



Submission guidance:

Application of sections 274 & 275 of the 1995 Act

This paper provides guidance for those thinking of applying to the Commission on the basis of an alleged misapplication of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. It summarises the Commission's understanding of the law. For a fuller explanation, see the Commission's more detailed position paper.

Application of sections 274 & 275 of the 1995 Act – in brief

- Sections 274 and 275 are applicable only to sexual offence trials within scope of section 288C of the 1995 Act.
- Section 274 prohibits the leading of certain evidence or questioning. Such evidence as is covered by section 274 may be introduced or elicited if it is admissible at common law **and** falls within the exceptions in section 275.
- Section 275(1) sets out a three-stage, cumulative test, which must be satisfied before the court can allow questioning or evidence to be led which would otherwise be excluded by section 274.
- Admissibility of the evidence at common law is a pre-requisite for the admission of evidence under section 275. Sections 274 and 275 do not provide a new path to have evidence admitted that would be inadmissible under the general rules of evidence.
- Evidence is only admissible in a criminal trial if it is relevant. Evidence is relevant if it bears directly on a fact in issue or does so indirectly because it relates to a fact which makes a fact in issue more or less probable. Evidence which is collateral to the facts in issue is generally excluded.
- The test for the introduction of evidence of either pre- or post-charge conduct is that it will only be relevant if it has a reasonably direct bearing on a fact at issue in the trial, in the sense of making that fact more or less probable. Broadly the same position applies to post-charge conduct as to pre-charge conduct.
- **Evidence of previous consent to sexual activity between the same parties or evidence of character (good or bad) will rarely be admissible at common law.**



Position Paper:

Application of sections 274 & 275 of the 1995 Act

This paper sets out the Commission's approach when dealing with this area of law.

Introduction

1. Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (hereinafter "the 1995 Act") regulate the use of evidence relating to the sexual history or character of complainers in sexual offence trials. They are sometimes referred to informally as 'rape shield' laws.
2. By way of background, provisions to regulate the use of sexual history evidence were first introduced in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985¹. These provisions were later extended by the introduction of sections 274 and 275 of the 1995 Act, which were replaced by new sections 274 and 275 in 2002². These revised provisions took effect from 1 November 2002.
3. There is a growing number of sexual offences being reported and prosecuted in Scotland. Recorded crime statistics show a 96 % increase in reporting of sexual crimes in the eight-year period from 2012-13 to 2020-21³. In 2017, the Inspectorate of Prosecutions found that sexual crimes made up 75 % of Crown Office and Procurator Fiscal Service (COPFS) High Court work, up from 50 % in 2015⁴. In 2020, COPFS noted that over the preceding two years, the number of High Court level sexual offences reported to the Crown increased by approximately 50 %⁵. People proceeded against

¹ Section 36 inserted provisions into the Criminal Procedure (Scotland) Act 1975, following the *Report on Evidence in Cases of Rape and Other Sexual Offences*, Scottish Law Commission 1983.

² Section 10, Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 inserted sections 275A and 275B into the Criminal Procedure (Scotland) Act 1995. Where an application under section 275 is successful, section 275A allows the previous convictions of the accused to be put before the judge or jury. Section 275B sets out further procedure for a section 275 application.

³ Scottish Government, *Recorded Crime in Scotland: 2021-2022*, published 28 June 2022

⁴ Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes*, November 2017, at page 3

⁵ Crown Office and Procurator Fiscal Service, *Securing Justice: Our Strategic Plan 2020-23*, published 23 July 2020

in Scottish courts for sexual offences has increased by approximately 65 % from 2011-12 to 2019-20, with a drop in 2020-21 from the previous year likely attributable to the impacts of the Covid-19 pandemic⁶.

