

SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) ACT

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9) ("the Act"). They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act has two main purposes. These are—
 - To prevent the accused in a sexual offence case from personally cross-examining the complainer; and
 - To strengthen the existing provisions restricting the extent to which evidence can be led regarding the character and sexual history of the complainer.
4. The first purpose will be achieved by requiring the accused to be legally represented throughout his or her 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 his or her 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.
5. The second purpose will be implemented by replacing the present sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), which deal with

sexual history evidence, with substitute sections containing new wording. In addition, where an accused does succeed in convincing the court that character or sexual history evidence should be introduced, there will be greater scope for the court to take into account any previous sexual offence convictions which he or she has, in order to ensure a balanced picture.

COMMENTARY ON SECTIONS

Section 1: Prohibition of personal conduct of defence in cases of certain sexual offences

6. Section 1 inserts a new section 288C into Part XIII (Miscellaneous) of the 1995 Act. Subsection (1) of this new section sets down the rule that an accused in a sexual offence case (as defined) is not permitted to carry out his or her defence in person.

7. Subsection (2) of the new section lists the offences to which the prohibition applies.

8. Subsections (3), (4) and (5) of the new section allow a court having jurisdiction to try an alleged offence to make an order applying section 288C even though the offence is not listed in subsection (2). The court is directed to do this where satisfied that there is a sufficiently substantial sexual element involved in the particular circumstances of the case. It could do so, for example, in cases charged as breach of the peace, if the libel disclosed a sufficient sexual element. Such an order may be made either on a prosecution application or on the court's own motion ("*ex proprio motu*"). The order is not retrospective, so the prosecution will not be invalidated by prior failure to comply with any of the procedural requirements set out in the Bill (see also paragraph 59 of these Notes).

9. Subsections (6) and (7) of the new section confer on the Scottish Ministers a power to vary the list in subsection (2) by statutory instrument, subject to the affirmative resolution procedure. This could, for example, be used in the event of any changes in the common law definitions of offences.

10. Section 288C sets out the offences to which the Act applies. Anyone wishing to find out if the provisions of the Act applied to a particular case would first look at Section 288C.

Section 2: Appointment of solicitor by court in such cases and availability of legal aid

11. Section 2(1) inserts a new section 288D into the 1995 Act. This new section imposes on the court a duty to appoint a solicitor to the accused where the court is satisfied that he or she will not have legal representation for the trial. Subsection (2)(b) and (c) of the new section extend the duty to cover cases where the accused has dismissed his or her solicitor, or a solicitor has withdrawn from acting, and the court is satisfied that the accused does not intend to instruct another.

12. As the purpose of imposing the duty is to ensure that the accused is represented throughout the trial, subsection (3) of the new section provides that a court-appointed solicitor cannot be dismissed by the accused, nor can he or she be obliged by the accused to dismiss

counsel. The latter safeguard prevents the accused from putting the solicitor in a position where counsel is removed without a suitable alternative being readily available. It remains open to the solicitor to agree to the dismissal of counsel.

13. Subsections (4) and (5) of the new section make provision for the role of a court-appointed solicitor. He or she is placed under an obligation to seek the instructions of the accused. If instructions are obtained which the solicitor is able to follow, adopting normal professional rules of conduct, then he or she should follow them. To the extent that such instructions cannot be obtained, the solicitor's duty is to act in the interests of the accused to the best of his or her ability on the basis of the material available. Otherwise, no difference is drawn between a court-appointed solicitor and any other solicitor acting for an accused in a sexual offence case purely by virtue of the fact of court appointment.

14. Subsection (6) of the new section allows the court to discharge a solicitor it has appointed to the accused, and select another, where satisfied that the original appointee cannot continue to act, whether on the instructions or in the interests of the accused. However, lack of co-operation on the part of the accused would not in itself mean that the solicitor was unable to continue to act in the accused's interests.

15. Section 2(2) of the Act amends section 22 of the Legal Aid (Scotland) Act 1986 so as to make legal aid available automatically and without means-testing where the court appoints a solicitor to act for the accused under section 288D. Section 2(3) amends section 31 of the 1986 Act to remove the accused's right to choose his or her solicitor once the court has reached the stage of appointing one for him or her under the Act.

