning and evidence sought in applications is now more detailed and extensive than that sought under the 1995 Act. There are several reasons for the rise in level of detail and scale of information sought. Partly it is due to procedural changes, in particular, the requirement of a written application, which specifically seeks information on the nature and type of the proposed evidence or questioning. The increased level of detail is also due to the scope for refinement and/or expansion of the content of applications that is afforded by advance notification, and the ensuing pre-trial discussions that can span more than one preliminary hearing. A related contributory factor is the "belt and braces" or "scattergun" approach adopted by the Defence where they seek to include as much detail as possible in applications. The propensity of the Defence to do this has been exacerbated by a range of other factors, beyond the legislation, which have altered the general legal landscape within which applications are made.

This increased detail has not resulted in more Defence applications being challenged by the Crown or refused by the Judge. Questioning about sexual history and character allowed

under application typically continued to stray beyond the boundaries of what had been formally permitted by the court.

This leads the research to conclude that the 2002 Act, launched with ministerial hopes of curbing sexual history and character evidence and support from campaigning organisations against violence against women, has had the largely unanticipated and unintended consequences of the introduction of *more* sexual history and character evidence than occurred under the 1995 legislation.

Whilst the 2002 legislation has not reduced the extent to which complainers are subject to questioning about their sexual history and character, the procedures have however rendered this much more visible. The greater visibility of the use of this type of evidence enhances the possibility of informed debate among practitioners, yet there has been little apparent shift in the balance in favour of complainers when weighing up the relevance of such evidence against the dignity and privacy of the complainer.

CHAPTER ONE: “RAPE SHIELD” LEGISLATION IN SCOTLAND

INTRODUCTION

1.1 This Report presents findings from an evaluation of legislation intended to restrict the admission of previous sexual history and character evidence of the complainer in sexual offence trials in Scotland.

1.2 The use of sexual history and sexual character evidence is highly controversial, and questions concerning the relevance, admissibility and probative value of such evidence have excited critical attention from the legal profession, academics, and politicians over the past 30 years.

1.3 Since the early 1970s many jurisdictions around the world, with broadly similar legislative intent, have enacted “rape shield” legislation designed to curb the use of such evidence in sexual offence trials. All jurisdictions have encountered similar difficulties in the effective implementation of these provisions, and consequently such legislative attempts are seen as limited in effectiveness (see Birch, 2002; Brown *et al*, 1993; Temkin, 1993, 2002; Hornick, 1996; McColgan, 1996; Kelly, Temkin and Griffiths, 2006).

1.4 Scotland first enacted “rape shield” legislation in 1986. The Criminal Procedure (Scotland) Act 1975 sections 141A and 141B and 346A and 346B (as inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 section 36) placed restrictions on the use of sexual history and sexual character evidence of complainers in sexual offence trials. The restrictions were later extended to a slightly wider range of sexual offences by s.274 and s.275 of the Criminal Procedure (Scotland) Act 1995 (hereafter “the 1995 Act”).

1.5 The use of sexual history and sexual character evidence has been the subject of criticism since the first statutory provisions restricting the admissibility of such evidence were introduced. Critics of the earlier Scottish legislation argued that the policy aims behind the provisions of protecting complainers from inappropriate character attacks were not being achieved and that, despite the statutory restrictions, irrelevant sexual character evidence, which was of limited probative value, continued to be admitted in sexual offence trials.

1.6 Research carried out shortly after the introduction of the first “rape shield” legislation (Brown *et al*, 1992; 1993) and much more recently (Burman *et al*, 2005) concluded that the legislation was largely ineffective in terms of achieving its stated aims, in that despite the statutory provisions, sexual history and sexual character evidence of the type that the legislation aimed to limit was still being introduced in Scottish courts.

1.7 The Sexual Offences (Procedure and Evidence) (Scotland) Act, 2002 (hereafter “the 2002 Act”) came into effect in Scotland in November 2002, replacing the earlier “rape shield” legislation, which had been in operation for the previous 16 years. The 2002 Act introduced entirely new evidential and procedural provisions to limit the scope of questioning relating to a complainer’s character and sexual history in sexual offence trials. Underpinning the reform is a chief concern with the relevance and admissibility of sexual history and character evidence. A key aim is to ensure that the questioning or evidence introduced is relevant to the issues of fact before the court, rather than calculated to demean or humiliate

the complainer by raising tangential and otherwise irrelevant issues (Scottish Executive, 2001b).

THE SCOPE OF THE REPORT

1.8 The introduction of the 2002 Act was an attempt to address the perceived deficiencies of the earlier legislation, by ensuring an assessment of the relevance and admissibility of sexual history and character evidence by the court. This research study endeavours to gauge the effectiveness of this legislation in achieving those aims. Although the 2002 Act covers sexual offence cases heard at both High and Sheriff Courts in Scotland, this research study is concerned only with the operation of the 2002 Act at High Court level.¹

1.9 The rest of this chapter describes the recent legislative background leading up to the introduction of the 2002 Act, and the perceived inadequacies of the earlier legislation that the 2002 Act was designed to address. It also describes the structure and terms of the relevant provisions of the 2002 Act.

1.10 The chapter also describes some of the recent developments and reforms that have taken place in the High Court of Justiciary, providing a wider context against which the operation of the 2002 Act can be examined.

1.11 Chapter Two sets out the research aims and objectives specified by the Scottish Executive for this study, and describes the multi-method approach that was designed to address the research questions.

1.12 Chapter Three presents the findings of a case mapping exercise conducted in the High Court which aimed to estimate the proportion of sexual offence cases in which applications were made under the 2002 Act to introduce otherwise prohibited evidence (s.275 applications), and the proportion which were allowed by the courts, and to provide some assessment of impact.

1.13 Chapter Four sets out the findings of an in-depth analysis of a sample of sexual offence trials in order to establish more detail about the grounds and reasons given for s.275 applications, and the contexts in which applications are made.

1.14 Chapter Five draws on data from the in-depth analysis of trials to examine the point in the process when applications are decided and examines decision-making with regard to s.275 applications. This chapter also explores views held by the court in relation to the relevance and admissibility of sexual history and character evidence.

1.15 Chapter Six examines the extent to which, and the circumstances under which, previous convictions of the accused are disclosed.

¹ Scotland has a 3-tier criminal court system. These are, in order of precedence, the High Court of Justiciary (the High Court), the sheriff courts and the district courts. Criminal procedure (i.e. the procedure for the investigation and prosecution of crime) is mainly regulated by the Criminal Procedure (Scotland) Act 1995 and is divided into solemn and summary procedures. Solemn procedure involves the most serious of criminal cases and may lead to a trial on indictment, either before a judge in the High Court or before a sheriff in the sheriff courts. All trials at the High Court are conducted with a jury.

1.16 Chapter Seven focuses on the use of sexual history and character evidence in sexual offence trials in which s.275 applications have been made, and examines whether and how the parameters of applications are adhered to in the course of examination-in-chief and cross-examination of the complainer and other witnesses.

1.17 Chapter Eight draws on data from those trials in which s.275 applications were not made, and considers the extent to which sexual history and character evidence is being used in the absence of an s.275 application.

1.18 Chapter Nine reports on a small number of interviews undertaken with women who have given evidence as complainers in sexual offence trials heard since the introduction of the 2002 Act. Finally, Chapter Ten sets out conclusions and recommendations drawn from this study.

THE LEGISLATIVE BACKGROUND

1.19 In November 2000, the Scottish Executive issued a pre-legislative consultation document entitled *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* seeking views on proposals to change the law of evidence in sexual offence trials (Scottish Executive, 2000).

1.20 *Redressing the Balance* acknowledged that sexual offences, by their very nature, have particular elements which distinguish them from other crimes, giving rise to difficulties of proof. These include: the fact that there is frequently a pre-existing relationship between the complainer and the accused which has the potential to divert attention from issues of fact; that there are rarely ear or eye witnesses to a sexual assault; that delay in reporting may lead to a loss of evidence; that even where physical evidence is present, this may be re-cast in the trial as ambiguous or given an alternative explanation (2000:5). The pivotal roles played by the consent of the complainer in such trials were also highlighted. In common with international research evidence (e.g. Temkin, 2002; Kelly *et al*, 2006), *Redressing the Balance* noted that the fact that consent of the complainer is under such scrutiny from the outset leads to a diversion of attention from what the accused said or did, to what the complainer did or did not say or do:

“In many cases, and particularly those where there is either a previous relationship or some kind of previous contact between complainer and accused, he will do so by trying to show how the complainer’s behaviour led him to believe that she consented, expressly or by implication, or at least that she was not unwilling - and it is in doing this that he is most likely to try to take advantage of any prejudices about sexual behaviour which the judge or jury may hold, however unconsciously” (2000:5)

1.21 *Redressing the Balance* also explored the issue of rape myths and stereotypes in its discussion of the law on sexual history evidence, noting the prevalence of beliefs that are often deployed in legal reasoning (Scottish Executive, 2000), and concluding that not only do these stereotypes have no basis on fact, they are also “illogical and at odds with any system of morality which places a value on the individual’s right to self-determination” (Scottish Executive, 2000: 6).

1.22 *Redressing the Balance* sought views on the perceived need for greater protection for victims of sexual offences, particularly rape. Specifically, it put forward proposals to change the law of evidence in sexual offence trials in order to:

- a) Prevent the accused in such cases from personally cross-examining the complainer, and
- b) To strengthen the restrictions on the use of evidence about the sexual history and sexual character of the complainer.

1.23 The proposals, and in particular the first one, sparked some controversy. The consultation that followed received nearly 70 responses from a wide range of groups including women's support groups, victim support organisations, members of the judiciary, organisations representing lawyers, local authorities and academics. The consultation revealed that, with a few exceptions, responses from organisations representing the legal profession and the judiciary thought the existing system largely satisfactory, and saw no need for reform in this area. This was in stark contrast to the views of other groups, in particular Rape Crisis Centres and other support groups and organisations, as well as legal academics.

Limiting the accused's right to conduct a defence

1.24 The first proposal put forward in *Redressing the Balance* addressed a concern by the Scottish Executive that there was a trend developing in Scotland, similar to that in England, of an accused person dispensing with their legal representation and seeking to conduct the cross-examination of the complainer in a manner that was particularly intimidating and upsetting. The proposal to place limits on an accused's right to conduct a defence aimed to prevent complainers from being humiliated, embarrassed, intimidated or otherwise inhibited in giving evidence as a result of having to submit to questioning by the accused personally about highly intimate or degrading matters. Women's groups and academics have long pointed to the ordeal of the witness box as adding a further level of "secondary victimisation" to the complainer's experience (see e.g. Chambers & Millar, 1986; Adler, 1987, Brown *et al*, 1993; Lees, 2002; Gregory & Lees, 1999; Temkin, 2000, 2002) and have also identified this as being a strong factor in women's reluctance to report sexual assault.

1.25 In *Redressing the Balance*, it was suggested that the court may be reluctant to intervene too severely in a case where an accused person is conducting his own defence and, because an accused is not normally legally qualified or trained in criminal procedure, the court may not wish to be seen to be unduly restrictive to an unrepresented accused, since to do so might be seen as oppressive, and give rise potentially to grounds for appeal (Scottish Executive, 2000).

1.26 The proposal to place limitations on the right of the accused to conduct his own defence addressed an issue that received much media attention in Britain in the late 1990s, despite being a relatively uncommon event in Scotland. The number of sexual offence cases where the accused conducted his own cross-examination taking place in this country has been small but very high profile². Indeed, the Policy Memorandum which accompanied the subsequent Bill, which was published in June 2001, pointed out that such cases invariably receive wide media attention, and this may create apprehension amongst victims of sexual offences, thereby acting as a further deterrent to reporting sexual crimes.

² Pressure for a change in the law intensified following the case of *HMA v Anderson* at the High Court in Perth in 2000. Anderson, who was acquitted, was accused of raping a 13-year-old girl and her mother and was allowed to subject his alleged victims to extensive cross-examination.

Strengthening restrictions on sexual history and sexual character evidence

1.27 The second proposal presented in *Redressing the Balance*, relating to the effectiveness of the statutory restrictions on sexual character evidence, has been a long-standing source of public complaint. Throughout the 1990s, there was growing disquiet with the criminal justice response to rape. Against a background of criticism of the conviction rate in rape compared to the number of complaints made to the police, the treatment of complainers in sexual offence trials became an increasing cause for concern, north and south of the border.

1.28 The existing “rape shield” legislation in both mainland British jurisdictions was seen as ineffective, and the intentions of the legislature were considered to be undermined in legal practice (Brown *et al*, 1992, 1993; Burman *et al*, 2005; Kelly *et al*, 2006). In an attempt to address the well-documented failings of section 2 of the Sexual Offence Amendment Act 1976 (see Adler, 1987; McColgan, 1996), which was the first concerted attempt to regulate sexual history evidence in England and Wales, sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 was introduced. This legislation placed restrictions on sexual history evidence and sought to offer a more structured approach to decision-making concerning the admission of such evidence.³

1.29 In Scotland, critical attention focused on the perceived inadequacy of the existing legislation, in particular in relation to the issues of the relevance and admissibility of sexual history and sexual character evidence. Underpinning the proposals on restrictions on such evidence outlined in *Redressing the Balance* are complex and long standing questions about the relevance and admissibility of such evidence. These questions were first debated in Scotland in the 1970s, and led to the introduction of the first Scottish “rape shield” legislation in 1986.⁴

“RAPE SHIELD” LEGISLATION IN SCOTLAND

1.30 The first Scottish “rape shield” legislation, in 1986, took the form of a general prohibition on the Defence introducing any sexual history or sexual character evidence concerning a complainant that was not part of the subject matter of the charge. The restrictions specified that the court shall not admit questioning or evidence designed to show that the complainant:

- (a) is not of good character in relation to sexual matters;
- (b) is a prostitute or an associate of prostitutes; or,
- (c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge.

1.31 The Crown was exempt from these restrictions. The legislation also specified a set of exceptions to the restrictions to which the Defence could appeal in making an application to the court to have the prohibition lifted. These were:

- (a) That the questioning or evidence is designed to explain or rebut evidence adduced, or to be adduced, otherwise than by or on behalf of the accused;
- (b) That the questioning or evidence:
 - (i) is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming part of the subject matter of the charge; or,

³ This legislation is the subject of a detailed evaluation commissioned by the Home Office (see Kelly *et al*, 2006).

⁴ For a discussion of the earlier history of rape reform in Scotland, see Brown *et al* 1993, chapter 1.

- (ii) is relevant to the defence of incrimination; or,
- (c) That it would be contrary to the interests of justice to exclude the questioning or evidence.

1.32 The legislation was distinctive from other jurisdictions as it included all heterosexual and homosexual offences (except clandestine injury and incest) and it excluded evidence concerning the complainer's previous sexual behaviour with the accused, as well as third parties.

1.33 The stated aim of this first "rape shield" legislation was to achieve overall, a balance between minimising undue questioning of complainers about their sexual life, while continuing to admit all the evidence necessary for justice to be done to the accused. One of the grounds for exception permits such evidence to be adduced if it would be "contrary to the interests of justice" to exclude the evidence the Defence sought permission to elicit. Indeed, an early explanation for the shortcomings of the earlier legislation was the wide discretion given to the court by the "interests of justice" exception, which was regarded as a "loop-hole" through which the aims of the legislators could be subverted (Field, 1988).

1.34 In order to introduce otherwise prohibited evidence, the Defence made a *verbal* application to the court during the course of the trial, at which point the judge would ask the jury to retire before hearing the legal argument and seeking the view of the Crown. Research into the operation of the earlier legislation revealed that the subsequent discussion concerning the application by the Defence was usually very brief, and rarely addressed the relevance or probative value of the evidence (Brown *et al*, 1992, 1993; Burman *et al*, 2005). There was no statutory requirement in the legislation that any such relevance be shown by the Defence in making an application to introduce the evidence or questioning and, as such, the legislation gave little leeway for the probative value of the sexual evidence to be considered and weighed against its potentially prejudicial effects. While the court (at least in jury trials) was required to give reasons for its decision to be entered in the record of proceedings, there was no guidance as to what these should contain.

1.35 Research conducted by Brown *et al* (1992; 1993) found that the provisions were not being properly observed, and identified 3 specific problems:

1. Despite the existence of the rules restricting sexual history and sexual character evidence, the rules were not being followed, and evidence of the type that the legislation aimed to restrict was still being introduced;
2. Even if the rules were followed, and applications to introduce evidence or questioning were made, the general aim of protecting complainers from irrelevant questioning was not achieved, because subsequent questioning overstepped the limits agreed in the application, or strayed into areas that were not outlined in the application or, following court's refusal of an application, the Defence subsequently introduced the evidence or questioning; and,
3. Despite the rules, more subtle character attacks on complainers were made through the use of innuendo and suggestion.

1.36 The research found that questions of weak relevance to key matters in the trial, yet with much potential for connotations of "bad" sexual character, were introduced. Lines of questioning which were justified as tests of the credibility of the complainer often became attacks suggesting a person of "bad character" or sexual character and sometimes also

explicitly suggesting a tendency to consent to sexual acts (Brown *et al*, 1992; 1993). Such lines of questioning had the potential for diverting attention away from the key issues under determination in the trial, and were also likely to prejudice a jury against the complainer.

Character evidence

1.37 *Redressing the Balance* also drew attention to the unacceptability of the use by the Defence of subtle character attacks “intended to create an atmosphere of bad character and “easy virtue” around the complainer with (presumably) the intention of making her appear generally less credible, but without producing evidence that she has ever behaved dishonestly” which the law as it was drafted did nothing to prevent (2000: para 104).

1.38 By way of background, “character” is an accepted legal concept in Scots law, although it is recognised as carrying tendencies for distorting judgement. As far as the law of evidence is concerned, a person's character includes known disposition from previous actions and general reputation in society. “Character” means both actual disposition and general repute and, as such implies certain propensities to act in certain ways. A “character for dishonesty” for example, may be indicated by evidence that someone has committed a crime of dishonesty, such as theft.

1.39 Under the existing rules of evidence, character evidence is classed as a collateral issue in most cases, meaning that it is not directly relevant or material and, as a general rule, it is inadmissible, disallowed either as prejudicial, or irrelevant. The character of a witness may be relevant in assessing credibility, but it is always subject to the broader rule that it is normally irrelevant and inadmissible.⁵ The trial judge has a wide discretion to refuse to allow questioning on the accused’s character in order to ensure a fair trial and avoid prejudice to the accused, bearing in mind that the justification of such questioning is that it has a bearing on the accused's credibility, but that evidence of his bad character is not relevant to his guilt of the offence charged. Prosecutors, too, are expected to exercise a wise discretion as to whether it is really necessary to ask for leave to cross-examine on character.

1.40 The potential use of “bad” character evidence to challenge the complainer’s credibility in sexual offence trials had been recognised in past Scottish reform developments. In their deliberations which preceded the introduction of the first Scottish “rape shield” legislation, the Scottish Law Commission (1983: para 5.3) discussed the use of “bad” character evidence, concluding that it “opens the door to much that is irrelevant” and that to admit such evidence is “inconsistent with contemporary sexual attitudes.” The Scottish Law Commission also acknowledged that evidence of “bad character” can divert the jury from the proper issues in a case, although they did not fully address the issue of the possibly prejudicial nature of such evidence.⁶

1.41 In the debates preceding the first “rape shield” legislation, the potential for blurring of general “bad” character and “sexual” character was also recognised, as was the problem of “character innuendo” - that is, the relative ease with which sexual character could be built up, through the course of the trial, over several witnesses’ evidence, without any direct reference to sex at all.⁷ But the commitment to do something about the problem of prejudicing a jury

⁵ At common law, it is always open to an accused to put their own character in issue - normally evidence of ‘good’ character which he is entitled to raise as an issue (see Dickson on Evidence, n. 2, para. 15).

⁶ Scottish Law Commission Report No 78

⁷ First Scottish Standing Committee col 878

through evidence with a strong potential to mislead failed to find a legislative solution in the first Scottish “shield” legislation.

1.42 The specificity of being “not of good character in relation to sexual matters” was not part of the original Bill drafted by the Scottish Law Commission, but was added during the passage of the legislation through Parliament (see Brown *et al*, 1993:34-39). The focus on lack of good character in sexual matters rather left the door open to innuendo which was not sexual but which could suggest someone was of “ill repute.” The result was that while questioning specifically in relation to “sexual” character was excluded under the 1995 Act, questioning could still slip through which, although not specifically related to a complainer’s sexual morals, could suggest “looseness of character” in general.

1.43 *Redressing the Balance* proposed that evidence of complainer's “bad character” should only be admitted where: it is relevant to the issue of whether the complainer is worthy of belief; and it is of specific instances of behaviour casting doubt on the complainer's honesty or showing a motive to fabricate allegations. In the main, responses to the proposals from organisations representing the legal profession and the judiciary thought the present system largely satisfactory and saw little need for reform (Scottish Executive, 2000).

Prejudicial effect

1.44 The statutory provisions of the first Scottish “rape shield” legislation did not make any attempt to restrict the admission of evidence which may have a prejudicial effect. The concern highlighted by *Redressing the Balance* was that the Defence might suggest invalid inferences to the jury on the basis of evidence, and “play on the kind of doubtful presumptions and prejudices which judges and jury members might hold” (2000: para 100).

Relevance

1.45 Another key problem with the 1995 Act, identified by the research by Brown *et al* (1993) and flagged up by *Redressing the Balance* was that the provisions simply did not deal with the complex but very real issue of the relevance to the charges labelled of the evidence sought to be introduced. The court is given no indication as to what ought to be the guiding principles on which it makes its decision as to relevancy. With the exception of incrimination, there was no requirement on the accused to demonstrate the relevance of the evidence which he wished to introduce to any of the issues requiring to be proven at trial and, even if only relevant evidence is admitted, the provisions took no account of its potentially prejudicial effect. In allowing too wide a discretion, through the “interests of justice loop-hole”, the purpose of the legislation could be undermined, since the court is unlikely to exclude any evidence which may be even slightly relevant.

1.46 Despite the recognition of some of the potential problems, in its final legislative formulation, there was no requirement in the first “rape shield” legislation to address the issue of relevance. The legislation also neglected to address the issue of the potential prejudicial effects of sexual history and sexual character evidence. Hence the proposals set out in *Redressing the Balance*, to widen and strengthen the existing restrictions on sexual history and character evidence, and to sharpen the focus on relevance were a clear attempt to address the perceived deficiencies of the earlier legislation.

1.47 In considering what changes to the law might be appropriate, *Redressing the Balance* had 2 basic objectives:

- To ensure that evidence of the complainer’s sexual history and/or her character is only admitted when its relevance to the crime libelled has been demonstrated; and,
- To ensure that such evidence is not admitted if it is likely to cloud the issues unnecessarily or cause undue prejudice and accordingly distort the judicial process.

1.48 In framing the proposals to address the question of relevancy *Redressing the Balance* drew heavily on the approach adopted in Canada, which requires the court to assess the probative value of the evidence against its possibly prejudicial or misleading effect. The approach adopted by s.276(2) of the Canadian Criminal Code is to prohibit evidence of *any* sexual activity engaged in by the complainer, other than that forming the subject matter of the charge, unless the court has decided, following a written application, that: the evidence is of specific instances of sexual activity; is relevant to an issue at the trial; and, has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice. In determining admissibility, the Judge must take a range of factors, including the interests of the complainer, into account.

1.49 *Redressing the Balance* also suggested the need for requiring applications to introduce otherwise prohibited evidence to be made in writing and for the court to be required by statute to state what its reasons are for admitting such evidence, to what issues it is considered relevant, the nature or extent of the evidence to be admitted, and the use to which it is to be put, on the basis that written applications and reasons should help to focus the issues of relevancy and possible prejudice more clearly, and prevent evidence admitted for one purpose thereafter being used for another invalid one.

The Sexual Offences (Procedure and Evidence) (Scotland) Bill

1.50 Following the consultation, the Scottish Parliament published the Sexual Offences (Procedure and Evidence) (Scotland) Bill in June 2001, which proposed the strengthening of the existing prohibitions and exceptions (s.274 and s.275), the latter limiting the discretion of the trial Judge through the introduction of more detailed guidance regarding the circumstances of when sexual character evidence may be adduced.

1.51 The Policy Memorandum of the Bill acknowledged the deficiencies in the existing provisions: namely that they were sufficiently elastic not to discourage the use of sexual history and sexual character evidence; that even where such evidence was relevant, its probative value was frequently weak when compared with its prejudicial effect and, that the provisions rely heavily on individual Judges to achieve a proper focus on these matters, without providing clear guidance (Scottish Executive, 2001b: 5-6). Other deficiencies recognized by the Scottish Executive concerned the lack of any express requirement that evidence or questioning must be relevant before it is admitted; the lack of any weighing up of the potentially prejudicial effect caused by diverting a jury’s attention from the issues it requires to determine in arriving at a verdict; the lack of guidance on how the general “interests of justice” exception is to be interpreted; the lack of guidance on the content of a decision on admissibility; and the fact that the complainer’s privacy and dignity are not accorded any particular status (Scottish Executive, 2001b: 6).

1.52 The Scottish Parliament passed a motion agreeing the general principles of the Bill following the Stage 1 debate in November 2001. Stage 2 consideration was undertaken in December 2001, and a number of amendments were agreed, including the addition of a new provision to change the law on the disclosure of an accused’s previous convictions in rape and other sexual offence cases.

THE SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) ACT 2002

1.53 The Bill was passed by the Scottish Parliament in March 2002 and received Royal Assent in April 2002. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 came into force in November 2002. It had 2 purposes. The first, to prevent the accused from personally cross-examining the complainer, was to be achieved by requiring the accused to be legally represented throughout the trial. Warnings and preliminary stages are built into the criminal justice process to ensure that the accused is made aware in good time of the need for legal representation and to encourage him or her to appoint a solicitor of choice, who can then instruct Counsel in the normal way if required. Where the accused does not do this, then a solicitor will be appointed by the court.

1.54 The second purpose, to strengthen the existing provisions restricting the extent to which evidence can be led regarding the character and sexual history of the complainer, was to be achieved by replacing s.274 and s.275 of the 1995 Act, which deal with sexual history and sexual character evidence. The substitute sections are aimed at discouraging the use of evidence of limited relevance where the primary purpose of such evidence is to undermine the credibility of the complainer or divert attention away from the issues under determination. In addition, where the Defence does succeed in convincing the court that character or sexual history evidence should be introduced, the 2002 Act introduces provisions to allow the court to take into account any previous sexual offence convictions which the accused person has, in order to ensure equity in the possibility of deploying past history. These provisions for the disclosure of previous convictions are unique to Scotland, and are not found in rape shield legislation in other jurisdictions.

1.55 At the time of its introduction, the Bill which preceded the 2002 legislation was greeted with mixed reactions from academics, politicians and the legal profession. Some thought the reforms entirely unnecessary. Some gave the legislation a qualified welcome. Yet others saw it as a rational and robust attempt to protect both the rights of the complainer and the accused in sexual offence trials, aiming to strike a balance between protecting the complainer from indignity and humiliating questions, whilst at the same time admitting evidence which is nonetheless so relevant that to exclude it would endanger the fairness of the trial (Jamieson and Burman, 2001; Raitt, 2001).

Offences covered by the 2002 Act

1.56 Like the earlier legislation, the 2002 Act has a wide ambit in terms of the range of sexual offences it covers. Section 288C subsection (2) lists rape and rape-related offences, sodomy, indecent assault, age-related statutory offences, procurement, abduction and homosexual offences under the Criminal Law (Consolidation) (Scotland) Act 1995. The provisions also give courts the discretion to apply the requirements of the 2002 Act to other cases with a substantial sexual element.

1.57 The Act applies to trials for sexual offences heard under solemn and summary procedure in Scottish courts.

Advance notice of consent

1.58 A new section 149A requires the accused in a sexual offence case to give prior notice if his defence is to include a plea of consent on the part of the complainer. This incorporates both actual consent and the accused's belief in consent. Notice should be given at least 10

clear days in advance of trial, although the court can extend this on cause shown. Prior to the 2002 Act, such a defence could be introduced at any point in the trial.

1.59 In evidence to the Justice 2 Committee, the Deputy Minister for Justice explained that the policy aim of this amendment was to provide a complainant with sufficient forewarning to be able to prepare psychologically for questioning aimed at supporting such a defence (Justice 2 Committee, 2001b: column 745).

Restrictions on evidence relating to sexual offences

1.60 The structure of the 2002 Act is somewhat similar to the 1995 Act, in that section s.274 lays down a general prohibition on certain types of evidence relating to the complainant's sexual history and sexual character across a wide range of sexual offences, and at s.275 a set of exceptions are specified under which the evidence may be admitted, following permission to do so given by the court.

1.61 There is a general prohibition on evidence at s.274 (1) which shows or tends to show, that the complainant:

- a) Is not of good character (whether in sexual matters or otherwise);
- b) Has, at any time, engaged in sexual behaviour which is not 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; and,
- d) Has, at any time, been subject to any such condition or predisposition as might found the inference referred to in (c) above.

Wider scope of restrictions on character

1.62 As previously mentioned, a key concern of *Redressing the Balance* was that the provisions of the 1995 Act did not go far enough to prevent the kind of "subtle character attacks" used to undermine the credibility of the complainant which were identified in the research by Brown *et al* (1993). A key difference between the 1995 Act and the 2002 Act is the scope of the otherwise prohibited evidence; whereas the earlier legislation focused on sexual history and sexual character evidence, the 2002 Act extends to more general issues of character or credit. The 2002 Act is thus much wider in scope as it includes general character evidence. As previously stated, the use of character evidence was largely seen as not directly relevant or material, and so already subject to some controls under existing law. The trial judge has wide discretion to disallow such questioning. Consequently, at the time of its introduction, the widened scope of the 2002 legislation was greeted with some scepticism by legal practitioners on the basis that general character evidence was already largely excluded by existing law (Scottish Executive, 2001a). This theme was echoed by some of the legal practitioners interviewed in this study.

Exceptions to restrictions under s.274 of the 1995 Act

1.63 As in the 1995 legislation, a set of exceptions to the restrictions under s.274 is specified, but the wording of this section is also somewhat different. S.275 (1) of the 2002

Act provides that the court may, on application made to it, admit such evidence or allow such questioning as is referred to in s.274 Act, if 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 he or she is or has been subject;
- b) That occurrence or those occurrences of behaviour or facts are relevant to 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.

Advance written notification to introduce restricted evidence

1.64 There are a number of key differences to procedure; under the 2002 Act it is necessary that a *written* application is made to introduce the otherwise prohibited evidence, *before* a trial commences, if *either* the Crown *or* the Defence wishes to present sexual history or character evidence (whereas the restriction under the previous legislation did not relate to the Crown).

1.65 Where either the Crown or the Defence seek to lead evidence about the complainer's sexual history or behaviour, in the face of the general prohibition laid down in s.274, written notice must be given, ordinarily, not less than 14 days before trial. This was subsequently amended by the Criminal Procedure (Amendment) (Scotland) Act 2004 to 7 days before the preliminary hearing in the High Court. The purpose of this is to ensure that the application is raised, as far as possible, before the trial rather than at a point when evidence is being led. Although later notice of an application may be permitted, this is only on "special cause" shown.

1.66 Such written applications require to specify:

- a) The evidence sought to be admitted or elicited;
- b) The nature of any questioning proposed;
- c) The issues at trial to which that evidence is considered to be relevant;
- d) The reasons why that evidence is considered relevant to those issues; and,
- e) The inferences which the applicant proposes to submit to the court that it should draw from that evidence.

1.67 An intention of the written advance notification is 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. The Policy Memorandum which accompanied the Bill stated that advance written notice is an attempt to ensure that both the complainer and the Defence are clear at as early a stage as possible what the nature of the defence is, and what this may involve for the complainer (Scottish Executive, 2001b).

1.68 This timing enables the written applications to be considered at first or preliminary diet in solemn proceedings.⁸ In practice, the requirement that applications to admit restricted evidence be decided at a preliminary hearing may mean that the judge evaluating the evidential value of the proposed evidence is not always the same judge that presides at trial.

⁸ Or at the intermediate diet in summary proceedings.

This is in contrast to the position under the 1995 Act, where applications to waive the restrictions upon evidence relating to the sexual history or sexual character of the complainant were made verbally to the court, during the trial, and the decision on whether or not to allow the proposed questioning or evidence was made by the trial Judge.

Determining relevance and admissibility

1.69 A notable difference between the 1995 Act and the 2002 Act is that the court has to determine the relevance of the proposed evidence or questioning. In doing so, the court has to consider a broad test – the proper administration of justice – and to do so must weigh the comparative benefit to the accused in having such evidence against any impact it might have on the dignity and privacy of the complainant. Section 275 sets up an explicit balancing exercise for the admissibility of evidence, where the court is required to take an evaluative approach.⁹ Hence, the Act provides for a sharper focus on the relevance of evidence.

1.70 As stated earlier, *Redressing the Balance* (2001a) drew heavily on s.276 (2) of the Canadian Criminal Code in relation to assessing probative value and prejudicial effect of evidence, and this was largely taken up in the new legislation. Under the 2002 provisions, applications for admissibility of evidence will succeed if “the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited”. The proper administration of justice includes “appropriate protection of a complainant’s dignity and privacy,” which acknowledges the rights of witnesses implicit in articles 3 and 8 of the European Convention of Human Rights. According to some commentators, this balancing exercise preserves judicial discretion while making the conditions for its exercise more explicit (Raitt, 2001).

1.71 In considering s.275 applications and determining the admissibility of any evidence or questioning, the court may hear evidence to assist in its decision and, in so doing, may seek evidence from other parties, for example, from medical doctors, psychologists or social workers. This is intended to minimise the interruption which might otherwise occur during the trial itself.

1.72 In considering a written application, the court may also set limits to the extent of the evidence to be admitted, or the questioning to be allowed. The admission of evidence may be subject to certain conditions, such as compliance with any directions issued by the court, or limitations on the use which can be made of evidence to support particular inferences

1.73 The court is required to set out its reasons for the decision on admissibility. In issuing its decision, the court is required to state what items of evidence or lines of questioning (if any) are being allowed, why they are considered to be admissible, the issues to which they are expected to be relevant, any issues to which they are thought not to be relevant and any uses which ought not to be made of them, together with any conditions or general directions the court thinks appropriate, for example, to protect the complainant from further questioning straying beyond the boundaries set in the application. The legislation also provides that such conditions may include limitations on the use which can be made of evidence to support particular inferences.

⁹ Unlike the similar legislation enacted in England and Wales, and set out in Sections 41-43 of the Youth Justice and Criminal Evidence Act 1999, section 275 of the 2002 Act does not impose strict pre-determined constraints on adducing evidence of sexual character.

1.74 The 2002 Act also confers on the court an additional power to limit questioning or evidence as the trial proceeds, notwithstanding the decision on admissibility, or any condition attached to it.

Disclosure of accused's analogous previous convictions

1.75 In general, the Prosecution is prohibited from asking questions or leading evidence during a trial, before the sentencing stage, about any previous convictions that the accused may have. The justification for this rule is either that such evidence is irrelevant, or that it might prejudice the minds of the judge or jury against the accused, encouraging a tendency to judge the accused on past offences, rather than on the basis of evidence relating to the present charge.

1.76 Sections 266 and 270 of the 1995 Act established exceptions to this general rule, including one allowing the Prosecution, with the agreement of the court, to ask questions or lead evidence to demonstrate the “bad” character of the accused, including evidence about previous convictions or charges. Although these exceptions were very seldom used, an application to lead such evidence could be made where the Defence has asked questions or led evidence with a view to establishing the accused's “good” character, or attacking the character of the Prosecution witnesses, including the complainer. The purpose would be for the Prosecution to rebut evidence led by the Defence.

1.77 *Redressing the Balance* proposed that, where an application to admit evidence about the complainer's sexual history or character is granted, there should be automatic disclosure of any convictions the accused has for relevant sexual offences, arguing that if the past behaviour of the complainer is relevant to the case, then the same may be said to be true of the past behaviour of the accused (Scottish Executive, 2000). This sparked a good deal of controversy as it was considered, in particular by some members of the legal profession, that this would render the law in this area unfavourable to the accused, and that it would infringe the rights of the accused (Scottish Parliament, 2002). Arguments against automatic disclosure included the view that balance would require that the court should be obliged to determine whether any prejudicial effects of such disclosure were outweighed by the probative value of the information disclosed, as an equivalent to the arrangements proposed for the disclosure of the sexual history and character evidence of the complainer.

1.78 Amendments to the proposal outlined in *Redressing the Balance* were incorporated into the Bill to allow the accused to argue that any previous convictions should not be disclosed on the basis that this would be contrary to the interest of justice to do so.

1.79 Consequently, under sections s.275A (1) and (2) of the 2002 Act, where the Defence, following an application, does succeed in convincing the court that character or sexual history evidence should be introduced, the court is no longer prohibited from asking questions relating to offences other than the one with which the accused is charged. When the Defence makes an application under s.275, which is at least partially successful, the Crown will require to place before the judge, a list of the accused's previous relevant convictions. These are convictions for sexual offences which have been notified to the accused in advance of the trial.

1.80 Once the relevant convictions are before the judge, they will automatically be admitted as part of the evidence in the case and disclosed to the jury, unless the accused objects. The various grounds for objecting are set out at s.275 (4). An accused may object on

the basis that: the offence did not involve a substantial sexual element; that disclosure would be contrary to the interests of justice; or, that the conviction does not relate to the accused. Where the ground of objection is that disclosure would be contrary to the interests of justice, the onus is on the accused to show that is the case. The court is to presume, unless the contrary is shown, that disclosure is in the interests of justice.

THE WIDER CONTEXT OF LEGAL AND PROCEDURAL REFORM

1.81 Discussion of the procedural changes heralded by the introduction of the provisions of the 2002 Act needs to be located in its wider context, in order to allow a better understanding of the new provisions and an assessment of their impact. Since the publication of *Redressing the Balance* in 2000, a set of changes affecting the conduct and proceedings of the High Court have come into effect, which have, in turn, significantly transformed the legal and procedural context in which serious sexual offence trials are conducted. These developments include:

- The far-reaching programme of reform introduced into the High Court of Justiciary heralded by the Bonomy Report (2002), which resulted in greater emphasis on pre-trial procedures, early case preparation by the Defence, and disclosure of evidential material by the Prosecution to the Defence;
- The phasing in of the Vulnerable Witnesses (Scotland) Act 2004 which is designed to make it easier for vulnerable witnesses to give evidence in court;
- The review of the law of rape by the Scottish Law Commission (2006) which attempts to re-define the definition of rape, and clarify the issue of consent; and,
- The report of a Review by the Crown Office and Procurator Fiscal Service COPFS (2006) on the investigation and prosecution of rape and other serious sexual offences which made 50 recommendations for change.

High Court Reform Programme

1.82 In 2001, as part of a modernisation agenda following devolution, the Scottish Executive set up a review under Lord Bonomy, a High Court judge, to examine the practices and operation of the High Court of Justiciary, in the light of the increasing demands made on the court. The remit included the making of recommendations with a view to making better use of court resources in promoting the interests of justice.

1.83 Lord Bonomy reported just after the inception of the 2002 Act with a set of recommendations for modernisation, and specifically with the objective of bringing more order and a greater degree of certainty to the court's conduct and proceedings (Bonomy, 2002). The main problems and solutions identified are summarised as follows:

1. Volume of business and managing the caseload. It was recognised that the High Court had become clogged with a high volume of cases. To alleviate this, the Report proposed raising the sentencing powers of the Sheriff and Jury court from 3 to 5 years, in order to reduce the volume of High Court indictments.

2. Preparation of High Court cases. There was a concern about the high number of cases reaching the trial date with essential preparation incomplete, and the inconvenience resulting from a high level of adjournments. The solutions proposed were to ensure better-resourced and organised work by the Prosecution; the provision of more and earlier information to the Defence about the Prosecution case; and pre-trial discussions between Prosecution and Defence through a managed meeting. Mandatory preliminary hearings were proposed at

which both parties discuss preliminary issues in front of a judge, and confirm their readiness to go to trial.

3. *Modernising time limits.* Tight time limits were seen to contribute to a high level of adjournments. It was proposed that the only grounds for the court to extend a time limit should be “on cause shown” which means that the court has to be satisfied that there is a good reason for any extension.

4. *Encouragement to early realistic pleas.* The Report recognised the inconvenience caused to witnesses, victims and jurors, by the high volume of cases where accused persons plead guilty on the day of trial. This was to be partly addressed by the measures to encourage earlier case preparation (referred to above).

5. *(Un)certainty that trials will proceed.* The Report pointed to problems arising from uncertainty concerning the scheduling of cases, and the disruption of trials, often due to non-attendance of a bailed accused, or non-attendance of witnesses, and proposed a range of measure to address this, including the setting of a fixed date and time for most trials.

