



HM Inspectorate of Prosecution in Scotland

**Inspection of COPFS practice in
relation to sections 274 and 275
of the Criminal Procedure
(Scotland) Act 1995**

Terms of Reference

January 2022



About our inspection

Aim

1. The aim of this inspection is to assess Crown Office and Procurator Fiscal Service (COPFS) practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. These provisions regulate the use of evidence relating to the sexual history or bad character of complainers in sexual offence trials, and are designed to protect complainers giving evidence from irrelevant and often distressing questioning.

Background

2. Sometimes known as ‘rape shield’ laws, specific provisions to regulate the use of sexual history evidence were first introduced in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.¹ These provisions were later extended in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). In response to concerns about the operation of those provisions and following a consultation by the then Scottish Executive, the provisions in the 1995 Act were replaced by new sections 274 and 275 in 2002.²

Sections 274 and 275³

3. Sections 274 and 275 of the 1995 Act were intended to protect complainers in sexual offence trials from inappropriate questioning about their sexual history and character when giving evidence in court. In particular, they were designed to discourage the use of evidence of limited relevance, where the primary purpose of the evidence is to undermine the credibility of the complainer or divert attention from the issues that require to be determined at trial.⁴ Sections 274 and 275 apply to trials for sexual offences heard under solemn and summary procedure, and apply equally to evidence sought to be led or elicited by either the Crown or the defence.
4. Section 274 creates a general rule that evidence or questioning falling within certain categories is not admissible in sexual offence cases. The categories cover evidence which shows or tends to show that the complainer:
 - is not of good character
 - has engaged in sexual behaviour not forming part of the subject matter of the charge
 - has engaged in other behaviour or been subject to any condition or predisposition that may lead to an inference that the complainer is likely to have consented to the acts forming the subject matter of the charge or is not a credible or reliable witness.
5. Section 275 allows the court, on application made to it, to admit evidence or allow questioning falling within the general prohibition at section 274, so long

¹ Section 36 of the 1985 Act inserted provisions regulating the use of sexual history evidence into the Criminal Procedure (Scotland) Act 1975.

² Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.

³ The following paragraphs briefly summarise the legislation for the purposes of this Terms of Reference. The full text can be found at www.legislation.gov.uk.

⁴ *Sexual Offences (Procedure and Evidence) (Scotland) Bill: Policy Memorandum* (2001).



as the evidence meets three cumulative tests. Set out in section 275(1), these tests relate to the specificity, relevance and probative value of the evidence. Its probative value must be significant and must outweigh the risk of prejudice to the proper administration of justice, having regard to the protection of the complainer's dignity and privacy.

6. Sections 274 and 275 restrict the admissibility of evidence which would otherwise be permissible at common law. Thus, prior to considering whether evidence falls within the prohibited categories in section 274, the court must first consider whether the evidence is admissible at common law. If inadmissible in common law, the evidence cannot be admitted via section 275.
7. Applications made under section 275 must be in writing, and must be made not less than seven days before the preliminary hearing in the High Court or 14 days before the trial in the Sheriff Court. Sections 275(3) requires that applications must specify:
 - the evidence sought to be admitted or elicited
 - the nature of any questioning proposed
 - the issues at the trial to which the evidence is considered to be relevant
 - the reasons why that evidence is considered relevant to those issues
 - the inferences which the applicant proposes to submit to the court that it should draw from the evidence.
8. Where the court grants an application to admit evidence or allow questioning about the sexual history or character of the complainer, section 275(7) requires the court to state what evidence or questioning it is permitting and the reasons for its determination that the evidence or questioning is admissible.

Recent case law

9. In recent years, a series of cases⁵ have sought to clarify the import of sections 274 and 275 and to set out the correct approach to be taken to section 275 applications. These cases have been a response to challenges faced by the courts, the Crown and the defence in following the '*basic rules of evidence*',⁶ and a tendency among some judges and sheriffs to consider what is '*fair, looking primarily, if not exclusively, at the interests of the accused rather than, in addition to his Article 6 right to a fair trial, the wider interests of justice, including the rights of the complainer.*'⁷ Clarification has been required because, as Lord Turnbull has noted, the '*legislative provisions have consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application.*'⁸
10. A review of the recent case law highlights some of the challenges encountered by all parties in making, responding to and determining applications regarding sexual history or character evidence, and the

⁵ Including *RN v HMA* [2020] HCJAC 3; *CH v HMA* [2020] HCJAC 43; *Macdonald v HMA* [2020] HCJAC 21; *RR v HMA* [2021] HCJAC 21.

