

# **SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) ACT 2002**

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## **EXPLANATORY NOTES**

### **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the new section extend the duty to cover cases where the accused has dismissed his or her solicitor, or a solicitor has withdrawn from acting, and the court is satisfied that the accused does not intend to instruct another.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

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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.

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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

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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.