6. *Supporting victims and witnesses.* A range of difficulties experienced by vulnerable witnesses were identified, including: lack of clarity concerning available support; trauma associated with the giving of evidence in the courtroom or listening to harrowing evidence; and anxiety surrounding the possibility of encountering the accused and his or her associates. It was proposed that the preliminary hearing address the needs of vulnerable witnesses for “special measures” helping them to give their evidence. Statutory backing for new forms of witness support would be provided by vulnerable witnesses’ legislation.¹⁰

7. *Infrastructure.* The Report raised the need for appropriate resourcing of the High Court to support such changes, in terms of the training of practitioners and modernisation of buildings to provide a safe and secure environment.

1.84 Following consultation on the proposals, the Scottish Executive subsequently published a White Paper in 2003, and a programme of change was introduced which acted on the Report’s recommendations (Samuel and Clark, 2003).

1.85 New ways of working for the judiciary and for those who prepare cases and appear before the court were phased in. These incorporated an emphasis on more productive work early on in the process with the introduction of the new preliminary diets, and early case preparation by the Defence. These also included a greater degree of communication between parties and open exchange between Prosecution and Defence as early in the case as possible,

¹⁰ The Vulnerable Witnesses (Scotland) Act 2004 is being introduced in phases, and the new regime has applied to cases tried at the High Court since 1st April 2005 for child witnesses (under 16 years when the indictment is served) and since 1st April 2006 for adult vulnerable witnesses. The Act is designed to make it easier for children and adult vulnerable witnesses to give evidence in court and provide clarity in relation to the use of special measures, such as screens and video-links. The Act can potentially apply in trials for sexual offences where it is considered that a victim or a witness is vulnerable. In terms of the definition provided by s27(1)(b), an adult person is vulnerable where ‘there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of (i) mental disorder or (ii) fear or distress in connection with giving evidence at trial’. All children are considered vulnerable in terms of the Act.

including routine disclosure of statements and other evidential material at an early stage of the proceedings.

1.86 From 1st April 2005, a new procedure introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004 came into effect, whereby all cases in the High Court were indicted to a Preliminary Hearing, rather than to a Trial Diet, which had been what happened before then. The main purpose of the new procedure was to avoid the so-called “churn” in High Court trials, many of which had been adjourned on several occasions. Since 1 April 2005 all preliminary issues were supposed to be dealt with *before* a High Court case is set down for trial.

Scottish Law Commission Review of the Law of Rape

1.87 In June 2004, Scotland’s First Minister, Jack McConnell, asked the Scottish Law Commission to carry out a wide-ranging and comprehensive review of the law of rape and other sexual offences. The terms of the review were to: “examine the law relating to rape and other sexual offences, and the evidential requirements for proving such offences, and to make recommendations for reform.”

1.88 This followed some widely publicised High Court cases which sparked critical attention from the public, academics and lawyers. In the case of *HMA v Edward Watt* in 2001 the trial Judge dismissed the charge of rape, and referred the ruling to the High Court of Justiciary for clarification of the law. Up until this point, a defining element of rape was that sexual intercourse took place against the will of the victim. To prove that intercourse was against the woman’s will it was necessary for the Crown to show that the accused used, or threatened to use, force. This understanding of the law changed when in what is known as the *Lord Advocate’s Reference (No 1 of 2001)* the court held that rape is defined as a man having sexual intercourse with a woman without her consent, regardless of whether or not force was used. Following the *Reference* decision, a man commits rape if he has sexual intercourse with a woman without her consent, and he knows that she is not consenting or is reckless as to whether she is consenting.

1.89 Subsequent to the clarification of the definition of rape in this case, a number of appeal cases led to concern about the inherent and significant difficulties faced by the Crown Office in bringing about successful prosecutions for rape. These issues were considered in the later decisions of *McKearney v HM Advocate*¹¹ and *Cinci v HM Advocate*¹², which were widely interpreted as pointing to the existence of major problems for the Crown in proving the accused’s lack of belief in the consent of the victim.

1.90 The appeal judgment in *McKearney v HM Advocate* in 2004 set out that the Crown has to prove beyond reasonable doubt not only that sexual intercourse took place and that it was without the consent of the complainer, but that the accused knew, or was reckless to the possibility, that the complainer was not consenting. In *Cinci v HM Advocate* the Court reiterated a further point made in *McKearney* that evidence of distress by the victim after an alleged rape could not act as corroboration of the accused’s state of mind at the time of the rape.

¹¹ *McKearney v HMA* 2004 SCCR 251

¹² *Cinci v HMA* 2004 JC 103

1.91 In addition to the issues arising from the decisions of the High Court, other more general aspects of the Scots law on sexual offences were identified as requiring consideration and reform. Consequently, the Scottish Law Commission published a consultation paper setting out proposals to reform the law of rape and other sexual offences. The key issues of the consultation paper were: the need to define consent in statute¹³; a redefinition of the act of rape to include non-consensual penetration with a penis of the vagina, anus or mouth; that protection should not only be given to those who cannot consent (such as children) but other vulnerable people (such as those with a mental disorder, or those over whom others hold a position of trust or authority); and, that sexual conduct with children should be a strict liability offence, for which no defence of mistaken belief in age or consent would be available.

Crown Office Review of the Investigation and Prosecution of Sexual Offences

1.92 Two years after the introduction of the 2002 Act, in late 2004, the Crown Office and Procurator Fiscal Service (COPFS) announced a review of the investigation and prosecution of sexual offence cases in Scotland. The aims of the review were to make recommendations:

- To improve the standard of service provided by COPFS to victims and witnesses of sexual offences;
- For the development of comprehensive guidance for prosecution staff on the investigation and prosecution of sexual offences; and,
- For the delivery of appropriate training to prosecution staff in the investigation and prosecution of sexual offences.

1.93 The comprehensive Report was published in June 2006, and contained 50 recommendations (COPFS, 2006). Significantly for the research study reported on here, these include recommendations concerning the provision of guidance to Prosecution staff on the test to be applied and the approach to be taken to Defence s.275 applications, and the circumstances in which the Crown might require to make an application. Another important recommendation for change concerns the provision of information to the complainer at the precognition stage. Where the evidence suggests that sexual history or character evidence might be put in issue at a subsequent trial by the Defence, the precognoscer must seek to explore the complainer's position and explain why questions which the complainer may find distressing are to be asked. Furthermore, where the Crown receives notification of a s.275 application by the Defence, Victim Information and Advice (VIA) should advise the complainer accordingly, and inform the complainer of the court's decision on the application. The precognoscer must consider whether re-precognition is required in order to obtain the complainer's position in relation to the matters raised in the application which have not been the subject of the earlier precognition. Other key recommendations of the COPFS Review include:

- A comprehensive guidance manual on rape and other serious sexual offences should be produced for those who investigate and prosecute sexual offences;
- A comprehensive system of specialised training should be developed within COPFS, and a system of certification should be developed for all COPFS staff working with sexual offences;

¹³ Since the decision of the High Court in the *Lord Advocate's Reference (No 1 of 2001)* rape has been defined as a man having sexual intercourse with a woman without her consent. However 'consent' is not defined, and juries are expected to apply what they consider to be the ordinary meaning of that word.

- A programme of specialist training for Advocates Depute should be developed to ensure they are sensitised to the issues arising in sexual offences, and that they are supported in delivering the highest level of advocacy;
- In all trials for rape and other serious sexual offences, there should be a presumption that the Advocate Depute introduces himself or herself to the victim and assists with any questions the victim may have about the procedure; and,
- A comprehensive Information Pack should be published for use by both male and female victims of sexual offences, spanning their information needs across the entire criminal justice process.

CHAPTER SUMMARY

1.94 The Sexual Offences (Criminal Procedure) (Scotland) Act 2002 was introduced in response to the perceived failure of s.274 and s.275 of the Criminal Procedure (Scotland) Act 1995. The 2002 Act introduced entirely new procedures designed to protect the complainer from irrelevant questioning. It excluded use by both the Defence and the Crown of evidence that is designed to show that the complainer: is not of good character; has engaged in sexual behaviour which is not part of the charge; has engaged in behaviour which might found the inference that he or she is likely to have consented; or is not a reliable or credible witness.

1.95 Advance written notice must be given of any applications to adduce sexual history or character evidence. The court can only admit such evidence where it is satisfied that it is relevant to whether the accused is guilty of the offence, and the probative value of the evidence is significant and is likely to outweigh any risk of prejudice to the proper administration of justice. The court may request information or hear evidence to assist in the determination of an application, and must provide written reasons for its decision.

1.96 The 2002 Act changed the law on the disclosure of an accused's previous convictions in rape and other sexual offence cases. Where a Defence application is successful, the prosecutor is required to place before the judge any previous analogous convictions that the accused may have. The 2002 Act also introduced a requirement that advance notification must be given to the Prosecution if the defence is one of consent.

1.97 The 2002 Scottish "rape shield" legislation has some unique features. The restrictions extending to questioning or evidence introduced by the Prosecution are not found in other jurisdictions. The scope of the restricted evidence is very wide, extending beyond "sexual" character to include questioning or evidence about the complainer's general character, as well as sexual history. Under the existing Scots law of evidence "character" evidence is deemed collateral, in that it is not directly relevant or material, and largely inadmissible. This represents an important change to the scope of the legislation, and also constitutes another rather unique feature.

1.98 In the years since the publication of *Redressing the Balance*, and the subsequent inception of the 2002 Act, Scotland has seen some considerable developments, in terms of a set of wider reforms that have streamlined procedure for serious prosecutions, along with policy and practice reviews, and broader legislative interventions that, taken together, have quite considerably changed the legal landscape in which sexual offences trials are conducted. It is within this wider context that Scotland's latest attempt at the implementation of "rape shield" legislation needs to be assessed.

CHAPTER TWO: RESEARCH AIMS AND METHODOLOGY

AIMS AND OBJECTIVES

2.1 The first part of this chapter describes the overall aims and objectives of the research as specified by the Scottish Executive. The second part provides a description of the research methods, data sources, sampling procedures, and data analysis.

2.2 The stated aim of this research study is to evaluate the impact of the changes made to the law of evidence in sexual offences cases heard under solemn procedure at the High Court by the Sexual Offences (Procedure and Evidence (Scotland) Act 2002 (the “2002 Act”). The research has 5 main objectives:

- a) To establish how the legislation is being applied in practice and whether the use of sexual evidence differs from the use of such evidence prior to the inception of the Act;
- b) To establish the extent to which previous convictions of the accused are disclosed, the circumstances under which they are disclosed and any impact this has on proceedings;
- c) To establish the impact the Act has had on the outcome of cases;
- d) To establish the extent to which parties are continuing to use sexual history and/or character evidence without an application to the court and in cases where applications have been made the extent to which the parameters set within the application are adhered to; and,
- e) To examine complainers’ experiences of the court process.

The Law of Evidence in Sexual Offence Trials Baseline Study

2.3 In order to facilitate this work, a prior baseline study was commissioned to the same research team by the Scottish Executive in 2003. The key objectives of the baseline study, as specified by the Scottish Executive, were:

- a) To explore the nature of the examination-in-chief and cross-examination of complainers in sexual offence cases and assess whether, to what extent, and in what circumstances questioning of the complainer may have been intimidating, humiliating or harassing, and to what extent and in what circumstances the judiciary or Prosecution intervened to prevent this;
- b) To examine how often, in what kinds of case and on what grounds the Defence applied to the court to lead evidence about sexual history and character, and how often these applications were granted, and how often and in what kinds of cases such evidence was introduced by the Defence without an application to the court, and without objection;
- c) To examine how often, in what kinds of case and on what grounds information about the sexual history and character of the complainer was led by the Prosecution or introduced as a result of questioning from the judge;
- d) To explore how often and from whom objections to the use of such evidence were made and how often these objections were upheld;
- e) To explore how often the defence of consent was employed by the Defence and at what point in the trial this was introduced;
- f) To provide data on the length of sexual offence trials, and the causes and extent of delays in trials starting or being adjourned;
- g) To examine the extent and nature of the use of special arrangements to assist complainers in giving evidence e.g. use of CCTV, screens, allowing a supporter to sit nearby; and,

- h) To examine how often, and in what circumstances, judges used their powers to clear the courtroom before evidence from the complainer was led.

2.4 Not all of the baseline study objectives are replicated in the current study. Furthermore, whereas in the baseline study, the research ambit included both High Court and Sheriff Court data on sexual offence cases, in the current study the research focuses solely on the High Court. Therefore the findings relating to High Court data only are drawn on throughout this Report.

2.5 The baseline research study entailed a retrospective analysis of all sexual offence cases heard under solemn proceedings in Edinburgh and Glasgow Sheriff Courts. Data was collected on sexual offence cases which took place in the High Court and the Sheriff Courts in 1999, 2000 and 2001, which were the 3 years preceding the implementation of the 2002 Act. The baseline report provides a comparative starting point for an evaluation of the effectiveness of the provisions of the 2002 Act, presenting a picture of how legislation to protect complainers in rape and other sexual offence trials was being applied before the change (see Burman *et al*, 2005).

2.6 For the baseline, data were obtained from written records on sexual offence trial charges, outcomes, special measures and the uses of the relevant provisions of the 1995 Act, which restricted the use of sexual history and sexual character evidence. This information was obtained for 313 High Court sexual offence cases identified as having proceeded to trial in the 3-year research period. A sub-sample of 84 High Court cases were selected for more detailed scrutiny by analysing sections of the tape-recordings of these trials. This included all 66 trials which involved an application to introduce sexual evidence under the 1995 Act, and an additional 18 trials which involved similar sexual charges, but which did not involve applications to introduce sexual evidence.

2.7 It is important to note that evidence of “general” character was not specifically excluded under the 1995 Act in the same way as sexual history and sexual character. Consequently, quantitative data on the use of “general” character was not collected in the base-line study in the same way as sexual character and sexual history data, the introduction and use of which was identified in relation to the relevant restriction and exception clauses under the 1995 Act. Because of the different scope of the 1995 Act, applications in the base-line study did not specifically seek to introduce “general” character evidence; nevertheless the use of character evidence in the base-line study can be determined from the transcribed trials.

RESEARCH DESIGN AND DATA COLLECTION

2.8 The current research study utilised a multi-method approach, using both qualitative and quantitative data collection methods. It employed both retrospective and prospective data gathering. That is, data on trials that took place since the introduction of the 2002 Act and the commencement of the research study (retrospective) and data on cases dealt with during the period of the research project (prospective). The principal components of the research were as follows:

- Mapping of all High Court cases involving the full range of sexual charges over a 12 - month period using computerised and written records. The research therefore extends beyond rape cases, and includes cases for attempted rape, assault with intent to rape,

indecent behaviour, lewd and libidinous practices, the age-related statutory sexual offences, and sodomy;

- Detailed analysis of 30 sexual offence cases drawn from the mapping exercise, using transcribed taped proceedings of preliminary hearings and trials, and corresponding case Sitting Papers;
- Attendance at court to observe trials in full, and specifically the use of the 2002 legislation during the complainer's evidence;
- Interviews with judges, Advocates Depute, and Defence Counsel; and,
- Interviews with complainers in trials which had taken place since the introduction of the 2002 Act.

Mapping sexual offences cases (1st June 2004 to 31st May 2005)

2.9 An initial sexual offence case mapping exercise was carried out. This involved the collection of basic data on all cases involving sexual charges coming before the courts during a specified time period, in order to compile an accurate picture of the proportion of cases involving s.275 applications, and the outcomes in each case.

2.10 Identifying relevant sexual offence cases was facilitated by the assistance of High Court IT personnel and the use of the High Court Case Management System (HCCMS), although not all of the information required to address the research objectives was obtainable from this system. Data on s.275 applications, outcomes and the consent Defence are not routinely recorded by the Scottish courts. It was therefore necessary to use other sources of data, in particular the Books of Adjournal, and the individual sexual offence case Sitting Papers stored in paper form in the High Court. Using these sources, all sexual offence cases called to the High Court in the 12 -month period, 1st June 2004 to 31st May 2005, were identified. The period June 2004 to May 2005 was identified in consultation with the Research Advisory Group. This period was selected primarily because it was thought that the HCCMS database, which was introduced in early 2004, would assist in the identification of relevant sexual offence cases.

2.11 Where available, the following information on the characteristics of the cases identified from the mapping exercise was inputted into an SPSS data file: case reference number; name of accused; charge(s); numbers of complainer(s); type of plea; whether case went to trial and evidence was led; duration of trial; whether notification of consent was lodged; whether, when, and by whom an application was made to introduce sexual history, sexual character or general character evidence and with what result; the outcome in the case of each charge and, where available, sentence.

Sample of 30 sexual offence trials from the mapped cases

2.12 A sample of 30 High Court sexual offence trials were identified from the mapping exercise. The trials were purposively selected, using a sampling rationale developed in consultation with the Research Advisory Group. The sample was not intended to be representative of all sexual offence cases, but rather to reflect the range of sexual offence trials heard at the High Court where the 2002 Act may apply.

2.13 Given the range in the particular qualities of cases, in terms of charge type, presence and absence of s.275 applications, and decision of the court whether or not to allow the evidence or questioning sought, purposive sampling was considered the most appropriate approach. This allowed identification of cases most relevant to the key research objectives.

2.14 In order to address the research questions, it was agreed that trials which display different combinations of key characteristics would be sampled, and to aim to include the following kinds of cases:

- Rape trials (involving both single and multiple charges) with s.275 applications;
- Other sexual offence trials (not including rape charges) with s.275 applications;
- Sexual offence trials where s.275 applications were not made and, where possible, to try to match these with application cases which display similar characteristics (i.e. in terms of charge type, relationship between complainer and accused);
- Trials where s.275 applications were challenged and/or were not allowed, in order to try to determine what constitutes inadmissible or irrelevant questioning; and,
- Trials where applications were lodged by the Defence only, the Crown only and both Defence and Crown.

2.15 The sexual offence cases that proceeded to trial identified through the case mapping exercise provided the sampling frame. There were 123 sexual offence trials, and the target sample number for more in-depth analysis, specified by the Scottish Executive, was 30 trials, just under a quarter (or 24%) of the mapped trials.

2.16 Differential selection criteria were employed for each category of trial in order to obtain a spread of trials involving different s.275 application decisions, whilst retaining a strong focus on single charge rape cases. Because of the relatively large number of such cases, single charge rape trials with fully and partially successful Defence applications were randomly selected; conversely, because of their relative scarcity, single charge rape Crown only application cases, and those involving applications by both Crown and Defence, were purposively selected. Refused applications were rare; hence all such cases in this category which were available were selected for transcription. Cases which did not involve applications were also included in the sample. Table 2.1 shows the trials selected for transcription by the type of charge involved and whether or not an application was made in the case.

2.17 All of the corresponding paperwork relating to each sexual offence trial and preliminary hearing was obtained. Details of the written applications were obtained from the case Sitting Papers. Each of the 30 trials, and the associated preliminary hearings in which applications were submitted and decided, were transcribed from the court tapes. The tapes of the relevant preliminary hearings where any applications were discussed were all transcribed verbatim. The trial tapes were selectively (rather than fully) transcribed, with a verbatim transcription of the complainer(s) examination-in-chief, cross-examination and re-examination, and a selective transcription of the summings-up by the Crown, Defence and trial Judge. The trials were highly variable in length, ranging from one to 6 days. Consequently, the typed transcriptions ranged from 30 to 170 pages in length, particularly those involving more than one complainer, and those where the complainer was in the witness box for several hours.

Table 2.1: Trials selected for transcription by type of sexual charge(s), whether s.275 application made and decision of court

Charge Type	Without s.275	With s.275 applications								Total
		Allowed in full			Partially allowed		Refused			
<i>Transcribed trials</i>		<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	
Rape only	5	3	4 *	3	4	0	1	0	0	20
Rape with other sexual/non-sexual charges	1	2	0	0	1	0	0	1	0	5
Sexual offences, other than rape	0	3	0	0	0	0	1	0	1	5
Total	6	8	4	3	5	0	2	1	1	30

* in 2 cases both applications were allowed in full; in one case the Crown application was allowed in full, and the Defence application in part; in one case the Crown application was withdrawn and the Defence application was allowed in full

2.18 Pro formas for each of the 30 transcribed trials were completed, recording charge details; offence locus; relationship between complainer and accused; preliminary hearing and trial dates; whether a s.275 application was made, and by whom; s.275 application contents and court decisions regarding relevance and probative value; and any use of sexual history and/or character evidence in the trial (see Appendix 1).

Court attendance and trial observation

2.19 Notification procedures were established to enable the research team to be advised of forthcoming trials by High Court staff in order to facilitate trial attendance. This notification was highly beneficial and facilitated this aspect of the research. The researchers were regularly provided with a list of sexual offence cases, drawn from the HCCMS, with details of charge(s), court location and dates. This list also detailed whether or not a s.275 application to introduce otherwise prohibited evidence had been made in the case.

2.20 The researchers also obtained the weekly sitting lists for the High Court in Edinburgh and Glasgow. The Sitting Lists detail the dates and locations of fixed and dedicated floating trials, and allow for closer monitoring of the likely trial start date. Before a trial commenced, the research team contacted the relevant High Court for advice on dates of floating trials, and to notify the court clerk that a researcher would be in attendance.

2.21 Although research access had been granted by the Lord Justice-General, permission to remain in the closed court was sought from the trial Judge on the day of the trial. The agreement of the complainer to the presence of a researcher was also sought.

2.22 Ten High Court trials in all were attended from the start of the trial to its completion. Detailed notes were taken of the entire proceedings using a laptop. As far as possible the exact sequence of questions and answers were recorded for all witnesses called in the case, but with particular attention paid to the questioning of the complainer(s) during evidence-in-

chief, cross-examination and re-examination. All references made to s.275 applications and provisions of the 2002 Act were recorded as close to verbatim as it was possible to do so. The case Sitting Papers were used to obtain any further relevant information, such as the details of any application lodged and decided at a preliminary hearing, and the presence of previous analogous convictions of the accused. Table 2.2 shows the charge type and whether or not an application was made in the ten attended trials.

Table 2.2: Attended trials by type of sexual charge(s), whether s.275 application made and decision of court

Charge Type	Without s.275	With s.275 applications								Total
		Allowed in full			Partially allowed		Refused			
		<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	
Rape only	1	1	1	0	1	1 ^(a)	0	0	0	5
Rape with other sexual /non-sexual charges	1	1	1	0	1	0	0	0	0	4
Sexual offences, other than rape	0	0	0	0	1 ^(b)	0	0	0	0	1
Total	2	2	2	0	3	1	0	0	0	10

^(a) the Defence application was partially allowed, the Crown application was allowed in full;

^(b) there were 3 Defence applications in this case; one was partially allowed; one was refused; and the judge refused to consider the third.

2.23 The corresponding tapes of any preliminary hearings dealing with s.275 applications in the attended trials were also transcribed. A list of observed trials with details of sexual charge type, whether an application was made, whether or not a defence of consent was made, and trial outcome can be found in Appendix 3.

Interviews with legal professionals

2.24 Interviews with Judges, Advocates Depute and Defence Counsel were undertaken to address specific aspects of the research questions, and to explore their perceptions and experiences of the legal reform. Face-to-face interviews were undertaken with 4 Judges, 5 Advocates Depute and 5 Defence Counsel (one of whom was a Solicitor-Advocate). Each interview lasted approximately one hour. With one exception, all interviews were digitally recorded and then fully transcribed. The exception was an interview with a Judge who declined to be recorded; in this case 2 researchers attended, one asked questions and the other took handwritten notes. Numbers of interviews with legal professionals are small but provide useful insights into the operation of the legislation. That said, the small number does mean that the views expressed are illustrative rather than representative.

2.25 Legal professionals were approached for interview on the basis that they had been involved in sexual offence cases which invoked the 2002 Act. All had considerable

experience of sexual offence cases, and most had experience of the operation of the earlier 1995 Act.

Interviews with complainers

2.26 Interviews were undertaken with 4 complainers who gave evidence in sexual offence trials heard since the introduction of the 2002 Act. Several research studies have reported difficulties in finding complainers willing to participate in research on criminal justice responses to sexual assault (see, e.g. Gregory and Lees, 1999; Harris and Grace, 1999) and this research was no exception. The final decision to allow complainer interviews to be undertaken was taken by the Research Advisory Group relatively late in the research period, after all of the court-based fieldwork and most of the other interviews had taken place.

2.27 As a result of this late decision, it was not possible to approach complainers for interviews at the same time that they were approached to ask whether they would object to a researcher's presence during the trial, as intended, and this contributed to the difficulties of recruiting complainers to participate in the research. Consequently, complainers were approached solely through support organisations, such as Rape Crisis Scotland, Victim Support Scotland and the Violence Against Women Network of the Scottish Women's Convention, which also ensured that they had access to appropriate support.

2.28 All 4 complainers were female and white. The accused was well known to the complainer in each case. Three of the complainers had been allegedly assaulted by a single male assailant. In the first, which involved a single charge of rape found not proven, the accused and complainer had dated previously. In the second, the accused was the complainer's father. This case involved multiple sexual charges including a rape charge. The accused was found guilty of some charges, but not the rape. The third case involved a single charge of rape, found not proven. The fourth case involved 2 complainers (although only one was interviewed) and 2 accused charged with several charges of a sexual nature, but not including rape. None of the complainers knew whether an application had been made in the case. Interviews with complainers are discussed in Chapter Nine.

2.29 Interviews with complainers typically lasted for between an hour and an hour and a half. Three took place in a comfortable private room in the offices of a support organisation. A support worker was present, at the complainer's request, in one of these interviews. The fourth interview took place in a private office at the work place of the complainer. All complainer interviews were recorded and fully transcribed.

Notations

2.30 All direct quotes from interviews are anonymised and non-attributable. Where quotes are presented from interviews, or reference is made to specific cases, various notations are used. The interviews are identified by a number (e.g. Judge 1; AD 3; Defence 4; C 2). The 30 transcribed trials and the 10 attended trials are coded by a 3 digit numeric reference (e.g. 006; 156; 212), which relate to a case identifier.

CHAPTER THREE: HIGH COURT CASES INVOLVING SEXUAL CHARGES

FINDINGS FROM CASE MAPPING

3.1 This chapter presents the findings of a case mapping exercise conducted in the High Court in Scotland over a 12 month period (1st June 2004 to 31st May 2005). The purpose of the case mapping was to assess:

- The number of cases with sexual charges called to the High Court, and going to trial;
- The proportion of such cases in which s.275 applications were made;
- How often s.275 applications were allowed;
- The relationship between the use of sexual history and character evidence introduced through a s.275 application, and trial outcomes; and,
- The proportion of cases in which a defence of consent was lodged.

3.2 The data from the case mapping exercise was also used as a sampling frame for the identification and selection of a sample of 30 cases for more in-depth analysis of s.275 applications and the use of sexual history and character evidence.

3.3 The first part of this chapter provides an overview of the mapped sexual offence cases called to court. The second part reports data on cases which proceeded to trial. Given the procedural differences between the 2 sets of legislative provisions, in particular concerning when (pre-trial and at trial) and how (written and verbal applications) s.275 applications were made, and the different legislative structure, the baseline data is drawn on mostly in the latter part of the chapter.

Numbers of cases involving sexual charges

3.4 The mapping exercise identified a total of 231 cases involving sexual charges called to the High Court in the 12 month period from 1st June 2004 to 31st May 2005.

Type of sexual charges (mapped cases)

3.5 Rape is the most common charge in sexual offence cases called in the High Court, in that 162 cases (70%) included at least one charge of rape.

Table 3.1 Types of charge(s) in High Court sexual offence cases (June 2004 to May 2005) mapped cases

Sexual charge type	n	%
Cases involving rape charge only	67	29
Cases with multiple sexual and/or non-sexual offences, including at least one charge of rape	95	41
Cases with sexual offences other than rape (e.g. attempted rape, indecent assault, sodomy)	69	30
Total	231	100

3.6 Table 3.1 shows that 67 (29%) of sexual offence cases involved a single charge of rape only;¹⁴ whereas 95 (41%) involved at least one charge of rape with multiple (sexual and/or non-sexual) charges; and 69 (30%) involved sexual charges other than rape, such as indecent behaviour, sodomy, assault with intent to rape, and age-related statutory sexual offences.

Numbers and sex of complainers and accused (mapped cases)

3.7 Complainers in sexual offence cases called in the High Court are overwhelmingly female. Of the 231 mapped cases: 139 cases involved single female complainers (60%); 58 involved more than one female complainer (25%); 13 involved only male complainers (6%); and 18 involved both male and female complainers (8%). In 3 cases the sex of the complainer was not known.

3.8 Accused persons in sexual offence cases called in the High Court are almost always male. Two hundred and twenty five (97%) cases involved a single male accused. Sexual offence cases with multiple accused persons are relatively rare in Scotland's High Courts: 3 cases involved 2 male accused; one case involved 3 male accused.

3.9 Female accused persons in sexual offences are also extremely rare; there were just 2 cases involving females. In one case, a female accused was charged along with a male with 4 charges of lewd and libidinous practices, 2 age-related statutory sexual offences¹⁵, and 4 non-sexual charges; in the other case, 2 females were accused of indecent assault.

Proportion of sexual offence cases with s.275 applications (mapped cases)

3.10 One hundred and three (or 45%) of the 231 cases involving a sexual charge called in the High Court, involved a s.275 application to introduce sexual history or character evidence (see Chart 3.1 and Chart 3.2).

3.11 Chapter One outlined the rationale for encouraging pre-trial written s.275 applications, and the procedure for doing so. A stated intention was to allow the court more time to scrutinise the relevance of evidence and the extent to which it may divert attention onto tangential or irrelevant issues. It was not a stated intention to afford the Defence with multiple opportunities for making an application, although the procedures did exceptionally allow the Defence to make an application during the trial in the event of new evidence. The data presented in Table 3.2 shows the timing of when s.275 applications were lodged, although in over half of the cases this information was not recorded in the available data sources. The information in the table refers to the point in the process when the first s.275 application was made (some cases involved more than one application).

3.12 As described in Chapter One, under the 2002 Act, unlike the 1995 Act, the requirement that an application be made to introduce otherwise prohibited evidence extends to the Crown as well as the Defence.

¹⁴ Included in this category are a small number of single rape charge cases which also included a charge of contravention of bail.

¹⁵ Section 6 Criminal Law (Consolidation) (Scotland) Act 1995 (indecent behaviour towards girl between 12 and 16 years).

Table 3.2 Point in process when (first) s.275 applications made (June 2004 to May 2005) mapped cases

Point in process when first s.275 application made	n	%
Pre-trial	41	40
At commencement or during trial	7	7
Not Known	55	53
Total	103	100

3.13 As Table 3.3 shows, in the majority of the mapped cases the s.275 application(s) were made by the Defence; most cases involved a single application by the Defence (64), and in a small number (11) a single application was made by the Crown. Ten cases involved more than one application by the Defence, and in 18 cases, separate applications were made by both the Defence and the Crown, some of which involved multiple applications by the Defence.

Table 3.3 Numbers of s.275 applications in sexual offence cases and who made them (June 2004 to May 2005) mapped cases

Who made s.275 applications?	No of cases with one s.275 application	No of cases with more than one s.275 application	Total	
			n	%
Crown only	11	0	11	11
Defence only	64	10	74	72
Crown and Defence	0	18	18	17
Total	75	28	103	100

S.275 applications by charges

3.14 As Table 3.4 shows, there was variation in the proportion of cases involving a s.275 application by the charges involved. Cases involving charges of rape were more likely than not to involve an application.

Table 3.4 Selected charges and whether s.275 applications (June 2004 to May 2005) mapped cases

All cases involving selected charges	Without Application %	With Application %	Number of Cases	
			n	%
Rape without other charges	40	60	67	100
Rape whether or not with other charges	49	51	162	100
All sexual offences cases, with no charge of rape	71	29	69	100
Attempted rape or assault with intent to ravish without rape	57	43	21	100
Indecent assault without rape	53	47	19	100
Lewd and libidinous practices and behaviour (inc. towards a girl between 12-16 yrs) without rape	77	23	31	100
Incest or sodomy or attempted sodomy without rape	87	13	16	100

3.15 Among cases that involve charges other than rape, there is considerable variation in terms of the proportions involving applications.. Almost half (47%) of such cases with charges of indecent assault involved applications, as did 43 percent of such cases involving attempted rape or assault with intent to ravish. On the other hand, s.275 applications were found in very few cases involving incest or sodomy.

3.16 Further analysis of rape cases involving multiple charges also shows variation in the incidence of applications by the nature of the other charges. Cases involving rape combined with indecent assault charges were the most likely to involve an application (applications were made in 73% of the 26 cases) followed by cases involving attempted rape or assault with intent to ravish (applications were made in over half of such cases). In contrast, applications were not made in 5 of the 6 cases involving both rape and sodomy and in 2 of the 3 cases involving rape and incest.

Decisions relating to s.275 applications (mapped cases)

3.17 Applications were rarely refused in full by the court. Almost all (60 out of 64) of the single applications made by the Defence were allowed either fully or in part. Of the 11 Crown only applications, 8 were allowed in full, one was refused by the court and 2 were withdrawn by the Crown.

Table 3.5 Decisions on s.275 applications (in cases with a single application June 2004 to May 2005) mapped cases

Who made applications?	Allowed in full	Allowed in part	Allowed following amendments	Refused	Other^(a)	Total
Crown	8	0	0	1	2	11
Defence	31	16	13	1	3	64
Total	39	16	13	2	5	75

(a) these were either withdrawn by the party or considered “unnecessary” by the court.

3.18 Cases containing more than one application show a similarly high rate of success, in that most are allowed either in full or in part. For example, 10 cases involved more than one application made by the Defence only. Of these, 9 cases involved 2 applications, and one case involved 3, making a total of 21 Defence applications in all. Of these, two thirds (14) were allowed.

3.19 As stated above, 18 cases involved separate applications made by both Crown and Defence. Most (15) entailed one application by the Defence and a separate application made by the Crown. All of the Crown applications in these 15 cases were allowed either in full or partially. Thirteen of the Defence applications were allowed either in full or partially, one was refused and one was withdrawn. In one of these cases both the Crown and Defence applications were allowed in full on resubmission at trial having been refused in part during the original preliminary hearing.

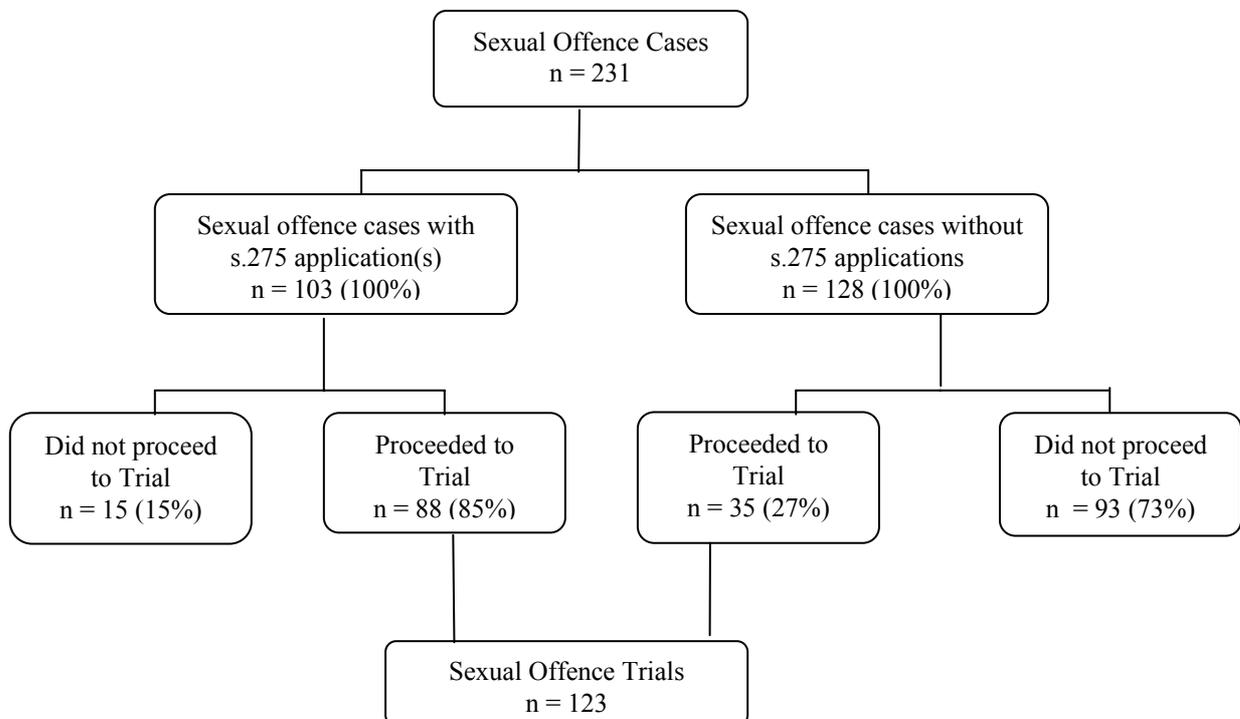
3.20 Of the 3 remaining cases which involved applications made by both parties, the Defence submitted 2 separate applications, both of which (in all 3 cases) were allowed either in full or in part. Two of the Crown applications were allowed, and one was withdrawn.

Sexual offence cases proceeding to trial

3.21 Chart 3.1 shows the numbers of sexual offence cases called in the High Court, those proceeding to trial, and whether or not they contained an s.275 application. Of the 231 sexual offence cases called in the 12 month period, just over half (123 or 53%) proceeded to trial and evidence was led. In 89 cases (39%), the accused pled guilty to all or some of the charges in the indictment, and the case did not go on to trial. The remaining 19 cases (8%) were deserted by the Crown *pro loco et tempore*¹⁶ or the accused failed to appear, and a warrant to apprehend the accused was issued.

3.22 Chart 3.1 shows that s.275 applications were made in 45 percent of all sexual offence cases indicted to the High Court. However when contested and non-contested cases are separated out, as in Chart 3.2, it becomes evident that a relatively high proportion of contested cases involve an application, compared to non-contested cases which have a relatively low incidence of applications.

Chart 3.1 Sexual offence cases indicted to the High Court and proceeding to trial, with and without s.275 applications (1st June 2004 to 31st May 2005)



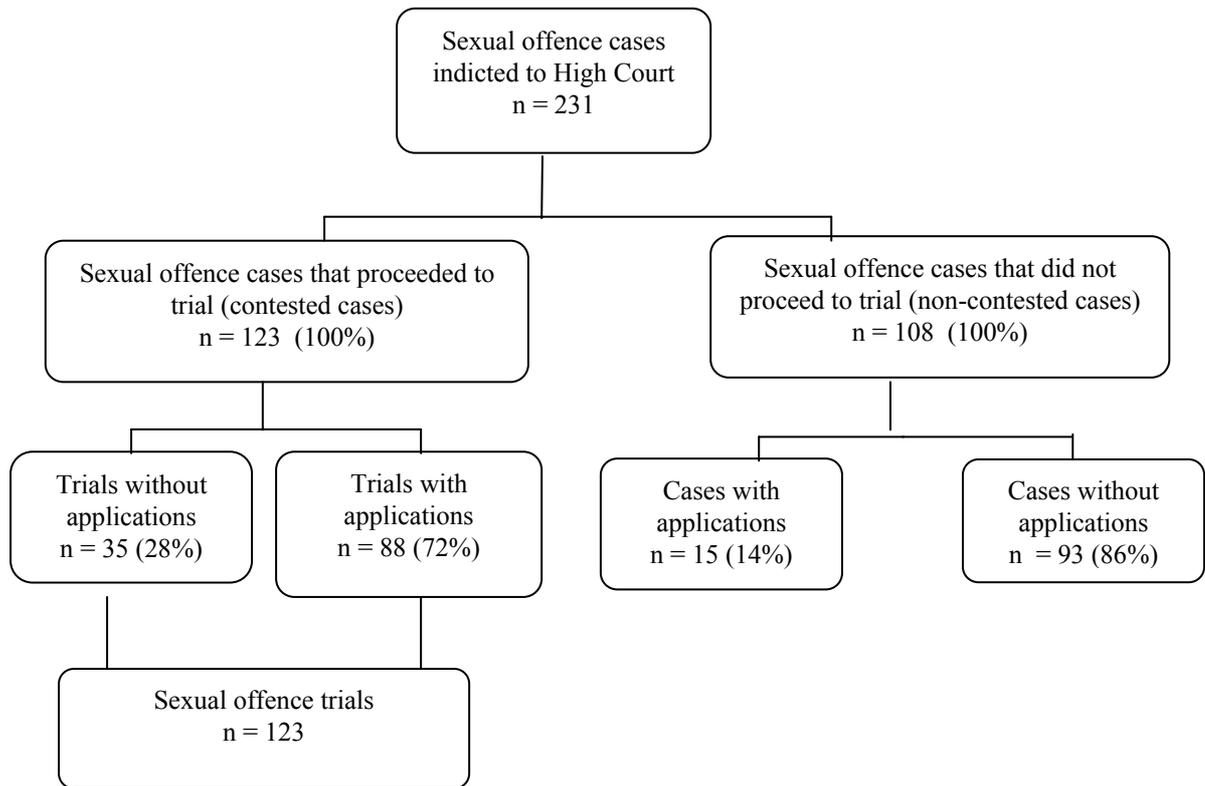
Sexual offence cases with s.275 applications proceeding to trial

3.23 A very high proportion of sexual offence cases in which a s.275 application is submitted proceed to trial (that is, 85%, or 88 out of 103 cases); conversely those cases which do not involve an application are less likely to proceed to trial. The exact relationship between the presence of an application and the likelihood of a case proceeding to trial or not is not clear, although the findings suggest that there is some association. One possible reason for an association between high rates of applications and high rates of “not guilty” pleas, is that the effort involved in preparing an application is not likely to take place if early

¹⁶ Cases which are deserted *pro loco et tempore* (‘without place and time’) on the motion of the prosecutor can be re-raised at a later date.

indications suggest an accused will plead guilty. Of the 231 sexual offence cases indicted to the High Court, more than half (128 or 55%) did not involve an application. Of these just over a quarter, (27% or 35) proceeded to trial. Of those cases which did involve an application, the majority (85% or 88) proceeded to trial.