⁶ *Macdonald v HMA* [2020] HCJAC 21 at para 47.

⁷ *CH v HMA* [2020] HCJAC 43 at para 6.

⁸ *CH v HMA* [2020] HCJAC 43 at para 109.



appropriate control of the nature and scope of questioning during trial. These include:

- consideration of the common law rules of evidence before applying the statutory provisions⁹
- a lack of opposition by the Crown to some applications (either in whole or in part) made by the defence¹⁰
- deficiencies in the quality of applications, including failures to address all three tests set out in section 275(1) or fulfil the requirements of section 275(3)¹¹
- a failure by the court in some cases to state or record reasons for the granting of applications¹²
- a lack of intervention or objection by the courts and the Crown to inappropriate or prohibited questioning during cross-examination of witnesses at trial.¹³

11. As the Lord Justice Clerk noted, recent cases have not been a restatement of the law, but will have led '*to an enhanced, if belated, appreciation of the full significance of the legislation and how it should operate*'.¹⁴

12. More recently, in *RR v HMA*,¹⁵ the court clarified the Crown's duties when engaging with complainers regarding section 275 applications. By virtue of the Victims and Witnesses (Scotland) Act 2014¹⁶ and Article 8 (right to privacy) of the European Convention on Human Rights, the Crown has a duty to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's own attitude. This will require that the complainer must be told of the application, invited to comment on the accuracy of any allegations within it, and be asked to state any objections to the granting of the application.

13. The recent case law has prompted COPFS to revise its operational instructions and to enhance the training offered to staff in respect of section 275 applications.

Research

14. In August 2020, the Equality and Human Rights Commission (EHRC) published research carried out by Professor Sharon Cowan on the use of

⁹ *Kerseboom v HMA* [2016] HCJAC 51 at paras 10 and 16; *LL v HMA* [2018] HCJAC 35 at paras 9 and 22.

¹⁰ *Macdonald v HMA* [2020] HCJAC 21 at para 34; *LL v HMA* [2018] HCJAC 35 at para 11; *W(J) v HMA* [2021] HCJAC 41 at para 17; *CH v HMA* [2020] HCJAC 43 at para 27. In *Macdonald*, the Lord Justice General highlighted the importance of the Crown opposing defence applications which seek to admit evidence that is inadmissible at common law or under section 274 as, '*Without such opposition... the court may find it difficult to exclude the proposed evidence... when it is relatively ignorant, at the stage of determining the application, of the totality of the evidence which is to be adduced by the Crown at the subsequent trial.*' (para 34).

¹¹ *HMA v JG* [2019] HCJ 71 at paras 35 and 43; *RN v HMA* [2020] HCJAC 3 at paras 6, 7, 8 and 26; *W(J) v HMA* [2021] HCJAC 41 at para 28; *HMA v Selfridge* 2021 SLT 976 at paras 40-41; *CH v HMA* [2020] HCJAC 43 at paras 42-44.

¹² *RN v HMA* [2020] HCJAC 3 at para 20; *Macdonald v HMA* [2020] HCJAC 21 at para 36.

¹³ *Macdonald v HMA* [2020] HCJAC 21 at para 47; *Dreghorn v HMA* [2015] HCJAC 69 at para 39.

¹⁴ *W(J) v HMA* [2021] HCJAC 41 at para 26.

¹⁵ *RR v HMA* [2021] HCJAC 21.