4. Sections 274 and 275 are applicable only to sexual offence trials within the scope of section 288C of the 1995 Act. Many sexual cases feature section 275 applications. Given the rise in the number of prosecutions of sexual offences in recent years, it would seem likely that there has been an increase in the number of section 275 applications being made within the criminal justice system in Scotland.
5. The Commission has made one referral⁷ to date on matters relating to these provisions. The Commission had concluded that questioning disallowed at trial to show that the complainer had previously made false allegations of sexual abuse did not strictly fall within the prohibition in section 274, it being proposed only to show that the allegations were false, not that the complainer had engaged in any other sexual behaviour. In refusing the appeal, the court held that the line of questioning proposed was not designed to elicit evidence that the complainer was of bad character in relation to sexual matters and if any question of admissibility had arisen, it would have been at common law and not under the legislative provisions. The court concluded that the trial judge had not erred in his decision to regard the evidence as being collateral⁸.
6. In *CH v HMA*, Lord Turnbull noted that the “legislative provisions have consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application.”⁹ Against this background, it is perhaps not surprising that matters relating to the provisions have featured on a number of occasions in recent years before the Appeal Court and in applications to the Commission.
7. Many of these appeal cases have dealt with the issue of admissibility of the evidence which is sought to be elicited or admitted at trial on behalf of the accused. In recent years, the court has repeatedly stressed that for it to be demonstrated that evidence **should** have been admitted under the exceptions in section 275, evidence will require

⁶ Scottish Government, *Criminal proceedings in Scotland: 2020-2021*, published 21 June 2022

⁷ *Thomas Thomson v HMA* (No 2) [2010] HCJAC 11. Mr Thomson’s case was also referred by the Commission on an earlier occasion, although on a ‘fresh evidence’ ground – this was reported at *Thomas Thomson v HMA* (No 1) [2005] HCJAC 7.

⁸ *Thomas Thomson v HMA* (No 2) at para 16

⁹ *CH v HMA* [2020] HCJAC 43 at para 109

to first pass the hurdle of admissibility at common law before being considered under the statutory regime. The stronger approach that has been taken by the court to such issues is perhaps demonstrative of the general shift in attitude relating to sexual offences and the focus on consent in recent years. Failure to demonstrate admissibility at common law is a common reason for the Commission refusing to refer cases which advance grounds concerning the misapplication of section 275. This paper discusses the issues of admissibility at common law in further detail below.

Statutory provisions

8. Section 274 prohibits the leading of certain evidence or questioning, of the kinds set out in section 274(1)(a)-(d), in a sexual offences trial. This is evidence which shows or tends to show that the complainer –
 - (a) is not of good character (whether in relation to sexual matters or otherwise);
 - (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
 - (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—
 - (i) is likely to have consented to those acts; or
 - (ii) is not a credible or reliable witness; or
 - (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.
9. Such evidence as is covered by section 274 may be introduced or elicited if it is admissible at common law and falls within the exceptions in section 275. While the prohibition relates to sexual offences to which section 288C of the 1995 Act applies, case-law suggests that if there is a sexual crime on the indictment, as well as other crimes, the prohibition under section 274 applies to the whole indictment¹⁰.

¹⁰ *Stewart v HMA* [2013] HCJAC 152; *HMA v JW* [2020] HCJ 11

10. Section 275(1) sets out a three-stage test, which must be satisfied before the trial judge can allow questioning or evidence to be led which would otherwise be excluded by section 274 –

- (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 complainant's character; or
 - (ii) any condition or predisposition to which the complainant is or has been subject;
- (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and
- (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

11. Section 275(2)(b) provides that the 'proper administration of justice' includes the appropriate protection of the complainant's dignity or privacy, and ensuring that the facts and circumstances of which a jury are made aware are relevant to an issue which is to be put before them and commensurate to the importance of that issue to the jury's verdict.

12. Section 275 also sets out procedural requirements for an application, along with section 275B. Section 275B concerns the timing within which an application is to be made, as well as arrangements for the consideration of an application or an objection during the course of a trial¹¹.

13. In the event that an application under section 275 is granted, the provisions of section 275A require the prosecutor to put before the presiding judge any relevant previous conviction(s) of the accused which, subject to a right of objection detailed in

¹¹ In respect of the timing for making an application, section 275B provides that an application shall not be considered, unless on special cause shown, by the court unless it is made, in the case of proceedings in the High Court, not less than 7 clear days before the preliminary hearing, or in any other case, not less than 14 clear days before the trial diet. There is limited reported case law dealing with the consideration of 'special cause shown' in the context of these statutory provisions, although the matter is addressed in the first instance opinion of Lord Turnbull in *HMA v JG* [2019] HCJ 71.

section 275A, shall be laid before the jury (in proceedings on indictment) or taken into consideration by the judge (in summary proceedings).

The Commission's Position

14. It is worth noting that all cases of this kind are to some degree fact specific¹². However, when considering an application to the Commission based on the alleged misapplication of sections 274 and 275, the Commission applies the following broad principles derived from previous decisions of the High Court.