Chart 3.2 Sexual offence cases indicted to the High Court by plea and s.275 applications (1st June 2004 to 31st May 2005)



3.24 Table 3.6 shows that the total number of cases involving sexual charges indicted to the High Court in the 12 month period June 2004 to May 2005 was higher than the corresponding figures from each of the 3 years of the baseline study. Apart from the 2001 figures, the proportion of cases proceeding to trial is broadly comparable.

Table 3.6 Sexual offence cases indicted to the High Court, current and baseline study

Year	Cases involving sexual offences n	Sexual offence cases going to trial	
		n	%
Current study June 04 -May 05	231	123	53
Base-line study 1999	213	111	52
2000	198	111	52
2001	211	91	43

Charges in sexual offence cases which proceeded to trial

3.25 Of the 67 cases involving only rape identified in the case mapping exercise, 7 out of 10 proceeded to trial; of the 95 cases involving a charge of rape along with other sexual and/or non-sexual offences, over half (54%) proceeded to trial; of the 69 cases involving other sexual offences, over a third (36%) proceeded to trial. Trials involving rape charges are more likely than other sexual offence cases to proceed to trial. These proportions are broadly similar to those found in the baseline study: in the period 1999-2001, 66 percent of the cases indicted with a single charge of rape or clandestine injury and 58 percent of those involving multiple charges including rape or clandestine injury went to trial

Table 3.7 Charges in sexual offence cases proceeding to trial in the High Court (June 2004 to May 2005)

Charges in sexual offence cases	Trials	
	n	%
Rape only	47	38
Rape with other sexual and/or non-sexual charges	51	42
Other sexual offences (e.g. attempted rape, indecent assault, lewd and libidinous behaviour, sodomy, but not involving rape)	25	20
Total	123	100

3.26 Rape was the most common sexual offence dealt with in the High Court. As Table 3.7 shows, four fifths (or 80%) of High Court sexual offence trials involved at least one charge of rape. Almost two fifths (38%) of sexual offence trials involved rape only, with 42 percent involving at least one charge of rape along with other sexual charges. One fifth (20%) involved sexual offences other than rape (e.g. attempted rape, indecent assault, sodomy).

3.27 This is a rather different picture than that produced by the baseline study, as Table 3.8 shows, where cases involving rape accounted for just under two thirds (65%) of High Court sexual offence trials in the 3 year period 1999 – 2001.

Table 3.8 Numbers of cases with sexual charges proceeding to trial in the High Court (1999, 2000, 2001) baseline study

Trials with sexual charges at the High Court	1999	2000	2001	Total	
				n	%
Rape only (one or more charges of rape only)	35	38	33	106	34
Rape with other sexual and/or non-sexual charges *	28	32	37	97	31
Clandestine injury only	7	12	5	24	8
Sexual offences (not involving rape or clandestine injury)	29	28	29	86	27
Total	99	110	104	313	100

* includes 2 cases of rape and murder, one in 2000 and the other in 2001.

3.28 One explanation for the increase in trials for rape since then may be that, since a decision by the Appeal Court in Lord Advocate’s Reference (No. 1 of 2001), the offence of clandestine injury has been effectively abolished. Cases of clandestine injury are now necessarily rape.¹⁷ If the numbers of base-line clandestine injury cases were added to the base-line rape cases, then the overall proportion (73%) is not so markedly different to the proportion of rape cases in the current study (i.e. 80% of all trials in current study involve rape).

Proportion of sexual offence trials with s.275 applications

3.29 As Chart 3.1 shows, almost three quarters of sexual offence trials now utilise a s.275 application (that is, 72%, or 88 out of 123 trials). This is a very marked increase, compared to the base-line study, see Table 3.9, where just over one fifth (21%, or 66 out of 313) of the sexual offence trials heard at the High Court over the 3 years 1999, 2000 and 2001 involved an application.

Table 3.9 Numbers of sexual offence trials, trials with s.275 applications, and total numbers of s.275 applications, current study and baseline study

Year	Sexual offence trials	Trials with s.275 applications		Total s.275 applications
	n	n	%	n
Current June 04-May 05	123	88	72	118
Baseline 1999	111	22	20	28
2000	111	19	17	21
2001	91	25	27	26
Baseline Total	313	66	21	75

3.30 The numbers of trials with multiple applications has also increased. In the base-line study, a total of 75 applications were made in all, as 8 trials involved the submission of more than one application: 5 trials involved multiple applications in 1999; 2 trials in 2000; and one trial in 2001. In the current study, there were a total of 118 applications in 88 trials.

3.31 This can be primarily explained by the opportunities afforded through the changes in the way in which applications are submitted. Although advance written applications are normally decided at a preliminary hearing, there is an opportunity for the Defence to request a continuation, usually to allow the incorporation of new or previously unavailable evidence.

¹⁷ Prior to the decision by the Appeal Court in *Lord Advocate’s Reference (No. 1 of 2001)* 2002 Scots Law Times 466, it was thought that rape required that the woman’s will had been overcome by force, threats of force, or drugging. It was not rape to have sexual intercourse with a woman who was asleep, or insensible through drink or drugs (unless the accused or an accomplice had plied her with drink or drugs for this purpose). Such acts amounted to the criminal offence of “clandestine injury” or indecent assault. The *Reference* decision arose after a student was acquitted of rape at a trial in March 2001 because there was insufficient evidence to prove he had used force to “overcome the will” of the victim. Following a media outcry, the Lord Advocate exercised his statutory power to refer the point of law involved in the case to the Appeal Court for an authoritative ruling. The court ruled that previous court decisions which laid down a force requirement should be overruled. As a result of this decision, the crime of “clandestine injury” was effectively abolished – such conduct is now necessarily rape.

As well as amended or extended applications, an entirely new application may be submitted at a subsequent preliminary hearing, or even at the trial diet itself.

Sexual offence charges in trials with s.275 applications

3.32 The increase in the proportion of trials occurred across all types of sexual charges, but particularly markedly in rape trials. Applications were made in less than one in 4 rape (or clandestine injury) trials (24%) in the base-line study, compared to more than 3 in 4 cases (77%) in the current study.

3.33 Rape charges feature in four fifths of all sexual offence trials (80%, or 98 out of 123 trials) and over three quarters of those rape trials involve applications (75 out of 98 trials).

3.34 More detailed comparisons with the baseline data on the basis of charge type are illuminating. In the baseline trials involving a single charge of rape (or clandestine injury), one quarter of such trials (25%) involved an application, compared to over three quarters (77%) of such trials in the current study. The proportion of such trials in relation to all sexual offence trials was broadly similar in both data sets (33% in the baseline and 38% in the current study).

3.35 Trials with multiple charges of rape (or clandestine injury) accounted for 18 percent of all sexual trials in the baseline, of which a quarter (26%) involved an application. Although there was a far lower proportion of such trials in the current study (8%), four-fifths of these involved an application.

3.36 Looking at trials with sexual charges other than rape, in the baseline these accounted for 29 percent of all cases, and just 13 percent involved an application. Whilst there is a lower proportion of such trials in the current study (20%) over half of these (52%) involved applications to introduce sexual history and/or character evidence.

Trials with more than one s.275 application

3.37 Cases with multiple applications included those where separate applications were made by both the Defence and the Crown (although all multiples were made by the Defence, in all instances the Crown made only one application per case), and those cases where the Defence made more than one application, either because there was more than one complainer, or more than one accused or, as occurred in several of the cases identified here, where the Defence made a number of applications in relation to one complainer.

3.38 The proportion of cases involving multiple applications has more than doubled post-2002, as Table 3.10 shows. Whereas in the baseline study, just 8 out of the 66 trials with s.275 applications (or just over one in 10) involved more than one application, this has risen to 26 out of the 88 trials (or 3 in 10) under the 2002 Act.

Table 3.10 Numbers of s.275 applications made, and who made them (June 2004 to May 2005) trials only

s.275 application made by	Number of s.275 applications in trial			Total Trials
	1	2	3	
Defence only	57	8	1	66
Crown only	5	0	0	5
Defence and Crown	0	14	3	17
Total	62	22	4	88

3.39 Under the 1995 Act, the requirement to make an application to introduce otherwise prohibited evidence, applied only to the Defence. A partial explanation for the rise in multiple application cases can be found in the requirement placed on the Crown to make an application to introduce evidence. In 17 trials involving applications, separate applications were made by both the Defence and the Crown.

3.40 The increase is also partly due to the occurrence of cases involving more than one Defence application, although these numbers are relatively small. Table 3.10 shows this occurred in 9 cases. There were no cases with more than one Crown application. Under the 1995 Act, multiple applications occurred only in trials involving one accused and more than one complainer (i.e. one Defence application per complainer) or in cases with more than one accused (i.e. one Defence application made on behalf of each accused), but never in cases involving a single accused and a single complainer. While more than one application was not expressly prohibited under the previous procedure of speaking directly to the judge during the course of the trial, a second try would obviously risk testing the judge's patience and was not the practice. In all but 2 of the 9 multiple application cases in the current study, there was a single complainer and a single accused.

3.41 As previously stated, the fact that written applications are heard at a preliminary hearing in advance of trial, offers some scope for applications to be amended at subsequent pre-trial diets, or for entirely new applications to be made if, for example, additional evidence comes to light in the run-up to trial, or there is an indication from the court that the application is likely to be refused, or could be strengthened or amended in some way. This is explored in more detail in subsequent chapters.

The decision of the court in relation to s.275 applications (trials)

3.42 Of the total number of 118 applications, 105 were allowed either in full or in part. Two were withdrawn, 3 declared unnecessary by the judge and 8 were refused. Table 3.11 shows that in 57 trials, there was a single application made by the Defence, of which 55 were allowed either in full or in part by the court. In the 5 trials in which the single application was made by the Crown, all were allowed in full.

Table 3.11 Decision of the court in single s.275 application cases (trials)

Party making s.275 applications	Allowed in full	Allowed in part	Refused	Other ^(a)	Total single s.275 applications
Crown only	5	0	0	0	5
Defence only	28	27	1	1	57
Total	33	27	1	1	62

(a) these were either withdrawn or considered “unnecessary” by the court.

3.43 Table 3.12 shows the decisions of the court in those sexual offence trials which involved an s.275 application by both the Crown and the Defence. In 14 trials, both applications were allowed. In 2 other cases, the Crown applications were allowed and the Defence applications were refused and withdrawn respectively.

3.44 In 3 of the trials where both parties made applications, the Defence submitted a second s.275 application, all of which (that is both Defence applications in each case) were allowed in full.

Table 3.12 Decisions of the court where s.275 applications made by both Crown and Defence (trials)

Decisions of the Court	n
Both Crown and Defence s.275 applications allowed in full or in part	14
Crown s.275 application allowed and Defence application refused	1
Crown s.275 application allowed and Defence application withdrawn	1
Crown s.275 application withdrawn and Defence application allowed in part	1
Total	17

3.45 In addition, there were 9 trials involving multiple Defence applications. A total of 19 applications were made in all: 8 cases involved 2 applications and one case involved 3 applications. Of the 19 Defence applications, 11 were allowed, 6 were refused, and 2 were considered “unnecessary” by the court.

3.46 The rate of successful s.275 applications made under the 2002 Act is not dissimilar to that found in the baseline study where verbal applications made during the course of the trial were rarely unsuccessful; indeed only 5 out of 75 were refused entirely. Almost two thirds (63%) were wholly successful in that the court allowed all the evidence sought, and the court allowed the remaining 29 percent with some restrictions placed on the proposed line of questioning or evidence.

The relationship between s.275 applications and trial outcomes

3.47 The recent review of the investigation and prosecution of sexual offences in Scotland undertaken by the Crown Office and Procurator Fiscal Service (published 2006) indicates that of the rape charges that reached court within the period of the one year sample,¹⁸ 26 percent

¹⁸ The COPFS Review counted the number of charges rather than cases with a rape charge so, for example, an indictment with 2 rape charges was counted as 2 rapes (COPFS, 2006).

resulted in a conviction, (19% resulting in a verdict of guilty after trial and 7% resulting in a plea of guilty) (COPFS, 2006).

3.48 As Table 3.13 shows, in the current study, the accused was acquitted of all charges in just over half of the sexual offence trials (51%), found guilty of all charges in 23 percent of trials, and found guilty to some offences in 26 percent of trials.

Table 3.13 Trial outcomes for trials with and without s.275 applications (June 2004 to May 2005) trials only

	Trials with s.275	Trials without s.275	Total	
	n	n	n	%
Acquittal on all charge(s)	47	16	63	51
Guilty of all charges(s)	19	9	28	23
Guilty of some charge(s)	22	10	32	26
Total	88	35	123	100

3.49 In 3 out of 5 rape only trials in which an application was made to introduce sexual history or character evidence, the verdict was one of acquittal, as Table 3.14 shows.

Table 3.14 Trial outcomes for rape only trials, with and without s.275 applications (June 2004 to May 2005)

	Rape only trials with applications	Rape only trials without applications	Total
	n	n	
Acquittal	21	2	23
Guilty	8	3	11
Guilty to reduced charge	1	1	2
Withdrawn	6	5	11
Total	36	11	47

Advance intimation of a defence of consent

3.50 The 2002 Act necessitates that if the accused wishes to lead a defence of consent this should be intimated in advance of trial, Just under a third (74 out of 231, or 32%) of mapped cases lodged a defence in consent in writing.

3.51 Looking only at the sexual offence cases which proceeded to trial, the proportion of cases involving an advance intimation of consent rose to over half of the trials (68 out of 123, or 55%), as shown in Table 3.15.

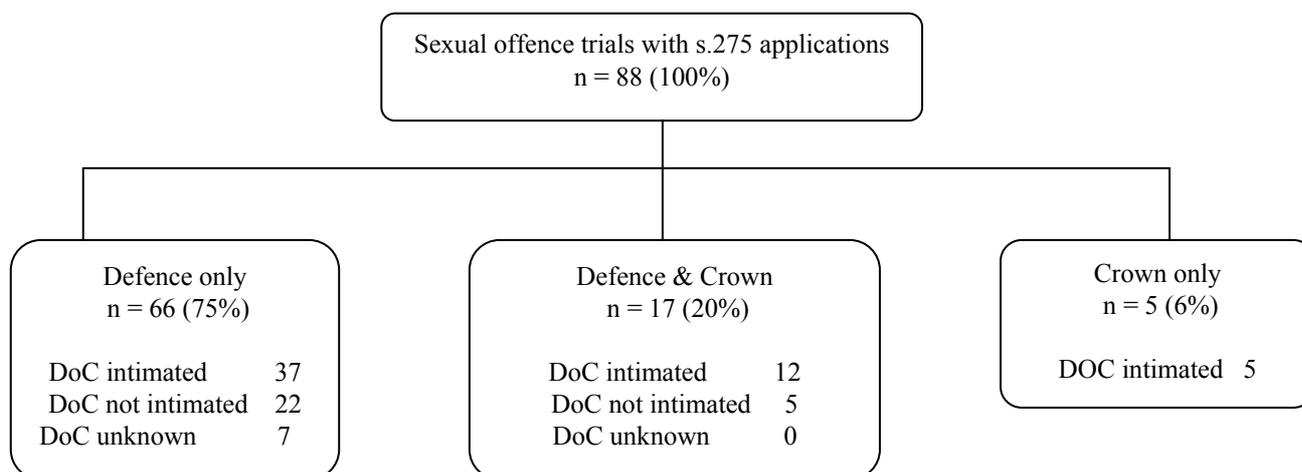
Table 3.15 Sexual offence trials with and without notification of defence of consent (June 2004 to May 2005)

	Rape only	Rape with other sexual/non-sexual charges	Other sexual offences	Total
Defence of consent lodged	39	23	6	68
Defence of consent not lodged	7	23	12	42
Not known	1	5	7	13
Total	47	51	25	123

3.52 Although advance notice of a defence of consent was not required under the 1995 Act, the baseline study found that a defence that the sex was consensual was explicitly put forward by the Defence in approximately 40 percent of the sexual offence trials monitored.

3.53 In the base-line, consent was given by the Defence as a key reason in 20 of the 75 applications made in the High Court (4 of which involved mistaken-belief-in-consent). Consent was also the main defence argument in another 15 trials involving s.275 applications, although not explicitly stated in the verbal application to the court. Consent was most commonly introduced by the Defence during the cross-examination of the complainer, but was pursued through the cross-examination of subsequent Crown witnesses, and the examination of Defence witnesses.

Chart 3.3 Sexual offence trials with s.275 applications, who made application, and whether or not a defence of consent (DoC) was intimated by Defence



3.54 Chart 3.3 depicts the sexual offence trials with s.275 applications, showing which party made the application and whether or not a defence of consent was intimated. The increased proportion of trials with a defence of consent suggests that the procedural requirement to make such a defence explicit prior to trial has led to the increase in the number of cases in which the defence is intimated. However, this must be treated with some

caution, as quite different methods of recording whether or not a defence of consent was led were used in the 2 studies.¹⁹

Reasons for increase in s.275 applications

3.55 The explanation for the rise in the number of trials in which applications are made is complex and a number of causes are discussed in turn. First, however, one possible cause can be quickly eliminated. This is not solely the result of the requirement placed on the Crown to make an application to introduce evidence or questioning. There were just 5 trials (or 6%) in which the Crown made an application which did not also involve an application by the Defence; in the other 17 trials with a Crown application, the Defence also made an application (see Chart 3.3).

3.56 The likelihood of an application being allowed by the court cannot be so easily discounted as a reason for the high numbers of applications. Whilst the views from interviewees should be read as illustrative rather than representative, they nevertheless offer some useful insights. All were aware of the high incidence of applications, and the likelihood that, for the most part, such applications will be allowed, at least in part if not in full, by the court. This was put forward as a possible reason for the high numbers of applications by several interviewees. It is also the key reason put forward for increased number of such applications by the many legal practitioners that the researchers came into contact within the course of doing the research. However, it has to be remembered that a high likelihood of success was also a feature of the previous legislation. Whilst the very high likelihood of success is almost certainly an influential factor, there are other precipitating factors which, taken together, have led to the increase in applications, compared to the figures found in the baseline study.

3.57 One factor leading to the increase in cases with applications may be found in what have been termed “Anderson appeals”, following the case in 1995 of *Anderson v HM Advocate*.²⁰ The appellant in the case claimed that his defence had not been properly conducted, in that his solicitor advocate had ignored his instructions to challenge the character of one of the complainers.²¹ Here, it was recognised for the first time that the conduct of the Defence of an accused by his representatives could result in a miscarriage of

¹⁹ In the baseline study, researchers were reliant on the Defence identifying consent to sex on the part of the complainer as a reason for wishing to introduce otherwise prohibited evidence in the application made verbally to the court, usually just prior to the cross-examination of the complainer, or an indication that a defence of consent had been led in the trial recorded by the court clerk in the Book of Adjournal. In contrast, in the current study, whether or not a defence of consent had been lodged was ascertained from the presence of the written notification contained in the case Sitting Papers.

²⁰ *Anderson v HM Advocate* 1996 J.C.29; 1996 S.L.T.155; 1996 S.C.C.R.487

²¹ The accused in *Anderson* was charged with assault. Following his conviction, he complained at appeal that his solicitor advocate had ignored his instructions to challenge the character of one of the complainers, who he claimed was a violent person, by putting to him in evidence his previous convictions. The court rejected the appeal, and highlighted that not only was the appellant’s contention regarding the complainer’s character unsupported by the evidence, any such attack was irrelevant to his defence of alibi. More fundamentally, however, the decision as to whether an attack should be made upon the character of a witness related to the manner in which the defence was conducted was accordingly for the solicitor advocate to take, not the accused. The Appeal Court drew a distinction between an instructed defence (on which the Defence required to accept direction from the accused) and decisions made as to how the defence should be presented (on which the Defence is entitled to refuse such direction and proceed according to his or her own discretion). Only when the instructed defence was not presented at trial would the court be prepared to intervene (*Anderson v HMA* 1996 JC 29)

justice. It is impossible to measure in any objectively precise way the impact that that decision may have had on the approach of Defence practitioners to the preparation and conduct of cases. However, among legal practitioners the view is widely held that it has had a significant impact.

3.58 Following *Anderson*, subsequent appeals in cases involving sexual offences (as well as other kinds of offences) saw some extension to the principles laid down in that case concerning the presentation of an accused's Defence, and somewhat widened the scope of so-called "defective representation" appeals.²² Although few appeals based on *Anderson* have been successful, subsequent opinions of the Criminal Appeal Court have led practitioners to be apprehensive that the principle in *Anderson* may not be restricted to the question of whether the accused's Defence was presented, but may be extended to the manner in which it was presented.²³ There is a perception amongst practitioners that Defence Counsel and solicitors may be reluctant to decide on the basis of their experience not to pursue what might be considered fairly speculative lines of inquiry.

3.59 Three of the Defence interviewees spontaneously referred to being "aware of *Anderson*" when preparing to defend in sexual offence cases. As one said,

"The obligations from a Defence perspective have increased and certainly the awareness of those obligations are much more sharply focussed I think, since the onset of the legislation." (Defence 2)

3.60 This is also a perception held by one of the Advocates Depute, who said:

"The requirement to make a written application in advance and the making of an order combines with what are called *Anderson* Appeals - these are appeals

²² In *Garrow v HMA* 2000 SCCR 772, the court held that the failure of the Defence to obtain a medical opinion on the appellant's amended defence to a charge of rape, resulted in that defence not being properly presented to the jury. The court was prepared to look beyond whether the defence was presented at all, and consider the manner in which it was presented. In *E v HMA* 2002 SCCR 341; 2002 SLT 715, the appellant was convicted of raping his 2 daughters and appealed on the ground that his Counsel had not adequately prepared or presented his defence. In particular, it was alleged that the appellant had provided his solicitor with material bearing upon both the medical evidence which it was anticipated the Crown would lead, as well as the possible manipulation of the child witnesses into giving false accounts of sexual abuse. Following conviction the appellant obtained expert reports which reflected the material he had earlier produced, which supported certain aspects of his defence. He argued that to substantiate his defence, the children's mother (his former wife) should have been cross-examined as to her character. He claimed she had previous convictions for dishonesty, had been vindictive and violent towards the complainers in the past and had unduly influenced them. E's Counsel, in his response, acknowledged that he had not made an "all out attack" on the mother's character and explained that this had been a tactical decision, to avoid antagonising the jury, and exposing the appellant, who also had previous convictions, to a similar attack. The appeal was upheld. The Lord Justice Clerk stated that the distinction made in *Anderson* between a failure to present an instructed defence and the judgement as to the manner in which it is presented should not be applied "too rigidly". The underlying principle was whether the presentation of the appellant's defence was such that he did not receive a fair trial. A second appeal judge was of the view that a "substantial line of defence", which supported the proposition that the complainers' evidence was incredible and unreliable, was not presented to the jury. Given the nature of the defence, he considered that there was no option but to also attack the complainers' credibility on the basis that their evidence was deliberately false. Such an approach would also have necessitated an attack upon the mother's credibility, even though this would have exposed the appellant himself to such an attack.

²³ *Hemphill v HM Advocate* 2001 S.C.C.R.361; *E v HM Advocate* 2002 S.C.C.R.341 and *Winter v HM Advocate* 2002 S.C.C.R.720

based on inadequate representation – to put the Defence under enormous pressure actually to make the applications and to ask the questions. Whereas under the former law the Defence could take a view in the course of the conduct of the trial about whether or not this was really necessary, and desirable, now in order to avoid an Anderson Appeal which blames them, if they think there's a possibility of it, they put the application in. If they get an Order granting the application, in whole or in part, they feel that having got the Order saying they can do this, they've got to ask the questions, because if they don't and the chap gets convicted he'll appeal on the basis that they didn't do what they'd been allowed to do.” (AD 1)

3.61 A second set of factors contributing to the increased number of s.275 applications, put forward by interviewees, concerns the impact of some of the elements of the High Court Reform Programme, described in Chapter One. In particular, this concerns the emphasis on the early preparation of cases by the Defence, and the early disclosure of statements and other evidential material by the Prosecution to the Defence. This, along with the requirement to submit a written application at the preliminary hearing, means that the need for a s.275 application is considered much earlier in the process than was the case under the 1995 Act, and information which may prompt a s.275 application by the Defence is available at an early stage of the proceedings.

3.62 As one Defence interviewee said,

“I think people have to grasp cases at an early stage and I think that’s beginning to, you know, there’s been a culture change with this Bonomy thing ... which has meant disclosure at an earlier stage and people have to grasp cases at an earlier stage.” (Defence 3)

3.63 This was echoed by an Advocate Depute:

“It’s preliminary hearings. And now the Defence know that they can’t come along on the Friday before the trial starts on a Monday with an application, with a list of witnesses, with a list of productions, and that’s what frequently happened in the past. Now everything has to be put in place well in advance of the trial. So people are having to apply their minds to this.” (AD 2)

3.64 There have also been some noteworthy appeals that have overturned the decision by the trial Judge not to allow evidence or questioning under application. The impact of the decisions taken by the Court of Appeal in such cases was seen by some of the legal practitioners interviewed in this research as another reason for the increase in s.275 applications.

3.65 In *Cumming v HM Advocate* 2003 SCCR, 261, the Appeal Court over ruled the trial Judge’s exclusion of some of the character evidence specified under a s.275 application. In *Kinnin v HM Advocate* 2003 SCCR 295 an appeal against the exclusion of sexual history and character evidence was not opposed by the Crown and so was granted without much discussion. In *Tant v HMA* 2003 GWD 24-686, the appeal, which was against conviction, involved a successful submission that the trial Judge had wrongly refused an application for permission to ask the complainer whether she accepted that she had had consensual sexual intercourse with the accused some months previously. The Judge took the view that to allow

the application would be to allow the Defence to go into matters which the new legislation specifically excluded. The Appeal Court, however, took the view that such questioning was material to the accused's Defence, and it was therefore contrary to the interests of justice to refuse to admit it.

3.66 The role of the Crown in 2 of the appeal cases has been to support opposition to judicial rulings excluding sexual history or character evidence either at the preliminary hearing and/or during the appeal processes. Whilst it was not possible to assess the direct effect of Appeal rulings on the making and deciding of applications, interviews with all legal professionals indicated that they consider Appeal Court decisions influential.

3.67 Some commentators have alluded to the position taken by the Crown as an important factor in the incidence of s.275 applications made by the Defence (Lothian, 2003) on the basis that where an application is made which is not opposed by the Crown, the trial Judge may take the view that what is required is an adjudication on the parties' submissions rather than an independent assessment, and hence allow the application (2003:53). The nature of the competing interests which must be weighed by prosecutors in their approach to applications was recognised in the COPFS Review (2006), which recommended that revised guidance on the approach to applications be issued to all prosecutors. Interviews with Judges concurred with this position to some extent, viewing the position taken by the Crown as an important factor in deciding whether or not to allow the evidence or questioning sought, and this is discussed in more detail in the following chapter.

3.68 Another set of related factors contributing to the increased numbers of applications concern the increased scope of the legislation and the fact that applications may cover questioning that would not have previously required an application, including general character evidence. Several interviewees remarked upon the consequences of this, believing that there are more applications simply because the scope of the legislation is wider. The extent to which applications include questioning or evidence that would not have previously required an application is pursued in subsequent chapters.

CHAPTER SUMMARY

3.69 Two hundred and thirty one sexual offence cases were indicted to the High Court in the 12 month period 1st June 2004 to 31st May 2005. Forty five percent of these contained a s.275 application to introduce sexual history or character evidence. Just over half (53%) of these sexual offence cases proceeded to trial. Eighty percent of all High Court sexual offence trials involved at least one charge of rape.

3.70 The accused was acquitted of all charges in just over half of the sexual offence trials (51%), found guilty of all charges in the indictment in 23 percent of trials, and found guilty to some and acquitted on some offences in 26 percent of trials.

3.71 Almost three quarters of sexual offence trials taking place in the High Court following the 2002 Act now seek to introduce sexual history or character evidence by means of a s.275 application (that is, 72%, or 88 out of 123 trials). This is a very significant increase, of almost 3 and a half times, compared to the base-line study, where just over one fifth (21%, or 66 out of 313) of the sexual offence trials heard at the High Court over the 3 years 1999, 2000 and 2001, involved a s.275 application.

3.72 The proportion of cases involving multiple applications has increased, from just over one in 10 cases in the base-line study, to 3 in 10. Successive applications were made both pre-trial and at the trial itself, in relation to the same complainer. This seems to run counter to legislative intent. The requirement for advance written application affords an opportunity for Defence requests for continuation, largely in order to assimilate new or previously unavailable evidence in the application. This can result in additional, as well as amended applications.

3.73 The overwhelming majority (97%) of s.275 applications are successful, in that the evidence sought is almost always fully or partially allowed. The court sometimes facilitates applications and very rarely entirely disallows applications. This is similar to the situation in England and Wales (see Kelly *et al*, 2006).

3.74 Rather perversely, it seems, the new provisions have resulted in an increased proportion of trials where requests are made to introduce sexual history or character evidence. The submission of an application shows signs of becoming a routine aspect of case preparation in sexual offence contested cases. Whilst the majority of applications are made by the Defence, the Crown made an application in one quarter of trials containing applications (or 22 out of 88 such trials). Most of these occurred in cases where an application was also made by the Defence.

3.75 Over half of the trials involved an advance intimation of a defence of consent (55%).

3.76 There are several reasons for the increase in applications. The requirement that the application be made in advance and in writing has combined with other changes in procedure to heighten early consideration of the possibility of an application by the Defence. These other changes include: greater emphasis on early preparation for preliminary hearings; more extensive and earlier disclosure by the Crown of material and evidence that may be pertinent to the decision of whether or not to lodge an application; and the effect of “Anderson Appeals” and other influential Appeal Court decisions on cases which have involved applications. Some appeals have over-turned decisions not to allow evidence sought, and upheld the inclusion of character evidence as material to the case. It is widely understood that s.275 applications are likely to be successful and the otherwise prohibited sexual history and character evidence allowed, at least in part. Furthermore, the increased scope of the restrictions to include general character evidence has also contributed to the increase in the number for applications.

3.77 The legislation has had an apparently rather perverse effect, in that the vast majority of sexual offence trials, and almost all trials for rape, now involve requests to introduce (often extensive) questioning or evidence on the sexual history or character of the complainer, and moreover, such requests are overwhelmingly allowed. The result is that the introduction and use of such evidence under the 2002 Act is more extensive than before.

CHAPTER FOUR: MAKING S.275 APPLICATIONS TO INTRODUCE OTHERWISE PROHIBITED EVIDENCE OR QUESTIONING

APPLYING THE PROVISIONS

4.1 This chapter aims to establish how the relevant provisions of the 2002 Act are being applied in practice, by focusing on how applications to introduce otherwise prohibited evidence or questioning are made. As such, the chapter focuses primarily on the pre-trial process.

4.2 The chapter describes the process of submitting applications. It also provides a detailed examination of the written contents of s.275 applications, including the nature of evidence sought, the nature of questioning proposed, the issues in the trial to which evidence is considered to be relevant, the reasons why evidence is considered relevant, and the inference(s) that the court should draw from the evidence as put forward by the Crown and the Defence in their written s.275 submissions to the court (see Appendix 4 for a full list of evidence sought in applications).

4.3 In order to illustrate the process of making applications and offer insights in terms of the nature of the evidence or questioning sought, the chapter also draws on data from the in-depth analysis of transcribed trials and attended trials with applications.

Table 4.1 Transcribed and attended trials by type of sexual charge(s), whether s.275 application made and decision of court

Charge Type	Without s.275	With s.275 applications (Final decisions)								Total
		Allowed in full			Partially allowed		Refused			
		<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Defence only</i>	<i>Crown & Defence</i>	<i>Crown only</i>	
<i>Transcribed trials</i>										
Rape only	5	3	3 ^a	3	3 ^b	1 ^c	1	0	0	19
Rape with other sexual /non-sexual charges	1	2	0	0	2 ^d	0	0	1 ^c	0	6
Sexual offences other than rape	0	3	0	0	0	0	1	0	1	5
<i>Total</i>	<i>6</i>	<i>8</i>	<i>3</i>	<i>3</i>	<i>5</i>	<i>1</i>	<i>2</i>	<i>1</i>	<i>1</i>	<i>30</i>
<i>Observed Trials</i>										
Rape only	1	1	1	0	1	1	0	0	0	5
Rape with other charges	1	1	1	0	1	0	0	0	0	4
Sexual offences other than rape	0	0	0	0	1 ^e	0	0	0	0	1
<i>Total</i>	<i>2</i>	<i>2</i>	<i>2</i>	<i>0</i>	<i>3</i>	<i>1</i>	<i>0</i>	<i>0</i>	<i>0</i>	<i>10</i>
Total All Trials	8	10	5	3	8	2	2	1	1	40

Notes to table: **a.** In one case the Crown s.275 application was withdrawn before trial; **b.** One case involved 3 s.275 applications for same complainer: one allowed, 2 refused; **c.** In both cases, the Crown s.275 application was allowed in full; **d.** Includes one case with 2 s.275 applications, one of which was refused; **e.** Defence submitted 3 s.275 applications: one partially allowed; one refused, and the third considered unnecessary.

4.4 Table 4.1 presents information on the quantity and the nature of the data used in this and subsequent chapters. It shows the types of charges involved in the 30 transcribed and the 10 attended trials, whether or not s.275 applications were made in the trial, and the corresponding decisions by the court. Twenty four of the 30 transcribed trials involved at least one s.275 application, as did 8 of the 10 observed trials (see Appendices 2 and 3 for further details of charges, s.275 details and verdicts in these trials).

4.5 The chapter also draws on interviews undertaken with the legal practitioners in order to present their views on the process of making applications and the changes in procedure introduced in the 2002 Act, including the need for the accused to give advance notification of a defence of consent. Interview data is also drawn on in order to assess the impact of those changes from the perspective of practitioners involved in sexual offence trials.

Advance notification of defence of consent

4.6 Chapter Three detailed the proportion of cases which involved a defence of consent; in those cases which proceeded to trial, it was just over half (55%).

4.7 Judges regarded the required prior notice of a defence of consent as either neutral or as helpful. The former position was summed up by the observation that: “the Prosecution is on notice in any case that consent will be an issue” (Judge 1). In contrast, Judge 4 stressed that it gave the Crown and the court proper notice and presuming that because the Crown had notice, it allowed the complainer notice that such a defence would be used. It also allowed the Crown to investigate any issues surrounding consent in advance of the trial.

“I would say that's been helpful, in the sense that it means everyone knows the limitations of what's going to happen in the trial before you get there. And so the Crown have proper notice of what the line is going to be. The court has proper notice of what the line is going to be. And of course, because the Crown have it that means that the complainer has it. And so that means that the Crown can investigate any issues surrounding that in advance of the trial. And can raise it with the complainer as well.” (Judge 4)

4.8 However, interviews with Advocates Depute suggested that complainers are not always informed of this, largely because of a concern that this might affect the evidence which the complainer will give, and create a risk of allegations of coaching. In response to a question on whether and when complainers are told, Advocate Depute 1 said:

“No. A defence of consent is simply notice to the Crown. I would however expect that the precognoscer will always have asked the complainer questions directed to the question of consent. You can see it coming. You can see it coming in most cases anyway. If you've got a rape and you can prove intercourse, then it's either consent or it's an honest belief that there was consent, it's got to be one of these 2, so you can see it coming and you take account of it. What you don't do is say to the complainer “he says that you consented”, because if you do that you'll affect the evidence that she gives. And also what will happen will be that in the court she will say “the Prosecutor told me that he said that I consented and I didn't”. And all hell will break loose about what the Prosecutor has been telling the complainer and were we influencing and coaching.” (AD 1)

Advance written notification to introduce otherwise prohibited evidence

4.9 Where either the Crown or the Defence seek to lead evidence about the complainer’s sexual history or character, written notice must be given, ordinarily, not less than 7 days before the preliminary hearing in the High Court.²⁴

4.10 The purpose of this advance submission is to ensure that the application is raised, as far as possible, before the trial rather than at a point when evidence is being led. Although later notice of an application may be permitted, this is only on “special cause” shown, and in these circumstances, a s.275 application could be considered by the court at a later stage, or indeed, during the course of the trial itself. These requirements apply to both Crown and Defence.

Who is making s.275 applications?

Table 4.2 Party making s.275 applications (transcribed and attended trials)

	Transcribed trials with s.275	Attended trials with s.275	Total s.275 trials
Crown and Defence	4	3	7
Crown only one s.275	5	0	5
Defence one s.275	9	5*	14
Defence two s.275	5	0	5
Defence three s.275	1	0	1
Total	24	8	32

*In one case (234) the same application was submitted 3 times: the first time it was considered not relevant; the second submission was partially allowed; and on the third submission, the judge refused to reconsider the application.

4.11 Chapter Three showed quite clearly that the majority of applications are made by the Defence. This is no different in the sample of 32 transcribed and attended trials as Table 4.2 shows.

Defence decision-making concerning s.275 applications

4.12 The need for written s.275 applications to be notified in advance, and decided at a preliminary hearing, together with the enhanced disclosure of information gathered by the Crown (see Chapter One) have meant a number of changes in approach to case preparation taken by the Defence. In particular, this has affected the timing of their decision concerning whether or not to make an application to introduce sexual history or character evidence.

4.13 Interviews with Defence practitioners revealed that they assess the need for a s.275 application in a sexual offence case at a very early stage of the proceedings, often before the case has been indicted. In answer to a question about when a decision to make an application would first be made, one said:

²⁴ The 2002 Act stipulated that this should be not less than 14 days before trial, but this was subsequently amended by the Criminal Procedure (Amendment) (Scotland) Act 2004 to 7 days before the preliminary hearing in the High Court.

“It depends on what information I have at the first meeting. Sometimes, historically the Crown has been quite slow in giving you information and you might not have the full set of precognitions. Now with the new disclosure rules, when you first come to consult with the client, you tend to have all the police statements, so you’ve got a broad picture of what the case is against the accused. My general practice is if I have a full set of statements, then we will go over that and yes my questions at that stage – because I will have a statement from the complainer – will be targeted to find out if there is anything that will require a s.275 application.” (Defence 1)

4.14 The key impact of the requirement for advance notification of an s.275 application from the perspective of Defence practitioners is that consideration of whether there might be a need to introduce sexual history or character evidence comes at a much earlier stage in the proceedings than was the case under the 1995 Act or, as one said “preparations are a lot more front-loaded” (Defence 3). The following 2 extracts sum up the Defence position on the difference between the 1995 Act and the 2002 Act in terms of the need for early stage case preparation:

“Now I specifically ask for information which I think might be the subject of a s.275 application. I mean I won’t identify it to an accused but I will ask around about information, if there’s any information that they know about the complainer etc. and my questions will be specifically targeted to eliciting information that might be the subject of a s.275 application.” (Defence 1)

“I’m having a consultation this afternoon with a firm of solicitors in connection with a rape case which has not yet been indicted, it’s still at the petition stage, and this is our first consultation. It won’t be fully detailed, but it will be sufficient to let me know whether s.275 is going to be on and that will be the first note I’ll make today in big, bold letters s.275.” (Defence 2)

4.15 Interviews with Defence practitioners also indicated an approach which erred on the side of making an application if they could identify any line of questioning or evidence that they regarded as having a bearing on the credibility or consent of the complainer which seemed likely to be admitted:

“I do think that we’re back to covering ourselves again and I want to make sure that I’ve done all that I can, it won’t be left open to criticism in the future, whilst on the one view as you and I sit here we may say how could [sexual history evidence] be all that relevant, I think in the eyes of some people on a jury it might well be. I think that may well ring as quite a strong factor to some people.” (Defence 3)

4.16 The approach of erring on the side of making an application included taking the precaution of making an application even when the proposed questioning or evidence concerned events shortly before or after the subject matter of the charge, and were, therefore, arguably beyond the need for an application:

“... you feel you really have to avoid any comeback on you in these days of Anderson appeals and all this sort of thing or defective representation. You

really have to almost adopt a belt and braces approach. And if you are in doubt, “Is this shortly before or shortly after?” Put it in.” (Defence 4)

4.17 This interviewee also went onto explain how changes in disclosure had opened up new material to draw on in constructing an application concerning the credibility of the complainer.