¹⁶ Section 1(3)(a) and (d) of the Victims and Witnesses (Scotland) Act 2014 require that the complainer be able to obtain information about what is happening in proceedings and, in so far as is appropriate, be able to participate effectively in them.



sexual history and bad character evidence in Scottish sexual offence trials.¹⁷ This research provides an overview of the legislation, case law and literature, and compares the situation in Scotland with that in other jurisdictions. Professor Cowan notes that there appears to be room for improvement in the operation of the provisions regulating the use of sexual history and bad character evidence in Scotland, particularly in relation to protecting the dignity and privacy of the complainer. She highlights several areas for further work so that we can better understand how the law is being implemented and what change may be required. These include:

- a review of COPFS practice in relation to sexual history and character evidence
- the need for robust and transparent official statistical data on the operation of sections 274 and 275
- a programme of research on the use of sexual history and character evidence at trial
- consideration of further legal and procedural reform, including whether complainers should have access to state funded independent legal representation in section 275 hearings.

The inspectorate's role

15. Following publication of the EHRC report, HM Chief Inspector of Prosecution had discussions with both the then Lord Advocate and the EHRC regarding the possibility of HM Inspectorate of Prosecution in Scotland (IPS) carrying out a review of COPFS practice in relation to sections 274 and 275. In light of those discussions, the Lord Advocate referred the issue to IPS for inspection. He considered that the inspection was timely and in the public interest.
16. IPS agrees that an inspection of COPFS practice in relation to sexual history and bad character evidence is timely, given recent case law and subsequent changes to the Crown's policy and procedures. While IPS has only recently reviewed the investigation and prosecution of sexual crime,¹⁸ we consider that further work in this area is merited. It is essential that COPFS has policies and systems in place so as to ensure that it makes and responds to section 275 applications appropriately, and that it engages with complainers in a manner that respects their autonomy and dignity. This is particularly important at a time when sexual crime is estimated to make up around 75% of the Crown's workload as well as the majority of evidence led trials in the High Court.¹⁹
17. As well as providing an assessment of COPFS practice in relation to sections 274 and 275, we hope the report of our inspection will increase transparency around the Crown's approach to this important issue.

Previous scrutiny

18. In 2017, IPS published a review of the investigation and prosecution of sexual crime in the High Court by COPFS.²⁰ That review resulted in 12

¹⁷ Professor Sharon Cowan, [The use of sexual history and bad character evidence in Scottish sexual offence trials](#) (EHRC, August 2020).

¹⁸ IPS, [Thematic review of the investigation and prosecution of sexual crime](#) (2017) and IPS, [Follow-up review of the investigation and prosecution of sexual crime](#) (2020).

¹⁹ Lord Justice Clerk, [Improving the management of sexual offence cases](#) (March 2021), paragraph 1.2.

²⁰ IPS, [Thematic review of the investigation and prosecution of sexual crime](#) (2017).



recommendations – six were aimed at supporting COPFS to reduce the journey time of cases, while six sought to support improvements in how COPFS communicates with and supports victims and witnesses. In 2020, IPS published a follow-up review.²¹ We noted considerable progress had been made in implementing the recommendations. Eight recommendations had been achieved, three were in progress and one was no longer relevant given changes to working practices. Despite this progress, we found that delays still occur and there remains scope for improving communication with victims. We made three new recommendations.

19. The 2017 review only briefly addressed the issue of section 275 applications. IPS noted concerns from victim support groups and legal commentators that sections 274 and 275 were not achieving their intended purpose. Their perception, which was supported by feedback IPS heard from victims, was that the court and the prosecution were not robustly challenging applications and that sexual history and character evidence were being routinely used to discredit witnesses and reinforce the prejudices and myths that prevail around sexual crimes. IPS sought to review section 275 applications in a small number of cases. While there was some evidence of the court and the Crown questioning the relevance and scope of applications, IPS noted its review of the applications was of limited value in assessing the effectiveness of the legislation without more detailed information about the applications and the case being available.

Scope

20. Our inspection will examine how COPFS makes and responds to section 275 applications. We will consider how policy and practice has changed in response to recent case law, identifying areas of effective practice and areas for improvement. In particular, we will consider:
 - how COPFS has responded to recent case law and the courts' clarification of its role in respect of section 275 applications
 - how well COPFS supports its staff to manage section 275 applications appropriately. This will include consideration of the policy, guidance and training available to support staff in their decision making, and consideration of the extent to which staff understand the issues and are aware of their role and what is expected of them
 - whether there is an appropriate process in place for managing section 275 applications and the extent to which that process is being followed
 - how well the Crown is fulfilling its duties to engage with complainers as set out in *RR*, how well it communicates with complainers regarding section 275 applications and whether communication is tailored to the needs of complainers. This will include consideration of the timescales within which the complainer must be informed of an application and their attitudes towards it ascertained, as well as the potential tension for the Crown in having to present to the court its own views on the application as well as those of the complainer where these are not aligned. This may lead to consideration of whether complainers would be better served by having independent legal representation

²¹ IPS, [Follow-up review of the investigation and prosecution of sexual crime](#) (2020).



