



# Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

2002 asp 9

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 6th March 2002 and received Royal Assent on 11th April 2002**

An Act of the Scottish Parliament to prohibit persons charged with certain sexual offences from conducting their own defence at the trial; to provide for the appointment of solicitors to defend those persons where they do not make those appointments themselves; to prevent those persons from personally precognosing or taking statements from alleged victims; to require those persons to give notice of defences of consent; to make new provision about the admissibility of certain evidence bearing on the character, conduct or condition of alleged victims at trials of those persons for those offences; to provide for disclosure of those persons' previous convictions of sexual offences where such evidence is allowed; and for connected purposes.

VALID FROM 01/11/2002

## *Prohibition of personal conduct of defence by alleged sex offender*

### **1 Prohibition of personal conduct of defence in cases of certain sexual offences**

After section 288B of the Criminal Procedure (Scotland) Act 1995 (c.46) (the "1995 Act") there is inserted—

#### *"Trials for sexual offences*

#### **288C Prohibition of personal conduct of defence in cases of certain sexual offences**

- (1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his defence in person at the trial.
- (2) This section applies to the following sexual offences—
  - (a) rape;
  - (b) sodomy;

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- (c) clandestine injury to women;
  - (d) abduction of a woman or girl with intent to rape;
  - (e) assault with intent to rape;
  - (f) indecent assault;
  - (g) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);
  - (h) 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);
  - (i) an offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—
    - (i) sections 1 to 3 (incest and related offences);
    - (ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);
    - (iii) section 6 (indecent behaviour toward girl between 12 and 16);
    - (iv) section 7(2) and (3) (procuring by threats etc.);
    - (v) section 8 (abduction and unlawful detention);
    - (vi) section 10 (seduction, prostitution, etc. of girl under 16);
    - (vii) section 13(5)(b) or (c) (homosexual offences);
  - (j) attempting to commit any of the offences set out in paragraphs (a) to (i) above.
- (3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.
- (4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or *ex proprio motu*, make an order under this subsection.
- (5) The making of such an order does not affect the validity of anything which—
- (a) was done in relation to the alleged offence to which the order relates; and
  - (b) was done before the order was made.
- (6) The Scottish Ministers may by order made by statutory instrument vary the sexual offences to which this section applies by virtue of subsection (2) above by modifying that subsection.
- (7) No such statutory instrument shall be made, however, unless a draft of it has been laid before and approved by resolution of the Scottish Parliament.”

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

- (1) After section 288C of the 1995 Act (as inserted by section 1 above) there is inserted—

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### **“288D Appointment of solicitor by court in such cases**

- (1) This section applies in the case of proceedings in respect of a sexual offence to which section 288C above applies.
  - (2) Where the court ascertains that—
    - (a) the accused has not engaged a solicitor for the purposes of his defence at the trial; or
    - (b) having engaged a solicitor for those purposes, the accused has dismissed him; or
    - (c) the accused’s solicitor has withdrawn,then, where the court is not satisfied that the accused intends to engage a solicitor or, as the case may be, another solicitor for those purposes, it shall, at its own hand, appoint a solicitor for those purposes.
  - (3) A solicitor so appointed is not susceptible to dismissal by the accused or obliged to comply with any instruction by the accused to dismiss counsel.
  - (4) Subject to subsection (3) above, it is the duty of a solicitor so appointed—
    - (a) to ascertain and act upon the instructions of the accused; and
    - (b) where the accused gives no instructions or inadequate or perverse instructions, to act in the best interests of the accused.
  - (5) In all other respects, a solicitor so appointed has, and may be made subject to, the same obligations and has, and may be given, the same authority as if engaged by the accused; and any employment of and instructions given to counsel by the solicitor shall proceed and be treated accordingly.
  - (6) Where the court is satisfied that a solicitor so appointed is no longer able to act upon the instructions, or in the best interests, of the accused, the court may relieve that solicitor of his appointment and appoint another solicitor for the purposes of the accused’s defence at the trial.
  - (7) The references in subsections (3) to (6) above to “a solicitor so appointed” include references to a solicitor appointed under subsection (6) above.
  - (8) In this section “counsel” includes a solicitor who has right of audience in the High Court of Justiciary under section 25A (rights of audience in various courts including the High Court of Justiciary) of the Solicitors (Scotland) Act 1980 (c.46).”
- (2) In section 22 (automatic availability of criminal legal aid) of the Legal Aid (Scotland) Act 1986 (c.47), in subsection (1), after paragraph (dc) there is inserted—
    - “(dd) where a solicitor has been appointed under section 288D of the Criminal Procedure (Scotland) Act 1995 (c.46) (appointment by court of solicitor for person accused of sexual offence and thereby prohibited from conducting defence in person) to act on his instructions or in his interests;”.
  - (3) In section 31 of that Act of 1986, in subsection (1A) (exceptions to provision entitling person receiving legal aid or advice and assistance to select a solicitor and counsel)—
    - (a) the word “and” immediately preceding paragraph (e) is repealed; and
    - (b) after that paragraph there is inserted “; and