“With disclosure now such as it is, I mean we get all the police statements now, statements given by the complainers, these can be used in cross examination which we couldn’t do before, ... so that again opens up areas of attacks on credibility because there might be a prior and [in]consistent statement, for example if the complainer has said in evidence, “I was raped in the living room” and then in the police statement said “It all happened in the bedroom”.” (Defence 4)

4.18 The fact that the Defence may be making s.275 applications which need not be made in the first place, may be one of the reasons why the Crown do not oppose Defence applications, although this possibility was not put forward by any of those interviewed.

Deciding not to make an application

4.19 Informal conversations with Defence practitioners in the courts during the course of research field work revealed that where an accused had previous analogous convictions, then this would act as a strong disincentive for not making applications, even where they thought that the use of sexual history or character evidence was relevant and would assist the Defence case. This view was upheld in formal interviews, as Defence 5 put it: “It would have to be pretty powerful [evidence] before you’d put a rape conviction before the jury and so no I probably wouldn’t make one.” The view of practitioners in relation to the potential disclosure of an accused’s previous analogous conviction following a successful Defence application, and the extent to which previous convictions of the accused are disclosed is discussed in much more detail in Chapter Six.

Crown decision-making concerning s.275 applications

4.20 In the first instance, Crown applications are drafted by an indicter within the Crown Office, although, if called upon to do so, Advocates Deputes may give instructions as to the need for a Crown application, but only if asked at an early stage.

“When we come to prepare a case for the preliminary hearing we should be considering whether there’s anything which should be covered by an application and then giving a further instruction that an application be prepared.” (AD 3)

4.21 The Advocates Depute interviewed had mixed feelings about the need for the Crown to make an application to introduce sexual history evidence or, as one put it in relation to the leading of evidence about virginity, the need to make an application to lead evidence of “the absence of sexual history evidence”:

“I’ve mixed feelings about that. It’s a pest. And it’s very easy to overlook it. And it’s very easy to overlook it because this is our complainer. Of course we need to lead evidence about that, if relevant. To have to go to court and make an application to do what of course we have to do. On the other

hand if the point of this is to make the court take responsibility for the protection of the privacy and dignity of the complainant then I can see why this would have to be even handed and why the Crown would have to do it as well. It just seems like an awfully cumbersome thing to have to do and the parameters of it are not very clear. There was, in one case, an Application recently, I think, to establish that the complainant had not had sex. Now I'm not at all sure that the Act requires authority for that." (AD 1)

4.22 Whilst there was broad agreement amongst Advocates Depute concerning the need for the Crown to make applications, there was a view that it was a "cumbersome" procedure and that, sometimes, the parameters are unclear. As one said:

"It's fair enough. What's sauce for the goose is sauce for the gander and there are occasions which the Crown need to raise restricted issues to put matters in context and so it's quite proper that the same restrictions should apply to the Crown and the Crown should have to ask permission of the courts to raise these issues." (AD 2)

4.23 A third suggested that the need for an application is not always at the forefront of the Crown's mind, unlike the Defence who are very mindful of the possible need for an application from a very early stage in the proceedings. Moreover, the possibility that the Advocate Depute at trial may be a different person to the one at the preliminary hearing(s) can present difficulties:

"... I think it's more difficult to remember to prepare and to decide what the approach is, particularly from the point of view of the Crown when there will be a different AD who prepares the case from the one who runs it. So it's making a decision about what someone in the future would wish to have covered. But I think, in general, there's a greater risk that something will be overlooked from the Crown because we don't come at it as thinking ... we are attacking her character, ... the Act appears to be to protect attacks on character. We tend to be seeing it as explaining how it is that what she says is correct. We will be doing it on the whole to boost credibility." (AD 3)

4.24 The Crown and Defence will inevitably have a different approach to "rape shield" legislation, as they have different interests. The Defence will be looking very keenly at undermining and attacking the complainant, who will be the principal witness against the accused. This will often be the basis of the Defence case. As Advocate Depute 3 notes, the Crown position is quite different. In the main, the Crown will not be intending to lead evidence which will serve to undermine the complainant. There may be no evidence from the Crown, which would require an application.

The requirement of a written s.275 application

4.25 Under the 1995 Act, s.275 applications were submitted verbally during the trial, usually following the complainant's evidence, although occasionally during the complainant's cross-examination by the Defence. The discussion which preceded the decisions by the court as to whether or not to allow the evidence or questioning sought, was usually very brief. The Defence usually made reference to the provisions of the legislation which set out the exceptions in s.275 (1) under which the evidence could be introduced. Ninety one percent of all applications in the baseline study invoked s.275 (1) (c) "the interests of justice", either on

its own, or in combination with one or more of the other exceptions. The issues in the trial which the evidence was intended to address were infrequently specified.

4.26 Chapter One details how, under the current legislation, s.275 applications now need to specifically address certain matters and so adopt a particular format, as follows:

- a) The evidence sought to be admitted or elicited;
- b) The nature of any questioning proposed;
- c) The issues at trial to which that evidence is considered to be relevant;
- d) The reasons why that evidence is considered relevant to those issues; and,
- e) The inferences which the applicant proposes to submit to the court that it should draw from that evidence.

4.27 An intention of the written advance notification is 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.

4.28 Written applications under the 2002 Act provide the court with the opportunity to see clearly what evidence is being sought, the precise nature of such questioning, and the reasons such evidence is considered relevant to those issues.

4.29 The requirement that the s.275 application be in writing was generally seen by Judges as a sensible procedure encouraging precision and as one put it: “if one Judge is to be bound by another then it has to be in writing” (Judge 1). Two others (Judge 2 and Judge 4) maintained that the requirement that a written application be lodged in advance of the preliminary hearing enabled the Crown to “prepare the complainer, for the lines of cross-examination and indeed to produce evidence to rebut any lines which are being developed” (Judge 2). However, both Judges stated that they did not know whether the Crown sought to inform the complainer about applications.

4.30 The need for precision in drafting was recognised by both Defence and Advocates Depute:

“They don’t want general comments like on a day in 2004 the ... complainer went to a nightclub and left with a stranger. That is just ... is not specific enough for the court’s purposes. So they do require the Defence to do some work and not just fly kites.” (AD 2)

4.31 Whilst Defence and Advocates Depute felt that written applications were useful for forcing attention on evidential requirements and the key issues in the trial, some spoke of the requisite format leading to a degree of overlap and repetition in the written application. Scrutiny of written applications indicated considerable overlap in the required parts, particularly those dealing with the issues to which the evidence is relevant, the reasons why it is relevant and the inferences to be drawn from the evidence or questioning sought.

4.32 The next sections present findings from the written contents of applications made in the 32 transcribed and attended trials. Since the overwhelming majority of applications are made by the Defence, they primarily deal with those applications, although one section is devoted to Crown applications.

EVIDENCE OR QUESTIONING SOUGHT TO BE ADMITTED OR ELICITED

4.33 In a little over half (18) of these trials, a single application to introduce sexual history or character evidence was made. Thirteen trials involved 2 applications, and one trial involved 3 separate applications. This means a total of 47 applications were made in the 32 trials.

4.34 Unlike such applications made under the 1995 Act, there was not always a specific reference made by the party making the application to the specific exception clauses that may apply in each case. Rather, the written application details particular questions to be asked of the complainer (or any other witnesses), and outlines the purpose of the evidence to be elicited.

4.35 The exclusion clauses²⁵ were explicitly referred to in 10 cases, although for the most part, the specification of the provisions occurred following a query by the Judge or, on a few occasions, by the Advocate Depute in a challenge to an application made by the Defence. Reference to the exception clauses²⁶ of the legislation was made by the applicant in 11 cases. The majority referred to s.275 (1)(a): “specific occurrences of sexual or other behaviour demonstrating the complainer’s character or predisposition”.

4.36 Typically, under the heading the “nature of evidence sought”, applications identify the kind of questioning to be pursued, and often specify particular questions to be asked in the trial. As some Defence practitioners pointed out, they try to be very precise in terms of specifying the evidence or questioning sought in applications, because of a belief that the Judge will be looking for precision in the drafting:

“I’m very aware that the judges will interpret the section, I think reasonably strictly. Specifics, that’s really what it’s about, specifics, nature of detail, and a client trying to say “x”, “y” and “z” will have to be told unless we can come up with specifics perhaps in some occasions, details to back up what he’s saying, then we can’t consider a s.275.” (Defence 2)

4.37 Table 4.3 shows the type of evidence and questioning sought. It draws on analysis of all of the applications (that is, 47) made in the 32 trials. The figures were compiled by doing a first count of all the different types of evidence and questioning sought across all applications, then aggregating this to show the overall proportions.

4.38 The table shows the extent to which sexual history and character evidence is used in the court. Most of the applications sought to introduce more than one type of questioning or evidence. Some applications were very lengthy, seeking a range of different kinds of evidence. It was not uncommon for applications to seek to introduce the complainers’ (alleged) past sexual behaviour with the accused, as well as with someone else, and also seek to ask questions relating to general character. Defence interviewees referred to this as a “belt and braces” or “scatter gun” approach to try to ensure that at least some evidence or questioning will be allowed.

²⁵ S.274(1) (a), (b), (c) (i) and (ii), (d) Restrictions on evidence relating to sexual offences

²⁶ S.275(1) (a) (i) and (ii), (b), (c) Exceptions to restrictions under section s.274

Table 4.3 Nature of questioning sought in all s.275 applications made in transcribed and attended trials

Nature of questioning sought	Proportion of all evidence sought %
Past sexual history with accused	16
Non-sexual past history with accused	3
Behaviour with accused on/around same occasion	14
Sexual behaviour with/in presence of a third party on same occasion	4
Complainer's current relationship status	4
Sexual history of complainer (other than with accused)	20
Sexual character of complainer	4
General character of complainer	24
Behaviour of complainer after offence	11
Total	100

Note: Percentages refer to overall proportion of questioning sought across all 47 applications in the 32 trials. Most applications sought to introduce different types of questioning.

4.39 Evidence or questioning concerning the character of the complainer was a common feature in applications, accounting for approximately a quarter of all evidence sought (24%). This included questioning concerning the complainer's (alleged) mental instability, depression, dishonesty (such as previous convictions or arrests, working and claiming unemployment benefit, committing benefit fraud, making fraudulent claims to the Criminal Injury Compensation Board, lying about age, and propensity for making up stories, including unproven allegations of sexual assault). Very commonly the character evidence that is being sought concerned the complainer's use of alcohol or drugs in the past and/or at or around the time of the alleged offence.

4.40 Questioning on the complainer's sexual history other than a past relationship with the accused was also relatively common (20% of all evidence sought). This included questioning and evidence about the extent of the complainer's previous sexual history, sexual practices (such as use of sex aids), virginity, contraceptive history and prostitution.

4.41 Evidence of the complainer's past history with the accused was also common (19%). For the most part this was past *sexual* history with the accused, but in some cases this concerned past *non-sexual* behaviour between the complainer and accused, in particular arguments, "fallings-out" and "bad" feeling, either in the past or around the time of the alleged offence.

4.42 Evidence concerning behaviour with the accused on or around the same occasion of the alleged offence included: the complainer's willingness to go somewhere alone with the accused (e.g. to his home, in a taxi with him, to a party); giving him a phone number or address; allegedly showing "sexual interest" in him (e.g. provocative dancing, sensual posturing, kissing, cuddling, showing breasts, unzipping accused's trousers); or making sexually explicit remarks.

4.43 For the most part, evidence concerning behaviour with someone else on or around the same occasion as the alleged offence concerned sexual contact, but also included "suggestive dancing" with, or showing sexual interest in another person.

4.44 Questions about the behaviour of the complainer *after* the offence included: showing no visible signs of distress; refusal/unwillingness to report matter to the police or undergo a medical examination; maintaining contact with accused (e.g. continuing to live in same house as accused despite having own home, allowing accused to look after children, giving gifts to accused, and/or writing to accused); withdrawal of allegation; and complainer's alleged sexual behaviour after the alleged incidents (e.g. masturbation, touching other boys, looking at older men).

4.45 When considering the distribution of types of questioning introduced by application, note that several of the categories of questions would not have featured in applications prior to the 2002 Act. This is the result of the wider scope of the legislation. This includes the general character of the complainer (24%), non-sexual past history with accused (3%), complainer's current relationship status (4%) and behaviour of complainer after offence (11%). To introduce behaviour with accused on or around the same occasion (14%) of the offence would have required an application under the 1995 Act only if it were explicitly sexual behaviour and sexual behaviour that was not part of the subject matter of the charge. In other words, between two fifths (42%) and a half (56%) of the questioning sought in applications concerned matters which complainers were certainly exposed to prior to the 2002 Act, but which were never or rarely the subject of applications. It can safely be said, therefore, that at least 40% of the questioning would not previously have required an application.

4.46 The research findings in relation to both the volume and the level of detail concerning the questioning sought in applications runs contrary to both the intentions of the legislation, and the expectations of the reformers. It has resulted in neither a decrease in the use of sexual history and character evidence overall, nor a tighter focus on the type of questioning that is allowed. Paradoxically, the requirement of making a written application goes some way to facilitate the introduction of a wider range of evidence and a greater level of detail of questioning than occurred prior to the 2002 Act.

Crown only applications

4.47 There were 4 cases in which only the Crown made an application (Crown-only applications) in the 32 trials examined in detail. Given the very small number of such instances, it is difficult to draw any meaningful conclusions, and so these cases should be considered illustrative rather than representative. Interviews with practitioners suggested that, by and large, the evidence sought in Crown applications concerned the sexual history of the complainer, rather than character evidence, and was introduced because it was context needed by the jury to make sense of events. This could apply, for example, to evidence of past sexual relationships between the complainer and accused and evidence that the complainer was working in prostitution at or around the time of the alleged offence. One of the Advocates Depute interviewed explained this general view:

“Quite often we get allegations of rape and the parties have been involved in a sexual relationship in the past and it clearly makes sense for us to actually bring that context out.” (AD 2)

4.48 For the most part, Crown applications sought to introduce evidence to assist in setting the context for the alleged assault, as Judge 4 said:

“Sometimes I think Crown make applications that are, that require to be refused ... in most cases the Crown are leading evidence which is essential for the purpose of leading the evidence, for example, in the case of a rape of a prostitute. In a case like that it's essential for them to be able to lead that. ... But I've had other cases where the Crown have made applications that I've refused.” (Judge 4)

4.49 Whilst not backed up by the 4 cases with Crown only applications examined here, a small number of practitioners did however suggest that sexual history evidence introduced by the Crown was not always restricted to that which was essential to the narrative of events.

4.50 In 3 of the Crown-only applications the Crown argued the proposed questioning was a necessary context for the narrative of events or other essential evidence. Of the 4 Crown-only applications, 3 involved a single rape charge; the fourth case involved one female and 2 young male complainers and charges of lewd, indecent and libidinous practices, along with several charges of a non-sexual nature.

4.51 In the latter case (078) the nature of evidence sought was in respect of one of the male complainer's sexual history. The complainer was 4 years old at the time of the first indicted offence, and aged 9 years at trial. The evidence sought of his precocious sexual behaviour – masturbation; being seen to look at older men; and having been caught by a teacher in the toilets with 2 other boys – was said to be relevant for indicating the circumstances of the complainer's foster mother's enquiries which led to the disclosure of the sexual offences. As discussed in the next chapter, this application was regarded as an unnecessary “voyage of discovery” by the Defence and refused by the court.

4.52 In one of the rape cases in which a Crown application was granted, the evidence sought was that the complainer and accused had a long-term relationship, and had borne a child together. In a second rape case, the Crown sought to introduce evidence that the complainer was not a virgin before the offence. The accused's defence was one of consent and the Prosecution argued that out of fairness to the accused it was necessary to lead evidence to show that the ruptured hymen of the complainer referred to in the medical report could not be attributed to the events which were the subject matter of the charge: “It is to lead evidence, out of fairness to the Defence, there is a background here which gives a possible explanation for certain medical findings and that is the only basis upon which this application has been brought.” This case involved previous analogous convictions by the accused and is discussed further in Chapter Six. In one case, the third rape case, the Crown sought to introduce evidence relevant to the credibility of the complainer. Rather than seeking to introduce sexual history evidence, the application sought to introduce evidence concerning a depressive illness, in order to demonstrate that despite this, she was a credible and reliable witness with adequate capacity to recollect the events in question.

The nature of any questioning proposed

4.53 This part of the applications tends to be brief. Usually, it is simply stated from whom the evidence sought is to be elicited (overwhelmingly this is the complainer), but occasionally it is to be elicited from other witnesses in the trial.

4.54 Two Defence practitioners interviewed said they eschew specific lines of questioning, preferring instead to keep matters a little more general, as the following excerpt shows:

“The questions that I’m going to ask the complainer are quite general. I won’t list specific questions that I’m going to ask her but it’s questions of a nature which will elicit the information that we require to have brought out in evidence. That of course ties you to specific areas, but there’s nothing stopping you from making a fresh application further down the line at any stage.” (Defence 1)

4.55 A small number of applications did provide specific questions, as the following examples show:

- “To elicit whether complainer engaged in work as prostitute immediately after being with accused and whether complainer was then robbed by a client.”
- “To ask complainer whether she was dressed only in underwear when she caused a member of the public to telephone police.”
- “To ask the complainer if she was victim of assault immediately prior to the incident and if she stole drugs from her assailant.”
- “To question the complainer as to her motive in seeking prescription of contraceptive pill.”

Issues at trial to which evidence is considered relevant

4.56 Under the 1995 Act reasons for questioning or introducing evidence were not always provided by Defence nor sought by the court, because the legislation did not specify this as a requirement. On the basis of the discussion that preceded a decision on an application by the court, the baseline study estimated that the key issues were as follows, where the numbers in brackets refer to the number of (verbal) applications in which these issues were referred to:

- Consent or mistaken-belief-in-consent (20);
- Credibility of complainer (35);
- To suggest or show motive for false allegation (10); and,
- Alternative explanation for physical or forensic evidence (5)

4.57 In the current study, written applications detail the issues at trial to which the evidence or questioning sought was to be considered relevant. Typically, these issues were: consent and/or the complainer’s character or predisposition, which included the credibility and reliability of the complainer; the complainer’s character; predisposition towards sexual behaviour on the same occasion as the offence; mental state as an alternative explanation for distress; the complainer’s lifestyle; and motivations for false allegation.

4.58 Consent was cited as an issue in two fifths of the 32 application cases, and character or predisposition was cited as an issue in two fifths of the cases. In just over a tenth of cases (12%) medical or forensic evidence was cited. This included the evidential significance of injuries, and medical evidence of a disrupted hymen.

4.59 A small proportion of cases (5%) cited either the credibility or the guilt of the accused as the issue in the trial to which the evidence or questioning sought was relevant.

The reasons why the evidence is considered relevant to the issues

4.60 This section of the application also tends to be rather brief, although a wide range of reasons was put forward (see Appendix 4). In the 32 trials, a single reason was put forward in a third of cases, with the majority involving 2 to 6 reasons why the evidence was

considered relevant to the issues. Some were fairly specific, linking the evidence sought, the nature of the questioning and the issues at trial together. Others were much more general and most commonly, consent, credibility and reliability of the complainer, past sexual relations between the complainer and accused, and to demonstrate motive for false allegation.

The inferences which the applicant proposes to submit to the court that it should draw from that evidence

4.61 As stated earlier, the written text in the last sections of applications often repeats the text of earlier sections. There is much overlap, particularly in the sections that list issues, reasons, and inferences to be drawn from the evidence or questioning sought.

4.62 In terms of what is written under the heading of “inferences”, most commonly, this was again consent, credibility, complainer’s character, alternative explanation and motivation and reasons for false allegation (e.g. complainer sought to conceal true nature of her relationship with accused; jealousy; afraid partner would find out; to gain sympathy and become the centre of attention).

Information sharing and the effect of disclosure on s.275 applications

4.63 Interviewees held different views on the extent to which they might discuss s.275 applications with the other party prior to lodging the applications. As one Defence agent said:

“Absolutely, I’d speak to the Crown. It might not be in advance because sometimes you don’t have an Advocate Depute allocated. It might just be in the morning of the preliminary hearing.”

Researcher: “You’d discuss the substantive contents?”

“Yes, and obviously if the Crown are going to make an application, if you’ve identified something for example in the transcript, then you might say “Is the Crown’s position that they’re going to make the application?” in which case you might not need to do yours.” (Defence 1)

4.64 Similarly, the Advocates Depute interviewed spoke positively of information sharing with regard to s.275 applications:

“Advocates Depute and Defence Counsel talk to each other a lot and if I receive a s.275 application from the Defence, it’s very probable that I will get in touch with the Defence Counsel and say “Right, I’ve had a look at your application, I’m quite happy with paragraphs 3, 4 and 5 but one and 2, I’m not happy with and this is the reason why I’m not happy with them.” And we can discuss these and it may be that they’ll decide “Right, okay, we’ll not insist on these paragraphs or, if we amend it, would that make a difference?” ” (AD 2)

“Having this mechanism in place whereby in the normal scheme of things these matters should be flagged up, discussed and disputed if necessary at the earliest possible stage is a good thing.” (AD 5)

“If I can get a position which is satisfactory to me hammered out with the Defence in advance I’m comfortable.” (AD 1)

4.65 One issue raised by 2 Advocates Depute concerns the effect of disclosure on speculative “fishing expeditions” by the Defence in order to inform the contents of an s.275 application. Both referred to instances of the Defence requesting the complainer’s past medical information:

“With disclosure these days, we are quite often met with requests for medical records, and what I’m hearing at preliminary hearings [from Defence] is that we need the medical records because that may lead, in turn, to an s.275 application. And generally our position is no. We don’t consent to that. We will not produce them because, well, for a number of reasons, one we don’t have them; 2, the victim has a right under Article 8 to privacy and;3, the medical records, if you get them in their entirety, will contain things that are of no relevance whatsoever and you’re indulging in a fishing exercise.” (AD 2)

“What’s happening, and this troubles me very greatly, is that some Counsel more than others are very keen to have access to the medical records of the victim and the social work records of the victim. ... I refuse absolutely to use the Crown’s powers to seize social work or medical records, unless I actually need them to prove the case, and insist that they make an Application to the court to recover these records so that the process is intimated to the complainer who can vindicate her position, and make the Judge take a decision. That’s about as far as I can take it. And what we’re getting is fairly wide ranging enquiry into the past with a view to promoting an s.275 Application, and where’s that coming from? Why has that got any relevance?” (AD 1)

Informing the complainer about s.275 applications

4.66 Judges noted that they did not know whether the Crown sought to, or had the time to, inform the complainer following notification of an s.275 application.

4.67 Interviews with Advocates Depute indicated that, following the submission of a defence application, they do tend to try to ascertain the complainer’s position with regard to the evidence sought, for 2 main reasons. First, because it may inform the way in which the Crown deal with the defence application and, second, because of the high incidence of successful applications, the questioning or evidence sought will almost inevitably come up in trial. Seeking to ascertain the position of the complainer on particular matters that are the subject of a defence application is not necessarily the same as informing the complainer that an application has been made. None of the complainers interviewed in this research were aware of whether or not an application had been made in the cases in which they were involved. Interviewees said that whilst they would seek to have the subject of the application raised with the complainer to ascertain her position, there was a need to exercise care in the level of detail provided to the complainer to avoid the risk of improperly influencing the complainer’s answers.

“One thing that we do if the application is raising issues that we haven’t known about from the precognition, is get the precognoscer to ask the complainer just what the story is, and what’s being said that mattered in the past. Not what her attitude is to it being allowed in evidence, but tell us what else has happened. Tell us your side of it.”

Researcher: “And would that involve making the complainant aware of the fact that there is an Application?”

“It would depend on the practice of the individual precognoscer. What we would do is say (to the precognoscer) “the Defence are now saying this, can you find out what the complainant says about it?” If I were in receipt of such an instruction I suppose I would get the complainant in or “phone her and say, “We're being told this” - I wouldn't explain how or in what context - “can you tell me about that”?It would be to try and avoid influencing the complainant in her answer that I would do it that way.” (AD 1)

“Quite often in these applications they contain information like Defence witness so and so says that the complainant did a, b, c and d so clearly you want to go back to the complainant to find out, “Did you do a, b, c and d? Is there any truth in that?” It's really an extension of the precognition process.”(AD 2)

4.69 The Defence interviewees believed that the pre-trial submission of s.275 applications did offer the Crown the opportunity to inform the complainant that particular evidence or questioning may be led in the trial. Two Defence interviewees were generally rather wary of the effect on the defence case of communication between the Crown and the complainant on the subject of an s.275 application:

“The detail we have to provide for the applications is horrendous and I take the view that a lot of is unnecessary and unfair. We are required to disclose so much of the Defence now. The Crown have the opportunity and are taking the opportunity to question their witnesses further and you can definitely see that complainants have had questions put to them and have come with their answers prepared .. They already know the line you are going down.” (Defence 5)

“You have to disclose very fully what your line is going to be, the purpose of your questioning, what you're seeking to elicit and again there's sometimes a wee reservation in you to say well you know, this is setting out my whole case in paper beforehand and that's not the way our system works.” (Defence 2)

4.70 The question of informing the complainant about an application by the Defence was considered in the COPFS Review of the Investigation and Prosecution of Sexual Offences (2006). The Report concluded that where the Crown receives notification of a Defence application, then Victim Information and Advice (VIA) should advise the victim accordingly. This is a positive recommendation which should go some way to ensuring that complainants are informed about the likelihood of questioning on sexual history and character.

CHAPTER SUMMARY

4.71 This chapter has focused on how s.275 applications are made, and the details of how the process operates.

4.72 The majority of applications were made by the Defence, although Crown applications featured in one quarter of application trials. Defence practitioners interviewed sought to establish at an early stage in sexual offence cases, particularly rape cases, whether any line of questioning or evidence requiring a s.275 application could be used to attack the credibility of the complainant or to otherwise have a bearing on the issue of consent, by actively exploring whether there were grounds for such an application from the point of first interview with their client.

4.73 Scrutiny of written s.275 applications revealed questioning about a wide range of issues, at least 40% of which concerned matters that were likely to have been asked without an application prior to the 2005 Act. Questions that would previously have required an application – past sexual history with the accused, other forms of sexual history, sexual character evidence and sexual behaviour with others around the same occasion as the charge – made up 44 percent of the proposed questioning. Twenty four percent of the proposed questioning concerned the character of the complainant. The reasons given for the proposed questioning were its relevance to the issue of consent, and the credibility of the complainant and sometimes, more specifically, to the complainant's character and motivation or reasons for false allegation or to offer alternative explanations to particular events.

4.74 Crown applications were typically made to introduce sexual history evidence that was required to enable a jury to make sense of subsequent evidence or to provide them with context for the alleged events.

4.75 Exception provisions are rarely specified, and the Defence tend to take a “belt and braces” or “scatter-gun” approach to the contents of applications, in order to find a route that the court will accept for the evidence or questioning to be allowed.

4.76 Advance notice of an s.275 application, like the advance notice of a defence of consent, was not typically translated by the Crown into explicit advanced warning to the complainant. One reason for this is that the provision of detailed information to the complainant could make the Crown case vulnerable to allegations of coaching. Such concerns were echoed by the Defence who expressed similar concern over the prospect of the Crown speaking to the complainant about the content of an application. However, it is standard practice for the Crown to re-precognise a complainant to get “her side of the story” concerning any emergent events or issues raised in a defence application.

CHAPTER FIVE: DECIDING S.275 APPLICATIONS

THE DECISION-MAKING PROCESS

5.1 This chapter examines the process of deciding applications in order to address how the legislation is being applied in practice. The chapter examines the position taken by the other party in relation to s.275 applications, and presents information on the approach of the court in weighing up the probative value and determining the relevance of the questioning or evidence sought. The chapter also presents data on the point in the process when applications are decided, and examines the reasons why some s.275 applications are continued across several hearings before a decision on whether to allow the evidence is reached.

5.2 Like the previous chapter, this chapter draws on data from the 32 trials containing applications that were studied in detail. It uses the transcripts of the taped court proceedings and the associated paperwork relating to the preliminary hearings where s.275 applications were discussed and decided.

5.3 The chapter also draws on the interviews undertaken with the legal practitioners, in order to present their views on the process of deciding applications, and their perceptions of the challenges in determining relevance and admissibility of evidence sought to be admitted. Like the previous chapter, this chapter primarily concerns use and interpretation of the provisions of the 2002 Act during the pre-trial stage, although it does also include discussion of those applications which were lodged and/or decided at, and during, the trial itself.

5.4 A notable difference between the 1995 Act and the 2002 Act is that under the latter the court has to determine the relevance of the proposed evidence of questioning. In doing so, the court has to consider a broad test – the proper administration of justice – and to do so must weigh the comparative benefit to the accused in having such evidence against any impact it might have on the dignity and privacy of the complainer. Section 275 sets up an explicit balancing exercise for the admissibility of evidence, where the court is required to take an evaluative approach.

Prior agreement between the parties on contents of s.275 applications

5.5 At the preliminary hearing, the party making the application starts proceedings by addressing the court on the contents of the written application. Thereafter, the other party will be given an opportunity by the court to give a view. When the other party is in agreement, application hearings are then generally brief. In many cases, the Defence simply informed the court that the Crown was not opposing the application. In many, but not all cases, once it was established that there were no objections from the other party, the application was granted by the court “for the reasons stated therein.”

5.6 Bearing in mind that fact that the Defence use a “belt and braces” approach to applications, then, there are likely to be cases in which the Crown will not oppose a Defence application.

5.7 The following extract (from case 236), in which both the Crown and Defence submitted an application to question the complainer about her prostitution, illustrates the brevity of the type of exchange that often occurs when the parties agree:

Judge: “Right. Now I read your s.275 application, Advocate Depute, and the Defence s.275 application in this case. Is there any opposition to either of them?”

Defence: “No my Lord.”

AD: “There’s no opposition my Lord from the Crown to the Defence application.”

Judge: “Well, I’ll grant both s.275 applications for the reasons therein stated.”

5.8 Agreement that evidence should be introduced does not, of course, necessarily mean agreement concerning the interpretation of that evidence. The agreement between Crown and Defence in case 236 reflected very different reasons for seeking to ask about prostitution. The Crown referred to enabling the complainer to give her evidence in “a full and credible manner as to the nature of her movements, actions and line of work on the date libelled”. The inferences the Crown wished to draw from the questioning were listed as “employment as prostitute does not mean the complainer consented to the conduct in the charge or is not a credible and reliable witness”. The Defence referred to relevance of the questioning to the central issue of consent and credibility and reliability of the complainer, giving rise to a reasonable doubt that the complainer was a rape victim and seeking the inference that the complainer consented.

5.9 In some cases (039, 188, 237, 235) it was explicitly stated at the preliminary hearing that the parties had discussed and reached agreement on the nature of evidence sought in s.275 applications prior to the preliminary hearing.

5.10 In case 188, involving a series of sexual offences alleged to have been committed against 2 complainers by their father, the Crown questioned whether an application was strictly necessary and made no objection to a delay requested by the Defence as to seek information from a foreign police force relevant to their application. The Defence application sought to introduce various pieces of evidence advanced as casting doubt on the credibility of one complainer: previous claimed reports of sexual abuse to teachers during her childhood, which the Defence sought to rebut by calling the teachers as witnesses; a previous report of alleged rape by the complainer against the accused when overseas, which the application said was not treated seriously by the relevant police force; and various non-sexual exchanges between the complainer and her father, which the Defence argued showed a degree of trust and friendliness inconsistent with the alleged charges. The application was decided at a second preliminary hearing where it was granted in the absence of opposition by the Crown.

5.11 Interviews with Advocates Depute revealed that they do try to agree applications with the Defence in advance wherever possible. For example, AD 1 described a successful negotiation leading to agreement:

“I conducted a trial ... in which the victim had a 20 year history of ... mental disorder, the nature of it fluctuated. I ... spoke to Counsel, because they'd put in a s.275 which sought to narrate her whole medical history from the time she was first diagnosed, including her suicide attempt And what I said to ... the Counsel then instructed was, “Look. Is this really necessary?”” And we agreed that the initial diagnosis was going to be relevant, because the Defence

was going to be that there was a good deal of fantasy involved. We agreed that the last couple of years of history would be relevant, under the head of “a condition to which she was subject”. And that because there was material in the medical records that suggested that this lady had been in the habit of wandering around ... scarcely dressed, shouting invitations to men, beckoning men in. So one could see that in the context of a case in which the accused said that he was the subject of such an invitation, there was relevance in that. But [the Defence Counsel] was willing to take out the intervening 18 years of stuff.” (AD 1)

5.12 In interview, Advocates Depute acknowledged that they often share the Defence view that the evidence or questioning sought is relevant, and should be heard by the jury:

“I think it is proper of the Crown not to object if it feels that information is thrown up which, if true, the jury should know to be able to decide the case. I think it may be a sign that the section is being effective and that the applications which are ... bad applications are just not being made anymore. I don’t think it’s the role of the Crown to oppose every Defence s.275 [s.275 application]. I certainly don’t see that as my role and quite often I read one and think, this is suitable.” (AD 3)

CHALLENGING APPLICATIONS

Crown opposition to Defence s.275 applications

5.13 Objections to the Defence application were raised by the Crown in 10 of the 32 applications studied in detail.²⁷ In all instances the Advocate Depute questioned the relevance of the evidence sought to be admitted to the issues at trial. Most challenges by the Advocate Depute also specifically raised the issue of the protection of the “dignity and privacy of the complainer”, and a small number referred to a lack of specification in relation to the evidence or questioning sought by the Defence.

5.14 Notably, Crown challenges to Defence applications were more likely to be made in relation to character evidence (in particular where the nature of the evidence sought concerned dishonesty). For example, in case 007 which involved 2 young complainers (one female and one male), the Defence sought to elicit character evidence from Defence witnesses, and a complainer’s former teachers, in relation to one complainer’s alleged predisposition to make up stories:

Defence: “This is evidence that relates to behaviour referred to in s.275 (1a), behaviour demonstrating the complainers character. It also demonstrates a predisposition to which he has been subject and indeed still is. That the occurrences of that behaviour are in fact relevant in terms of s.275(1b) to establishing whether the accused is guilty of the offence with which he is charged and I also say that given that this case centres around the credibility and reliability of only 2 complainers, the Crown case cannot stand with just one complainer being accepted as credible and reliable but the probative value

²⁷ Cases 007, 076, 099, 121, 128, 172, 231, 233, 234, 239.

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.”

5.15 The Advocate Depute’s concern was that the (character) evidence sought to be elicited was to be corroborated by school teachers (the Defence witnesses concerned) who were not professional psychologists, and so was “fundamentally inadmissible.” Following a lengthy debate, the Judge agreed with the Advocate Depute and refused to allow the application on the basis of the inadmissibility of evidence from non-professional witnesses:

Judge: “Plainly the evidence on one view of [the teachers] might be thought to be significant however it has to be remembered that credibility and reliability in these areas is fundamentally a matter for the jury and in order to approach that topic what is required is objective evidence of a pathological or medical condition or possibly the fact that regard may be had to an objective reference from the witness that can then be examined along the same lines to see whether such a condition exists... It may be possible to acquire that... I cannot grant the application in its present terms.”

5.16 In case 076, which involved a very lengthy application by the Defence, part of which sought to question the complainer on her investigation for employee theft, the Advocate Depute challenged that particular aspect on the grounds that such evidence was not relevant to determining the guilt of the accused. The Judge repeatedly asked the Defence to explain the relevance of the fact that a complaint had been made, saying that it was not usual to go into past character unless there had been a conviction. The Defence replied that it was “a material point” and would go towards the complainer’s reliability and credibility.” The Judge was not convinced, and allowed only part of the application, disallowing all references to the investigations for theft.

5.17 In a third case, 231, the questioning sought to be admitted by the Defence, that X and Y, 2 of the 4 female complainers “are persons who are engaged in a sexual relationship” was considered too imprecise by the Crown who also disputed the claimed relevance to the credibility of the witnesses. The Judge upheld both critiques. The application in its original form was disallowed, although the Judge also left open the possibility that the Defence might return to the issue:

Judge: “There does seem to me to be 2 major problems. First of all a possible lack of specification in the application itself, in the event because in view of the explanation tendered it’s not immediately clear why a close relationship, which included a sexual relationship, will reflect on the credibility of the witnesses, and secondly the existence of the close relationship, although it would justify the kind of questioning which seems to me to be sought in this case, and the factor that a sexual relationship appears to be something to which the act specifically is designed, rightly or wrongly, to give protection. So at this stage I’m not disposed to grant the application. However, that clearly is unsatisfactory in some respects because it doesn’t resolve the matter and it will be perhaps either for a further application or a matter for enquiry at the time of the trial as to what lengths cross-examination can possibly go in exploring the relationship between the 2 complainers in order to cast doubt on their credibility and reliability.”

5.18 Interviews with Advocates Depute indicated that what the Crown are considering when reading the Defence application is whether it is too imprecise or lacking in detail in terms of the requirements of the provisions, or the overall relevance is weak or unsubstantiated:

“I look at the application, I look at each paragraph within it to decide is that something that would be admissible at common law, therefore is a s.275 application necessary? Is what is contained within the individual paragraphs specific and relevant? Is it caught by s.274 and are the 3 requirements in terms of s.275 satisfied? And that’s the process I go through with every paragraph to decide whether or not I’m going to oppose that paragraph or bits of the paragraph or just say yes, I agree with that.” (AD 2)

Defence opposition to s.275 applications by the Crown

5.19 Among the sample of 32 cases, there were 5 cases involving s.275 applications by both parties, and 4 cases in which the application was made only by the Crown. As stated earlier, Crown applications tended to focus on sexual history rather than character evidence,²⁸ and typically were allowed.

5.20 Of all the Crown applications, just one was refused by the court and in this case the Defence objected to the nature of the evidence that the Crown wished to introduce. Case 078 involved a string of charges including 2 counts of lewd and libidinous practices towards a very young boy (aged 6 at trial). The application sought to introduce evidence about the boy’s behaviour after the offence, which concerned masturbation, being seen to “look at” older men, and having been found by a teacher in the school toilets with 2 other boys. Whilst the Crown’s reason for wishing to introduce this evidence could have been to lead evidence of the events which led to the disclosure of the allegation, this was not specified in the application. The Defence objected to the application:

Defence: “These sections are there to protect complainers to see that a voyage of discovery is not made into their sexual behaviour either before or after the event and what the Crown in this is attempting to do is to lead evidence relating to sexual episodes affecting a 6 year old boy after the event. Now in my respectful submission, that is not a proper use of this section. To ask a 6 year old boy about his private sexual habits could do perhaps irretrievable damage to his psyche, we’re not in a position to know.”

5.21 Although the Defence objection was on grounds of hearsay, inadmissibility and protecting the dignity and privacy of the complainer from a “voyage of discovery into his sexual behaviour”, the discussion that ensued primarily focused on the admissibility of such evidence. After lengthy debate, the Judge decided:

Judge: “Gentlemen I have come to the view that the application on behalf of the Crown is to be refused. It seems to me that the evidence which is sought to be led is inadmissible on the ground that it is hearsay and not de recenti when the best evidence will be the evidence of the children in the witness box. ... I have come to the view that the totality of the material contained in the

²⁸ For example, case 138 concerned the fact that the complainer and accused had been involved in a long term relationship and had a child together; case 056 sought to elicit that the complainer was not a virgin prior to the alleged sexual incident.

application should not be allowed to be the subject of application and I refuse the application.”

5.22 No challenges were raised in any of the other Crown applications, however in one (209), the Defence was unhappy about the wording in respect of the “inferences which the court should draw from the evidence” which were that, despite a psychotic illness the complainer was credible and reliable. The Defence supported the introduction of the evidence sought by the Crown but not the inference that the Crown indicated that the court should draw from the evidence. After a brief discussion the Judge suggested that the Defence was “nitpicking” and granted the application.²⁹

DECIDING S.275 APPLICATIONS: THE VIEW OF THE COURT

5.23 Judges interviewed were very clear that it was their duty to ensure that the legislation was observed and would pay very careful attention to the wording of the legislation when deciding an application. Judges were also aware of exercising a degree of discretion in interpreting the legislation.

5.24 Some Judges observed that carrying out their duties had involved them in reminding the Crown of their responsibilities under the 2002 legislation. This included reminding the Crown of the need to make an application. When commenting on the extension of the requirement to make an application to the Crown, one Judge said, “if you don’t do that, you have no judicial control and the Crown will be asked by the Defence to lead evidence of something and they’ll do it. That’s what actually happens. So I think yes, judicial control over these matters is important” (Judge 2).

5.25 It has already been emphasised that unsuccessful s.275 applications were rare; most applications were allowed in full or in part. Applications in which there was no disagreement were often allowed in full with little discussion. From the cases examined, it appears that Judges were more likely to restrict or disallow Defence s.275 applications where the Advocate Depute registered opposition.