Admissibility at common law

15. Admissibility of the evidence at common law is a pre-requisite for the admission of evidence under the exception of section 275. Sections 274 and 275 restrict the admissibility of evidence which would otherwise be admissible at common law¹³. They do not provide a new path to have evidence admitted that would be inadmissible under the general rules of evidence.

16. Evidence is only admissible in a criminal trial if it is relevant. Evidence is relevant if it “either bears directly on a fact in issue (i.e. the libel) or does so indirectly because it relates to a fact which makes a fact in issue more or less probable”¹⁴. Determining whether a fact is relevant depends upon its context and the degree of connection between what is sought to be proved or disproved, and the facts libelled¹⁵. The fundamental question is whether the evidence to be led has “a reasonably direct bearing on the subject under investigation”¹⁶. This has the effect of excluding collateral evidence¹⁷.

17. By way of example concerning the relevance of evidence at common law, an accused person might wish evidence to be admitted of consensual sexual activity on an occasion(s) before the libelled offence, with a view to suggesting that the act with which they are charged also took place on a consensual basis. However, as detailed further below, the court has repeatedly held that in general terms, evidence of

¹² *CH v HMA* at para 64

¹³ *CJM (No.2) v HMA* [2013] HCJAC 22 per LJC (Carloway) at para 43

¹⁴ *Ibid.*, per LJC (Carloway) at para 28

¹⁵ *Ibid.*, per LJC (Carloway) at para 28; *SJ v HMA* [2020] HCJAC 18 para 77

¹⁶ *Ibid.*, per LJC (Carloway) at para 28, quoting from *Bark v Scott* 1954 SC 72, LP (Cooper) at 75-6; *CH v HMA* at para 36

¹⁷ *CH v HMA* at para 36

consent to sexual activity on an earlier occasion between the same parties will rarely be admissible at common law as relevant¹⁸.

18. The common law generally excludes evidence which is collateral to the facts in issue¹⁹, subject to an exception relating to material which could be verified more or less instantly, and which cannot be challenged²⁰. An example of material which is verifiable in these terms would be evidence of a complainer's previous conviction relating to a previous false report to police in relation to a similar matter to that for which the accused is being prosecuted (i.e. a false report to police about another sexual matter)²¹. Even evidence which has relevance may be inadmissible as collateral.

19. The court has said that "a 'collateral issue' is one which runs parallel to a fact in issue but evidence of it is generally inadmissible on grounds of relevance, because the existence of the collateral fact does not have a reasonably direct bearing upon a fact in issue and thus does not render more or less probable the existence of that fact, and it is inexpedient to allow an inquiry to be confused and protracted by enquiries into other matters"²².

20. Evidence of character (good or bad) is generally inadmissible because it is collateral to the issues to be decided in terms of the libel²³. An accused may seek to elicit evidence of previous false allegations made by a complainer against another party in relation to sexual matters with a view to discrediting the complainer. Such evidence has been held by the court to be inadmissible as collateral²⁴.

¹⁸ *LL v HMA* at para 14; *Oliver v HMA* [2019] HCJAC 93; *Lee Thomson v HMA* 13 December 2019 HCA 2019 unreported; *SJ v HMA* at para 69

¹⁹ *Brady v HM Advocate* 1986 JC 68, LJC (Ross) at 73

²⁰ *CJM (No.2) v HMA* per Lord Menzies at paras 55 and 56; *XY v HMA* [2022] HCJAC 2

²¹ Although note our comments at paragraph 19.

²² *CH v HMA* at para 38 quoting from Walker and Walker, *The Law of Evidence in Scotland* (4th ed) at para 7.1

²³ Walker and Walker, *The Law of Evidence in Scotland* (4th ed) at paras 7.1 and 7.4

²⁴ *CJM (No.2) v HMA* concerned an allegation made by the complainer to police about sexual conduct involving another party; *RN v HMA* [2020] HCJAC 3 concerned multiple allegations made by a child complainer against teaching staff at his school. Note the distinction when the complainer has been convicted of a crime relating to the false allegation, see paragraph 18 of this paper.