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(f) section 288D of the Criminal Procedure (Scotland) Act 1995 (c.46)”.

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

The schedule to this Act has effect.

VALID FROM 01/11/2002

*Prohibition on alleged sex offender personally precognosing complainer*

**4 Precognition on oath by person accused of sexual offence**

In section 291 (precognition on oath of defence witnesses) of the 1995 Act, after subsection (3) there is inserted—

“(4) This section does not, however, extend to the citation of the complainer for precognition by the accused in person.

(5) In subsection (4) above, “complainer” has the same meaning as in section 274 of this Act.”.

**5 Addition to standard bail conditions**

(1) In subsection (5) (standard bail conditions) of section 24 of the 1995 Act—

(a) the word “and” immediately preceding paragraph (d) is repealed; and

(b) after that paragraph there is inserted “; and

(e) where the (or an) offence in respect of which he is admitted to bail is one to which section 288C of this Act applies, does not seek to obtain, otherwise than by way of a solicitor, any precognition of or statement by the complainer in relation to the subject matter of the offence.”.

(2) After subsection (7) of that section there is inserted—

“(7A) In subsection (5)(e) above, “complainer” has the same meaning as in section 274 of this Act.”.

VALID FROM 01/11/2002

*Notice of defence of consent*

**6 Accused to give notice of defence of consent**

(1) In section 78 (which provides for, amongst other things, prior notice of special defences in proceedings on indictment) of the 1995 Act—

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(a) in subsection (2), for “or coercion” there is substituted “, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent”;

(b) after that subsection there is inserted—

“(2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer’s consent to the act which is the subject matter of the charge or the accused’s belief as to that consent.

(2B) In subsection (2A) above, “complainer” has the same meaning as in section 274 of this Act.”.

(2) After section 149 of the 1995 Act there is inserted—

#### “149A Notice of defence plea of consent

(1) It shall not be competent for the accused in a summary prosecution for an offence to which section 288C of this Act applies to found on a defence of consent unless, not less than 10 clear days before the trial diet, he gives notice to the prosecutor of the defence and of the witnesses by whom he proposes to maintain it.

(2) The court may, however, on cause shown, allow the accused to maintain such a defence after giving such notice although given after the time limit specified in subsection (1) above.

(3) In subsection (1) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer’s consent to the act which is the subject matter of the charge or the accused’s belief as to that consent.

(4) In subsection (3) above, “complainer” has the same meaning as in section 274 of this Act.”.

VALID FROM 01/11/2002

### *Restrictions on evidence*

#### **7 Restrictions on evidence relating to sexual offences**

For section 274 (restrictions on evidence relating to sexual offences) of the 1995 Act there is substituted—

#### “274 Restrictions on evidence relating to sexual offences

(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—

(a) is not of good character (whether in relation to sexual matters or otherwise);

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- (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.

(2) In subsection (1) above—

“complainer” means the person against whom the offence referred to in that subsection is alleged to have been committed; and  
the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature.”.