5.26 There were, however, 3 cases where the Crown did not oppose the Defence application but the Judge, nevertheless, disallowed or restricted the extent of the proposed questioning. In the following example (case 204) the Defence sought to introduce evidence that the complainer had asked the accused for payment for sex on a previous occasion, and that she claimed unemployment benefits whilst working. The Judge expressed some surprise that the Advocate Depute was not objecting to the application, as he or she considered it to be very loosely phrased, and not at all relevant to the determination of guilt. The Judge subsequently restricted the parameters of the application in the following way:

Judge: “I will allow the s.275 application with the exception of the final part of paragraph [This paragraph stated: That throughout the period August 2002 to January 2004, the complainer was working as a cleaner whilst also claiming unemployment benefit. Around January 2004, the complainer was informed that her benefit was being suspended and she was required to repay sums

²⁹ The accused in this case had previous analogous convictions and there is some discussion in the preliminary hearing suggesting that the Crown section 275 application allowed the Defence to avoid incurring ‘certain consequences and penalties’ in this regard. This case is discussed in more detail in Chapter Six.

claimed. Thereafter the parties continued to have intercourse fortnightly, but the complainer demanded £50 a week, which applicant gave her.].... on the basis that I'm not satisfied that the requirements of s.275 are being made out in relation to that matter and in particular that these issues are irrelevant to proof of the charge and indeed that it would be in line with the provisions of the section in relation to the privacy and dignity of the complainer that these matters ought to be brought out in a trial of this sort.”

5.27 In another case (211) both parties were seeking to introduce sexual activity, kissing and cuddling, between the complainer and the accused on the evening in question. The Defence also sought to put to the complainer that she was unwilling to tell the police about the alleged events and to ask “any other appropriate questions arising from examination in chief or cross exam” without objection from the Crown to this approach. However, the Judge refused this aspect of the application which the Defence then withdrew. As well as stating objection to this part of the application, the Judge expressed the view that the rest was required unnecessarily by the legislation:

Judge: “I wouldn’t be happy about[“any other appropriate questions arising from examination in chief or cross exam”].”

Defence: “In that case I’m happy to delete [“any other appropriate questions arising from examination in chief or cross exam”] from the application at this stage.”

Judge: “It’s just the extraordinary consequences of this Act that applications like this have to be made at all. But anyway, I certainly have no concern about them at all. What I’ll do is grant both applications. ... and the interlocutor will formally state in both cases that I’m doing that because I’m satisfied that all the matters in s.275 1.(a),(b) and (c) are satisfied and that these questions relate to the question of consent and the credibility of the complainer.”

5.28 In another case (168) in which the Judge disallowed the Defence application despite the lack of objections from the Crown, the proposed questioning to the complainer concerned 2 alleged previous attempts to kiss the accused on the lips, one around a year previously and one some 3 years previously. The Judge’s reasons were as follows:

1. There was a lack of specification in respect of the alleged occurrences;
2. It was not clear that these demonstrate any predisposition of the complainer’s character;
3. The latitude was too far separated from date of alleged offence; and,
4. The probative value of “the attempts to kiss” is unlikely to be significant or outweigh risk of prejudice to a proper administration of justice (case 168).

5.29 This application was re-submitted at a subsequent pre-trial hearing, but was again refused by the (different) Judge, who maintained that the application could only properly be considered at the trial, after the complainer’s examination-in-chief, when the evidence regarding prior statements had been conveyed to the jury. After establishing that the Crown would have no objection to the application being raised after the complainer’s examination-in-chief, the Judge refused the application, but said that as he would also be the trial Judge he would scan the evidence for the application in mind, and allow the Defence to raise it again at trial.

5.30 During interview, Judge 3 observed that there were instances in which he had disallowed applications, not because the evidence was to be prohibited, but because they were the result of the Defence not understanding the legislation, and making an s.275 application where none was required.

5.31 In the 32 trials studied in detail, there were a small number of cases in which the court expressed the view that the application was unnecessary. For example, in case 069, the Judge ruled that the Defence did not require an application in order to ask the complainant whether she was on the contraceptive pill or whether she had told the accused that she was on the pill. The Judge said:

“I can well understand the extreme caution that has to be exercised in these cases but equally, I do have a concern that we are now seeing s.275 applications asking for the court to approve questions that are really just ordinary questions that don’t carry the problems that the Act is trying to meet. If you want to cross examine the complainant to the effect that she said to him she was on the pill, I don’t see that that involves suggesting to her that she was engaged in other sexual activity at or about that time.”

5.32 As in the case (188), in which the Crown expressed doubt about the necessity of an application, discussed above, the doubt concerning the necessity of the application seems to reflect the lack of explicit sexual material in the questioning sought by the applicant. However, the wording of the legislation is designed to capture more than explicit sexual material and it is not clear whether another Judge would have taken this view.

Judicial views on the Crown’s approach to Defence applications

5.33 During our interviews, Judges sometimes spontaneously offered their views on the approach taken by the Crown to Defence applications. Judge 1 complained that the application procedure rarely involved a proper debate, with the Crown often taking a neutral view, commenting that he sometimes says something about the inadequacy of this response. Judge 4 also recalled instances of explaining to the Crown the reasons why he disagreed with the Crown’s lack of objection to Defence applications.

5.34 In contrast to this, however, when discussing applications at the preliminary hearing, some Judges still saw the position of the Crown as decisive. Judge 2, for example, indicated that the possibility of an appeal robbed the Judge of any ability to effectively object to Defence applications which were not opposed by the Crown:

“If you are faced with a situation in which you make a decision and you know it’s capable of being appealed post trial, then your decision obviously is potentially going to jeopardise a conviction if it occurs, and if the Crown at the end of the day well, we’re not supporting this conviction because we didn’t oppose the s.275 application, that’s going to be the end of the case. The Appeal Court are unlikely to support the trial Judge in the face of a concession from the Crown. They don’t generally do that, although they can. The short answer is, if the Crown do not oppose these applications, and they often don’t, the trial Judge is put in a very difficult position because he is potentially jeopardising the rape conviction in advance.” (Judge 2)

THE TIMING OF S.275 APPLICATIONS

5.35 In a little over half (18) of the 32 trials with s.275 applications, a single application was made. Thirteen trials involved 2 applications, and one trial involved 3 separate applications, totalling 47 applications in all.

5.36 The timing of the applications are displayed in Table 5.1 which shows that 39 applications were lodged with the other party in advance of the trial. Most of these were decided by the court at one preliminary hearing, although several were continued to subsequent hearings before the court's final decision on the application was given.

5.37 All of the Crown applications were lodged pre-trial and, with very few exceptions, were decided at a preliminary hearing in advance of trial.

Table 5.1 s.275 applications by when application lodged (transcribed and attended trials)

s.275 applications lodged	Application #1	Application # 2	Application # 3	All Applications
Pre-trial	29	9	1	39
Start of trial	3	4	0	7
During trial	0	1	0	1
Total	32	14	1	47

Point in process when s.275 applications are decided

5.38 Table 5.1 showed that most applications were lodged pre-trial. Table 5.2 shows that of the 47 applications made, 33 were lodged pre-trial and decided at a preliminary hearing, 26 were decided in a single preliminary hearing and 7 continued over 2 to 6 subsequent hearings before the application was decided. Eight applications were decided at the start of the trial, and 2 were lodged and decided during the trial. In 4 applications, some aspects of the application were decided at a preliminary hearing, with other aspects only decided at the trial itself.

Table 5.2 Number of hearings involving s.275 applications by when applications decided (transcribed and attended trials)

Application decided	Application 1	Application 2	Application 3	All Applications
One pre-trial hearing	18	7	1	26
2-6 pre-trial hearings	6	1	0	7
Start of trial	4	4	0	8
During trial	1	1	0	2
Pre-trial & at trial	3	1	0	4
Total	32	14	1	47

5.39 Whilst, in the cases examined here, there were few instances of s.275 applications being revisited during trial, several Defence interviewees referred to the disadvantages of applications being decided in advance of a trial, without being able to see the "lie of the land" in terms of the witnesses and the progress of evidence. For example, one Defence practitioner said:

“The disadvantages are that you are restrained into particular corridors or boxes of cross examination and you are ever conscious of the fact that you have certain boundaries as to where you can and cannot go, and if something occurs to you – as it can – in the course of a trial or evidence does not come across as expected, in theory, one would have to interrupt the trial to put in a further application. There’s also a tendency now to be – and I don’t have any difficulty with the concept – to be overly complainer friendly and to take the views of the complainer before the over riding interests of justice, which would be paramount in any other trial. As I say, it puts rape and sexual offences into a different category.” (Defence 4)

5.40 While Judges and prosecutors sometimes also acknowledged this difficulty, they were more likely to stress the advantages of deciding s.275 applications in advance of the trial.

5.41 Defence practitioners were also more likely to express disquiet that the Judge deciding the relevance of an s.275 application is almost certainly not the same person as the trial Judge. As Defence 1 said:

“But even cases where you think you have a very strong point which is ...prohibited by s.274, you might get a Judge who is particularly brutal with applications and not give it to you and then that leaves you in the situation where you’re coming before a trial Judge and the sense of the application is [relevant] – you can’t put it forward again in the same terms, but you might still strongly feel that you ought to have been able to ask that question. But you’re hampered – the trial Judge might even agree with you, because had it been him at a preliminary hearing he may well have granted it. That has happened to me.” (Defence 1)

Continuations of applications beyond one preliminary hearing

5.42 There was a range of circumstances in which applications were continued over more than one preliminary hearing. Sometimes this was because it was not possible to have a full discussion of the application due to lack of time, or the applicant requested more time because the relevant information or evidence was unavailable. For example, in case 128, the Defence application was continued 3 times due to medical and telephone records being unavailable, before finally being decided at a fourth pre-trial hearing. In case 204, the Defence requested more time for preparation and their application was continued across 4 pre-trial hearings before being heard at the start of the trial. In case 188, the initial Defence s.275 application was withdrawn pending further information from foreign police authorities, and the trial postponed. This application was subsequently re-submitted and granted at a later preliminary hearing.

5.43 Another set of circumstances involved the applicant creating an opportunity to have a second chance, resubmitting an application or a part thereof after it had been partially or entirely refused by the court. From the 32 cases studied in detail, there were 2 examples of this occurring with Crown applications, and 5 examples of Defence applications. For example, in case 044 the Crown application sought to lead evidence that the (young) complainer had previously engaged in consensual sexual intercourse, thus explaining a disrupted hymen identified in the medical examination which the Prosecution did not seek to attribute to the alleged rape. This was deemed not to be specific enough by the Judge, since it

did not specify the previous occurrence of consensual sexual intercourse³⁰ and the application was withdrawn. This application was subsequently amended to offer a more precise date and resubmitted with “special cause shown” at a further hearing, where the application was then allowed.

5.44 In case 212, which involved an application by both parties, the questioning sought concerned kissing between the complainant and the accused on the evening in question and the possession and handling by the complainant of a condom. The Judge ruled that an application was not necessary with respect to these details since they concerned events “shortly before, at the same time as or shortly after the acts which form the subject matter of the charge”. The applications were repeated and allowed at the start of the trial. The trial Judge, however, stated that: “It is not entirely clear to me that the evidence and questioning to which these applications relate is strictly speaking, struck at by the prohibition in s.274.”

5.45 In 3 Defence applications continued beyond one preliminary hearing, the original application was partially or fully refused and then re-submitted in front of a different Judge. In case 007, already referred to in some detail earlier in this chapter, the application sought to lead evidence which questioned the credibility of a young complainant based on the report of a teacher which indicated that the child had a tendency to tell “elaborate lies”. This was refused due to concern about the admissibility of evidence from teachers in relation to “a pathological or medical condition”. However, the Judge did grant leave to appeal this decision.

5.46 In an attempted rape case (234) the original Defence application, which sought to introduce evidence about the complainant’s “confused sexuality” and challenge her claim that she had not had a sexual relationship, was refused outright by the court in a preliminary hearing. Leave to appeal this decision was also refused, although the Defence re-submitted the same application at the start of the trial to a different Judge. This was partially allowed in respect of the complainant’s virginity, however a third attempt to submit during the trial was refused (See Appendix 3).

5.47 Similarly, in case 231 which involved 4 complainants, and several charges of rape and indecent assault, an application by the Defence to elicit that 2 of the complainants were involved in an “intimate lesbian relationship” and were, therefore, not credible or reliable witnesses, was refused at the initial preliminary hearing and resubmitted at a subsequent preliminary hearing, and again disallowed by the court.

Late applications and “special cause shown”

5.48 Seven applications were introduced for the first time at the start of the trial, that is, before any evidence was led. The second application in one trial (case 099) was lodged during the trial itself.

5.49 In all but one of the 8 applications the court accepted that there was “special cause shown” for the lodging of the late application and generally, lateness was not, in itself, a barrier to the success of an application as the Judge made clear in case 56:

³⁰ Section 275 (1)(a) of the 2002 Act stipulates that the court may admit questioning or evidence contained within a s.275 application if it is satisfied that: “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 complainant’s character; or (ii.) any condition or predisposition to which the complainant is or has been subject.”

Judge: “Well obviously I’ll hear what (Defence) has got to say about the lateness of the application but unless persuaded otherwise I think you can take it that, if I take the view that its in the interests of justice to grant the application, on its merits then that in itself would seem to me to justify my considering it at this stage.”

5.50 In case 117, the late Defence application consisted of a long list of the Defence narrative of events leading up to the alleged incident including, among the many details, alleged consensual sex between the complainant and the accused, prior to the subject matter of the charge. The Judge quickly agreed the application, noting that it was not opposed by the Crown, and commenting on the long and detailed list of proposed questioning, concluding “Well I’ve read it and I can’t see that all of it would be likely to be asked or would need to be asked but I’ll allow it to save time.”

Practitioner’s views about s.275 continuations

5.51 Discussion with interviewees about the shift from the verbal applications at trial that characterised the 1995 Act, to a process of written submissions at preliminary hearings, indicated a range of views and experiences concerning 2 procedural issues: the practice of continuing preliminary hearings across more than one pre-trial diet in order to allow more time for applications to be made in advance of the trial; and deferring decisions about applications from the pre-trial diet to the trial.

5.52 Interviewees held mixed views about the desirability of continuations of s.275 applications. Some Defence practitioners referred to the inevitability of continuations, resulting from the need to submit a written application in advance:

“The only reason for additional pre-trial procedure is if the case has not yet been prepared at preliminary hearing. Previously if it wasn’t prepared, no one would have bothered with the s.275 application in advance and sought to postpone the trial in advance. If there was no trial, there was no need for the s.275 application. Following the High Court reforms, there is a mindset now that bits of paper are everything and one is completing a preliminary hearing form for the court. It will ask if there are to be any s.275 applications; it would be unusual to say yes there are but we’re not sending it in at the moment. And it’s almost a waste of resources of applications going in almost in skeletal form because the information is not there, simply so as the diet can be continued until all the information is available. And that is unnecessary.”
(Defence 4)

“Additional applications become necessary if further information becomes available. Obviously in a trial situation you have got all the information to hand then but if its being addressed in advance that’s not the case. It’s maybe a little artificial, you know, what we are doing just now, doing it in advance.”
(Defence 3)

5.53 Some Judges spoke of the practice of continuing preliminary hearings across more than one pre-trial diet in order to allow more time for applications to be made in advance of the trial, and deferring decisions about applications to the trial, as related issues. Judge 2 thought both stemmed from the general unwillingness of Judges to make decisions about the admissibility of evidence outside of the context of the trial:

“Deciding admissibility of evidence in advance of a trial is a relatively alien concept. ... We’re asking to decide matters of relevancy ... in a vacuum; that’s a problem for us. No question that that’s a difficulty for us. That’s not to say that the thing should not be dealt with in advance. ...I think the idea that these things are dealt with in advance is a laudable one. ... I know that a number of Counsel [ask] that these matters be continued to the trial diet and I know that a lot of my colleagues do that as ... that as I understand it is contrary to the spirit of the Act. It is not what is intended. ... I think you’ll find that it’s not infrequent for all sorts of different applications to be repeatedly continued from one preliminary hearing to another.” (Judge 2).

5.55 Judge 4 had adopted a practical strategy which sought to address the difficulty of judging the admissibility of evidence prior to the context of the trial in which the detail of evidence unfolds. This Judge routinely read interview statements in advance of the trial, particularly police interviews with the complainant and the accused which were likely to flag up issues that might fall under the legislation and be the subject of applications. He was of the view that written applications assist in understanding beforehand the limits of the issue, because otherwise the Judge wouldn’t know the scope of the material that the Defence sought to introduce:

“A lot of it will be in statements that they have rather than in anything that’s lodged in court. The most that the court really ever, I would think, has a notion of beforehand is stuff that’s in the Statement made by the accused to the police. ... I think so far as Interview Statements in sexual offences cases, particularly rapes, I think most Judges do read those in advance. Because that can help the Judge identify whether there is a risk of a prohibition being broken, because the responsibility is on the Judge. ...I do always read the Interview Statements in those kind of cases, because I think that’s the only way I can tell in advance if there might be an issue. And sometimes the Crown and the Defence don’t pick them up. Sometimes the Crown, particularly, are a bit relaxed about it, or perhaps just haven’t taken enough care in looking through it. And you suddenly read something and you think you can’t possibly allow that.” (Judge 4).

5.56 Judge 3 was also concerned by the practice of continuing preliminary hearings across several pre-trial diets but saw this in terms of Judges responding to pressure from Defence Counsel for more time to prepare or consider whether to submit an application. He thought that the provisions caused both parties to give more detailed consideration as to what evidence could be elicited about the complainant’s behaviour and character, from the complainant, the accused and, possibly, other witnesses in the case. Requests for continuations of preliminary hearings because the parties are not yet in a position to decide whether they are going to lodge an application, can have the unwelcome practical effect of delaying the start of a trial.

5.57 It seems unlikely that a Judge would allow hearings to be continued knowing that the Defence was conducting enquiries simply hoping to find sexual history or “bad character” evidence rather than having any specific reason for pursuing a line of enquiry. However, some Defence practitioners reported variation in the closeness of questioning by Judges about

the nature of their enquiries and suggested that they were, on occasions, conducting general enquiries in the hope of finding something rather than following a specific line of enquiry.

5.58 In Chapter Four it was noted that some Advocates Depute were concerned about the practice of some Defence Counsel attempting to obtain past medical records or social work records of complainer's in sexual offence cases, as part of a "fishing expedition" to uncover character evidence that may inform a s.275 application:

"What's happening, and this troubles me very greatly, is that some Counsel more than others are very keen to have access to the medical records of the victim and the social work records of the victim. ... But it means that whereas I refuse absolutely to use the Crown's powers to seize social work or medical records, unless I actually need them to prove the case, and insist that they make an application to the court to recover these records so that the process is intimated to the complainer who can vindicate her position, and make the Judge take a decision." (AD 1).

5.59 While Judge 2 spoke against the practice of deferring decisions about an application to the trial, Judge 3 believed that matters were best left to the trial Judge if issues which would have to be revisited during the trial were involved. When asked to elaborate, Judge 3 referred to contested issues that would continue to "rumble on" or evidence involving events taking place within the hours leading up to the time of the alleged offence where excluding the prohibited evidence might cause difficulties with respect to admissible evidence:

"... in that event I think I would incline to the view that it's better to leave it to the trial Judge. And a lot may also depend on the attitude of the parties, you know. If they consent that it should be dealt with now or if they consent that it should be granted now that's one thing. If they are vehemently, if one side is vehemently opposing the other side then and you can see the issue rumbling on then I think I would, in that event be more inclined to defer it." (Judge 3)

WEIGHING RELEVANCE AND PREJUDICE

5.60 As the application cases indicate, there was some variation in the extent to which Judges questioned the parties making applications about the factual basis for the application. This has some bearing on Judges' views about weighing the probative value and relevance of evidence to the key issues in the case against the possible prejudice that it might cause to the proper administration of justice, including harm to the privacy and dignity of the complainer.

5.61 The interviews with Judges were informative in this regard. Judge 3 was not inclined to question the nature of the evidence underpinning an application, but rather suggested that if evidence is relevant, then there is typically little room for its exclusion, even if the probative value is weak.

"You can only proceed upon the basis that the Defence have, are in a position to elicit evidence of the factual matters set out in the application. And if they are in a position to elicit that evidence then you must proceed on the basis that the, a jury could accept the evidence as being credible and reliable evidence. Or at least evidence which causes them to have a reasonable doubt. ... if you

thought about it yourself you might take a view that it is extremely unlikely that a jury would believe that evidence. But your own personal view as to credibility and reliability of it, I don't think would really come into it very much. It's more, its relationship to the, to the, the allegations and the charge and proximity and time obviously being a relevant consideration. And you've just got to go through the statutory scheme that's played out." (Judge 3)

5.62 Indeed, Judges generally had difficulty imagining situations in which the need to protect the dignity and privacy of the complainer would result in evidence of some relevance being excluded. Judge 1 noted that it was always going to be better to give the accused leeway even if it means embarrassing and upsetting the witness. Judge 4 thought that if the evidence was relevant to the reliability or credibility of the complainer then it was almost impossible to exclude that evidence. This was partly because of this Judge's reading of what he referred to as "the slight dichotomy" between the restrictions under s.274 and the exceptions to those restrictions under s.275 of the legislation. In particular, he thought that s.274 (1) (c)³¹ was very wide, potentially "covering everything:"

" And then you go to the provisions of s.275 it says "the court is satisfied that the question will relate only to specific occurrences demonstrating the complainer's character or any condition or disposition to which the complainer is or has been subject, the occurrence or those occurrences are relevant to establish whether the accused is guilty of the offence with which he's charged, and the probative value of the evidence sought to be admitted or elicited is significantly likely to outweigh any prejudice." ... So once you've got something relating to the question of whether she's a credible and reliable witness I suppose on one view means that automatically the probative value of it is significant and likely to outweigh any risk of prejudice to the proper administration of justice." (Judge 4)

5.63 Note, however, that whilst most maintained that credibility is central to probative value, Judges did not generally accept that any issue of relevance to the complainer's credibility and reliability should be admitted:

"I'd be disappointed in myself if I'd took the view that every fact in a life's occurrence that could have some bearing on complainer's credibility required to be admitted. That, I would have thought, to hold that view I think would be difficult to reconcile with the proper construction of s.275 (1) (c)." (Judge 3)

5.64 Judge 3 went on to complain that this aspect of the legislation was particularly and unnecessarily complicated and difficult to interpret, observing that "it's the sort of legislation where you have to go right back to the detail of it every time there is a contested application. And in particular you have to go to the definition of a proper administration of justice."

5.65 Judge 4 also thought this part of the legislation was problematic and may be drafted in such a way as to contain a contradiction between sections s.274 and s.275 as noted above.

³¹ s.274(1) (c) prohibits evidence which shows or tends to show that the complainer has, at any time, (other than shortly before, at the same time as or as shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, as might found the inference that the complainer (i) is likely to have consented to those acts; or (ii) is not a credible or reliable witness.

The relevance of a past sexual relationship between complainer and accused

5.66 All of the Judges interviewed would allow an application to establish a past sexual relationship between a complainer and an accused, accepting that this would normally be relevant background context that the jury would need to be able to understand the events. As Judge 1 put it, “in order to explain the reality or context of the whole transaction you have to go into some history. It would be ridiculous to keep that from the jury.” When specifically asked whether evidence of a single sexual encounter a year or more ago should be admitted, most Judges thought there was some possible relevance. Judge 1, for example went on to suggest that “possibly the significance of the accused putting a hand on shoulder or arm round waist would be different. The jury needs to know to have context.”

5.67 The possible relevance of the evidence to an honest belief in consent was spontaneously raised by Judge 4:

“I think it could be relevant to the question of whether he had a genuine belief, an honest belief rather in consent. Because on one view of it you think “well what relevance can that possibly have”? But because these things are so much a matter of degree, yes you could say if it's a situation where they haven't seen each other during that period, it could go either way. If, since that time they had seen each other regularly and there had not been any further sexual encounters, then it might be less influential in forming a view that there might be consent. Whereas, if they hadn't seen each other for a year and on the last time there had been a sexual encounter, then it might be more likely to lead to the belief. I think it would be quite difficult for that to be kept out.”
(Judge 4)

5.68 Whilst some Judges stated that they would seek to limit questions or evidence, others added additional qualifications, for example, the need to check whether or not the issue was a matter of dispute between the Defence and the Crown, with greater wariness if it was disputed. Some would be less inclined to admit evidence that was many years previously.

5.69 Defence practitioners also maintained that previous sexual relations between the complainer and accused would almost always be relevant in a sexual offence case, as it is demonstrative of a predisposition to engage in sexual behaviour in the future.

“I think in order to give the jury a picture that these are people that have had a relationship, and are not just people who have just met on a first date; it's going to always be relevant because of the nature of the offence. It's about human interaction, and if they don't have that information to base what's going on in a specific incident, then they're not getting the full picture.”
(Defence 1).

5.70 However, some Defence practitioners were not optimistic that evidence about a single episode a number of years before would be allowed by the court, although they would be inclined to put in into an application.

5.71 Advocates Depute varied in their attitude to past sexual history between the complainer and the accused with some agreeing that it had some relevance and some denying this position. For example, AD 1 saw no relevance in a previous sexual encounter between a

complainer and an accused a year previously, whereas AD 4 was more inclined to the view that this was relevant.

“In deciding the Lord Advocate's reference on rape, ... the then Lord Justice General said explicitly, that a women is entitled to consent or not consent at any time, and her position may change differently from man to man, or with the same man from time to time. That's got to be right. So why does the fact that she was willing to have intercourse with him a year ago make a difference. I find it very difficult to see how leading evidence of previous sexual conduct actually bears on the question of whether or not there was consent on this occasion.” (AD 1)

“It's a difficult one because without any evidence of history then from a jury point of view these 2 are strangers and that might not accurately reflect what the situation was but of course the fact that they are not strangers doesn't mean there is some licence to have intercourse and that's why it would need to be very recent, it would need to be really part of a relationship almost as a course of conduct, an encounter a year before on a single occasion because they met after a disco or something and then something a year later I don't see as being relevant at all and wouldn't agree to that.” (AD 4)

The relevance of sexual behaviour between the complainer and third parties

5.72 On the issue of sexual behaviour with third parties, that is someone other than the accused, Judges gave examples of evidence that they would exclude and some that they would include. Sexual intercourse with a third party *at the same time and place* as the alleged incident was the most common example of evidence that should be admitted, but then it was generally acknowledged that this would not need a s.275 application because it would be allowed by the wording of the provision at s.274 (1) (c) .

5.73 Judge 3 further extended admissibility from the same place and time to include events leading up to the incident that were close in place and time:

“If you had a party and there was, it was going on for several hours and there was clear evidence that the complainer had been consent[ing] to have sex with various other people in other rooms and then I think in that event you would envisage it would be admitted.” (Judge 3)

5.74 However, Judge 4 and Judge 2 would agree in excluding the following:

“If there's an allegation of rape happening in someone's flat and it's a rape by “A” and there's evidence or the proposed line is that she had sex with “B” in the pub an hour before, I would disallow that as wholly irrelevant. So what? Because that is exactly the kind of situation which, it's purely prejudicial material. It has no bearing on her credibility, the fact that she chooses to have sex with someone else an hour, a day, 2 days, a week, a month. I have disallowed that type of evidence.” (Judge 2)

5.75 Defence practitioners interviewed considered that applications to introduce sexual history evidence with someone other than the accused were rare and would be considered irrelevant by the court unless, as Defence 3 put it, “you were to have a situation where a

complainer was absolutely, outrageously promiscuous, you really can't from a practical point of view see how it's ever going to rear its head.”

5.76 Sexual behaviour between the complainer and someone other than the accused was considered relevant by Defence in those circumstances where the sexual behaviour took place close in time to the alleged incident.

Excluding general character evidence

5.77 In Chapter Four, it was stated that evidence or questioning concerning the character of the complainer was sought in approximately one quarter of cases. Most commonly, the character evidence related to the complainer's (alleged) mental instability, dishonesty (including past unproven allegations of sexual assault), or use of alcohol or drugs in the past and/or at, or around the time of the alleged offence.

5.78 On the issue of excluding character evidence, several Judges returned to the point that general character evidence was always largely excluded by existing law, and the 2002 Act widened the restrictions on evidence unnecessarily. This view was shared by most Advocates Depute and Defence practitioners interviewed. Consequently, they did not view the 2002 legislation as improving on the existing legal situation in this respect.

5.79 As far as Judges were concerned, the most pertinent form of relevant and therefore admissible character evidence identified was dishonesty on the part of the complainer and, in particular, previous unproven allegations of rape.

5.80 Yet some Defence practitioners believed that Judges would not easily admit such evidence. As Defence 3 said:

“I've seen applications going in and people trying to argue them in which somebody said, “She's claimed she's been raped before”, and I think that's extremely weak and judges have always seen through them and said, “So what?” because it's a ludicrous argument that that means that the second allegation must be false, or something like that.” (Defence 3)

5.81 Judge 1 cited a different kind of example of evidence of dishonesty in reporting sexual behaviour, recalling an s.275 application to lead evidence that the complainer had gone to the accused's flat and engaged in intimate sexual conduct which she had denied to the police because she didn't want to get somebody into trouble, and then changed her story. The Judge noted that the important thing was her dishonesty about the sexual behaviour, and not the sexual behaviour itself.

5.82 The same Judge gave another example of dishonesty becoming relevant evidence because it was cited as a motive for an unproven allegation, referring to a case in which it was alleged the complainer had made an allegation of rape to elicit sympathy in a situation in which she had been the subject of an allegation of theft.

5.83 Judges typically had no difficulty in imagining forms of dishonesty that would not be relevant and did not generally take the view that simply anything which had a bearing on the credibility of the complainer was of relevance. For example, Judge 1 noted that he or she would not allow questioning to show that a complainer lied, saying: “I'm just going to my

friend's" when in fact she was going to a night club. However, Judge 4 thought there was some lack of clarity in the legislation with respect to this issue.

Comparison with the baseline study

5.84 It is possible to use the baseline study to compare the dialogue around applications before and after the legislation, in order to further consider whether the 2002 legislation has refocused discussion. This is done here by looking at attempts to introduce similar sorts of sexual character evidence in applications before and after the 2002 legislation. Three similar cases are discussed: 2 from the baseline study and one from the current study. A fuller description of each is given in Appendix Five. These are all cases involving rape (and/or, in the earlier period, clandestine injury) and attempted rape in which the Defence claimed that whatever had happened was consensual and sought to introduce evidence about the complainant's sexual behaviour which blended into claims about her *sexual character*.

5.85 Case 1110 is an example from the baseline study, in which the Crown accepted the arguments of the Defence who sought to introduce questioning about the complainant about alleged incidents involving "naked dancing" witnessed by someone other than the accused, and her "offers of oral sex." The Defence suggested that this demonstrated the complainant's propensity to "promiscuously consent to sex" and that she was not a credible witness. The Judge allowed the questioning after a short dialogue with the Defence.

5.86 In a second baseline case, 1202, involving an application to introduce a similar sort of proposed evidence, of alleged "exhibitionist, sexually provocative behaviour", the Crown did object arguing that the Defence were seeking to put evidence before the jury of sexual occasions which were prejudicial to the complainant and had little bearing on the night of the alleged offence. Although the Judge permitted some of the proposed questioning, other aspects were disallowed, and restrictions were placed on the questioning.

5.87 The most similar case among the sample of cases studied in depth post 2002 was case 121 in which the Defence sought to establish that the complainant had "a practice of making sexual advances to others when she had been drinking." The Advocate Depute argued that this line by the Defence was against the purpose of the legislation and was a general attempt to undermine the complainant's credibility without showing relevance to the charge. The Judge was similarly not satisfied that the proposed evidence was relevant to establishing guilt nor was he satisfied that the probative value of the evidence was likely to outweigh any risk of prejudice to the proper administration of justice. The Judge made explicit reference to "the need to protect the complainant's privacy and dignity and to ensure that the facts and circumstances put before the jury are commensurate to the importance of the issue of the jury's verdict."

5.88 This comparison suggests that it may be that the way in which the new legislation orients the discussion during an application makes the introduction of *sexual character* evidence more difficult to argue and more likely to be opposed by the Crown.

CHAPTER SUMMARY

5.89 While the written nature and required format of s.275 applications rendered them much more transparent than applications under the previous legislation, prior agreement between the parties typically meant relatively little discussion of any aspect of s.275 applications at preliminary hearings.

5.90 Advocates Depute tend to take a neutral view on Defence s.275 applications, and the majority of applications to introduce sexual history and character evidence were not opposed by either party.

5.91 Where s.275 applications were opposed by the Crown, this was most often in relation to general character evidence and in particular to allegations of dishonesty on the part of the complainer. Judges revealed that they considered the most relevant form of dishonesty admissible to be previous “false allegations” of rape on the part of the complainer. Some examples were also found of Advocates Depute challenging aspects of applications that were poorly specified.

5.92 S.275 applications by the Crown were less common, typically unopposed by the Defence and accepted by the court. However, the 4 Crown only application cases included one in which the Defence objected to a Crown application as a potentially damaging exploration of a complainer’s private sexual habits, a view upheld by the court which refused the application.

5.93 Some Judges were clear that it was their duty to ensure that the legislation was observed and would pay very careful attention to the wording of the legislation when deciding a s.275 application. However, by their own admission, Judges were also more likely to restrict or disallow Defence applications where the Advocate Depute opposed. Some Judges also said they would refuse Defence applications whether or not the Crown objected, particularly those that were poorly specified or of weak relevance. However, some Judges said the position of the Crown was decisive. One indicated that the threat of appeal denied the Judge the ability to effectively object to Defence applications unopposed by the Crown.

5.94 Two Judges described the drafting of the legislation as unnecessarily complicated and detailed, rendering some sections, in particular the need to take account of the “proper administration of justice”, rather difficult to interpret.

5.95 Examination of s.275 applications and interviews revealed that there was often a shared presumption of relevance by Crown and Defence and, arguably Judges, concerning sexual history evidence, particularly where there was a past history between the complainer and accused. All Judges interviewed would allow evidence to establish a past sexual relationship between a complainer and an accused, accepting that this would normally be relevant background context that the jury would need to understand the events.

5.96 Most applications were decided at one preliminary hearing, although several were continued to subsequent hearings before a final decision. Continuations were for 2 main reasons: when it was not possible to have a full discussion due to lack of time or unavailability of relevant information; or where an applicant was trying again at a subsequent hearing or at the trial itself after an application had been partially or entirely refused by the court.

5.97 The Judge at preliminary hearings is rarely the same as the trial Judge and, moreover, different Advocates Depute can be involved at different points in the process. Defence practitioners were the most likely to refer to the disadvantages of applications being decided in advance of a trial.

5.98 On the issue of excluding general and sexual character evidence, interviewees emphasised that general character evidence was always largely excluded by law, and considered the widening of the restrictions unnecessary in this regard.

CHAPTER SIX: S.275 APPLICATIONS AND PREVIOUS CONVICTIONS OF THE ACCUSED

6.1 This Chapter addresses one of the key research objectives, that is, to establish the extent to which previous convictions of the accused are disclosed, the circumstances under which they are disclosed and any impact this has on proceedings.

6.2 Information about any previous convictions of the accused is normally withheld from the jury, as it is considered prejudicial. Under section 270 of the 1995 Act, where the character of the prosecutor, the complainer or any other witness for the prosecutor is attacked, it was open to the Prosecution to retaliate by attacking the character of the accused. Where the Defence sought to undermine the credibility of the witness by attacking her character or sexual morals, it would be open to the Crown to apply to the court to examine the accused as to his own character and reveal his own previous convictions, if he has any, to the jury. In practice this did not appear to happen to any great extent (Burman et al, 2005).

6.3 *Redressing the Balance* (2000) argued that it is difficult to distinguish the logic of a Defence argument that, because the complainer has slept with other men in the past, or has engaged with the accused in sexual behaviour in the past, she is more likely to have consented on the occasion in question, from the logic of saying that if the accused has committed a sexual offence in the past, then he is likely to have done so on the occasion of the index charge. It was therefore proposed that where an application to admit evidence about the complainer's sexual history or character is granted, there should be an automatic disclosure of any convictions which the accused has for sexual offences within the offence categories covered by the legislation:

“Where the accused does have such previous convictions, he will therefore be aware that seeking to attack the character of the witness is going to result in disclosure of his previous convictions. Clearly where he had no previous convictions he would have nothing to fear (2000: 10) “

6.4 Chapter One described how under sections 275A (1) and (2) of the 2002 Act, where the Defence, following a s.275 application, does succeed in convincing the court that character or sexual history evidence should be introduced, the Judge and Prosecution are no longer prohibited from asking questions relating to offences other than the one with which the accused is charged.

6.5 Following a successful s.275 application by the Defence, and unless the accused objects, the Crown is required to place any relevant previous convictions of the accused before the judge. Once the relevant convictions are before the judge, they will automatically be admitted as part of the evidence in the case and disclosed to the jury, unless the accused objects. The various grounds for objecting are set out at s.275 (4). An accused may object on the basis that: the offence did not involve a substantial sexual element; that disclosure would be contrary to the interests of justice; or that the conviction did not relate to the accused.

6.6 Relevant convictions include a conviction for an offence to which section 288C of the 2002 Act applies,³² or where a *substantial sexual element* was present in the commission of any other offence of which the accused has been convicted. These convictions will then automatically be admitted as part of the evidence in the case and disclosed to the Judge and, potentially, to the jury. Where s.275 applications are made by the Crown, then the requirement to disclose previous convictions does not apply.

NO DISCLOSURE

6.7 There was no information in any of the available data sources to indicate that an accused's previous convictions had ever been disclosed as a result of a s.275 application by the Defence, but it was unclear whether this was because such disclosure had never occurred, or it had simply not been recorded in the data sources to which the research team had access.

6.8 To check this out further, information about the presence or absence of previous convictions of the accused was obtained from the Sitting Papers at the Judiciary Office in Edinburgh High Court (this information is not available from the High Court Case Management System).³³

6.9 Within the total sample of 231 mapped sexual offence cases, all of the 162 cases which include at least one charge of rape, were examined for the presence of previous convictions. In 14 of these cases, no information to confirm whether the accused had previous convictions was available. The information presented in this chapter is based on the 148 cases where relevant information about previous convictions was available.

6.10 Case Sitting Papers were used to confirm whether the accused had previous convictions in relation to the following categories of cases:

- Rape cases with s.275 applications made by the Crown only;
- Rape cases with s.275 applications made by the Defence alone, and by both the Defence and Crown; and
- Rape cases without s.275 applications.

6.11 Table 6.1 shows the presence or absence of previous convictions in the mapped rape cases. It can be seen that whilst in 93 of the 162 cases, the accused had some sort of previous conviction: this was for a sexual crime in just 20 cases (or 12%). In 55 cases, the accused had

³² Section 288C applies to the following sexual offences: rape; sodomy; abduction of a woman or girl with intent to rape; assault with intent to rape; indecent assault; indecent behaviour (including any lewd, indecent or libidinous practice or behaviour); an offence under section 106(1)(a) or 107 of the Mental Health (Scotland) Act 1984 (c.36) (unlawful sexual intercourse with mentally handicapped female or with patient); an offence under ss. 1,2,3,5,67(2) and (3), 8, 10 and 13(5) (b) or (c) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

³³ In the initial sweep of data collection, the Books of Adjournal (BOA) were used as the primary data source. However, the individual case Sitting Papers were the only reliable data source available to us about previous convictions since the BOA only provided information in *some* cases. Information about previous convictions of the accused was found in the papers titled the 'History of the Accused', which stated whether the accused had previous convictions, allowing this information to be positively identified, rather than relying on finding an actual schedule of previous convictions in the BOA. Some papers had been removed from the BOA (for example, because they were required for appeal proceedings). Further information about the existence and nature of any previous convictions can also be found in Social Enquiry Reports pertaining to the accused. The level of information available in Social Enquiry Reports, however, can vary.

no previous convictions, and in 14 cases it was not known whether there were any previous convictions.

Table 6.1 Previous convictions of accused in rape cases with and without s.275 applications (June 2004 to May 2005) mapped cases

Status regarding Previous Convictions	Cases without s.275 application	Cases with Crown only applications	Cases with Defence applications**	All Rape cases	
				n	%
Analogous	9	4	7	20	12
Non-analogous	36	0	37	73	45
None	32	2	21	55	34
Unknown	2	1	11	14	9
Total cases	79	7	76	162	100

** Includes cases with Defence only s.275 applications, and cases with both Crown & Defence s.275 applications.

6.12 Of the total of 20 rape cases where the accused had an analogous previous conviction, an application was made by the Defence in 7 cases, and in 4 cases the s.275 application was made by the Crown alone. In the remaining 9 cases where the accused had an analogous previous conviction there was no s.275 application made by either party.

6.13 Forty nine of the 162 rape cases did not proceed to trial, as Table 6.2 shows, and a quarter of the 20 rape cases where the accused had an analogous previous conviction did not proceed to trial. Although the numbers are extremely small and should therefore be treated with caution, this does tentatively suggest that cases where the accused had an analogous previous conviction were *less* likely to result in a guilty plea than rape cases where the accused had non-analogous or no previous convictions. This is interesting in that, during fieldwork, it was informally suggested by those involved in cases where the 2002 Act would potentially apply, that the possibility of disclosure of previous convictions might be a factor in deciding to plead guilty.