Application of statutory provisions

21. It is only if the evidence passes the hurdle of admissibility at common law that it falls to be considered under the statutory regime. The evidence is inadmissible if it relates to the matters referred to in section 274(1) and may only be permitted if the conditions in section 275 are met²⁵. Section 275 allows either or both the Crown and defence to make an application to introduce such evidence as is covered by section 274(1), notwithstanding the terms of that section.
22. It is worthy of note that the requirement is on the court not to admit such evidence, regardless of the position taken by the parties. This obligation persists throughout the trial and so a judge must exclude prohibited material even if no objection is made²⁶.
23. It is also appropriate to recognise that section 275(9) affords a trial judge discretion to limit the extent of evidence allowed in terms of an application previously granted. A court may do so in part or disallow the entirety of questioning previously allowed²⁷. The power is exercisable at any time, including during the trial and regardless of whether there has been a change of circumstances²⁸. The court may exercise the power itself and is obliged to review the matter in certain circumstances²⁹. The provision does not confer on a party a right to obtain a general reconsideration of an application³⁰.

Section 274

24. In relation to the material caught within scope of section 274, the following points can be noted.
25. Section 274(1)(b) concerns evidence which shows or tends to show that the complainant has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge. The court has confirmed that unless a particular type of

²⁵ *MacDonald v HMA* [2020] HCJAC 21 at para 35; *CH v HMA* at paras 39 and 41

²⁶ *RN v HMA* at paras 20 and 27

²⁷ *JW v HMA* [2021] HCJAC 1

²⁸ *Ibid.*, at paras 20 and 21

²⁹ *Ibid.*, at para 24

³⁰ *Ibid.*, at para 25

sexual conduct is libelled within the charge, that conduct cannot be ‘the subject matter of the charge’³¹.

26. ‘Statements’ do not generally count as behaviour for the purpose of these provisions³². For the purposes of section 274(1)(c), non-sexual behaviour does “not extend to evidence that is directed simply to words that the complainant may have said to a third party which bear on her credibility.”³³

27. A period of cohabitation between the parties does not constitute sexual behaviour and so does not require an application under section 275 in order to be admitted³⁴. Obiter remarks in *Moir v HMA*³⁵ imply that a section 275 application would be required to introduce evidence of any other kind of sexual relationship between the relevant parties³⁶. An unreported first instance High Court decision³⁷ included obiter remarks that a boyfriend/girlfriend relationship, short of cohabitation, did not require an application.

28. With reference to section 274(1)(d), a ‘condition or predisposition’ requires to be one which is objectively diagnosable in medical, notably psychiatric, terms, and requires medical evidence to this effect³⁸. It is necessary to show:

- (a) that the witness suffers from an objectively diagnosed medical condition,
- (b) that it is a recognised characteristic of the condition that it may have a particular effect, and

³¹ *CH v HMA* at para 74. The Commission notes that the Preliminary Hearings Bench Book, at paragraph 9.2.4, provides: “Accordingly if the accused wishes to say that sexual activity other than that referred to in the libel took place on the occasion which features in the charge, he requires to make a section 275 application. If an accused seeks to incriminate another person as having committed the crime charged, he will require to make a section 275 application because anything said or even proved to have been done by the incriminee to the complainant is not the subject matter of the charge.”

³² *DS v HMA* [2007] UKPC D1 per Lord Hope at para 46 and Lord Rodger at paras 76 and 77; *JG v HMA* [2019] HCJ 71 per Lord Turnbull at paras 55 and 53 which suggests that in appropriate circumstances, the evidence may in any event fall within scope of section 263(4).

³³ *DS* per Lord Hope para 46; *Judge v HMA* 2010 SCCR 134 at 139C

³⁴ *DS v HMA* per Lord Hope at para 46 and Lord Rodger at para 75; *Moir v HMA* 2005 1 JC 102 obiter remarks of LJC (Gill) at para 27

³⁵ Per LJC (Gill) at para 27

³⁶ Perhaps supported by *CH v HMA* per LJC (Dorrian) at para 80

³⁷ *HMA v Black*, unreported 13 January 2020

³⁸ *CJM (No.2) v HMA* at para 46

(c) that it has in fact had this effect on the witness³⁹.

29. The effect must be brought about by the illness, not by some general disposition or wilfulness of the witness. It would be insufficient to show that the witness was simply a habitual liar⁴⁰.