Section 3: Notice to accused about effect of sections 288C and 288D of 1995 Act and special pre-trial court procedures

16. Section 3 gives effect to the schedule to the Act. This contains the procedural provisions concerning warnings to the accused and pre-trial hearings referred to in paragraph 4 above.

Section 4: Precognition on oath by person accused of sexual offence

17. A precognition is a witness statement made in advance of the trial, which is then transformed into a written report of what the witness said by the person taking the statement. Normally, this is done by an agent or solicitor for one of the parties in the case. However, it would be possible for an accused to take a defence precognition personally.

18. There is no general legal requirement on a witness to supply a defence precognition. However, where a witness declines to do so, a sheriff can require him or her to give a precognition on oath before the sheriff. Such a requirement does have to be complied with. Section 291 of the 1995 Act contains penalties for failure to do so.

19. Section 4 amends section 291 to make it clear that, in line with the ban on conduct of the defence in person, a complainer in a sexual offence case is under no obligation to submit to precognition on oath by the accused in person.

Section 5: Addition to standard bail conditions

20. Section 24(5) of the 1995 Act contains the standard bail conditions, which are imposed on all those accused granted bail pending trial.

21. Section 5 inserts a new standard bail condition into section 24(5). This provides that the accused is not to communicate with the complainer (other than by way of a solicitor) with a view to taking a statement for the purposes of his or her defence. To do so will place the accused in breach of his or her bail.

Section 6: Accused to give notice of defence of consent

22. An accused currently requires to give the court prior notice of special defences (alibi, incrimination, etc.) where the case is to be tried by jury (1995 Act, section 78). Corresponding notice requires to be given of a plea of alibi in non-jury cases (section 149).

23. Section 6 amends section 78 and inserts a new section 149A. The effect is to require the accused in a sexual offence case to give prior notice in the same way if his or her defence is to include a plea of consent on the part of the complainer. This is defined to incorporate both actual consent and the accused's belief that such consent existed. The notice should be given at least 10 clear days in advance of trial (at or before the first diet in sheriff and jury cases - see paragraph 33 below) although the court can extend this on cause shown.

Section 7: Restrictions on evidence relating to sexual offences

24. Section 7 substitutes a new section 274 for the one presently contained in the 1995 Act.

25. Subsection (1) of the new section creates a general rule that evidence or questioning falling within categories (a) to (d) is not admissible in sexual offence cases in respect of which the new section 288C of the 1995 Act applies. The prohibition will apply to the prosecution as well as the defence.

26. The prohibition applies to all offences covered by section 288C. Section 274 (2) contains relevant definitions.

Section 8: Exceptions to restrictions under section 274 of 1995 Act

27. Section 8(1) substitutes a new section 275 for that currently contained in the 1995 Act.

28. Subsection (1) of the new section 275 allows the court, on application made to it, to admit evidence or allow questioning falling within the general prohibition if it passes the tests set out in paragraphs (a) to (c).

29. The effect of subsection (2)(b) of the new section is to require the court, in considering the criterion of the proper administration of justice (section 275(1)(c)), to take account of the need to protect the privacy and dignity of the complainer and to prevent any jury from becoming potentially side-tracked from consideration of the key issues at trial.

30. Subsections (3) and (4) of the new section deal with procedural aspects of making an application under section 275. Subsection (3) requires applications to be in writing and to contain the information specified in paragraphs (a) to (f). Subsection (4) requires a copy of the application to be sent to every other party to the case (so in a case with several co-accused, a defence application would require to be copied to each other co-accused and the prosecutor).

31. Subsection (5) of the new section simply provides, for the avoidance of doubt, that the court may determine admissibility of any evidence or questioning using any method open to it at common law. The court may, if it wishes, hear some or all of the evidence in question before reaching a decision on admissibility.

32. Subsections (6) and (7) of the new section state that the court's decision on admissibility shall set out its reasons, and in particular shall address the matters specified in paragraphs (a) to (c) of subsection (7). The decision of the court (for example, to admit certain evidence) may be made subject to conditions. These may include compliance with any directions issued by the court. Subsection (8) provides that such conditions may include limitations on the use which can be made of evidence to support particular inferences. Subsection (9) confers on the court an additional power to limit questioning or evidence as the trial proceeds, notwithstanding the content of a decision on admissibility under section 275, or any condition attached to it.