Table 6.2 Previous convictions in cases which do, and do not proceed to trial (June 2004 to May 2005)

Status of previous convictions	Guilty/ mixed plea (no trial)	Not guilty/ mixed plea (going to trial)	Other ^(a)	All rape cases
Analogous	5	12	3	20
Non-analogous	23	46	4	73
None	21	32	2	55
Unknown*	0	12	2	14
Total cases	49	102	11	162

^(a) Includes cases that were deserted pro loco et tempore, and non-appearance by the accused

Previous convictions and Crown only s.275 applications

6.14 It has already been established that cases in which the Crown only make applications are rare;³⁴ just 7 out of the 162 mapped rape cases involved Crown only applications. With the caveat that numbers are very small here, the research nevertheless found that a relatively

³⁴ In all of the mapped cases, there were just 11 Crown only 275 application cases.

high proportion of Crown only applications (i.e. 4 out of the 7) involve previous analogous convictions on the part of the accused.

6.15 One of the 4 cases (209) formed part of the sample for more detailed analysis, and was transcribed. The following extract is from the preliminary hearing where the application was discussed, and suggests that the Crown offered to lodge an application in order to allow certain evidence to be introduced at the trial:

Defence: "...in order to place that evidence before the jury, there has to be a s.275 application. And this was discussed with the Crown and with a view to ensuring a fair trial the Crown very helpfully and properly offered to present the s.275 minute themselves because for us to present the s.275 minute has certain consequences and penalties at this stage which the Crown do not face."
(case 209)

6.16 This raises the question of whether the Defence might seek to avoid the penalty of lodging an s.275 application by negotiation over the lodging of a Crown s.275 application to introduce similar questioning or evidence to that which the Defence would otherwise seek to introduce. However, no practitioner interviewed fully endorsed the view that this was likely to become a common practice. Defence 1 refers to pre-trial discussion with the Crown but does not say anything to indicate pre-trial negotiation designed to avoid the penalty of disclosure.

Researcher: "You'd discuss the substantive contents of the s.275 application [with the Crown]?"

Defence: "Yes, and obviously if the Crown are going to make an application, if you've identified something for example in the transcript, then you might say "is the Crown's position that they're going to make the application?" in which case you might not need to do yours." (Defence 1)

6.17 Defence 3 expressed clear doubts:

"I've never come across a situation where that has happened in practice and I think it's perhaps unlikely that it would in some ways because I think Crown application, as I'll come on to, are a wee bit rare and seldom go as far as the Defence would want them to." (Defence 3)

Previous convictions and s.275 applications made by the Defence

6.18 In 3 of the 7 rape cases where the Defence made a s.275 application, it was allowed either in full or partially, and the case went to trial. From the available information (case minutes for all 3 cases, and a transcript for one case), there was no evidence to indicate that the analogous previous convictions were placed before the judge, or the jury, as the legislation intended.

6.19 In the first case (044, one of the transcribed trials) which involved a single rape charge and the submission of s.275 applications by both the Defence and the Crown, both applications were allowed in full. The previous conviction in this case related to s.4(1) of the Sexual Offences (Scotland) Act 1976 (sexual intercourse with a girl of or above 13 years and under 16 years). The preliminary hearing dealt only with the Crown application, as the

Defence at that stage had not lodged an application. At the preliminary hearing, following a question from the court as to whether there was an intention to make an application, the Defence referred to the potential for the accused's previous convictions to be disclosed as a reason for not doing so, although the court was not convinced that a s.275 application was necessary:

Judge: "It's perhaps possible that the matter you are addressing is actually not excluded by virtue of s.274 (1)(c)."

Defence: "well, that certainly would be the basis upon which I would be proceeding because, as [judge] well knows, had I or those instructing me made an application and that application succeeded, then that has consequential difficulties in terms of previous convictions."

Judge: "Yes."

Defence: "It is for that reason that clearly much thought has to be given to these things but with respect, I share [judges'] view that that kind of evidence may well be allowed in another way."

Judge: "Yes, given the likelihood of the material remaining there for any length of time it would appear to be something that might well be not excluded by s.274(1c), so no doubt you could approach it on that basis at the trial."

Defence: "Indeed, I just in fact flagged that up in fairness to the Crown. In fact I've spoken to the learned depute who is doing the trial. I have raised this matter with him and I think possibly during the trial we can reach an accommodation." (Case 044)

6.20 However, the Defence did go on to submit a s.275 application at the commencement of the trial (under "special cause shown") which was allowed in full. There was no evidence in the transcript of the trial or the case minutes to show that the accused's previous analogous convictions were disclosed, or raised in any way, other than the reference made by the Defence in the excerpt above. The verdict was not proven.

6.21 In the second case (205), which involved a charge of rape along with one other (non-sexual) charge, a previous conviction for rape was listed in the schedule in the case Sitting Papers. From the case minutes, it seems that the previous conviction of the accused was raised only when the Advocate Depute moved for sentence after the jury had reached their verdict. At an earlier stage in proceedings, there was a Defence motion to desert the case since a tape of the accused's interview with the police was played to the jury, wherein the accused refers to having been in prison. The Crown did not object to this, the first jury was discharged and the trial went ahead before a second jury. In this case, it should be noted that the offence which resulted in the previous conviction for rape, occurred after the offences listed on the current indictment.

6.22 In the third case, with a successful s.275 application made by the Defence (136), there was no reference in the minutes to the accused's convictions relating to rape, lewd and

libidinous practices and behaviour, and unlawful sexual intercourse with a girl between 13 years and 16 years, being raised in the case. The verdict in this trial was not guilty.

6.23 There was a fourth case (084) which involved rape along with several other charges, and the Defence application was allowed in full. However, whilst the lengthy schedule of previous convictions included “Assault: agg: sexual”, this took place when the accused was a juvenile and was dealt with by the Children Hearing System, which imposed a supervision requirement. This would not count as an analogous previous conviction. The verdict was not guilty.

Crown discretion?

6.24 One reason why the relevant previous convictions were not disclosed in these cases may be that some discretion was used concerning such disclosure, as the following extracts indicate:

“Sometimes the s.274/5 you need the evidence in, you need to make these questions, so you would approach the Crown and ask them if they would withhold. I know it says shall disclose rather than may, but sometimes the Crown are quite reasonable.” (Defence 5)

“An awful lot of the job we do and Judges do is obviously a question of balance at all stages and I would have thought it would only be the most extreme cases that the Crown would seek to go about trying to get previous convictions in.” (Defence 2)

Impact of disclosure of past analogous convictions on proceedings in sexual offence trials

6.25 On the basis of these findings, it seems unlikely that the prospect of having to disclose analogous convictions following a successful s.275 application by the Defence to introduce sexual history or character evidence, might prompt the accused to consider pleading guilty in advance of trial, despite the fact that this was a common impression relayed informally to us by legal practitioners during fieldwork periods in the courts. Interviewees spoke about the general unwillingness of those accused of rape to consider pleading guilty in advance of trial. This can be summed up by the following:

“... I don’t think the legislation has absolutely any effect as to whether an accused will plead or not – it’s very difficult. I’m thinking specifically at the moment of rape cases and especially ones where consent is an issue; that’s usually something that has to go to trial. If consent is an issue, it’s just simply not going to happen that the accused is going to plead.” (Defence 1)

6.26 It is very difficult to gauge the effect of the requirement to disclose analogous previous convictions on proceedings when, first, so few cases where the accused had analogous previous convictions and which involved a s.275 application by the Defence were both successful and proceeded to trial. Second, even where such cases did proceed to trial, it seems as if the previous analogous convictions were not being disclosed to the Judge and jury in the way that the legislators intended. Although the numbers are small, we remain sceptical that practice follows legislative intent. The outcomes of various strands of legal practice have combined to protect the accused from having potentially damaging information disclosed.

Presence of previous convictions acting as a deterrent to making s.275 applications

6.27 There were 9 cases where the accused had analogous previous convictions, and which *did not* involve a s.275 application by the Defence. Given that there are relatively few cases where applications *are not* made, is there a possibility that the requirement that analogous convictions will be disclosed following a successful Defence application deter the making of an application in the first place?

6.28 Whilst informal discussion with legal professionals during fieldwork suggested that it does, when this was pursued in interviews, there was no clear consensus. Two Defence interviewees felt that Defence lawyers would choose “not to make” applications where there was a possibility that previous convictions would be disclosed to the jury. As Defence 3 said:

“I think there are few cases in which people would choose to do that. I think you would really have to say that the evidence that you were trying to adduce would have to be really in itself of huge importance to outweigh the likely prejudice of disclosing a previous conviction in front of a jury.” (Defence 3)

6.29 This interviewee went on to say that Defence lawyers would consider previous convictions in front of a jury to be “pretty catastrophic”:

“I suppose with perhaps a minor previous conviction from some time ago against a lengthy record for dishonesty from the complainer, or something like that. It would be a balancing act but as a generality I think people would be very slow to do that.” (Defence 3)

6.30 Similarly, none of the Judges interviewed could imagine situations where the Defence would be advising the accused to make a s.275 application to introduce otherwise prohibited evidence about the complainer where there was a risk that the past analogous convictions of the accused would be disclosed to the jury.

6.31 However, not all interviewees believed that the risk of previous convictions being disclosed would have a “chilling” effect on applications. The response from Defence 2 would suggest that the possibility of the accused’s previous convictions being disclosed *did not* act as a deterrent to submitting a s.275 application, since the Crown were unlikely to seek to disclose previous convictions. He said:

“It’s not been used as far as I’ve seen, as some sort of disincentive to the Defence. Unless the s.275 is clearly lacking, and this might be viewed as just an old fashioned attack on character for the sake of it, then I think then it would be something that the Crown would bring into play. But I think if the Defence is responsible in their framing of their s.275s then I think by and large you meet the requirements, its specifics and it’s clear that you have a line and there is a relevance, then the Crown are still very conscious of the general rules about presumption of innocence and things of that nature not being compromised unless it’s absolutely and utterly necessary.” (Defence 2)

Previous convictions in the context of domestic abuse

6.32 In the rape cases examined for the presence of previous convictions on behalf of the accused, 8 rape cases were identified where the accused had a previous conviction for an offence which occurred in the context of domestic abuse, but which did not contain a sexual element. This information was obtained from the case Sitting Papers, where it was variously documented under “History of the Accused”, in the Social Enquiry Report prepared by a social worker, or in the schedule of previous convictions, although the level of background information available in each case varied.

6.33 In 3 rape cases with a Defence application, and 2 rape cases with both a Defence and a Crown application, there was a previous conviction for assault, assault to injury, or assault to severe injury perpetrated against the partner or wife of the accused. In one rape case where a Defence application was submitted (and allowed in part), the previous conviction for assault to severe injury was against the accused’s ex-partner, who was also the complainer in the index offence. The verdict in this case was not guilty.

6.34 In a further 3 cases with no applications made by either party, there was a conviction for assault in the context of domestic abuse, although it was not clear from the documentation whether this was against the same complainer as in the index offence.

6.35 Although these are not strictly relevant previous convictions in terms of the 2002 Act, as they do not involve a “substantial sexual element”, they are indeed relevant in the context of the accused having a past history of violence against women. Prior convictions relating to domestic abuse on the part of the accused may be relevant in *any* rape or sexual assault case, in that they show a previous history of violence against women. Even more so where the history of violence evidenced through the previous convictions is against the same woman as in the current trial (as it was in at least one of the 8 cases identified here). This is as much a part of the facts of the case as the previous relationship itself.

6.36 It is worth noting in this regard that *Redressing the Balance* sought views on whether previous convictions for assault could be included under the terms of the 2002 Act, on the basis that assault is a crime of violence and might be considered just as relevant as previous convictions for shameless indecency. However, in the final formulation of the 2002 Act, disclosure of previous convictions did not extend as far as assault.

CHAPTER SUMMARY

6.37 S.275A of the 2002 Act allows disclosure of the accused’s relevant previous convictions where the court allows questioning or evidence about the complainers past sexual history or character. Relevant convictions are those for sexual offences, or offences where there was a substantial sexual element in the commission of the offence. An accused may only object to relevant convictions being admitted as evidence in the case where the offence did not involve a substantial sexual element, the disclosure would be contrary to the interests of justice, or the conviction did not relate to the accused.

6.38 In order to assess the extent to which previous convictions of the accused were disclosed, and the impact that this has on proceedings, all rape cases (n=162) over the 12 month period studied were examined for the presence of previous convictions. In 20 cases (12%), the accused had an analogous previous conviction. In 7 of these a s.275 application to

introduce prohibited evidence was made by the Defence, 3 of which were successful. There was no evidence to demonstrate that relevant previous convictions of the accused had been placed before the court as the legislation intended.

6.39 In 4 of the 7 rape cases in which an application was made by the Crown only, and not by the Defence, the accused had previous convictions. Although caution should be exercised in drawing conclusions from such a small number of cases, there is nevertheless some evidence from transcripts of preliminary hearings where the consequences of a Defence application were discussed, where it was acknowledged that submission of an application by the Crown allows the introduction of sexual history evidence into the trial, without the need for a Defence application, which could result in the accused's relevant previous convictions being disclosed to the court. It should be noted, however, that this was not a view fully endorsed by the legal practitioners interviewed.

6.40 With regard to the impact of the potential disclosure of the accused's previous convictions on case proceedings, the presence of analogous previous convictions did not result in the accused pleading guilty as seemed to have been anticipated by some of the practitioners interviewed. Nor, importantly, has the possibility of disclosure of previous convictions had a "chilling" effect on applications. Bearing in mind the caveat about small numbers of cases, the data suggests that not only has this not happened, but also a range of practices ensure that in virtually no cases is this information introduced as intended. In sum, the potential disclosure of previous convictions appears to have had little impact upon case proceedings. This may, in part, be a reflection of the fact that previous convictions did not appear to have been disclosed to the court.

6.41 Finally, in 8 of the rape cases, the accused had a previous conviction for assault, assault to injury, or assault to severe injury in the context of domestic abuse. Under the 2002 Act, these convictions are not defined as relevant convictions since they do not involve a substantial sexual element. Yet the fact that the accused had prior convictions relating to domestic abuse is relevant in sexual offence cases, in that they show a previous history of violence against women. Where the past assault was perpetrated on the same woman as in the index offence, as it was in at least one of the 8 cases identified here, then this is surely as much a part of the facts of the case as the previous relationship itself.

CHAPTER SEVEN: THE USE OF SEXUAL HISTORY AND CHARACTER EVIDENCE IN THE TRIAL

7.1 This chapter focuses on the use of sexual history and character evidence in the trial, following a s.275 application to do so, in order to address how the 2002 Act works in practice. The chapter draws on data from the 32 trials in which s.275 applications were made, and from interviews with legal practitioners.

7.2 Primarily, the chapter considers the ways in which the evidence or questioning sought in applications was introduced and used in the trial and, specifically, the extent to which the questioning adhered to the parameters set by the court in the preliminary hearing. It also examines, where appropriate, the role taken by the other party, and by the court when questioning or evidence strayed beyond the boundaries set for the application. The last part of the chapter compares both the extent and the use of sexual history and character evidence introduced under the 2002 Act with that identified by the baseline study.

INTRODUCING SEXUAL HISTORY OF CHARACTER EVIDENCE ALLOWED THROUGH S.275 APPLICATIONS

7.3 It has already been established that a very high proportion of sexual offence trials contained s.275 applications and, for the most part, the evidence or questioning sought was allowed by the court. Interviews with Defence practitioners suggested that they tried to ensure that s.275 applications were as full and detailed as possible, sometimes referring to including everything that they might possibly wish to pursue as a “belt and braces” approach, although they may not ask some of the questions or pursue all of the evidence sought during the trial itself. Detailed examination of trial data, however, revealed that it was rare that all evidence allowed under s.275 applications was not pursued by the Defence at some time during the course of the trial, but particularly during the complainer’s cross-examination. The “belt and braces” approach to drafting s.275 applications therefore resulted in detailed and often lengthy questioning of the complainer on sexual or character matters.

7.4 It was stated in Chapter Four that s.275 applications can be very detailed and lengthy. For example, the written application in case 172, which involved 2 charges of assault with intent to rape and attempted rape, listed 14 separate aspects relating to both sexual history and character matters under “nature of evidence or questioning sought”, all of which were considered relevant and allowed in full by the court:

- (i) That applicant and complainer formed a relationship in [date]. They lived together [soon after] and purchased property together;
- (ii) That the relationship was characterised by aggressive arguments especially if complainer had been drinking;
- (iii) That complainer frequently used illicit drugs particularly ecstasy and cocaine. On occasion of charge 1, complainer drank alcohol to excess and abused cocaine;
- (iv) That a physical confrontation occurred [charge 1: assault with intent to rape] which involved complainer slapping and scratching the applicant on face and body and kicking him;
- (v) That complainer denied to police that incident had any sexual element;
- (vi) That a few days after the incident complainer called the applicant and said “come and take me away”;

- (vii) That on [date 2 weeks after incident in charge 1] complainer phoned applicant. Complainer and applicant met and had sexual intercourse;
- (viii) Thereafter for several months, complainer and applicant met once or twice a week and regularly had sexual intercourse in complainer's flat, accused's house or at hotels;
- (ix) On [date one year later] complainer asked applicant for £1000 to help pay for a flat. Applicant declined whereupon complainer stated "I've got photos to show police, maybe police will help me get a mortgage";
- (x) That applicant attended a party in [place] with complainer in [following year] where complainer performed a "striptease" type dance directed towards the applicant;
- (xi) In early hours [same date] during phone call complainer asked applicant to meet at her flat;
- (xii) After arrival at the flat complainer performed a sexually suggestive dance in front of applicant;
- (xiii) That a physical confrontation occurred [charge 2 – attempted rape] involving the complainer grabbing the applicant and attempting to slap and scratch him; and
- (xiv) That since [date of charge 2] complainer has attempted to contact the applicant by phone.

7.5 All evidence was pursued during the trial, in much more detail than is conveyed in the written application, which in turn led to a very lengthy cross-examination. For example, in relation to establishing (i) above, the Defence tried to show that the complainer and accused embarked on a sexual relationship very shortly after they first met, that they had sex very frequently, that they had sex in public places including parks, that they had sex in a public place shortly after charge one, and that throughout their relationship sex was often accompanied by excessive drinking and drug-taking.

Breaching s.275 applications

7.6 Of the 32 trials which included applications, approximately one half introduced some evidence or questioning during the trial, which had not been explicitly agreed to by the court. This was evidence which had been either specifically disallowed by the court, or which strayed over the boundaries of questioning set by the court in the preliminary hearing, and included the following types of occurrences:

- s.275 application made by Defence and allowed by court but sexual history evidence introduced by Crown;
- s.275 application made by Crown, and allowed by court but sexual history and/or character evidence introduced or pursued by Defence without s.275 application;
- s.275 application allowed, but questioning strayed over the parameters set by the court; and,
- s.275 application disallowed by the court, but questioning or evidence sought was introduced.

7.7 So in some cases, this was a clear breach of the agreement reached by the court, or otherwise an obvious disregard for the provisions, but in other cases there was more room for debate.

OBJECTIONS AND INTERVENTIONS

7.8 Following the introduction of restricted or specifically prohibited evidence, objections by the other party and/or interventions by the court occurred infrequently, in just 7 cases in all. The Crown objected in 4 cases, and the trial Judge intervened in one case. In the sixth case (039), notably, the Defence objected to the line of questioning pursued by the Advocate Depute regarding details of the complainer's sexual history with the accused, due to a concern that the evidence elicited disclosed a sexual encounter between the complainer and accused outwith the period covered by the indictment. Following a brief discussion in the absence of the jury the court allowed some limited questioning to continue.

7.9 In a seventh case (188), which involved an objection from the Crown, the accused was the complainer's father, and the Defence application sought to elicit evidence concerning the manner in which the complainer reported the abuse and on the continued contact between the complainer and her father following the charge. During cross-examination however, the Defence began to question the complainer about her "stormy" relationship with her husband and mother, suggesting that she had a particularly volatile and malicious personality and was prone to violent temper outbreaks. The Defence tried to suggest that the complainer had sustained a black eye in an argument with her husband, and had a major fall-out with her mother on the eve of her wedding. The Advocate Depute interjected at this point, alluding to the need for this to be argued outwith the presence of the jury. There followed some discussion concerning whether this constituted character evidence that required an application, but one was not made. The Defence then moved on to another set of questions but, later during cross-examination, continued to question the complainer on the argument with her mother, building on the picture of her as argumentative and unpredictable. This time there was no objection, and the Defence continued:

Defence: "Yes. I think the reason your parents didn't attend the wedding is because they didn't like [partner] and you'd fallen out with your mother."

Complainer: "Yes. Well I fell out with my mum after the wedding not before it. I was upset that she wasn't coming to the wedding but we hadn't fallen out then."

Defence: "And some days after the wedding you telephoned your mum."

Complainer: "It was the night after the wedding."

Defence: "And you were screaming at her over the phone."

Complainer: "Well the conversation was fine to begin with and ended up in an argument over the phone."

Defence: "You've got a bad temper haven't you?"

Complainer: "Not really no."

Evidence or questioning sought under s.275 by Defence but introduced by the Crown

7.10 In some cases only the Defence made an application, but sexual history evidence was first introduced by the Crown. In case 108, for example, an application was made by the Defence to question the complainant about her relationship with her boyfriend, although it was the Crown that commenced questioning during examination-in-chief:

AD: “Now at the time back in [month /year] you’ve told the ladies and gentlemen you had a boyfriend.”

Complainant: “Yes.”

AD: “Prior to the night we’ve been talking about, when was the last time you’d had sexual intercourse.”

Complainant: “Two, 3 maybe even 4 weeks before, not sure.”

7.11 This was then picked up by the Defence during cross-examination:

Defence: “I don’t mean to cause you any embarrassment but you were asked by [AD] about [boyfriend] and when you would have last had intercourse with him, and I think if I’ve noted your answer correctly you said it would have been between 2 and 4 weeks.”

Complainant: “I think so. I’m not sure how long it was. I hadn’t seen him for a wee while before it.”

Defence: “But to be clear, I just want to be clear, I’m not suggesting you’re lying about that, just simply asking you your recollection is that it was 2 to 4 weeks.”

7.12 In case 232, which involved 2 complainants, an application was made by the Defence, and sought to question the first complainant on previous allegations of abuse made against another person when she was younger, and a criminal injuries claim, and also sought to elicit contraceptive history in respect of the second complainant. During examination-in-chief of the first complainant, the Advocate Depute elicited what might arguably be called “bad” character evidence in the context of establishing where and how she had divulged the previous allegation:

AD: “I want to ask about your conduct as a child, were you unruly?”

Complainant: “Don’t understand.”

AD: “Were you as a young person, did you misbehave, ever get drunk?”

Complainant: “Yes ... got drunk and that....”

AD: “You were drunk on one occasion the police lifted you.”

Complainant: “Yes.”

AD: “And you said something?”

Complainer: “Yes I was drunk and I said, “he’s paying me for sex”.”

AD: “To anyone in particular?”

Complainer: “Just announcing it...in the street where we lived.”

7.13 The Defence followed this up in cross-examination, saying she missed an opportunity to report the alleged abuse and suggesting it was a “false allegation.” The Defence then went on to introduce sexual history evidence by way of a question about the presence of love-bites:

Defence: “Did it not seem like another opportunity when police lifted you about your behaviour and were saying things about accused, not opportunity for you to tell them then?”

Complainer: “Yes it was a good opportunity but I was scared.”

Defence: “On one occasion your mum saw love bites on your breast?”

Complainer: “Quite a few occasions.”

Defence: “What age were you at that time?”

Complainer: “...16 or something, can’t remember.”

Defence: “Did you say to her it was none of her business or that it was to do with your boyfriend?”

7.14 There had been no reference to these issues in the Defence application, although it is interesting to note that, during the discussion of the Defence application, the Crown stated that they had intended to submit a s.275 application in respect of the contraceptive history of the second complainer, but it was an oversight and so sought to rely on the Defence application in this matter:

AD: “It may well be that the terms of the Defence s.275 are going to be sufficient to allow the Crown to ask the same questions unless your lordship takes a different view. ... Of course one of the differences between the Crown and the Defence application would be that the inference sought to be drawn would not be the same. ...But it may well be that the Defence application turns out to be sufficient. I know it is a matter the court has to be satisfied on but I take the view that if there is an application outstanding which the Defence covers I don’t see that the Crown should simultaneously cover the same thing. Maybe your lordship takes a different view?”

Judge: “I have not heard any authority on this where 2 different inferences are to be drawn.”

AD: “So long as the point is somewhere in a s.275 application somewhere, I have certainly never from the Crown’s point of view followed a line of questioning under s.275 and then raised an objection to any Defence line which sought to raise issues that I raised so I wouldn’t have thought 2 were necessary. However it may be that when I go back to the office and read the precognition then if anything further is required in so far as it goes beyond what the Defence have given notice of.”

Judge: “So you are just reverting to the position that the Crown will make an application under s.275 at a later stage if it feels something outside of the Defence’s application is required.”

AD: “Yes.” (preliminary hearing case 232)

7.15 Interviews with Advocates Depute suggested that the Crown are not always mindful of the need to make a s.275 application, partly because of the relative newness of the requirement to do so.

STRAYING BEYOND THE PARAMETERS OF QUESTIONING SET BY THE COURT

7.16 In case 044 the Crown application sought solely to elicit evidence that the complainer had had sexual intercourse with another male 5 or 6 months before the alleged offence. The court restricted the questioning thus: “subject to the condition that it is for the purpose solely of ascertaining whether the girl had on a previous occasion had sexual intercourse and no more than that.” (Judge in case 044)

7.17 The Defence also sought to elicit the same evidence on the basis that the complainer feared she was pregnant by someone other than her boyfriend. The Defence application, however, was made at a different preliminary hearing, before a different Judge, and the questioning was not restricted in the same way. At trial, the Defence questioned the complainer at length about how and when she lost her virginity, and also introduced evidence about her alleged predisposition to lying, delay in reporting the allegation to the police and refusing to undergo a medical examination, arguing that this was evidence of a “false allegation”, lack of credibility, and consent.

7.18 In case 204, the court restricted the Defence application by specifically disallowing questioning to elicit that the complainer had been working whilst also claiming unemployment benefit. In the trial, the Defence subsequently questioned the complainer on her “trouble with the DSS” at some length, the transcript of which extends to 3 pages.

7.19 In case 233, the Defence sought to elicit evidence about the young complainer’s “sexual maturity” based on the contents of the medical report, and also asked about her sexual relationship with another witness in the case, whose child she was carrying. During the preliminary hearing, the Judge expressed reservations about the evidence sought in relation to the relationship and set restrictions thus:

Judge: “I think what I’ll do is refuse that [part of] application “in hoc statu” because I suspect, particularly as the AD says, that the relationship between

the complainer and witness may very well emerge in the course of the evidence in chief ... it doesn't emerge that enables you the opportunity to come back and renew your application outwith the jury before you cross examine."

7.20 The relationship did not surface during the examination in chief of the complainer, and the Defence did not submit a s.275 application at trial, but did go on to question the complainer about her relationship with the witness, establishing that they currently live together, although they did not cohabit at the time of the alleged offence, and that she was currently pregnant with his child. The evidence concerning the complainer's physical "sexual maturity" was also pursued.

Evidence or questioning sought under s.275 by Crown but introduced or pursued by the Defence

7.21 In a small number of cases where the Crown made a successful application, the evidence introduced by the Crown was subsequently expanded upon by the Defence. In case 138, for example, the Crown sought to elicit that the complainer and the accused had engaged in consensual sexual intercourse during a long-term relationship. The Defence had not submitted an application at all in this case but questioned the complainer further on the nature of her sexual relationship with the accused that had been elicited by the Crown:

Defence: "During the course of your relationship with the accused you would have intercourse on a number of occasions."

Complainer: "During my relationship with him, yes."

Defence: "During the time you were staying together as a couple."

Complainer: "Yes."

Defence: "And during that time the fact that you were menstruating was never a bother to having intercourse was it?"

Complainer: "Sometimes it wasn't, no. I was very comfortable with it."

7.22 A little later on in cross-examination, the Defence questioned the complainer on the "volatility" of her relationship with the accused, as well as alleged sexual behaviour with someone other than the accused.

7.23 In case 210, which involved a charge of rape, the Defence sought to elicit information concerning the complainer's contraceptive history, her behaviour towards the accused on the occasion of the alleged offence and that she had had an argument with her boyfriend the day before. During cross-examination the Defence began to question the complainer about her alcohol consumption in general, and an argument that she had with a friend in the street, some of which was captured on CCTV:

Defence: "Okay. What we do know that you had a good going argument going, did you not, with [female friend]?"

Complainer: "I remember having an argument with [female friend], yeah."

Defence: “And that involved your, perhaps again to be fair to you influenced by what you’d had to drink, that involved you shouting and swearing at her and such like in the High Street at the time. Do you remember that?”

Complainer: “She would have been shouting and swearing back, we were just playing about like. It was nothing serious.”

Defence: “Okay. Were you shouting and swearing and calling her a “fucking bitch”?”

Complainer: “I don’t know.”

7.24 The Defence asked the complainer several more questions in respect of this suggesting that the fight eventually became physical, at which point the Advocate Depute intervened on the basis that the questioning is not covered by the s.275 application, although the Defence argued that, as this incident and the drinking took place around the same time as the alleged offence it was covered by s.274 (1) (c) and therefore exempted from the prohibitions in this section of the legislation. The court was cleared and there followed protracted discussions on the restrictions in s.274. Whilst the Judge was not entirely convinced of this, he nevertheless allowed the line of questioning to continue:

Judge: “Well I will repel the objection ... it seems to me that a lot of this material is already out. There is the fact, I think you’re right to say there is some indication on the video of something like this. I have considerable reservations about the “shortly before” point, that seems to be a matter of judgment in each case. But on the whole matter I think it inappropriate to sustain the objection when the matter has gone as far as it has so I’ll allow the question.”

Defence views about straying beyond parameter set in s.275 applications

7.25 Defence practitioners interviewed emphasized that they were very wary of straying beyond the parameters set by the court in an s.275 application, not least because the trial Judge has a copy of the application and the evidence or questioning that has been allowed:

“I think you have to be very, very careful because this is something which is... it has been written down, the judge has a copy and knows in advance of the trial what has been allowed and what has not been allowed, the Prosecution know that as well and I think it would be very bad practice for somebody to stray outwith that, and really I think somebody would be acting in a quite appalling way if they carried on a cross examination on matters which had actually been refused in an application.” (Defence 3)

7.26 But then later in the interview the issue was returned to, with the interviewee noting that there was a temptation to carry on with a fruitful line of questioning, particularly if there was no objection from the other party:

“Having said that, we know what trials are like, sometimes if cross examination was going well and going down a particular route then there's

always, it's human nature, there's a temptation to carry on and carry on, I think you can easily see situations where you are tempted to carry on, and sometimes you ask a question and half your eye is on the other side to see are they going to say anything about this or not.” (Defence 3)

Disallowed s.275 applications where evidence is subsequently elicited

7.27 In 4 cases where Defence applications had been refused the Defence went on to elicit sexual history or character evidence during the trial (this evidence was sometimes different to that sought in the s.275 application).

7.28 In case 007, discussed in Chapters Four and Five, which involved a young boy, the application sought to lead evidence from his teachers to the effect that he was known to tell frequent lies to an unusual degree. This application was refused by the court. However, the evidence elicited during cross-examination related to bullying experienced by the boy and, in particular, that he had seen a social worker and spoken to a support counsellor about being bullied by other children, but did not use this as an opportunity to mention the alleged abuse which was the subject of the charge. Following an intervention by the Advocate Depute, the Defence justified the questioning in terms of eliciting that the complainer had failed to report the allegations to either of these people, to whom he had been referred in connection with the bullying. The following extract conveys the reasoning behind the Advocates Depute objection:

AD: “I’m quite sure that my friend wouldn’t for a moment intentionally go anywhere near the subject matter which was sought to be raised in the s.275 Application but nevertheless there is always the danger that no matter how careful my learned friend is with her questioning that might be the case...I don’t think my objection has been premature because in my submission my Lord I don’t think that there is any relevance in exploring the bullying aspect. It doesn’t form part of this case and there is no relevance in exploring this matter any further.”

Defence: “M’Lord I’m well aware of the restrictions on me in relation to what I can and cannot ask. The matter of bullying was actually mentioned by the boy himself, first of all this morning not in response to any specific question from me. The line that I’m pursuing just now in relation to the people he has spoken to in the matters in issue here and the question I was about to ask and had started asking was “Did he get any help in relation to the bullying? That is all I’m interested in and the relevance of that has got nothing to do with bullying or linking that to sexual abuse or not. It has to do with opportunities to tell people about anything. I have no intentions of taking it any further than “Did he get any help and who it was that gave him help about the bullying?” ...given that the allegations against [accused] did not emerge until at least 2 years after he last had contact with the family that it is entirely relevant to ascertain whether there was contact with other persons in authority who were helping this boy with any particular issue that he had. That’s as far as I propose to take it and the relevance of it is in relation to his general credibility and failure to mention anything to anybody including his parents until this particular time.”

7.29 In light of this explanation the AD withdrew his objection and the Defence continued to question the complainer along the same lines.

Evidence of complainer’s alcohol consumption at or around the time of the alleged offence

7.30 It is notable that in a high proportion of cases, including those where objections were made by the Advocate Depute, the Defence attempted to introduce evidence of the complainer’s alcohol consumption at or around the time of the alleged offence, in the absence of any application, in addition to other kinds of character or sexual history evidence.

7.31 Several cases sparked debate on one or both of the following matters: first, whether evidence of drinking constituted character evidence and therefore required an application; and second, whether or not evidence of drinking around the time of an alleged offence could be considered to have taken place “shortly before, at the same time as, or shortly after the acts which form part of the subject matter of the charge” and was therefore exempted from the prohibitions by s.274 (1) (c). Whereas some Judges took the view that alcohol consumption on the same evening could be considered so, others were more dubious. It is clearly an area of some dispute.

7.32 In case 099, the Defence made 2 separate s.275 applications. The first, concerning 2 complainers, was very extensive, although much of it was disallowed by the Judge. An aspect of the application which was allowed concerned the alcohol consumption and alleged drunkenness of one of the complainers at the time of the alleged incident, although in the trial, both were asked about their alcohol use on the occasion and the second complainer, in particular, was questioned in detail about her use of a “bottle bomb” in order to consume a large amount of alcohol very quickly.

7.33 In case 121, 2 out of 3 applications submitted by the Defence were refused by the court. The successful application sought to introduce evidence of a history of alcohol consumption and drunkenness on the night in question, but in the trial the Defence also pursued questioning about recreational drug use, which was not objected to.

7.34 Case 231 involved s.275 applications by both the Crown and Defence, neither of which sought to introduce evidence of drinking. During the trial, the Judge intervened in Defence questioning about the complainer’s drinking, as he considered it required a s.275 application, although it was eventually decided not to do so, as the evidence had already been disclosed to the jury.

Intervening to restrict sexual history or character evidence: views of practitioners

7.35 Judges took the view that they would always intervene if the Defence strayed beyond the questioning or evidence and limits agreed with respect to an application. Judge 1 noted that the Act had made a difference in practice with respect to judicial intervention

“That would be a clear difference that the [2002] Act has introduced because previously you would take silence as agreement, but assuming I recognised it as an issue of sexual history or bad character I would intervene.”

“The legislation says the court shall not allow. That’s what s.274 says therefore you should not allow it unless it’s been granted. And even if the Crown, if the Crown, even if the Crown didn’t object, I would probably say to

the Defence, well you will have to make an application under s.275, albeit late, and I will then consider it. I would probably do that partly because again, not so much looking over one's shoulder etc. but at the appeal stage. I mean I know if I was sitting as an appeal Judge and something was just allowed or not objected to, I would want to know why that happened, because it shouldn't. We are supposed to consider these things in writing and so on and so forth." (Judge 2)

"I take the view...and I make it clear that I think I'm entitled to take the view that...the terms of s.274 require me to intervene. The duty is placed in me not to admit or allow the question. So I, that is the way I interpret it. I do not know whether other colleagues take that view. There is a difference of view in general amongst Judges and sheriffs as to whether they should intervene when objectionable evidence is being elicited. Or questioning this on objectionable terms. And I don't shrink from saying there are many instances where I and other Judges would welcome objections being taken. Because you think they should have been taken. Now in some instances you have to sit and bite your tongue. But in this area I'm in no doubt at all that there is a statutory duty in me to intervene. And I will intervene." (Judge 3)

"I think it probably has made me more interventionist on this, I'm not particularly interventionist, especially in criminal trials, I just let them get on with it. But I'm very ... I'm just very alert to the duty that is placed on the court by s.274, and feel that it's necessary for me to make sure that the Section is properly implemented." (Judge 4)

7.36 Advocates Depute acknowledged the "temptation" for the Defence to follow up fruitful lines of evidence, but maintained they do object when they consider it necessary to do so:

"If I'm doing one of these trials, I will have read the s.275 application and I will know which bits of it have been granted, they may have all been granted, and I'm alert to that so that if the Defence Counsel does try to deviate I will stand up to object. The Judges, I have to say, are also very aware of this as well and they will stop people too." (AD 2)

Comparisons with baseline study

7.37 Two of the key differences between the 2002 Act and the 1995 Act, which concern, first, the fact that the Crown now need to make a written s.275 application in advance in order to introduce otherwise restricted evidence, and second, the fact that the scope of the otherwise restricted evidence is now much wider, extending to the complainer's general character or credit, rather than specifically sexual character, makes direct comparison between the 2 pieces of legislation on the use of sexual history and character evidence somewhat problematic.

7.38 An obvious area for comparison is the extent of sexual history and character evidence introduced by the Crown. A key difference between the 2 Acts concerns the requirement that the Crown now need to make s.275 applications. The baseline study found that first, "good" sexual character evidence (for example that the complainer had only ever had one sexual partner, was a faithful wife, was a virgin, etc.), was introduced by the Crown in only a small number of cases (in 5 of the 66 sexual offence trials with applications heard at the High

Court). Second, in an equally small number of trials, it was the evidence led by the Crown during the complainer's evidence-in-chief that precipitated or became the starting point for an s.275 application made by the Defence.³⁵ For the most part, this was evidence concerning prostitution introduced by the Crown in order to establish the context and antecedents to the alleged offence.

7.39 The current study shows that the Crown are introducing sexual history and character evidence to a much greater extent than previously, although Crown applications occur far less frequently than those made by the Defence. Whilst much of the increase can be accounted for by the Crown requirement to make a s.275 application, examination of Crown applications reveal that they are more likely to seek to introduce evidence of a sexual history between the complainer and accused, rather than general character evidence. It is also likely to be the case that, where the Defence make a successful application, the Crown will seek to pre-empt the Defence line by leading evidence on that point, evidence which it might not have elicited in the absence of an application.

7.40 The baseline study found instances in which sexual evidence was introduced in the absence of an s.275 application. For the most part this concerned sexual history of the complainer, most commonly relations between the complainer and accused. It also found instances in which questioning permitted by a s.275 application strayed beyond the boundaries set in the application discussion, as well as a very small number of cases where the Defence managed to introduce sexual evidence without any objection, following an unsuccessful verbal application to do so.

7.41 The fact that the 2002 Act has resulted in the introduction of more sexual history evidence and more character evidence has not gone unrecognized. Most of the practitioners interviewed believed this to be a consequence of the Act. As Advocate Depute 1 said:

“I was looking back at what it said in the annotations, in which I looked at the policy intention, and the Justice Minister said “that it was believed that it was unacceptable for victims to be subjected to unnecessary and irrelevant questioning about their sexual history or character”. I think he was right about that, but I think that the legislation has certainly not improved the position, and indeed, has almost guaranteed the victims will be asked about their sexual character. And the reason for that is really 2 fold. First of all, it seems to me to be relatively easy to construct a case to demonstrate, that whatever it is the Defence want to put, has some relevance. And most judges seem to take the view that where what is put can be demonstrated to have some relevance to the question of the trial, that fair trial considerations outweigh, what I would regard as the...rights of the complainer. ... And so it's fairly easy provided you go through the hoops and s.275 in the right order. It's fairly easy to persuade a Judge to grant a s.275.”

7.42 However, whilst direct comparisons are difficult, some things are clear. Given the significant increase in numbers of applications being made under the 2002 Act, and the very high rate of success of such applications, there is a significant increase in the amount of sexual history evidence being elicited and admitted in sexual offence trials than was

³⁵ Under the 1995 Act, s.275 (1) (a) afforded the Defence the opportunity to pick up on evidence or questioning led by the Crown

previously the case. Scrutiny of application cases also reveals that much more detailed evidence than specified in the written application is pursued by the Defence in the trial.

Comparison of the use of character evidence under the 1995 and 2002 Acts

7.43 Given the widening of the scope of the legislation to include general character evidence, direct comparison with the baseline findings in relation to the inclusion of this type of evidence in trials pre- and post-2002 is not possible. There are, nevertheless, ways of using the baseline study to try to understand the impact of the new legislation on the use of character evidence.