## **8 Exception to restrictions under section 274 of 1995 Act**

(1) For section 275 (exception to restrictions under section 274) of the 1995 Act there is substituted—

### **“275 Exception to restrictions under section 274**

- (1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this 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 the complainer 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.
- (2) In subsection (1) above—
  - (a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;
  - (b) “the proper administration of justice” includes—
    - (i) appropriate protection of a complainer’s dignity and privacy; and

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- (ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict,
- and, in that subsection and in sub-paragraph (i) of paragraph (b) above, "complainer" has the same meaning as in section 274 of this Act.
- (3) An application for the purposes of subsection (1) above shall be in writing and shall set out—
- (a) the evidence sought to be admitted or elicited;
  - (b) the nature of any questioning proposed;
  - (c) the issues at the trial to which that evidence is considered to be relevant;
  - (d) the reasons why that evidence is considered relevant to those issues;
  - (e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence; and
  - (f) such other information as is of a kind specified for the purposes of this paragraph in Act of Adjournal.
- (4) The party making such an application shall, when making it, send a copy of it—
- (a) when that party is the prosecutor, to the accused; and
  - (b) when that party is the accused, to the prosecutor and any co-accused.
- (5) The court may reach a decision under subsection (1) above without considering any evidence; but, where it takes evidence for the purposes of reaching that decision, it shall do so as if determining the admissibility of evidence.
- (6) The court shall state its reasons for its decision under subsection (1) above, and may make that decision subject to conditions which may include compliance with directions issued by it.
- (7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement—
- (a) of what items of evidence it is admitting or lines of questioning it is allowing;
  - (b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;
  - (c) of the issues at the trial to which it considers that that evidence is relevant.
- (8) A condition under subsection (6) above may consist of a limitation on the extent to which evidence—
- (a) to be admitted; or
  - (b) to be elicited by questioning to be allowed,
- may be argued to support a particular inference specified in the condition.
- (9) Where evidence is admitted or questioning allowed under this section, the court at any time may—



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- (a) as it thinks fit; and
- (b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above,  
limit the extent of evidence to be admitted or questioning to be allowed.”.
- (2) In section 71 (first diet of proceedings on indictment in sheriff court) of the 1995 Act—
- (a) after subsection (2) there is inserted—
- “(2A) At a first diet the court may consider an application for the purposes of subsection (1) of section 275 of this Act.”;
- and
- (b) in subsection (3), after “above” there is inserted “ or which is relevant to an application for the purposes of subsection (1) of the said section 275 ”.
- (3) In section 72 (preliminary diet of proceedings on indictment in High Court) of the 1995 Act—
- (a) in subsection (1), after “subsection” there is inserted “ or subsection (2A) below ”;
- (b) after subsection (2) there is inserted—
- “(2A) The court may order that there shall be a diet before the trial diet for the purpose of considering an application for the purposes of subsection (1) of section 275 of this Act.”;
- (c) in subsection (3)—
- (i) after “ordered” there is inserted “ under subsection (2A) above or ”;
- (ii) for “any other” there is substituted “ any, or any other, ”; and
- (iii) for “that subsection” there is substituted “ subsection (1) above ”.
- (4) In section 73 (procedure at preliminary diet of proceedings on indictment in High Court) of the 1995 Act—
- (a) in subsection (3), after “section” where secondly occurring there is inserted “ or to considering an application for the purposes of subsection (1) of section 275 of this Act ”; and
- (b) in subsection (4), after “section” where secondly occurring there is inserted “ or which is relevant to an application for the purposes of subsection (1) of the said section 275 ”.
- (5) In section 148 (intermediate diet of summary proceedings) of the 1995 Act—
- (a) after subsection (3) there is inserted—
- “(3A) At an intermediate diet, the court may consider an application for the purposes of subsection (1) of section 275 of this Act; and, notwithstanding subsection (1) above, the court may fix a diet under that subsection for the purpose only of considering such an application.
- (3B) Subsection (3A) above shall not operate so as to relieve any court prescribed by order under subsection (7) below of its duty, which arises by virtue of the operation of that subsection, to fix an intermediate diet for the purpose mentioned in subsection (1) above.”;



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and

(b) in subsection (4), after “(1)” there is inserted “ or (3A) ”.

(6) In section 157 (record of summary proceedings) of the 1995 Act—

(a) in subsection (2) after “or”, where last occurring, there is inserted “ (subject to subsection (3) below) ”; and

(b) after subsection (2) there is inserted—

“(3) An application for the purposes of subsection (1) of section 275 of this Act, together with the court’s decision on it, the reasons stated therefor and any conditions imposed and directions issued under subsection (7) of that section shall be entered in the record of the proceedings.”.

## 9 Repeal

Section 10 of the International Criminal Court (Scotland) Act 2001 (asp 13) is repealed.