33. Subsections (2), (3), (4) and (5) of section 8 allow existing pre-trial hearings to be used to consider any application to introduce character or sexual history evidence under new section 275. These hearings are known as first diets in sheriff and jury cases, preliminary diets in High Court cases and intermediate diets in non-jury cases. At present, a preliminary diet can only be fixed by the court on the application of the prosecution or defence. Section 8(3) will permit the court to fix a preliminary diet of its own accord to deal with a character or sexual history evidence application.

34. Section 8(6) amends section 157 of the 1995 Act, which deals with the content of the official record of proceedings in a non-jury trial. At present, any objection to the competency or relevancy of evidence need only be entered in the record if either party desires it. Apart from this, nothing needs to be recorded except the complaint (or a copy of it), the accused's plea (guilty or not guilty), any documentary evidence produced and the conviction and sentence or other finding of the court.

35. Section 8(6) will require the record of proceedings to include any application under section 275, the court's decision on it, the reasons for the decision and any conditions imposed and directions issued under the new section 275(6). This will be done whether or not a party requests these matters to be recorded.

Section 9: repeal

36. Section 9 effects a consequential repeal. Section 10 of the International Criminal Court (Scotland) Act 2001 amends the current version of section 274 of the 1995 Act, which is itself replaced by section 7 of the Act.

Section 10: Disclosure of accused's convictions

37. Section 10 inserts a new section 275A into the 1995 Act. Subsections (1)-(3) of section 10 make consequential amendments to the 1995 Act, to reflect the content of the new section 275A.

38. Subsection (4) contains the new section 275A. Section 275A(1) states that, when the accused makes an application under section 275 which is at least partially successful, the prosecutor will require to place before the judge a list of the accused's previous relevant convictions. Under section 275A(10), these are convictions for sexual offences which have been notified to the accused in advance of the trial. If the conviction is for an offence listed in section 288C(2) (see paragraph 7 above), all that is required is that the conviction has been included in the notice of previous convictions which must already be served on the accused under section 69(2) or 166(2) of the 1995 Act. Where the conviction is not for an offence listed in section 288C(2), section 275A(11) requires the prosecutor in addition to serve on the accused an extract of the conviction disclosing the alleged sexual element in it. If this is not done, that previous conviction is not a relevant conviction and thus cannot be placed before the judge under section 275A(1).

39. Section 275A(2) provides that, once the relevant convictions are before the judge, they will automatically be admitted as part of the evidence in the case unless the accused objects. The grounds on which he or she may do so are set out in section 275A(4). Grounds (c) and (d) relate to the accuracy of the prosecution's record of the accused's convictions. The accused is already required to lodge any objection to the accuracy of the notice of previous convictions in advance of trial in jury cases, and section 275A(8) preserves this procedure. Where the ground of objection is that disclosure would be contrary to the interests of justice, section 275A(7) places the onus on the accused to show that to be the case.

40. Section 275A(3),(5) and (6) make additional provision in relation to extract convictions, which may disclose the detailed wording of the charge against the accused. In general, an extract can only be introduced if it has been served on the accused in advance of trial, along with the notice of previous convictions. However, an extract may be introduced by the prosecutor without notice in order to counter a defence objection to a previous conviction being admitted in evidence. If an extract is introduced for such a purpose, it will be shown to the judge only, not to any jury. If the judge is deciding the case without a jury,

he or she must use such an extract only to assist in ruling on the defence objection, and must leave it out of account in arriving at his or her overall verdict in the case.

COMMENTARY ON THE SCHEDULE

Paragraph 2

41. Section 17 of the 1995 Act imposes a duty on the police to inform a suspect who is arrested of his or her right to have a solicitor informed of his or her whereabouts. Paragraph 2 follows this provision with a new section 17A, requiring an oral warning to be given on arrest in a sexual offence case that legal representation will be necessary at trial, that it is in the accused's interests to seek the assistance of a solicitor and that, if this is not done, the court will appoint one to him or her.

Paragraph 3

42. Judicial examination is a preliminary hearing before a sheriff in a case which is to be tried before a jury. It is dealt with in section 35 of the 1995 Act.