7.44 Drawing on cases which were examined by listening to tapes of the complainer's evidence, it is possible to estimate the frequency of use of character evidence before and after the 2002 Act. For this particular comparative task, however, it does not make sense to separate trials involving s.275 applications from those that did not, since general character evidence did not fall within the scope of the 1995 Act. Rather, we matched the 40 cases scrutinised in detail in the current study, (that is, the 30 retrospective cases and 10 observed trials) with 30 cases from the baseline study. The baseline cases included 20 application cases³⁶ from one year 1999, and 18 rape or clandestine injury cases without applications from the 3 year period of the baseline research. This yielded a set of cases broadly similar in composition of charges as well as a similar number of cases. The balance between application cases and non-application cases is different, but this is appropriate given the increase in applications under the 2002 legislation.

7.45 Putting questions to the complainer in cross-examination which raised issues concerning her character was very common in the baseline study and occurred in 65% of the application cases scrutinised, and 55% of the non-application case. Appendix 4 lists the kind of evidence that was introduced as character evidence in the current study under the heading *General Character of Complainer*. This list is fairly comprehensive and covers the kinds of character evidence that was previously being introduced without application.

7.46 As in the current study, questions about drug and alcohol use were very common in the baseline sample. It is important to stress that Defence questioning was not simply establishing memory of events, but rather suggesting a person with a particular lifestyle (e.g. somebody who regularly drinks to excess, somebody who drinks but is under age and gets others to buy drink on their behalf), or more explicitly suggesting somebody who is morally lessened as person because of their consumption of drink or drugs (e.g. being a neglectful mother or a tendency to volatility or violence or some form of sexual or inappropriate behaviour when under the influence of drink or drugs).

7.47 There were also examples of all of the other broad categories of kinds of character evidence listed in Appendix 4. Questions suggesting violence and disorderly conduct included putting to a complainer that she was volatile and asking if she was violent (case 1108), or suggesting she had been a disruptive child. Questions suggesting mental instability included questions about depression and forgetting to take prescribed medication for mental illness. Questions about dishonesty included accusations of lying about issues other than the subject matter of the charge. Dishonesty, drugs and relationships with stigmatised others were all raised in one case when it was put to the complainer that she stole and lied for heroin and that her friends were prison inmates. There were also suggestions about possible reasons

³⁶ There were 21 applications cases in that year but the tapes from one case were unable to be located.

for making a false allegation such as wishing to financially “neuter” a former husband and reference to having received compensation for a past incident of abuse creating the alleged incentive to make a false allegation for further financial reward. The only category listed in Appendix 4 not found in this particular set of cases was “rootlessness”. In addition, however, the Defence also suggested “bad” character through questions about body tattoos in 2 cases. In one of these this also involved questioning the complainer about body piercings, and shaving her pubic hair.

7.48 In the current study, questioning about character evidence was the most commonly sought type of questioning in applications, accounting for approximately a quarter (24%) of all evidence sought (see Table 4.3 in Chapter Four). More applications sought to introduce character evidence than sexual history evidence, which accounted for 20 percent of all evidence sought. Although direct comparisons about the incidence of “character” evidence are not possible, the introduction of the 2002 Act does not seem to have reduced the incidence of questioning about character, although character is now a subject of applications. Moreover, the requirement of an advance written application in combination with other changes in the legal context mean that more systematic effort is now being made by the Defence to obtain evidence with a bearing on the complainer’s character at an early stage of case preparation. In addition, questions about alcohol which allude to a particular type of character, or take on suggestions about lifestyle and morality, continue to be introduced *without* a s.275 application, and remain common.

7.49 Several interviewees remarked upon the consequences of the widening brought by the provisions of the 2002 Act, believing that there are more applications simply because the scope is wider and both parties are now required to make an application for evidence or questioning that they did not have to make an application for in the past.

7.50 As one Advocate Depute explained, the rather “scatter gun” approach taken by some Defence to ensure that they include all possibly relevant evidence, combined with the need to seek permission to lead character evidence has had 2 major implications: a marked increase in applications, and a potentially more extensive range of character evidence being introduced in the trial:

“I think from a Defence perspective, there have been no real guidelines in case law as yet as to what sort of matters should be covered and what shouldn’t and we all live in a back covering age these days, including Defence Counsel, so I think that’s part of the reason why they take this, what I describe as scatter gun approach, because they don’t want to miss something out and, okay, if a Judge says no, that’s unnecessary well, that’s fine. They can’t then be criticised by their client at a later stage for not having raised something in a s.275 application and then not being allowed to raise something at trial. So I think that’s part of the reason for the slightly wide approach that they’re taking.” (AD 2)

7.51 Some interviewees saw some advantages for the Crown in the widening of scope, but also registered concern that, in evidential terms, character evidence tends to be collateral material that is not generally admissible:

“It probably operates to the advantage of the Crown. Whether that is necessarily a good thing I’m not entirely convinced. I can understand the

purpose of all this is to stop a routine dragging up of sexual history of usually a woman because that's not relevant in terms of deciding guilt or innocence neither is a more general attack on character I mean ignoring this legislation just looking at the laws of evidence this is collateral material and collateral material has never been admissible as proof of something directly in issue so that the fact that someone has a propensity to lie about things in the past doesn't mean that they are necessarily lying here and the trouble with that is it creates for the fact finder whether it is a Sheriff sitting alone or a jury it creates a diversion which is presumably the purpose behind the Defence seeking this so from an advantage point of view it works better I think for the Crown, the Defence would want to rubbish the credibility of a witness but there are examples where that might be brought to mind with a relevant aspect but its kind of hard to see." (AD 4)

CHAPTER SUMMARY

7.52 In all but a few exceptions, all evidence allowed in the s.275 application was introduced in the trial, usually during cross-examination of the complainant. Scrutiny of cases also revealed that the evidence or questioning tended to be in more detail than outlined in the written application.

7.53 The "belt and braces" approach to drafting s.275 applications, referred to by some Defence interviewees, whereby every possible aspect of questioning or evidence was included in an application, inevitably meant that complainants were cross-examined in detail and extensively on a range of sexual history and character matters.

7.54 Defence practitioners emphasized that they were wary of straying beyond the parameters set by the court in an s.275 application, not least because the trial Judge had a copy of the application and the evidence or questioning that had been allowed. Judges took the view that they would always intervene if the Defence strayed beyond the questioning or evidence and limits agreed with respect to an application.

7.55 Just under half (14) of the 32 observed trials with s.275 applications involved some evidence or questioning being led during the trial which had not been explicitly agreed in the s.275 application. This included cases where the evidence that was subsequently elicited had been either specifically disallowed or strayed over the boundaries of questioning or evidence set by the court in the preliminary hearing. Moreover, following the introduction of restricted or specifically prohibited evidence, objections by the other party and/or interventions by the court occurred infrequently. There is clearly a disjunction between what the Judges and Defence lawyers believe to be the case, and the research findings on these points. That practitioner accounts are belied by the research data is important on several levels, not least that what practitioners believe to be the case may turn out not to be.

7.56 The issue of alcohol consumption by the complainant was commonly raised by the Defence, both in cases where this was the subject of a s.275 application and also in cases where it was not. This sparked debate in some trials about 2 issues relating to alcohol consumption. First, whether evidence of a history of drinking on the part of the complainant constituted character evidence that required a s.275 application, or whether it was to be considered collateral material. Second, whether or not evidence of drinking around the time of an alleged offence could be considered to have taken place "shortly before, at the same

time as or shortly after the acts which form part of the subject matter of the charge” and is struck at by s.274 (1) (c). Whereas some Judges took the view that alcohol consumption on the same evening could be considered as occurring at the same time, others disagreed.

7.57 Given the significant increase in numbers of applications being made under the 2002 Act, and the very high rate of success of such applications, there was a significant increase in the amount of sexual history evidence being elicited and admitted in sexual offence trials than was previously the case under the 1995 Act. Furthermore, the widening of the scope of the Act may have led to more character evidence than previously, although this is difficult to quantify as a like for like comparison under the 2 pieces of legislation is not possible. In comparison with the baseline study, the Crown was introducing sexual history and character evidence to a much greater extent than previously, possibly due to the requirement of making a s.275 application.

CHAPTER EIGHT: CASES WITHOUT S.275 APPLICATIONS

8.1 This chapter is concerned with High Court sexual offence cases that did not involve a s.275 application. It considers what leads to the absence of an application in these cases and whether, when such cases go to trial, questioning about sexual history and sexual character evidence was indeed entirely absent.

8.2 Chapter Three has already shown the distribution of cases without and with s.275 applications and their flow through the criminal justice system. Of all High Court sexual offence cases between 1st June 2004 to 31st May 2005, slightly more than half, (128 or 55%) did not involve an application. The majority of these cases ended in a “guilty” plea, a small number did not result in a trial for other reasons and only 35 cases (27%) involved a “not guilty” plea and proceeded to a trial. This contrasts with the 88 percent of cases with an application that did go to trial.

8.3 Because the submission of a s.275 application is now part of the pre-trial process, it is possible for a case to involve the lodging of an application without a subsequent trial taking place, because the accused subsequently pled guilty, failed to appear or the case was deserted. In fact this was relatively unusual and only happened in 12 of the 103 cases with applications.

WHY APPLICATIONS ARE AND ARE NOT MADE

8.4 Chapter Three has also shown that the likelihood of an application varies by the charges involved and by the plea. One reason why the rate of applications varies with the charges is because particular charges create more or less reason for Defence interest in attacking the credibility of a complainer through her or his sexual history or character. A higher incidence of applications in rape cases than in other sexual offences could be anticipated because of the particular weight placed by the Defence on testing the credibility of the complainer in these cases. In Scots law, rape is also one of the “pleas of the Crown” and therefore one of the most serious charges that can be brought.

8.5 Sexual history evidence is often presented as directly relevant to contradicting the complainer’s account of absence of consent to sexual intercourse, a key element in the crime of rape, simultaneously attacking her credibility. Eighty one percent of the rape cases in which a defence of consent was lodged also involved a s.275 application. In comparison, only 40 percent of rape cases involved an application when no defence of consent was lodged. However, it is not clear why applications should also be relatively high in cases that involved charges not of rape but indecent assault, attempted rape, or assault with intent to ravish. Consent cannot be an issue in the same way in these cases and while the credibility of the complainer is always potentially at issue when he or she is a key witness, it is likely to carry less weight than in rape cases. It seems surprising therefore that the rate of s.275 applications was close to that of rape in cases of indecent assault rather than being relatively rare as they were in cases of sodomy, incest and lewd and libidinous practices.

8.6 Further analysis of the relatively low rate of s.275 applications in cases with charges of incest, sodomy and lewd and libidinous practices suggests that this is influenced by the fact that such cases typically involve children. It was possible to identify the ages of complainers in a total of 136 cases, 97 of which involved charges of rape. There were no applications in four fifths of the small number of cases (39) in which the complainer was

under 12 years of age, none in almost two thirds of all cases in which a complainer was aged 12 to 16 years, and none in over half of rape cases in which the complainer was aged 12-16 years. Note that in the case of rape, being a teenager afforded little protection against sexual history or character evidence.

8.7 It was noted in the introduction that the majority of cases indicted in the High Court, in which there was no application, ended in a guilty plea rather than going to trial. Nevertheless, in almost a quarter of rape trials (24%) and almost half of trials that did not involve charges of rape (48%), there was no s.275 application to introduce sexual history or character evidence.

Table 8.1 High Court Sexual Offence Trials, 1st June 2004 to 31st May 2005: Charges by the absence or presence of a s.275 application.

	All cases involving a charge or rape	Other (non-rape) sexual charges	Total
No Application	24 (24%)	12 (48%)	35 (28%)
Application	74 (76%)	13 (52%)	88 (72%)
Total	98 (100%)	25 (100%)	123 (100%)

8.8 It is not possible to say with certainty whether in some or all of these cases the Defence actively sought possible evidence to make an application but found none. However, interviews with legal practitioners suggest that this is likely, at least in cases of rape and perhaps also in the case of other charges. Many of the legal practitioners interviewed agreed that the Defence routinely consider whether there is sexual history or character evidence they may wish to introduce and often make active enquiries to seek such possible evidence.

8.9 It is likely then that in the majority of trials in which there was no application, nothing was known to the Defence concerning the complainer's sexual history or character which could be used to question credibility or to suggest consent to sexual intercourse in the case of rape. The only likely exception concerns the small number of cases in which the accused had a previous conviction for an analogous sexual offence. In such cases it was possible that the Defence was deterred from making an application by the possibility that the accused's previous convictions would then be put before the court.

Previous convictions deterring s.275 applications

8.10 The circumstance that was consistently suggested in interviews with legal practitioners as one in which the Defence might choose not to make an application, despite being aware of past sexual history or character evidence, was when there were analogous previous convictions. Data on actual practice in cases with analogous convictions, however, suggested at most a very modest effect on whether or not an application was made, which rather contradicts the views of those practitioners who argued that it was a very significant deterrent. This was discussed at length in Chapter Six. In order to reiterate the point, the table presented in Chapter Six is represented here, formatted to show percentages, despite the small numbers and so it is necessary, therefore, to read these with caution.

Table 8.2 All Rape Cases (whether going to trial or not) 1st June 2004 to 31st May 2005: Previous Convictions by s.275 applications

s.275 application	Analogous PCs	Non-analogous PCs	No PCs	PCs not known	Total PCs
By Defence*	7 (35%)	37 (51%)	21 (38%)	11 (79%)	76 (47%)
By Crown only	4 (20%)	0	2 (4%)	1 (7%)	7 (4%)
None	9 (45%)	36 (49%)	32 (58%)	2 (14%)	79 (49%)
Total	20 (100%)	73 (100%)	55 (100%)	14 (100%)	162 (100%)

* Includes cases with Defence only and Crown & Defence applications.

Does the absence of a s.275 application from a trial mean no sexual history or character evidence?

8.11 Twenty five rape trials (over the course of the case mapping period) did not involve an application. Eight of these were included in the in-depth sample of cases, and so it was possible to check whether or not complainers were questioned about their sexual history or character during the trial and to consider whether inferences might be made from these 8 trials to the larger group.

8.12 In case 012, the Advocate Depute established that the complainer and the accused were ex-partners who had previously lived together for a number of years and had had children together. Because this involved establishing a past sexual relationship, some practitioners might have made an application, but none was made in this case, perhaps because the Advocate Depute did not intend to ask about sexual matters. He simply began with the question “Were you in a relationship with [the accused] for a number of years?” In cross-examination, the Defence asked the complainer if she had “consensual intimacy” on a particular night approximately 3 weeks before the alleged event. This was a clear breach of the procedures. However, the pattern of decision-making in cases with applications studied suggests that it is very likely that if the procedures had been followed and a s.275 application had been made, then it would have been allowed. This was the only case that involved questions about sexual history that should have involved a Defence application under both the current legislation and the previous legislation. There was no judicial objection. In the same case, the Defence also put questions to the complainer that implied that she was of a certain character: “you were going to discos all the time, you were going out to get drunk all the time and you were having a great old time” (case 012).

8.13 In one other case, 240, the Defence asked the complainer a question which bordered on sexual history and character evidence: “Have you ever dated somebody from the Middle East?” but this line was not developed into any more explicitly sexual questioning or detail which unequivocally required an application. The Defence also asked very detailed questions about not only how much she had to drink on the evening but about her “student” drinking practices which bordered on an attack on her character, as well as developing the suggestion that drink may have made her behave in unusual ways, through a series of questions culminating in directly asking:

Defence: “Do you think having a drink affects your sex drive in any way?”

Complainer: “No not really.”

Defence: “Have you ever heard of the expression beer goggles? Making you look at people you would not otherwise look at?”

Complainer: “Yes.”

Defence: “So would you agree with me that having a drink might make some people more foolish with the opposite sex?”

Complainer: “Yes.” (Case 240)

8.14 Suggestions about drunkenness that border on character attacks were also made by the Defence in other cases. For example, suggestions about “loud and drunken behaviour” were put to the complainer in case 192. In case 094 both the Crown and the Defence asked very detailed questions about drinking habits. The Crown also asked the complainer if she had taken drugs and the Defence made similar suggestions about the possible consequences of alcohol to those put to the complainer in case 240.

8.15 In 2 cases the Crown asked explicit questions about sexual history, which should have involved an application under the current legislation, and again these cases involved a breach of procedure, although they may have been allowed if an application had been made.

8.16 In case 214, the Advocate Depute asked:

AD: “Had you had sex with [accused] before?”

Complainer: “No.”

AD: “Had you had sex with other boys before this incident?”

And at this point the Defence intervened:

Defence: “Don’t answer that question. I shouldn’t be jumping to the defence of a Crown witness, my Lord, but there’s no s.275 application.”

Judge: “Yes, indeed. I think you should withdraw that question.”

AD: “Yes, sorry my lord. Did you want to have sex with [accused]?”

Complainer: “No.”

8.17 In case 241, the Advocate Depute asked the complainer fairly detailed questions about her sexual history in the context of her relationship with her boyfriend, who was not the accused.

AD: “Was he your first sexual partner?”

Complainer: “Yes.”

AD: “Did you often stay at (boyfriend’s) house?”

Complainer: “Yes, a few times a week.”

AD: “And did he stay at your parents’?”

Complainer: “Yes 2 or 3 times a week.”

AD: “Before this happened when had you last had intercourse?”

Complainer: “About a month before.”

AD: “Have you ever had anal intercourse?”

Complainer: “Never.”

8.18 On the one hand, some of the evidence led by the Crown in case 125 can be read as evidence suggesting “bad” character and, as such, perhaps it should have involved an application. On the other hand, some questions were necessary to provide a jury with background context to the alleged events. These included asking the complainer who was 14 years old at the time of the offence: “Did you smoke in May of last year? Did you ever drink alcohol? Being 14 did you ever buy alcohol?” The narrative of events involved the complainer asking the much older accused to buy drink and cigarettes for her and her friend. Had they been included as proposed questions in an application, it would either have been allowed or judged as an unnecessary aspect of the application. However, some of the questioning that could be read as suggesting “bad” character went beyond the requirements of providing context for the jury. For example, the Advocate Depute also asked: “When was the first time you had an alcoholic drink? Had you ever been drunk?”

8.19 In sum, out of 8 cases, questions that required an application were introduced by the Defence and arguably also the Crown in one case (012), and by the Crown in at least 2 (214, 241) other cases.

8.20 In addition, questions about alcohol use and its effects, which bordered on character attacks were asked by the Defence in 4 cases. The sequences of questioning in clear breach of the legislation were typically short and in several cases their subject matter, involving sexual events between the complainer and the accused, was likely to have been allowed if the procedures had been followed. Nevertheless, some questioning asked by the Crown may have been experienced as an invasion of the dignity and privacy of the complainer and was not immediately obviously relevant to the guilt of the accused.

Objections to sexual history and character evidence without application

8.21 Judges took the view that they would always intervene if prohibited evidence was introduced by the Defence without an application, even if the Crown did not object. Several drew attention to the fact that this was a different situation than under the previous legislation when silence from the Crown would be interpreted as agreement and therefore a reason not to intervene. They also spoke of the need to be alert to potential breaches by the Crown.

Comparison with the baseline study

8.22 In both the baseline study and the current study, trials without s.275 applications were examined to check whether the prohibited evidence was indeed absent. In making a comparison between breaches of the procedures before and after the current legislation, it is very important to remember that only the Defence was previously prohibited from

introducing sexual history and sexual character evidence concerning a complainer, and also that the exclusion did not encompass general character.

8.23 Comparison of cross-examination of complainers before and after the current legislation suggests a decline in breaches of the procedure by the Defence with respect to sexual history and sexual character evidence being introduced without application. Among the sample of such cases without applications examined in detail in the baseline study, half involved some breach by the Defence during cross-examination of the complainer. In the current study, only one in 8 cases clearly involved such a breach. Yet this must be placed alongside the finding that most trials now involve an application, and that the contents of applications in terms of the evidence sought are much more extensive than previously.

8.24 The Judges interviewed stressed that they would actively intervene if the Defence introduced such questioning without an application and acknowledged that this was different from the situation under the previous legislation. Some also spoke of needing to be alert to breaches by the Crown. However, examination of cases indicates that breaches can still occur with no judicial intervention. This is another example of a disjuncture between practitioner beliefs about court practice, and the research findings.

CHAPTER SUMMARY

8.25 This chapter has sought to further clarify whether cases without s.275 applications are distinctive in other respects and to examine whether sexual history and character evidence was indeed absent from cases without applications.

8.26 The likelihood of a sexual offence case having or not having a s.275 application varied by charges and not surprisingly, with rates of “not guilty” pleas. The effort involved in preparing a s.275 application is not likely to take place if early indications suggest an accused will plead guilty. A higher incidence of applications in rape cases reflects the centrality of the issue of consent to sexual intercourse and the particular weight placed by the Defence on testing the credibility of the complainer. Rape cases in which a defence of consent was lodged were twice as likely to involve an application as those without such a defence. However, it has to be noted that applications were also relatively high in non-rape cases involving indecent assault, attempted rape or assault with intent to ravish in which consent was not an issue. An absence of applications characterised the majority of cases involving children under 12. The modest nature of the effect of the accused’s previous convictions on deterring the Defence from pursuing a s.275 application discussed in Chapter Six was reiterated.

8.27 Eight rape cases in which there was no s.275 application were studied in detail. The Crown was rather more likely than the Defence to introduce prohibited questioning about sexual history in the absence of an application. Where this occurred, the sequences of questioning in breach of the legislation were short, concerning sexual events between the complainer and the accused. These questions were likely to have been allowed if the procedures had been followed. Nevertheless, some questioning asked by the Crown may have been experienced as an invasion of the dignity and privacy of the complainer and was not immediately obviously relevant to the guilt of the accused. For example: “Had you had sex with other boys before this incident?” and “Have you ever had anal intercourse?” In one of

the 8 cases, the Defence asked about sexual history of the complainant in the absence of an application.

8.28 In 4 of the 8 cases, the Defence attacked the character of the complainant by asking very detailed questions about the complainant's alcohol use. Questions about alcohol use were also pursued by the Crown in 2 of the cases.

8.29 Comparison with the baseline study suggests a marked decline in one particular breach of the procedure by the Defence, that is, it indicates a decline in the introduction of sexual history or sexual character evidence without an application. Questioning that bordered on a character attack that was non-sexual remained quite common and was frequently introduced through sequences of questions about alcohol consumption.

CHAPTER NINE: COMPLAINERS' EXPERIENCES OF THE COURT PROCESS

9.1 Examination of complainers' experiences of the court process is one of the key objectives of this study. This chapter presents the findings of 4 interviews conducted with women who experienced going to court as complainers in sexual offence trials, since the inception of the 2002 Act. Although the number of women interviewed is relatively small, the interviews provide valuable insights about the experience of being a complainer in a sexual offence trial, which could not have been gleaned from any other data source. Further information regarding the methodological approach used, and the specific characteristics of the cases which complainers were involved in, is provided in Chapter Two.

9.2 Complainers were asked questions in respect of 3 broad areas: their views and experiences in the period leading up to the date of trial; their experience of the trial itself; and their current reflections on the process as a whole. Questioning in respect of these 3 broad areas centred upon understanding and awareness of the process of giving evidence in a sexual offence trial including the provisions contained within the 2002 Act, the nature and impact of questioning during evidence in chief and cross-examination, and recommendations for future policy and practice.

9.3 A number of common themes emerged from the interviews. Key issues identified by complainers relate to their lack of preparation for giving evidence, their understanding of this process and the respective roles of criminal justice personnel. These themes are illustrated here, in the complainers' own words, by using excerpts from the interviews. The evidence unearthed here also contributes to, and resonates with, the limited existing research evidence which documents the experiences of complainers in sexual offence cases in Scotland, and elsewhere.

Awareness or knowledge of the 2002 legislation

9.4 At the time of the trial none of the women interviewed were aware of the 2002 Act, or the way in which this legislation may impact on the nature of questioning or evidence introduced in sexual offence trials. As previously stated, a *written* application to introduce sexual history or character evidence is now required *in advance* of the trial. Similarly, advance notification must be given to the Prosecution if the defence to be used is one of consent.

9.5 The nature and level of information given to complainers regarding these issues merits particular attention. Informing complainers that an application to lead sexual history or character evidence has been made, or that a defence of consent is to be used, allows the Prosecution to explore the complainer's position on these issues, and allows the complainer, to some extent, to be mentally prepared for questioning of this nature.

9.6 Interviews with legal practitioners indicate that while the Crown ascertains a complainer's position on matters raised by a Defence application, this does not necessarily mean that complainers are informed that a s.275 application has been made. Some Defence practitioners expressed concern about the level of information they are required to provide about their "line" in advance of the trial, particularly in terms of the preparation which this may afford the complainer (see Chapter Four for further detail about practitioner's views).

9.7 However, none of the women interviewed were made aware of the defence to be used in their case, or the likelihood of being questioned on sexual history or character. Yet, across the 4 cases, there were identifiable examples of a defence of consent, and past sexual history and character evidence being used during cross-examination.

9.8 One complainer was aware that she could be asked questions about her sexual history because “it’s what you see on TV”, and expressed her anxiety about this prior to the trial:

“I think for weeks leading up to it, I was thinking if I get the opportunity to speak, I would say this, this and this, not actually thinking that that would be the case, worrying for weeks beforehand about my past being dragged up and then obviously that not happening. Just literally no preparation, speaking to the PF once about 6 months beforehand and then that just being it, you just turn up in court and that was it.” (Complainer 1)

9.9 In this instance, past sexual history was not used and the complainer might have been reassured to know that restrictions on the introduction of sexual history and character evidence are in place, or that an application to lead such evidence had either not been made or granted in her case. This complainer also indicated that knowing what the defence would be would have helped her feel more prepared for going to court:

“I definitely think [complainers] should be given some indication of what will happen in court. For example the fact that I didn’t know that sexual history wouldn’t be dragged up, you know, they couldn’t belittle your character – things like that. They’re the things I think I worried about and I think they should advise you of things like that. Even just, not, you know, these are the questions you’re definitely going to be asked, but at least I think you should have some indication of what the defence is. I had absolutely no idea of what his defence was. And I don’t know if they can do that, but I felt like he knew everything that I had said. He had a full year to get a defence together, a pack of lies together to get me into court and I didn’t have that.” (Complainer 1)

9.10 Complainer 4 also said she might have felt better if she had known about the measures to limit questioning around sexual history and character evidence:

“I didn’t know any of this, see if I had known this, it would probably have made me feel a bit better about, I don’t know, but just knowing the fact that that law was actually out and I was still made to answer these personal questions, it’s quite frustrating.” (Complainer 4)

9.11 The nature of questioning required in a sexual offence trial, combined with the limitations of the legislation, compromises any guarantee that questions of a personal or sensitive nature will not be asked of a complainer. However, responses from complainers in this study suggest that having an awareness of the legislation, particularly in relation to the implications that it may have for their own case, would ease some of the distress and uncertainty involved in the process of giving evidence. In another case, for example, the complainer reported being completely unprepared for her previous convictions dating from when she was a teenager (she was in her late 30s at trial) being brought out at the trial:

“They never told us about any of the paperwork lying anywhere and then maybe I’d have said to myself, right, that’s the notes probably from [support organisation]. They never said I’d get hit maybe with my criminal convictions, nothing like that, it was a total ... I walked in blindfolded.”(Complainer 3)

9.12 Two other complainers described questioning around character issues, the purpose of which they were puzzled about:

“I was asked if I was married. “Well, I believe you have children? Two different partners?” This was all brought up as well. They tried to bring up about [son].....To me it was as if I’d neglected my son and allowed him to be abused. I don’t know why they asked me those questions. They asked me about my marital status – I was single then. Before this all came out, about 6 weeks before, that’s when I split up with my partner and it took [son] 4 weeks to tell me what had happened. I don’t know. Was it to make out because I was a single parent or something that ... I don’t know, I honestly don’t know why they asked.” (Complainer 2)

9.13 Complainer 4 had a history of self-harming behaviour which she was unaware was known to the Defence:

“Just basically because I self-harm ..., they actually used that against me, like you self-harm and stuff like that and I was like well what’s that actually got to do with this court room today? I’m not here because I self-harm, I’m here because something bad happened to me. I was really, really angry about that.” (Complainer 4)

9.14 These complainers were unprepared for these issues being raised, and as a result of their perceived irrelevance to the case, they expressed feelings of anger and confusion about evidence of this nature being used in court.

9.15 The level of information to be given to complainers in relation to s.275 applications, in their case, has recently been examined in the COPFS Review (2006). As previously stated, the review recommends that the Crown (through Victim Information and Advice) should advise complainers of an application by the Defence to lead sexual history or character evidence, and its subsequent outcome. Where there is evidence that the Defence intends to lead sexual history or character evidence, the procognoscer should explore the complainers position with sensitivity and re-precognosce the complainers if previously unexplored issues come to light following a s.275 application. It is also recommended that the precognoscer explain to complainers why potentially distressing questions are to be asked. In view of the responses made by complainers interviewed in this study, these recommendations have the potential to alleviate some of the distress associated with giving evidence in a sexual offence trial. However, it has not been possible within the timescales of this study to evaluate the impact of this guidance.

Information about what the trial involved

9.16 The nature and level of information provided to complainers prior to the trial about the process that they would be expected to go through varied, although all of the complainers described this preparation in limited terms:

“I did go to visit the court, but that was it, I never talked to anybody.”
(Complainer 1)

“Really just where everybody would sit: where he (the accused) would be, where I would be; where if it was public or family, where they would be; where the Judge would be. Who would be sitting where basically. That was really all.” (Complainer 2)

“When we got our citations we were just told that there would be a witness protection person on the day that would tell us, basically, when we would probably get to go into court, which I thought, well, I should only be in court for so long because I was basically thinking things myself without anybody saying, oh no, you could be in this long or this could happen. Nothing prepared me for what actually happened on the day, you know.”
(Complainer 3)

9.17 Although they had received some practical information about going to court, all reported feeling inadequately prepared for the process of giving evidence and, in particular, what the process of examination and cross-examination would entail:

“And, I just had absolutely no idea what was going to happen when I got there, and I think that, I had no idea, no doubt he was prepped by his people saying you know, act this way, look this way, you know this sort of thing, and I didn’t have any of that I just had to turn up, I didn’t know what his defence was, I didn’t know anything, and I just, to walk into something and not entirely be sure how to react, how to even speak, I just could have done with more. Just, you know, just somebody to tell me a little bit about the best way to be, or the questions that might be asked, and the best way to answer them.”(Complainer 1)

9.18 For this complainer, her lack of preparation for giving evidence left her with a sense of imbalance compared with the preparation which the Defence may have had. Another complainer was particularly unprepared for the extent of the evidence she would be required to give:

“So, to me, I think that’s a main thing that people should do is get them involved with either somebody from the witness protection coming out and seeing the person and letting them know exactly what they’re gonna be going through before they even agree to anything. Because the only reason I kinda knew, basically, myself what I was gonna be going through is because I’d been through a trial just before [as a witness] but it wasn’t ... I thought, right, it’ll be the defence will stand up ... the PF will stand up and then the defence will stand up and then I’ll be away in about an hour or so and totally flabbergasted when the day actually came, you know.” (Complainer 3)

9.19 Based on her own experience, this complainer expressed a clear desire for more support and information to be given to complainers in future:

“...But I just think that things with court, they’ve got to change. More information, even a support person being there, contacting you, like saying to you, right, I’m gonna ... I’ve been assigned to you until this trial is over. This is my number, make an appointment and come and see me ... because it was originally supposed to be at Glasgow High and then it got moved to Edinburgh but even then they could have got somebody from Glasgow to work with us and tell us, right, you’re gonna be going in here, there’s a lot of reports in there, there’s a lot of stuff [relating to the case] sitting there, they could bring out your criminal convictions but just let them go on with that, you say your piece. But we never got anything like that either.” (Complainer 3)

Delays in the case going to trial

9.20 All women reported experiencing delay and uncertainty concerning when and, sometimes, where the case would be calling to court. This is something which complainers highlighted as being particularly distressing:

“That going to court was an absolute atrocity. I was told that, we had a due date for court, I was told that, something like, one of my witnesses wasn’t available – I think it was one of the policewomen, she was away on her honeymoon or on holiday – the Defence wanted to put the trial back because of that and the prosecutor said well we don’t need her anyway, we’ve got all these other people. But he wanted to put it back and so I was told that we weren’t going to court on that day and it would actually be a month or so later they would get in contact with me. Then I was contacted on a Friday, this was like the Wednesday or something, then I was contacted on the Friday and they said, “oh can you go to court on Monday” and I was like “oh I don’t see how, when you had put it back by at least a month, I don’t understand how I can go to court on Monday.” “Just leave it with me, leave it with me.” Eventually at about 4 o’clock, I spoke to somebody saying “look, you haven’t come back to me, I don’t even know what’s going on, if I’m going to court on Monday, if I’m going to court on Wednesday or if it’s going to be a month. You need to come back to me.” And nobody phoned me back. So I sat all weekend thinking I could be going to court on Monday and they just couldn’t be bothered to phone me back. On the Monday, eventually someone did phone me and say “No you’re going to court on Wednesday, but that’s just your opening start date so it might be later than that but we’ll let you know.” By this point, I mean I was literally, I just couldn’t believe that, certainly that someone hadn’t even bothered to phone me back on Friday, so I was sitting all weekend. I thought the way that it was handled with people contacting me as regards with my dates was just atrocious, it was appalling.” (Complainer 1)

“And I thought, oh, I’ll not maybe be up today, like the police were saying to me, oh, you probably won’t get called on the day that you’re actually at court, you’ll probably be there for a couple of days and then what will happen is ... and you ... a couple of days will pass and then it’ll be your time to go in. So, I thought going to court that day I was like, right, okay, I’m probably not gonna even get shouted today so, it was quite dramatic.” (Complainer 3)

“I had waited 2 years for it to go to trial, so like 2 and a half years so it was dead upsetting having to wait that long and then also when it came to court on my birthday and stuff like that, then it getting cancelled, I got more uptight about it, so it was, I don’t know, it was just dead like stressful should I say.” (Complainer 4)

IN THE WITNESS BOX

Complainers’ experience of examination-in-chief

9.21 All 4 complainers expressed a belief that the role of the Advocate Depute was somehow to be “on their side” or that the Advocate Depute was “their lawyer”. This displays a lack of information and understanding about the role of the Crown. Only 2 of the complainers had met the Advocate Depute prosecuting their case prior to the trial, despite recognition within the Crown Office that it is good practice for prosecutors to meet child or adult vulnerable witnesses before they give evidence. The Crown Office and Procurator Fiscal Service Review of the Investigation and Prosecution of Sexual Offences (2006) acknowledges that differing perspectives around what constitutes professional practice for Advocates in this regard have been in existence. This position is clarified by the review, which suggests that: “an introductory meeting is an essential part of preparing the victim for trial” (COPFS, 2006: 169).

9.22 The 2 complainers who had met the prosecutor prior to giving their evidence reported differing experiences of this process. For one complainer, this meeting seemed to go some way in allowing her to understand the approach taken during the evidence-in-chief:

“ [Prosecution] actually grilled me more than his lawyer did because she told me “I’ll do this so they don’t have anything to ask.” They only had very little questions, so she said “I’ll ask you everything that I know that the jury need to hear and the judge” so that when it comes to his lawyer, she only had so much to ask me. I knew what [Prosecution] – I didn’t know exactly what she was going to ask me – but I had an idea, so I knew what answers I had for her. I stumbled and everything because your nerves get the better, so some of the time, you were getting everything mixed up, so when it came to his lawyer, most of the hard questions had come out.” (Complainer 2)

9.23 For the second complainer, the extent to which this meeting prepared her for giving evidence was more limited:

“But when I had first went into court it was like the [Prosecution], before I’d went into court he came round and told me right, just answer yes, no and any questions. I’m here to help you, basically, and I was like right, okay. Nobody told me that their lawyers were quite rough.” (Complainer 3)

9.24 One of the complainers who did not have the opportunity for such a meeting indicated that it would have been helpful to have met the Advocate Depute before and after giving evidence:

“I think they [complainers] should be given more opportunity to speak to the Prosecution either before or after. I haven’t spoken to the Prosecution at all

afterwards and I still haven't been told that that is a possibility or I don't know maybe it is. I think the opportunity to speak with, or at least meet the person who is going to be asking the questions for the Prosecution, would be helpful." (Complainer 1)

9.25 With regard to the experience of the evidence-in-chief itself, complainers indicated that although this was less distressing than the cross-examination, it remained a difficult process. One of the main feelings expressed by complainers was that of embarrassment:

"I think I knew that he was sort of on my side if you like, but there to help me. I've never been in a situation like that before so it was quite intimidating. I remember at one point coming over really hot and feeling quite unwell and asking to sit down; I didn't feel majorly uncomfortable - a bit embarrassed - but mostly all right. I felt a bit intimidated by the amount of people that were there and the questions that they asked." (Complainer 1)

"Well there was one question – obviously I can talk about it now: it's still upsetting a wee bit, but I don't mind – and it was a question that, how can I put it, they asked me and it was something in the means of, how can I put it, it was a "blow job" but I actually had to say that sort of word in the court room. I had to say that word but I was trying to say it in another way so I didn't... but I had to actually say that for them to understand and it was quite ... honestly, it was dead embarrassing to stand in front of all those people and say that. I felt "oh my God, I can't..." I did it but I just wanted to run away from the whole thing." (Complainer 4)

9.26 In response to a question about whether the evidence in chief had allowed her to explain what happened, in a way which she thought was a fair recollection of events, this complainer made the following comment:

"How can I put it, no, not really actually; I didn't feel as if I did because although he was the bad party, I felt as if I was, as if it was me that was on trial for something when it wasn't." (Complainer 4)

Complainers' experience of cross-examination by Defence

9.27 All 4 complainers reported feeling very distressed during cross-examination. This included feeling sick, angry, frustrated, embarrassed, nervous, shaky, stupid and confused. Distress was most heightened at the times when the Defence mounted attacks on their credibility, by introducing "bad" character evidence suggesting they were liars, that the allegations were false, and that they were dishonest in character. Two broke down in tears during cross-examination and the trial had to be stopped temporarily.

"But she basically was calling me a liar and I was roaring back at her. I know I was roaring at her because in that courtroom, you came from this door and right down by where the public would have sat, come past and it was him and 2 of his Reliance – I don't know – police officers with him, and this was my box here. My police escort– he was a nice big guy – he was behind me in case I collapsed or fainted. I actually held on to it there and my knuckles were red raw by the time I came out. The more she shouted at me – she wouldn't have called it shouting – but the more she put her point across, the more determined

I was to, I actually roared back at her because she wasn't there, she didn't know." (Complainer 2)

".....It was very, very embarrassing, upsetting mostly ... I think I cried all the way through the trial when I was giving evidence. I managed to stop myself but then they would say something and it would kick me off again and, as I said, I marched out and then I got a break and then I went back in and then they were saying would you like another break and I was like that, no, I just want to get this over with and God man, I just wouldn't wish that on anybody." (Complainer 3)

"And they also used the fact against me that I was staying in a bed and breakfast. So because I'm homeless and I self-harm, that gives someone the right to do what they did to me? I don't think so. So at the same time I was obviously upset but I was actually angry at the way they were like speaking to me as if I was a piece of dirt. That's the way it felt honestly, and I was really angry, really angry. . . Then plus the fact – and I'm not ashamed to admit it – I actually used to prostitute myself, so that was another thing they used against me. It was all those things they were trying to use against me to make me look as if I'm just a down and out basically." (Complainer 4)

"... if that was me say, 3 year ago, I'd have collapsed in that court, I'd have clamped up and ... but because I'd been to confidence building classes, building on my skills and all that, I managed to fight back. When he said something cheeky to me I said something cheeky back, you know. I didn't hide who I really was but I also didn't hide the fact that I was still paying for all the things that they had done to me. But some poor person could walk in there and God, it hit me like a ton of bricks, and there's got to be something changed." (Complainer 3)

9.28 Distress during the cross-examination related, in part, to difficulty in understanding the questions which were put to them by the Defence, and to their sense of embarrassment in answering questions of a sexual nature:

"But I just got such a fright because he was saying a question and I couldn't understand the meaning of it so instead of me answering yes or no to a question I didn't understand I'd asked him to repeat it in a different way and he said it the same way and I looked at the Judge and I said "excuse me, I feel silly but I don't understand what he's actually meaning." And she said, "can you phrase it another way for her to understand." And he said it another high tech way and he made me feel ... I felt so stupid. (Complainer 3)

"...the questions they were asking me were quite, I thought, were quite dramatic the way they were treating me in that court room. It was disgusting and dreadful. I had actually to use some words of a sexual nature that quite embarrassed me in front of all those people in that courtroom and I was quite nervous as it was and I was awful shaky, so that didn't help me any more, that didn't help me. It was horrible." (Complainer 4)

9.29 On the whole, complainers did not report intervention or objection to Defence questioning by the Prosecution or the trial Judge. However one complainer did report intervention by the judge during particular points during the cross-examination:

“She intervened a couple of times and it was when ... especially when he was coming out with this ... he kept asking me this specific question but he was using these big words and I’d said to the Judge, “I feel as if he’s trying to make me look silly” and I don’t want to answer yes or no to a question that might be the opposite to what I say and I don’t mean to say it but he’s over the moon that I’ve said it so can he phrase it in another way. He would shout and she would go, “excuse me, I don’t think you have to raise your voice” and then when he was going on about I was a constant liar, isn’t it true you’re just a constant liar and the Judge would go ... and he would go on and on about being a constant liar and she would step in then. But she was a really good Judge, I’ve got to say that, she was.” (Complainer 3)

Reflections on giving evidence as a complainer in a sexual offence trial

9.30 When asked to reflect on the experience of being a complainer in a sexual offence trial, all 4 complainers questioned whether the process had been worthwhile, or said that they would not contemplate going through the process again. Further, if someone they knew was sexually assaulted, they would recommend that they do not pursue the complaint:

“I would never do it again. If I knew this is what would happen, my advice to anybody would be, you know obviously who hasn’t been dragged off the street and beaten to within half an inch of their life, I would tell them to do their very best just to forget about it. It’s something I would, if, God forbid, if it ever happened again to somebody you know, I would say just get on with it. The only good thing that I know has come out of this is the fact that I’ll probably never see him again and that he’ll never contact me again, but I would never recommend that anybody should do it, never.” (Complainer 1)

“But I mean, I’m not being funny, but see the whole thing about trials and rapes, I think it’s a big joke. It’s just as if ... it’s horrible. It’s really horrible as well when you think nobody believes you, to go through that whole thing and then go through all that in the court room and you just think – what was the point?” (Complainer 4)

9.31 With regard to alleviating the distress involved in giving evidence as a complainer in a sexual offence trial, all complainers identified special measures such as the use of screens and live television links while giving evidence as important and positive provisions, even although not all complainers were offered, or accepted, these measures. The presence of a support person in court was identified as a particularly positive measure for complainers.