Section 275

30. The exceptions in section 275(1) are cumulative⁴¹.

31. The third limb (section 275(1)(c)) requires that the probative value of the evidence sought to be admitted or elicited is significant and that the value is of such significance that it is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

32. Section 275(2)(b) provides that the ‘proper administration of justice’ includes the appropriate protection of the complainer’s dignity or privacy, and ensuring that the facts and circumstances of which a jury are made aware are relevant to an issue which is to be put before them and commensurate to the importance of that issue to the jury’s verdict. This requires the court to address the appropriate protection of a complainer’s dignity and privacy, and the proportionality of admitting the evidence⁴².

33. The appeal court in *LL v HMA* considered the issue of admissibility of evidence of consensual sex between the parties in October 2015 at the same locus for a charge of rape in July 2016. The court held that this evidence was not relevant and so was not admissible, but also observed that even had the evidence been found to be relevant, it would have failed under section 275(1)(c) because its invasion of the privacy and dignity of the complainer would outweigh any possible, but necessarily slight, relevance⁴³.

34. An application must, at a minimum, comply with the requirements of section 275(3), and set out the requisite detail in a comprehensible manner⁴⁴.

³⁹ *HMA v Selfridge* [2021] HCJAC 2 at para 29, referring to *CJM (No.2) v HMA*

⁴⁰ *Ibid.*

⁴¹ *CJM (No.2) v HMA* and *CH v HMA* at paras 34-36

⁴² *RN v HMA* at para 25

⁴³ *LL v HMA* [2018] HCJAC 35 at para 22. Also see footnote 48 below.

⁴⁴ *HMA v A* [2007] HCJ 15, *CH v HMA*, *RN v HMA*

Pre- and post-charge conduct

35. The test for the introduction of evidence concerning either pre- or post-charge conduct is that it will only be relevant if it has a reasonably direct bearing on a fact at issue in the trial, in the sense of making that fact more or less probable⁴⁵. Broadly the same position applies to post-charge conduct as to pre-charge conduct⁴⁶. Arguments that the jury should be presented with the “full picture” of relations between the parties have been rejected by the court⁴⁷.
36. In general terms, evidence of previous consent to sexual activity between the same parties will rarely be admissible at common law as relevant⁴⁸. Consent is to be given, in whatever form, at the time of the sexual act and not at a point remote from it⁴⁹. Communications indicating a willingness to engage in sexual intercourse at some time in the future are unlikely to be relevant to the question of consent⁵⁰.
37. It is not the case that a previous sexual encounter could never be relevant⁵¹. If relevance is to be established, the court has noted that “...particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, *prima facie*, unrelated events.”⁵²
38. The appeal court has allowed evidence of post-charge conduct to be admitted in limited circumstances⁵³, holding it was capable of undermining the complainant’s credibility regarding the earlier incident, but this is not support for a proposition that post-charge conduct would generally be admissible⁵⁴. In *Oliver*, the relevant admission concerned actions by a complainant in the immediate aftermath of an alleged event, which the court described as being “a period of hours, or perhaps a day or two, following an alleged event.”⁵⁵ A later first instance decision held that it was

⁴⁵ *CJM (No.2) v HMA* at para 28; *LL v HMA* at para 13; *SJ v HMA* per Lord Pentland at para 77; *CH v HMA* at para 67

⁴⁶ *Short v HMA* [2014] HCJAC unreported XC646/1/3; *JW v HMA* [2020] HCJ 11 (first instance case but decided by appeal judge Lord Turnbull)

⁴⁷ *LL v HMA*, *SJ v HMA* and *CH v HMA*

⁴⁸ *LL v HMA* at para 14; *Oliver v HMA* [2019] HCJAC 93; *Lee Thomson v HMA* 13 December 2019 HCA 2019 unreported; *SJ v HMA* at para 69

⁴⁹ *GW v HMA* [2019] HCJAC 23

⁵⁰ *JW v HMA*; *CH v HMA* at para 65

⁵¹ *LL v HMA* at para 14; *SJ v HMA* per Lord Pentland at para 77

⁵² *LL v HMA* at para 14

⁵³ *Oliver v HMA*

⁵⁴ *Lee Thomson v HMA*

⁵⁵ *Oliver v HMA*, para 9

not relevant to admit evidence of consensual sexual activity which took place a few hours after the incident libelled⁵⁶. It has also been held that the issue of consent requires to be examined at the time of the act in question, not subsequently⁵⁷.

Date of Approval: March 2023

Date of Review: March 2024

⁵⁶ *JW v HMA*

⁵⁷ *P v HMA* [2021] HCJAC 48