43. Paragraph 3 inserts a new section 35(4A). This provides for an oral warning about legal representation at trial to be given to the accused by the sheriff at judicial examination. The warning will be in similar terms to that given by the police on arrest.

Paragraph 4

44. Section 66 of the 1995 Act contains provision for a notice to be served on the accused along with the indictment in a jury case, calling on him or her to appear to answer the indictment at a specified trial date. Paragraph 4 inserts a new subsection (6A) requiring the notice to contain a written warning to the accused about the necessity of obtaining legal representation for the trial. This is to be in similar terms to the oral warnings given on arrest and at judicial examination. Where the trial is to be held in the High Court, the notice must also call on the accused to appear at the new pre-trial diet to be set under paragraph 7 of the schedule (new section 72A). This means that a specified date, time and venue for the pre-trial diet will require to be included in the notice.

Paragraph 5

45. A first diet is a preliminary hearing in the sheriff court in a case which is to go to jury trial in that court. These diets are already compulsory in all cases. They are dealt with in section 71 of the 1995 Act.

46. Paragraph 5 amends section 71 to provide for the first diet to be used to establish whether the accused has legal representation for the trial. It inserts a new section 71(5A), which provides that a first diet may not take place in the absence of the accused in a sexual offence case. It also inserts a new section 71(8A), which restricts the court's power to adjourn

a first diet to 48 hours where the adjournment is granted purely to give the accused a final chance to appoint his or her own solicitor.

Paragraph 6

47. Paragraph 6 inserts a new section 71A into the 1995 Act. This provides for a further pre-trial diet to follow a first diet where it is established at the first diet that the accused is legally represented, but his or her solicitor is subsequently dismissed or withdraws. Such a solicitor will be under a duty to notify the court of what has happened. The court will then fix a further pre-trial diet which the accused will be required to attend.

48. Where it does not appear that the accused has legal representation for the trial, the court has a discretion (dependent on the circumstances of the case) to adjourn the diet for up to 48 hours to enable him or her to appoint a solicitor. Where the accused still makes no appointment, the court will proceed to appoint itself under section 2 of the Act (new section 288D).

49. A further pre-trial diet may be dispensed with by the court, but only where the accused has a solicitor who confirms his or her appointment to defend the accused in writing and requests that the diet be dispensed with. Such a solicitor will require to notify the court if he or she is dismissed or withdraws after the diet is dispensed with, or after an application to dispense with it has been made. Equally, where a further pre-trial diet takes place and a solicitor acting for the accused at that time is later dismissed or withdraws, there will be a duty on the solicitor to inform the court. These notification obligations will allow another pre-trial diet to be fixed (section 71A(2)), or an application to dispense with a forthcoming diet to be refused.

50. Section 71A(5) provides that any pre-trial diet occurring after a first diet must take place no less than 10 clear days before commencement of the trial. This may necessitate an application for postponement of the trial in some cases.

Paragraph 7

51. Paragraph 7 inserts a new section 72A into the 1995 Act. This will make the holding of a pre-trial diet mandatory in all sexual offence cases to be tried in the High Court, unless dispensed with by the court when the accused has a solicitor who applies to do so. The accused must attend. The diet is to be used to establish whether the accused has legal representation for the trial. Subsection (3) of the new section confers on the court a discretion (dependent on the circumstances of the case) to grant the accused an adjournment for a maximum of 48 hours to enable him or her to appoint a solicitor. Where the accused still makes no appointment, the court will proceed to appoint itself under section 2 of the Act (new section 288D).

52. Subsection (4) contains the timescale within which the new pre-trial diet must be held. This corresponds to that applicable to the first diet in sheriff court jury cases.

53. Subsection (5) provides that a pre-trial diet may take place at the same time as any other preliminary hearing (known as a preliminary diet) which may have been fixed by the court in the same case, subject to the applicable timescale.

54. Subsection (7) requires a solicitor who is dismissed or withdraws from acting after applying for the pre-trial diet to be dispensed with, but before it has taken place or been dispensed with, to notify the court.

55. Subsection (8) requires a solicitor who is dismissed or withdraws from acting after the pre-trial diet takes place, or after it has been dispensed with, to notify the court. Subsections (7) and (8) will enable the court to deal with the situation by refusing any outstanding application to dispense with the diet, or by fixing a new pre-trial diet to consider the accused's legal representation afresh (section 72A(9)).