CHAPTER SUMMARY

9.32 Due to the small number of interviews with complainers, the views expressed here are illustrative rather than representative of complainers’ experiences of giving evidence in a sexual offence trial since the inception of the 2002 Act. Nonetheless, a number of important common themes emerged from these interviews.

9.33 Key issues identified by complainers were that they felt inadequately prepared for the process of giving evidence, in that they had a lack of information about what this would entail in both general terms, and in terms of specific issues which were raised while they were giving evidence. Complainers indicated that it would be helpful to be aware of these issues, and to meet the Advocate Depute prior to giving their evidence.

9.34 Complainers identified questioning around “bad” character evidence during cross-examination as particularly distressing, and some complainers had further difficulty in understanding the relevance of specific issues which had been raised (e.g. marital status, self-harming behaviour).

9.35 The level of relevant information provided to complainers about the provisions contained within the 2002 Act has been highlighted as an area of particular concern. The COPFS Review of the Investigation and Prosecution of Sexual Offences (2006) has made a number of positive recommendations in this regard. However, as yet, it is too early to evaluate the implementation of these recommendations, and the subsequent impact they may have on complainers’ experiences of preparing to go to court, and giving evidence in a sexual offence trial.

9.36 Since complainers in this particular study were only interviewed in respect of cases that went to trial, it is not possible to determine whether concerns about the possibility of past sexual history or character evidence act as a deterrent to making a sexual offence complaint, or pursuing this complaint within the legal system. This is an area which would benefit from further research.

CHAPTER TEN: CONCLUSION

INCREASE IN SEXUAL HISTORY AND CHARACTER EVIDENCE

10.1 The research has shown first, a marked increase in the numbers of s.275 applications. Almost three quarters (72%) of High Court sexual offence trials now include an application to introduce sexual history or character evidence. The research has also shown that applications were invariably allowed by the court. The extent to which sexual history and character issues were permitted to be present in trials following an application has therefore grown significantly.

10.2 At the same time, the research also found that sexual history and character evidence was being introduced without an application to do so, and where evidence or questioning had been allowed by the court following an application, the subsequent questioning could stray beyond the boundaries set at the preliminary hearing. Once evidence was before the jury, trial Judges tended to allow it, even if the nature of the evidence was such that it did require an application.

10.3 Previously, about half of rape trials without s.275 applications, involved some sexual history or sexual character evidence introduced without an application to do so. A comparison of cross-examination of complainers before and after the current legislation suggests a slight decline in breaches of the procedure by the Defence with respect to sexual history and sexual character evidence being introduced without application. Yet this must be placed alongside the findings that most sexual offence trials now involve an application to introduce sexual history and sexual character evidence, and these are almost always successful at least in part.

CHARACTER EVIDENCE

10.4 The impact of the legislation is relatively difficult to assess with respect to more general character evidence. There is some variation in practice among practitioners concerning whether some evidence actually requires a s.275 application. Examples were found of the same type of questioning concerning alcohol consumption by the complainer being proposed in applications and being introduced without application. Although non-sexual character evidence was a feature of about a quarter of the questioning proposed in s.275 applications, interviews with practitioners suggested that the Defence may be more vigorous in seeking out character evidence than previously. This may again be partly due to the necessity of the wider scope of the Act, and the need to make an application in advance. Instances where the Defence strayed over the boundaries of questioning set by the court were characterised by attacks on the complainer's character, as noted in Chapter Seven. In addition, general character attacks by the Defence were possibly the most common forms of evidence or questioning introduced in cases where there had been no application made at all. It seems clear, therefore, that evidence of "bad" character has not been curtailed or reduced by the 2002 legislation.

10.5 There are a number of pertinent factors contributing to this paradox. First, against the background context of "Anderson Appeals", the requirement to produce a written s.275 application in advance, compels the Defence to apply their mind to the construction of an argument in which relevance is claimed for questions concerning some aspect of the sexual

history or character of the complainer. Conversely, under the 1995 Act, a claim about the form, nature and value of such evidence or questioning was made in the course of the trial, as the case unfolded.

10.6 Second, the 2002 Act broadened the scope of restricted evidence to include all questions about the complainer's character. It is important to remember that not all of the applications in the current study involved proposed questioning that would previously have required an application. Many applications involved a relatively extensive mix of types of questioning and evidence sought and overall, as Chapter Four noted, at least 40 percent of the questioning would not have involved an application under the previous legislation. When considering the distribution of the nature and types of evidence or questioning sought and introduced by means of an application, as listed in Appendix 4 and discussed in Chapters Four and Five, it is important to note that much of the evidence introduced was as a result of this wider scope of the legislation, and would not have figured in applications prior to the 2002 Act. This includes: evidence or questioning sought about the general character of the complainer; non-sexual past history with the accused; and the behaviour of the complainer after the offence. Whilst these matters were certainly pursued by the Defence during the trial prior to the 2002 Act, they were not required to be the subject of an application. S.275 applications now encompass several types of questioning and evidence that complainers were previously exposed to in the course of trials but without any prior s.275 application.

10.7 Third, the Crown are now required to make a s.275 application to introduce restricted evidence when they were not previously required to do so, and were responsible for a quarter of the applications made.

10.8 Fourth, in recent years, Scotland has seen some far-reaching developments, in terms of a set of wider reforms that have streamlined procedure for serious prosecutions. These have quite considerably changed the legal landscape in which sexual offences trials are conducted. The greater emphasis placed on early preparation for preliminary hearings, more extensive and earlier disclosure by the Crown of material and evidence that may be pertinent to the decision of whether or not to lodge a s.275 application and the effect of "Anderson Appeals" and other influential Appeal Court decisions, along with the requirement of the 2002 Act that the application be made in advance and in writing, have combined to heighten early consideration of the possibility of a s.275 application by the Defence. There is little doubt that, taken together, these wider developments have contributed to the increase in s.275 applications.

10.9 Certainly sexual history and character evidence have now become much more visible. The more formalised procedure requiring written submissions seems, perversely, to make the Defence even more skilled at its introduction, whilst simultaneously giving more leeway for a greater range of matters to be introduced into cross-examination, as well as more attuned to its potential at a much earlier stage in the proceedings.

A SHARPER FOCUS ON RELEVANCE?

10.10 The changes in procedures introduced under the provisions of the 2002 Act, and in particular, the requirement that the court take an evaluative approach to determining the relevance of the evidence sought, weighing the comparative benefit to the accused in admitting such evidence against any impact it might have on the dignity and privacy of the

complainer, has provided both the means and the justification for a much sharper focus on relevance.

10.11 The requirement to make a written application to the court and for this to be discussed and decided at a preliminary hearing provides the opportunity for much closer attention to be paid both to the probative value and possible prejudicial effects of any evidence sought. Written applications list the evidence or questioning sought, often in great detail, and invariably state simply that the evidence is relevant to consent or the credibility of the complainer. Despite the opportunity afforded by the legislation for a sharper focus on the relevance of sexual history and character evidence, this has not resulted in very much discussion in court, as might have been anticipated.

10.12 A key question is whether the 2002 legislation has indeed led to a closer assessment of the relevance of sexual history and character evidence. A factor to consider here is the extent to which prior agreement between parties concerning the contents of applications influences the deliberations of the court. The research has shown that commonly there is discussion and exchange between the parties prior to the preliminary hearing and that consequently, this enhances the likelihood of agreement. However, there is little detailed discussion between the judge and the parties during preliminary hearings to decide applications as to the relevance of the proposed evidence.

10.13 While the written nature and required format of applications rendered them much more transparent than applications under the previous legislation, prior agreement between the Crown and Defence quite often meant minimal debate or discussion at preliminary hearings. In terms of the recommendations of the Bonomy Report (2002) to streamline court business, this can be read as a positive effect of the 2002 legislation.

10.14 It has been stated throughout the report that the position taken by the Crown is a key determining factor of whether or not an application is allowed by the court. Where the Crown supported the application, the court typically endorsed it without airing in any discussion the relevance of the evidence. Moreover, virtually all of the Crown applications were allowed.

10.15 Whilst most preliminary hearings were characterised by a lack of discussion of relevance, some cases have produced lengthy and lively discussions. For the most part, these are the cases where the relevance of questioning has been challenged by the Crown, although there were Defence applications in which the Crown acquiesced, but where the judge was not satisfied that the probative value outweighed the possibly prejudicial effects. The research has shown that the court disallowed some questioning or evidence which it considered to be too loosely phrased, too wide-ranging, lacking in specificity, or simply too speculative. There is little doubt that, if duly enforced, this procedure can, and does, remove some of the excesses of questioning on sexual and character matters that characterised many sexual offence trials pre-2002. However this has to be weighed against the fact that applications are almost always allowed, and there is relatively little discussion in court about the relevance of the evidence.

10.16 Another influential factor in undermining the anticipated rebalancing of the probative value of weakly relevant evidence against respect for the dignity and privacy of a complainer is the ease with which a “case” for relevance can be constructed. Several interviewees considered it relatively easy to construct a case demonstrating that any sexual history or sexual character evidence has some relevance to issues in the trial, in particular credibility or

consent. This can again be attested to by the high incidence of applications that were allowed on these grounds. The research has shown that the court tended to take the view that where what is included in the application can be demonstrated to have some relevance to the issues in the trial, in particular, credibility and/or consent, then what might be termed “fair trial” considerations tend to outweigh the rights of the complainant.

UNINTENDED CONSEQUENCES

10.17 Given the significant increase in numbers of applications, and their very high rate of success, there is a marked increase in the amount of sexual history and character evidence being legitimately elicited and admitted than before. This means that there is more use of evidence of sexual matters in the court than previously

10.18 This leads us to conclude that the 2002 legislation has not gone in the direction intended. It has resulted in the introduction of more sexual history and character evidence than under the previous legislation, even allowing for the higher rates of sexual history and sexual character evidence introduced with disregard for the provisions under the previous legislation. The proportion of trials with applications have increased markedly, questioning on sexual history and character is now sought by both the Crown and the Defence, the numbers of multiple applications have doubled and the “belt and braces” approach adopted by Defence lawyers means that the questioning or evidence sought in written applications is now far more detailed and extensive than that sought in verbal applications made during the trial under the 1995 Act. Moreover, applications are rarely disallowed and the Defence is likely to introduce all of the evidence and question the complainant on all of the matters sought in the application.

10.19 The “belt and braces” or “scatter-gun” strategy adopted by Defence lawyers in the drafting of applications suggests that the objective is to find anything that the court will accept. The findings that the exception provisions were rarely specified and the evidential basis for proposed questioning was rarely scrutinised in detail (the possibility of calling witnesses to this purpose was never taken), means this is an effective strategy.

10.20 The research data has shown that it is relatively straightforward and easy to construct a case to claim that whatever questioning or evidence that the Defence want to put to the complainant has some relevance. Moreover, most Judges seem to take the view that if what the Defence seeks can be claimed to have some relevance to fair trial considerations, then those considerations outweigh those in relation to the complainant, and the evidence sought is allowed. If greater weight were placed by the court on the rights of the complainant, there is little doubt that the legislation would be more effective in terms of protecting complainants from distressing and intimidating questioning.

10.21 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 “chilling” effect on applications of the potential disclosure of analogous previous convictions anticipated by some practitioners, has not occurred. Although the numbers are small, we also 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. Whereas practice may ensure the accused is protected from having potentially damaging information disclosed, the anticipated increased protections for complainers have not been forthcoming.

10.22 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. That the 2002 Act has had an unanticipated and perverse outcome, increasing the presence of sexual history and character evidence rather than limiting it, was a common view expressed by several legal practitioners interviewed.

10.23 The overall, paradoxical result is that 7 out of 10 complainers in the most serious sexual offence trials are now virtually guaranteed to be questioned on their sexual history and sexual character. Questioning about sexual history and character in order to contest consent and challenge the credibility of the complainer have always been characteristic features of sexual offence trials; the routine submission of s.275 applications is ensuring that these features will endure. This plainly runs counter to the policy aims of the 2002 Act, expressed, for example, in the prior discussion document, *Redressing the Balance*, which were to prevent complainers being subjected to unnecessary and irrelevant questioning. It seems clear from this research that the legislation has not improved the position, and indeed has probably had the opposite of the anticipated, and hoped for, effect of reducing such questioning.

INFORMING THE COMPLAINER

10.24 Another of the policy aims of the 2002 Act, to provide advance notification to the complainer, is also clearly not being met. The research found that advance notice of s.275 applications, like the advance notice of a defence of consent, is not typically translated by the Crown into explicit advanced notification to the complainer. Advocates Depute are wary of the possibility of being seen to ‘coach’ complainers in advance of trial, and so, whilst the Crown will consider whether it is necessary to re-precognosce a complainer to get his or her position concerning any emergent events or issues raised in a Defence s.275 application, this does not necessarily involve informing the complainer that such an application has been made, by either party, or of the detail of the lines of questioning which the Defence seek to admit. Nevertheless, it is widely believed by both Judges and Defence practitioners that complainers are indeed informed. The practice of the Crown in this area is to change following the recommendations of the COPFS Review (2006). Implementation of the recommendations will require that there is a presumption in favour of further precognition of the complainer and that in all cases the complainer will be informed of the fact that an application has been made and the outcome of the court’s consideration of the application.

10.25 Complainers interviewed felt inadequately prepared for the process of giving evidence, in that they had little information about what giving evidence would entail, and were unaware that they may be questioned about sexual matters. Questioning around “bad” character evidence during cross-examination was identified as particularly distressing, and some complainers had further difficulty in understanding the relevance of specific issues which had been raised (e.g. marital status, self harming behaviour).

10.26 The level of relevant information provided to complainers about the provisions contained within the 2002 Act has been highlighted as an area of particular concern. The COPFS Review of the Investigation and Prosecution of Sexual Offences (2006) has made a number of positive recommendations in this regard. However, as yet, it is too early to evaluate the implementation of these recommendations, and the subsequent impact they may have on complainers' experiences of preparing to go to court, and giving evidence in a sexual offence trial.

RECOMMENDATIONS

Drawing on the data in this report, the following recommendations are made:

- 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;
- The court should consider recording in more detail why it is satisfied of the merits of a s.275 application and, in particular the reasoning why the evidence or questioning sought is considered relevant;
- The making of successive s.275 applications should be strongly deterred, as this is sometimes an opportunistic use by the Defence of the procedures in order to maximise their chances of introducing sexual history and character evidence and in this sense runs counter to legislative intent;
- Given that most sexual offence trials now involve a (successful) s.275 application, then the routine provision, to all complainers in sexual offence trials, of written information about the legislative provisions and the implications for questioning on sexual history and character in the trial should be seriously considered;
- The provision of timely and sufficiently detailed information to individual complainers about the contents of any s.275 application made by either party in the case, and the court's decision on the merits of the application needs to be seriously considered;
- Whilst the provision of comprehensive information for victims spanning their information needs was recommended by the COPFS review, research needs to be undertaken to monitor the implementation of the recommendations of the COPFS Review, in particular those which refer to the provision of information to the complainer about successful s.275 applications;
- Consideration should be given to extending the provisions relating to disclosure of previous convictions to those committed within the context of domestic abuse,

regardless of whether these were perpetrated on the same women as in the index offence; and

- There should be research to monitor the implementation and impact of the legislation in sexual offence trials heard under solemn procedure in the Sheriff Courts.

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APPENDIX ONE: PRO FORMA FOR TRANSCRIBED AND ATTENDED TRIALS

SPSS Ref:	Court Ref.	Accused(s)
Court:	Trial Dates:	Duration (days):

Charge(s):

Offence location:

No and sex of complainers:

Defence of consent lodged:

Rel between com and acc:

THE APPLICATION PROCESS

Number of application(s):

If multiple complainers, which complainer(s) did application relate to?

Who made application:

When submitted?

Pre-trial

PH Date:

At start of trial

During trial

Judge:

For prosecution:

For accused:

Evidence sought:

Nature of proposed questioning:

Issues at Trial to which questioning relevant:

Reasons why evidence considered relevant:

Inference:

Objections to application?

Judge's Views on Relevance/Admissibility:

(E.g. were any of the following addressed by judge – Dignity/Privacy of complainer; distress to complainer; probative value of evidence):

Application decision:

Any restrictions/limits?

Total no. of application 'hearings'

THE TRIAL PROCESS

Judge:

For prosecution:

For accused:

Application parameters adhered to in trial ?

Any sexual evidence led which was not agreed in application? If yes, describe (e.g. past sexual history with accused/others, medical/gynaecological history, 'sexual reputation, character)

Who by?

During whose evidence?

Any objections? (give details)

Disclosure of accused's previous convictions?

Yes

No

Demeanour of Complainer when giving evidence

Audibly distressed (crying, difficulty speaking)

Anger/hostility

Silence/Inability to answer

Court adjourned

Tone of questioning during cross-examination

Hostile (loud, stern) Sarcastic

Disbelieving

Neutral

Complainer's evidence (hours)

Any special measures

Verdict/outcome

Further Comments

Researcher name

APPENDIX TWO: TRANSCRIBED TRIALS

High Court Sexual Offence Trials Transcribed (Feb to Aug 2006), By Sexual Charge, s.275 Application And Trial Outcome

No.	Charge Type	Consent	s.275 made?	Nature of evidence/questioning sought in s.275 application	s.275 decision of the court	Trial Outcome
007	1. Lewd and Lib 2. Lewd and Lib 3. Lewd and Lib 4. Assault 5. Assault 6. Assault 7. Assault 8. Assault 9. Assault	No	Defence 3 young complainers (2 of whom subject to sxl charges)	Complainer known to teachers for telling frequent lies	Refused	1. Not Proven 2. Not Proven 3. Not Proven 4. Not Proven 5. Withdrawn 6. Not Proven 7. Withdrawn 8. Withdrawn 9. Withdrawn
039	1. Crim Law Cons (5) 2. Rape	Yes	Defence	Past sexual history with accused; sexual history; complainers' use of alcohol	Allowed in full	1. Late guilty plea 2. Guilty of Crim Law Cons (6)
044	1. Rape	Yes	Defence Crown	Sexual history Sexual history with third party	Allowed in full Allowed in full	1. Not proven
056	1. Rape	Yes	Crown	Lack of virginity	Allowed in full	1. Not proven
069	1. Rape	Yes	Defence (2 apps)	1 st Sexual behaviour with accused on same occasion 2 nd Contraceptive history	Allowed in full	1. Not proven
076	1. Rape 2. Contra Bail 3. Contra Bail 4. Contra Bail 5. Contra Bail 6. Breach of Peace 7. Contra Bail 8. Breach of Peace 9. Contra Bail 10. Breach of Peace	Yes	Defence (2 apps)	1 st Sexual history; past sexual history with accused. Dishonesty (complainer being investigated by employer for theft); Behaviour after offence (maintaining contact with accused) 2 nd general character (allegations of theft)	Unnecessary Partially allowed Refused	1. Not proven. 2. Guilty 3. Guilty 4. Guilty 5. Guilty 6. Guilty 7. Not Guilty 8. Not Guilty 9. No case to Answer 10. No Case to Answer

	2. Indecent Assault 3. Sex Off Act 1995 s.6 4. Indecent Assault 5. Rape				complainer told community psychiatric nurse that she had reported the abuse to police who had not shown any interest in her complaint); behaviour after offence (continued contact with accused, inc. giving him gifts)	(AD thought the application was unnecessary but did not oppose it)	3. Guilty 4. Not proven 5. Charge withdrawn
204	1. Rape	Yes	Defence		Sexual history with accused; asking for payment for sex. Dishonesty (claimed benefits whilst working)	Partially allowed	1. Not guilty
209	1. Rape	Yes	Crown		Complainer suffers depression	Allowed in full	1. Not guilty
210	1. Rape	Yes	Defence		Complainer's contraceptive history; complainer in current relationship; sexual behaviour on same occasion	Allowed in full	1. Guilty
211	1. Rape	Yes	Defence Crown		Sexual behaviour with accused on same occasion Sexual behaviour with accused on same occasion	Partially allowed Allowed	1. Not guilty
212	1. Rape	Yes	Defence Crown		Sexual behaviour with accused on same occasion; complainer gave accused a condom; sexual history with accused; sexual character Complainer boasting of sexual prowess; displaying condom; telling 3 rd party of her interest in accused	Unnecessary, then allowed in full Unnecessary, then allowed in full	1. Not guilty
231	1. Indecent Assault 2. Indecent Assault 3. Rape 4. Indecent Assault 5. Rape 6. Indecent Assault	No	Defence Crown 4 complrs		Complainers 1 and 2 are engaged in sexual relationship Complainer 3 past sexual history with accused	Refused Allowed	1. Withdrawn 2. Not guilty 3. Withdrawn 4. Not guilty 5. Withdrawn 6. Not guilty
108	1. Rape	Yes	Defence		Sexual behaviour with accused on same occasion Sexual behaviour with accused in presence of third party	Unnecessary	1. Not guilty
192	1. Rape	Yes	None made		n/a	n/a	1. Not guilty
125	1. Rape	No	None made		n/a	n/a	1. No case to answer

094	1.Rape	Yes	None made	n/a	n/a	1. Not guilty
214	1.Rape	Yes	None made	n/a	n/a	1. Not guilty
042	1.Rape	Yes	None made	n/a	n/a	1. No Case to answer
012	1. Breach of Peace 2. Malicious Damage 3. Rape 4. Breach of Peace	Yes	None made	n/a	n/a	1. Withdrawn 2. Withdrawn 3. Not Proven 4. Withdrawn

Key to sexual offences:

- Crim Law Cons s.1 Criminal Law (Consolidation) (Scotland) Act 1995 section 1 (incest)
- Crim Law Cons s.5 Criminal Law (Consolidation) (Scotland) Act 1995 section 5 (intercourse with girl under 16 years)
- Crim Law Cons s.6 Criminal Law (Consolidation) (Scotland) Act 1995 section 6 (indecent behaviour towards girl between 12 and 16 years)
- Sex Offs 1976 s.5 Sexual Offences (Scotland) Act (indecent behaviour towards girl between 12 and 16 years)
- Lewd and lib Lewd and libidinous practices and behaviour

APPENDIX THREE: ATTENDED TRIALS
High Court Sexual Offence Trials Attended (Feb to Aug 2006), By Sexual Charge, s.275 Application
And Trial Outcome

SPSS No.	Charge number and charge type	Defence of consent	s.275 Application made?	Nature of evidence /questioning sought	Application decision	Charge Verdict
240	1. Rape	Yes	None made	n/a	n/a	1. Not Proven
241	1. Indecent Assault 2. Rape	No	None made	n/a	n/a	1. Not Guilty 2. Not Guilty
236	1. Abduction, Assault and Rape 2. Theft	Yes	Crown Defence	Prostitution; drug addiction Prostitution	Allowed in full Allowed in full	1. Not Proven 2. Withdrawn
238	1. Rape	Yes	Defence	Past sexual history with accused; sexual maturity; mistaken belief in age	Allowed in full	1. Not Guilty
233	1. Rape	Yes	Defence	Complainer's sexual maturity/sexual experience; consumption of alcohol at time of alleged offence	Partially allowed	1. Not Guilty
239	1. Rape alt Crim Law Cons Act 1995 s.1	No	Crown Defence	Sex behaviour with third party; complainer's alleged drug addiction Sex behaviour with third party; motive for false allegation; past unproven allegations; drug addiction	Allowed in full Partially allowed	1. Guilty of alternative - Criminal Law Consolidation Act 1995 s.1
234	1. Attempted Rape	Yes	Defence (Application was submitted 3 times)	1 st submission: complainer's sexuality; 2 nd submission: complainer's sexuality, virginity 3 rd submission: complainer's sexuality	Refused as not relevant to guilt of accused. Partially allowed. Judge refuses to consider 3 rd submission	1. Not Guilty
232	1. Rape; 2. Crim Law Cons Act s.1 3. Crim Law Cons Act s.6 4. Crim Law Cons Act s.6 5. Crim Law Cons Act s.1	No	Defence	Past unproven allegations of sexual abuse; delay in reporting alleged offences; motive for false allegation (financial gain); contraceptive history	Allowed in full	1. Withdrawn 2. Not proven 3. Not proven 4. Guilty 5. Guilty
237	1. Rape 2. Indecent Assault	Yes	Defence	Prostitution; sexual behaviour with accused on same occasion; consumption of alcohol at time of offence; refusal to cooperate with police; frequenting 'red light' area	Partially allowed	1. Guilty 2. Withdrawn
235	1. Rape	Yes	Crown Defence	Past sexual history with accused; Past sexual history with accused; complainer's sexuality; sexual behaviour with third party	Allowed in full Allowed in full	1. Not Guilty

APPENDIX FOUR: CONTENTS OF S.275 APPLICATIONS

A) THE EVIDENCE SOUGHT TO BE ADMITTED OR ELICITED

Past sexual history with the accused

- Past remarks by, or behaviour of, complainer to, the accused said to be indicative of a romantic or sexual interest;
- A previous sexual relationship or incidents of sexual intercourse with accused;
- Other previous forms of sexual behaviour short of intercourse (kissing, cuddling, fondling) between the complainer and the accused;
- Details of the practice of (past) sexual behaviour between the complainer and the accused (e.g. frequency of intercourse, locations of intercourse, nature of sexual behaviour, circumstances in terms of alcohol consumption, clothes worn, things said etc.).

Sexual behaviour with accused on or around same occasion as alleged offence

- Complainer's willingness to go with (or to) accused (e.g. to accused's home, get in taxi with accused, accompany accused to another location);
- Sexually explicit remarks made by complainer to accused;
- Complainer giving accused her address; phone number, etc.;
- Complainer's behaviour in presence of accused said to be indicative of readiness to engage in sexual foreplay (e.g. provocative dancing, sensual posturing, kissing, cuddling, showing breasts, unzipping accused's trousers).

Non-sexual behaviour with accused on or around same occasion as alleged offence

- Physical confrontation involving complainer slapping, kicking and scratching accused;
- Verbal argument between complainer and accused.

Sexual behaviour with (or in presence of) third party/ies on or around same occasion

- Provocative dancing in public, in club, bar, or someone's private home;
- Sexually explicit remarks made by complainer (e.g. 'I feel like sex tonight');
- Sexual intercourse or sexual activity with a third party prior or around time of offence.

Non-sexual past history with the accused

- Previous incidents indicative of 'bad feeling' between complainer and accused or possible anger or vindictiveness on part of the complainer towards accused (e.g. suggesting motive for false allegation);
- Volatile 'on-off' relationship (relationship characterised by aggressive arguments, break-ups and make-ups).

Complainer's current relationship status

- Whether complainer has partner at or around time of alleged offence;
- Possessive, jealous and/or violent partner;
- Recent argument/break-up with partner.

Sexual history of complainer

- Working as prostitute at or around time of alleged offence;
- Past history of working as a prostitute;
- Extent of previous sexual activity (e.g. past sexual relationships; number of previous sexual partners);
- Nature of previous sexual activity (e.g. 'kinky' sex; more than one partner at a time);
- Past sexual behaviour demonstrating complainer's sexual practices and proclivities (e.g. keeping condoms by her bed, use of sex aids, indulging in sexual fantasies; pierced clitoris, [false] history of abortion);
- Past allegations of sexual assault or abuse;
- Complainer's virginity or lack of sexual experience;
- Complainer's contraceptive history.

Sexual character of complainer

- Sexually bullying or blackmailing by complainer (e.g. threatening false accusation of rape if he refused to sleep with her; threatening to tell accused's wife of their sexual relationship);
- Homosexuality;
- Sexual maturity (e.g. early menstruation; developed breasts)
- Sexual reputation of complainer (e.g. references to being known as 'easy'; sexual boasting' to others by complainer, e.g. number of past partners; sexual prowess).

General character of complainer

Mental instability of complainer

- Complainer's past mental health (e.g. history of depression, self-harm, antidepressant medication, personality problems);
- Complainer's mental state at or around time of alleged offence (e.g. depressed, anxious, volatile, mood swings, irrational).

Violence, unpredictability, disorderliness

- Complainer's physically violent or verbally abusive conduct;
- Disorderly conduct by complainer (e.g. playing loud music, hosting wild parties, having disreputable friends);

Alcohol or drug use

- Complainer's history or practices of drug or alcohol use;
- Complainer's consumption of alcohol or drugs at or around time of offence (e.g. under influence).

False allegation

- Past instances in which the complainer has allegedly lied or made unproven allegations of sexual assault or abuse;
- Motive for false allegation by complainer (e.g. in order to keep other people's 'good opinion'; out of embarrassment or shame; inability to take responsibility for actions; at risk of losing room at homeless hostel if stayed out all night).

Dishonesty

- Complainer's previous convictions or arrests;
- Complainer dishonesty (e.g. working and claiming unemployment benefit; benefit fraud; CICB claims; lying to get a party invitation);
- Complainer lying about age;

- Complainer known for making up stories (e.g. ‘lying to an unusual degree’; ‘cannot be relied upon to tell truth’);
- Lack of medical or forensic evidence to support complainer’s account.

Rootlessness

- Complainer’s homelessness or lack of fixed abode;
- Complainer sacked from job.

Relationships

- Complainer’s relationships with others of questionable character (e.g. relationships with alcoholics, drug users, prostitutes, known offenders).

Behaviour of complainer after alleged offence

- Maintaining contact with accused (e.g. complainer attempts at contacting accused; continuing to live in same house as accused despite having own home; allowing accused to look after children; giving gift to accused);
- Complainer displaying no visible signs of distress;
- Complainer’s refusal to report to police;
- Complainer’s refusal to undergo medical examination or declining medical attention
- Complainer’s acknowledgement of consensual sex with accused/withdrawal of allegation (e.g. to someone else, in diary, in a letter);
- Inconsistency in complainer’s account (e.g. difference between statements given in police interview and medical examination);
- Complainer’s attempt to blackmail accused;
- Complainers sexual behaviour after the alleged incidents (e.g. masturbation, touching other boys, looking at older men).

B) NATURE OF ANY QUESTIONING PROPOSED

- To elicit evidence (of above) from complainer;
- To elicit evidence from other witnesses in trial (including evidence in form of audio recording of accused police interview);
- To put evidence of false allegation to complainer ;
- Any other appropriate questions arising from examination-in-chief or cross-examination;
- To elicit whether complainer engaged in work as prostitute immediately after being with accused and whether complainer was then robbed by a client;
- To ask complainer whether she was dressed only in underwear when she caused a member of the public to telephone police;
- To ask complainer if she was victim of assault immediately prior to incident and if she stole drugs from her assailant;
- To elicit contents of a letter forming part of Crown production, with intention of contradicting same;
- To question the complainer as to her motive in seeking prescription of contraceptive pill.

C) ISSUES AT TRIAL TO WHICH EVIDENCE IS CONSIDERED RELEVANT

Complainer's character or predisposition

- Complainer not of good character;
- Credibility and reliability of complainer;
- Predisposition of complainer towards sexual behaviour on same occasion;
- Complainer's mental state at or around time of alleged offence (e.g. as alternative explanation for distress);
- Complainer's lifestyle;
- Motivation for false complaints and explanation for delay in reporting.

Consent

- Accused's genuine/honest belief in consent;
- Consent.

Medical or forensic evidence

- Evidential significance of injuries (e.g. medical and forensic evidence);
- Medical evidence (e.g. disrupted hymen).

Accused

- Accused's guilt;
- Credibility of accused;
- Defence of self-defence.

D) REASONS WHY EVIDENCE IS CONSIDERED RELEVANT TO ISSUES

- Consent;
- Credibility of accused;
- Credibility and/or reliability of complainer;
- Past sexual relations between complainer and accused;
- Accused's guilt;
- Sexual activity which is subject of indictment is not an isolated incident;
- To place allegation in context (e.g. no need for complainer to otherwise disclose [to accused] being on pill except in a sexual context).
- Complainer's impaired judgement due to alcohol/drugs.
- Complainer's behaviour 'at odds' with one who has been raped.
- Alternative explanation (e.g. disrupted hymen as evidence of previous sexual activity; injuries consistent with type of sexual activity complainer regularly engages in);
- Explanation/background (e.g. for false allegation);
- Probative value is significant;
- To rebut evidence by Crown (e.g. that complainer unlikely to participate in more than one sexual relationship at a time, or that because of her age she had no prior sexual experience);
- Interests of justice;
- To demonstrate complainer's motivation for false allegation;
- To demonstrate complainer sought to blackmail the accused;
- Relevant to special defence of self-defence;
- Gives rise to reasonable doubt that complainer was victim of rape;

- To allow complainer to give full account.

E) INFERENCES WHICH COURT SHOULD DRAW FROM THE EVIDENCE

- Complainer consented;
- Complainer not credible/reliable;
- Complainer not of good character (e.g. fabricator; spiteful);
- Complainer not of good sexual character (e.g. complainer willing to have sex for money, alcohol and/or drugs);
- Alternative explanation for complainer's demeanour after alleged offence (e.g. distress due to other reasons such as drink, drugs, depression, relationship breakdown);
- Motivation and reasons for false allegation (e.g. complainer sought to conceal true nature of relationship with accused; jealousy; afraid partner would find out; to gain sympathy and centre of attention from others present);
- Complainer has attempted to blackmail applicant to obtain money in past;
- Accused not guilty.

In Crown applications only

- Unlikelihood of accused's version of events / accused's comments not true/inconsistent/false;
- Rebut defence inference (e.g. that complainer was working as prostitute does not necessarily mean consent);
- Employment as a prostitute does not mean that complainer is not credible and reliable;
- Medical evidence consistent with complainer's account;
- Complainer is credible and reliable witness;
- Prior consensual sexual activity involving kissing and cuddling does not necessarily mean complainer consented to sexual intercourse;
- None.

APPENDIX FIVE: APPLICATION TO INTRODUCE SEXUAL CHARACTER

Comparison of application dialogue in cases involving sexual character

Two baseline study cases are described, one in which the Advocate Depute did not oppose the application and it was granted and one in which the Advocate Depute did oppose the application and it was refused in part. These are compared with an application case post 2002 in which the Advocate Depute opposed the sexual character evidence and it was partially refused.

Baseline study case 1110 (1999) Attempted Rape; case abandoned by the Prosecution after the complainer's evidence.

The Defence application sought to question the complainer in respect of 3 matters; 2 of these pertained to sexual character: that the complainer danced naked in the pub a few weeks earlier than the alleged incident; that the complainer offered oral sex to barman in return for free drinks a few weeks before the alleged incident; the third concerned a previous allegation of rape.

As the Defence described the proposed evidence, the Judge intervened and said that s/he did not see the relevance of naked dancing in a pub. The Defence argued that it was a matter of the credibility and reliability of the complainer and shows her to be of bad character in relation to sexual matters. The Defence also argued that the issue did not really require an application but if it did then he asked the Judge to exercise the discretion allowed by the exception clause 'in the interests of justice'. With regard to the other item, the Defence said that this indicated the free and easy way the complainer offered sexual favours to others and her general behaviour when drunk. The Advocate Depute accepted these issues were relevant to character of the complainer and agreed with the Defence that naked dancing was not within the ambit of the prohibitions of the legislation: 'it may be distasteful but [it's] not strictly speaking relevant under the statute'. The Judge allowed the application simply stating satisfaction that all 3 matters were relevant in this case. The whole dialogue took 12 minutes.

Baseline study case 1202 (1999) Rape, amended to Attempted Rape at the end of the complainer's testimony; Not Guilty Verdict.

In this rape case the Defence made 2 applications: the first was to question a witness about the complainer dancing in underwear in front of him and others at his house, and her tendency for exhibitionism and sexually provocative behaviour such as going up to men in bars fondling and propositioning them, and sleeping with strangers despite having a boyfriend. The Defence also noted that that the complainer had admitted to the Crown to having worked as a prostitute but did not seek to raise this. The Judge allowed questions to be asked of the witness about what happened at his house but refused the motion regarding other matters of exhibitionist or sexually provocative behaviour.

In a second application immediately following the complainer's evidence in chief, the Defence sought to put questions to the complainer about 3 issues claiming that the Advocate Depute did not object to the first two and should not object to the third. Two of these issues concerned sexual behaviour with others than the accused, which the Defence said demonstrated a pattern relevant to the current charge. Clearly they also introduced evidence

that were also likely to suggest that the complainer was of bad character in relation to sexual matters, although this not an aspect that the Defence explicitly acknowledged. The first involved questioning the complainer about the forensic report which had found DNA of 2 men in addition to the accused in samples taken from her. The second issue involved questioning her about the medical record taken by the doctor, and as opening up questions about what the doctor had recorded concerning her sexual history, this allowed questioning about the fact that she was an alcoholic. Finally, the third issue involved questioning her about sex with a named man. The Defence again emphasised that despite the complainer admitting to police she worked as an escort and prostitute, they did not wish to raise any of that. The intention was to show that the complainer was willing on her own admission, to have sex with strangers. The Advocate Depute objected about putting evidence before the jury about occasions other than the alleged offence which were prejudicial to complainer and don't have a bearing on the night in question. The Defence argued that it was important to show that the complainer lost inhibition as a consequence of drink. The judge allowed questions to be put to the complainer about: 1. content of forensic report showing that DNA from several people found on samples taken from the complainer; 2. the medical history she had given to the police doctor; and 3. an incident with another named male. The judge ruled that the other issues raised by the Defence were not material to the trial but invited the Defence to revisit the application if it becomes necessary.

Post 2002 case 121 (2004) This case included the submission of 3 written applications with application 2 and 3 additional clauses, to those contained in the first application. The written substance is replicated below:

Evidence sought:

1. Any sexual activity was instigated by complainer and encouraged by her and that she made promiscuous sexual advances to the accused after she had consumed alcohol;
2. That prior to the alleged incident complainer had made similar advances to her niece on a previous occasion after consuming alcohol and had kissed her niece but had thereafter denied that she had made any such advances and had not consented to the conduct;
3. That complainer confessed to her sister that the allegation was false and was only intended to allow her to make a claim for criminal injuries compensation. The complainer disclosed that she had encouraged the accused because she found he was sexually inexperienced. Complainer's sister advised her to immediately withdraw the allegation and inform the police;
4. That complainer's nephew (currently in prison), lived with the complainer on landlord/tenant basis during which time complainer made frequent inappropriate advances to towards him after consuming alcohol. It will also be shown that complainer's statement to police that she is lesbian and hates men, is false.

Nature of proposed questioning:

To challenge complainer's truthfulness, to show a pattern of behaviour of complainer's willingness to engage in sexual behaviour with persons related to her when consuming alcohol, which will support the truthful evidence to be given or led by the accused, and to provide the court with a balanced picture of the evidence as a whole to allow it to properly weigh and evaluate the evidence.

Issues at Trial to which questioning relevant:

Complainer's consent to sexual conduct with the accused; Complainer's credibility.

Reasons why evidence considered relevant

To show that: the incident libelled was not an assault by the accused; the complainer is not credible in essentials of her evidence and that it is improbable her allegations are true; evidence has a positive probative value which will show applicant is not guilty

Inference

That conduct was instigated by complainer and was consensual.

Evidence of complainer's alleged distress cannot be relied on as supporting proof beyond reasonable doubt.

In the consequent discussion of the applications, the Advocate Depute argued that much of what the Defence sought to introduce under 1 and 3, was against the purpose of the legislation and a general attempt to undermine the complainer's credibility without showing relevance to the charge. The Judge was similarly not satisfied that the proposed evidence was relevant to establishing guilt or satisfied that probative value of that evidence was likely to outweigh any risk of prejudice to the proper administration of justice. *'Having regard to the need to protect the complainers privacy and dignity and to ensure that the facts and circumstances put before the jury are commensurate to the importance of the issue of the jury's verdict. I will therefore refuse the applications one and 3'*

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