- what data is available about the operation of section 275 and the extent to which this is used to inform practice or policy development
- the extent to which the equality impact of policies and procedures has been assessed, particularly in relation to access to justice for women and girls.

21. While data suggests that the majority of section 275 applications are made in the High Court, we will also consider how COPFS responds to and makes applications in Sheriff and Jury and summary cases.

Methodology

22. Following an initial period of scoping and planning our inspection, we will seek evidence from a range of sources. This will include:

- reviewing COPFS policies, guidance, procedures and other documentation relating to sections 274 and 275
- identifying any available data on the operation of sections 274 and 275
- reviewing a sample of cases in which section 275 applications have been made, whether by COPFS or the defence. It is likely that this will be a phased review, with Phase 1 involving the gathering of data from a statistically significant sample of cases and Phase 2 involving a more in-depth analysis of how section 275 applications are managed in a smaller number of cases. Phase 2 will include a review of how COPFS engages with complainers regarding section 275 applications
- seeking the views and experiences of complainers in cases where section 275 applications have been made by engaging directly with them and with the organisations which support them and advocate on their behalf
- interviewing key personnel within COPFS who are involved in making and responding to section 275 applications. This will include case preparers, deputies, Advocates Depute, and senior managers, amongst others
- interviewing relevant stakeholders such as defence agents, sheriffs and judges and other interested parties
- considering prosecution practice in relation to sexual history and bad character evidence in other jurisdictions, with a view to identifying any good practice and learning for Scotland.

23. In carrying out our inspection, particularly in the planning and evidence gathering stages, we will consider our duty of user focus, as set out in the Public Services Reform (Scotland) Act 2010. This will help us ensure that the views and experiences of service users, and those who represent them, shape our work.

24. Reviewing individual cases forms a key part of the inspection methodology used by IPS. During initial discussions about this inspection in late 2020, we noted that COPFS was not able to easily identify cases in which section 275 applications had been made. We therefore requested that COPFS staff manually collect data on such cases between 1 January and 30 June 2021. Our sample of cases for review will be drawn from this period, however we acknowledge that the manner in which the data was collated risks the data set being incomplete. Nonetheless, we are grateful to those staff who assisted in this task.



25. At this stage in the planning of our inspection, it is likely that our methodology will not include observations of prosecutors at court. This is for two reasons – carrying out court observations would significantly extend the scale of our inspection and the resources required; and we are aware that Professor Sharon Cowan is leading further research on section 275 and our understanding is that court observations will form a key part of her work. Given that both our inspection and the research project are financed by the public purse, we are keen to avoid duplication of effort and maximise value for money. However, we will keep this under review as our inspection progresses.
26. Our inspection will be delivered in compliance with the law and guidance relating to the Covid-19 pandemic. It is likely that the majority of our evidence gathering will continue to be done remotely. This is facilitated by inspectorate staff having direct remote access to COPFS systems, while interviews may be carried out by video or teleconferencing. Our approach will be kept under review to ensure that it reflects the latest government guidance, with a view to safeguarding the health and wellbeing of our own staff as well as that of those who participate in our inspection.

Reporting

27. A report of our inspection will be submitted to the Lord Advocate in accordance with section 79(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and will be published on our website. We anticipate publishing our report in Spring 2022. This timescale may vary, depending on the ease with which we are able to access relevant case files for review.
28. For further information about our inspection, or if you have information or experiences you would like to share with us, please contact us at IPS@gov.scot.

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About HM Inspectorate of Prosecution in Scotland

HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service (COPFS). The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person. COPFS is the sole prosecuting authority in Scotland and is also responsible for investigating sudden deaths and complaints against the police which are of a criminal nature.

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