Paragraph 8

56. In a non-jury case, section 140 of the 1995 Act provides for the service on the accused of a citation requiring him or her to appear in court to answer the charges in the complaint. Paragraph 8 inserts a new subsection (2A) requiring the citation to include, or be accompanied by a notice containing, a written warning to the accused about legal representation. This will be in the same terms as the warning to be contained in the notice accompanying the indictment in a jury case.

Paragraph 9

57. Section 144 of the 1995 Act sets down procedure at the first calling of a non-jury case in court. The accused will not necessarily be present at first calling. He or she may instead plead not guilty (or guilty) by letter, or may have a solicitor present. However, where the accused is present, the new section 144(3A) inserted by paragraph 9 will require the court to give the accused an oral warning about the need for legal representation. This will be in similar terms to the warning to be given by the sheriff at judicial examination in a jury case.

Paragraph 10

58. Section 146(3) of the 1995 Act provides that, where a non-jury case is adjourned for trial, the prosecutor shall furnish the accused with a copy of the complaint, if he or she does not already have one. Paragraph 10 inserts a new subsection (3A), whereby the complaint requires to be accompanied by a notice containing a written warning in similar terms to that included in, or contained in the notice accompanying, any citation.

59. Paragraphs 2,3,4,8,9 and 10 of the schedule contain provision whereby failure to give any of the oral or written warnings specified in those paragraphs to the accused about the need for legal representation does not invalidate the proceedings against him or her. These warnings are to be supplied in the interests of the accused. However, given the number of them required to be communicated at different stages of the process and the advice about the

need for representation which would be given to the accused by any competent solicitor, an entire prosecution is not to fail simply because a warning has not been provided.

Paragraph 11

60. Paragraph 11 inserts a new section 148A into the 1995 Act. This provides for an interim diet in all non-jury sexual offence cases to be held unless dispensed with by the court where the accused has a solicitor who applies to do so. The accused is required to attend. The diet is to be used to establish whether the accused has legal representation for the trial. Subsection (3) of the new section confers on the court the same power to adjourn the diet for a maximum of 48 hours as is provided for the High Court. Where the accused still makes no appointment, the court will proceed to appoint a solicitor under section 288D. Subsection (4) allows the interim diet to take place at the same time as any other preliminary hearing (known as an intermediate diet) fixed for the same case. Since intermediate diets are compulsory in most sheriff and district courts, it is expected that in practice the interim and intermediate diets can be held at the same time.

61. Subsections (7) and (8) of the new section impose a duty on a solicitor who withdraws from acting or is dismissed after the interim diet has taken place, or after it has been dispensed with, or an application to dispense with it has been made, to notify the court. This will enable the court to refuse an application to dispense with the interim diet, or to fix a fresh interim diet to deal with the issue of legal representation (section 148A(9)).

PARLIAMENTARY HISTORY OF SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) ACT 2002

The following table sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that stage took place, the references to the Official Report of those proceedings and the dates on which Committee reports were published and the references to those reports.

Proceedings and Reports	Reference
<i>Introduction</i>	
28 June 2001	SP Bill 31 (Session 1)
<i>Stage 1</i>	
<i>(a) Justice 2 Committee</i>	
20 th Meeting, 2001	5 September 2001, cols 326-352
23 rd Meeting, 2001	19 September 2001, cols 400-410
24 th Meeting, 2001	26 September 2001, cols 413-448
26 th Meeting, 2001	3 October 2001, cols 460-504
27 th Meeting, 2001	24 October 2001, cols 512-544
13 th Report 2001 (14 November 2001): Stage 1 Report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill	SP Paper 446
<i>(b) Subordinate Legislation Committee</i>	
24 th Meeting, 2001	11 September 2001, cols 560-561
<i>(c) Consideration by the Parliament</i>	

21 November 2001 Cols 3983-4031

Stage 2

Justice 2 Committee

35th Meeting, 2001 12 December 2001, cols 726-753

36th Meeting, 2001 18 December 2001, cols 765-787

Stage 3

(a) *Justice 2 Committee*

7th Meeting, 2002 27 February 2002, cols 1056-1073

(b) *Consideration by the Parliament* Cols 9904-9947 and

6 March 2002 Col 9954

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