VALID FROM 01/11/2002

### *Disclosure of accused’s convictions*

## 10 Disclosure of accused’s previous convictions where court allows questioning or evidence under section 275 of 1995 Act

(1) In section 101 (disclosure of accused’s previous convictions in solemn proceedings) of the 1995 Act—

(a) in subsection (1), after “not” there is inserted “ , subject to subsection (2) below and section 275A(2) of this Act, ”; and

(b) in subsection (3), after “not” there is inserted “ , subject to section 275A(1) of this Act, ”.

(2) In subsection (3) (accused’s previous convictions not to be disclosed in summary proceedings until judge is satisfied that charge is proved) of section 166 of the 1995 Act, after “not” there is inserted “ , subject to section 275A(1) of this Act, ”.

(3) In section 266 (which, amongst other things, prohibits the asking of questions relating to offences other than that with which an accused is charged) of the 1995 Act, after subsection (5) there is inserted—

“(5A) Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act.”.

(4) After section 275 of the 1995 Act there is inserted—

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**“275A Disclosure of accused’s previous convictions where court allows questioning or evidence under section 275**

- (1) Where, under section 275 of this Act, a court on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.
- (2) Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be—
  - (a) in proceedings on indictment, laid before the jury;
  - (b) in summary proceedings, taken into consideration by the judge.
- (3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.
- (4) An objection under subsection (2) above may be made only on one or more of the following grounds—
  - (a) where the conviction bears to be a relevant conviction by virtue only of paragraph (b) of subsection (10) below, that there was not a substantial sexual element present in the commission of the offence for which the accused has been convicted;
  - (b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;
  - (c) in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible;
  - (d) in summary proceedings, that the accused does not admit the conviction.
- (5) Where—
  - (a) an objection is made on one or more of the grounds mentioned in paragraphs (b) to (d) of subsection (4) above; and
  - (b) an extract of the conviction in respect of which the objection is made was not appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) above, which specified that conviction,the prosecutor may, notwithstanding subsection (3) above, place such an extract conviction before the judge.
- (6) In summary proceedings, the judge may, notwithstanding subsection (2) (b) above, take into consideration any extract placed before him under subsection (5) above for the purposes only of considering the objection in respect of which the extract is disclosed.
- (7) In entertaining an objection on the ground mentioned in paragraph (b) of subsection (4) above, the court shall, unless the contrary is shown, presume that the disclosure, or, as the case may be, the taking into consideration, of a conviction is in the interests of justice.

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- (8) An objection on the ground mentioned in paragraph (c) of subsection (4) above shall not be entertained unless the accused has, under subsection (2) of section 69 of this Act, given intimation of the objection in accordance with subsection (3) of that section.
- (9) In entertaining an objection on the ground mentioned in paragraph (d) of subsection (4) above, the court shall require the prosecutor to withdraw the conviction or adduce evidence in proof thereof.
- (10) For the purposes of this section a “relevant conviction” is, subject to subsection (11) below—
- (a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof; or
  - (b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence,
- which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.
- (11) A conviction for an offence other than an offence to which section 288C of this Act applies by virtue of subsection (2) thereof is not a relevant conviction for the purposes of this section unless an extract of that conviction containing information which indicates that a sexual element was present in the commission of the offence was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

#### **275B Provisions supplementary to sections 275 and 275A**

- (1) An application for the purposes of subsection (1) of section 275 of this Act shall not, unless on special cause shown, be considered by the court unless made not less than 14 clear days before the trial diet.
- (2) Where—
- (a) such an application is considered; or
  - (b) any objection under subsection (2) of section 275A of this Act is entertained,
- during the course of the trial, the court shall consider that application or, as the case may be, entertain that objection in the absence of the jury, the complainant, any person cited as a witness and the public.”.

### *General*

#### **11 Short title and commencement**

- (1) This Act may be cited as the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
- (2) This Act (except this section) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes.

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- (3) An order under subsection (2) above may contain such transitional and saving provisions as the Scottish Ministers consider necessary or expedient in connection with the provisions brought into force by the order.

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**Subordinate Legislation Made**

**P1** [S. 11\(2\)\(3\)](#): power fully exercised: 1.11.2002 appointed by [S.S.I. 2002/443](#), [art. 3](#) (with [art. 4](#))

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