Judicial Institute for Scotland

Preliminary Hearings e-Bench Book

The Hon Lord Beckett

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Foreword

The Preliminary Hearing system was designed, first, to deal with all preliminary pleas and issues in advance of the trial and, secondly, to fix a trial diet, within the 140 day time limit, at a point when the case was ready for trial. The trial would proceed as scheduled, other than where desertion or a guilty plea followed.

As a result of having a dedicated cadre of pro-active judges who have made a collective effort to maintain a uniform and effective approach, the introduction of a Preliminary Hearing has been largely successful in producing an efficient system which complies with the intention of the legislation and ensures that trials are held within a reasonable time.

Practitioners, staff and judges prefer to work in a system which operates efficiently. In the case of counsel and especially agents, there ought to be a degree of satisfaction on completion of a prosecution, whatever its outcome.

In an effort to maintain a consistent and effective approach to case management, Lords Matthews and Beckett have co-authored this comprehensive Bench Book for the conduct of Preliminary Hearings. It will provide support to the Preliminary Hearing judges in dealing with the many issues which must be addressed. It will also be a valuable tool for practitioners who will better understand the obligations which rest upon them and the expectations the court will have of them.

I am very grateful to Lords Matthews and Beckett for their work on this project. I commend the Bench Book to all.

Lord Justice General
The Right Honourable Lord Carloway
July 2020

User guide for the Preliminary Hearings Bench Book

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Please read the following information before using the Preliminary Hearings Bench Book.

Updates to the Bench Book.

The Preliminary Hearings Bench Book will be kept up to date by the Judicial Institute for Scotland. The JI Directors will endeavour to take note of future changes (such as Appeal Court decisions, legislation or Practice Notes) which require to be referenced in the Bench Book, and will work with the editor of the Bench Book to ensure that the Bench Book is kept up to date on the Judicial Hub. Lord Matthews and Lord Beckett co-authored the Bench Book in its original form and acted as co-editors until Lord Matthews was appointed to the Inner House in August 2021.

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Emphasis

Throughout the Bench Book, bold text has been used to emphasise certain parts of the text, including important aspects of quotations. Where emphasis has been added to a quotation by the authors, this is marked by the note *"[emphasis added]."*

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Chapter 1: The principal statutory obligations and powers governing preliminary hearings

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This chapter examines the duties and powers conferred on the court and practitioners by statute, primarily sections 72 to 75 of the 1995 Act.

1.1 Preliminary matters

1.1.1 Dispensing with preliminary hearing

Under section 72B the court may, on joint application, dispense with a preliminary hearing and appoint a trial diet if satisfied that the state of preparation is such that the trial is likely to be ready to proceed to trial on the appointed date, that there are no preliminary pleas or issues that require to or could with advantage be disposed of before the trial diet and that there are no vulnerable witnesses, including the accused. Such applications are, unfortunately, rare.

1.1.2 Absence of accused

In terms of section 72D, the court may, on cause shown, dispense with the presence of an accused at a preliminary hearing. This is a matter of discretion and will depend on the circumstances.

- Is the Crown seeking a warrant?[1]
- Is there a good reason why the accused is not present?
- Will there be any prejudice to any party if the hearing proceeds?
- Is there any point in continuing the hearing or can matters be dealt with?
- Is there any reason to suppose the accused will not be present at a trial diet or further preliminary hearing if one is fixed?

If continuing the preliminary hearing in absence, it is open to the court to continue consideration of whether to grant a warrant for the original failure to appear which would permit the court then to grant a warrant if so advised at the next hearing even if it has not been intimated to the accused.

If a non-appearance warrant is granted under section 102A(2), the indictment falls, (s102A(5)), unless the court makes an order to different effect under section 102A (6) and (7).

If a trial is fixed in the absence of the accused, the court should require the defence to intimate the diet to the accused.

1.1.3 Attendance by live TV link

In terms of para 2 of the High Court of Justiciary Direction No. 3 of 2021 [2], an accused who is in custody in any of the prisons, police custody centres or secure units referred to in schedule A may participate in a preliminary hearing and the other diets specified in schedule B through live television link.

Schedule B encompasses:

- An appearance following execution of a warrant to apprehend.
- An application for bail review under section 30 or section 31 of the 1995 Act
- An application for an extension of time under section 65 of the 1995 Act.
- A preliminary hearing under section 72 and section 72A of the 1995 Act.
- A hearing under section 75A (adjournment and alteration of diets) of the 1995 Act.
- A hearing under section 75C (re-fixing diets: non-suitable days) of the 1995 Act.
- A hearing under section 76 (procedure where accused desires to plead guilty) of the 1995 Act.
- An appearance under section 102A (failure of accused to appear) of the 1995 Act.
- Any hearing to which reference is made in Part XI (Sentencing) of the 1995 Act.
- A hearing under section 300A (Power of court to excuse procedural irregularities).
- A hearing in respect of a confiscation order under Part 3 of the Proceeds of Crime Act 2002.

1.2 Substantive matters

1.2.1 Sex cases, domestic abuse cases, cases with child witnesses and cases with vulnerable witnesses – inquire about representation

In a sex case or domestic abuse case, the court must ascertain if the accused has a solicitor but this will hardly ever be an issue as there will be representation in 99% of cases[3]. An accused person cannot represent himself in any such case where evidence may be led[4]. The same applies in certain cases involving child witnesses who were under 12 when the indictment was served[5]. These are cases of murder, culpable homicide, abduction, plagium and cases involving assault, injury or threats to injure any person (including any offence of neglect, ill-treatment or other cruelty to a child) but not cases of sexual or domestic offending, which are already covered.

In terms of section 288F the court may, of its own motion, or on the application of the prosecutor, make an order prohibiting the accused from conducting his own defence at any hearing at, or for the purposes of which, a vulnerable person gives evidence, if satisfied that it is in the interests of the witness to do so. However, this must not be done where the order would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice and that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is not made.

In each of the above cases reference should be made to Section 288D for the procedure for appointing a solicitor. If this happens, the hearing will normally have to be continued.

1.2.2 Disposal of preliminary pleas

The court must dispose of any preliminary pleas of which timeous notice has been given and the Act envisages this being done at the preliminary hearing.

These are:[6]

- Pleas to the competency or relevancy of the indictment;
- A plea in bar of trial;
- An objection to the validity of the citation or a discrepancy between the record copy of indictment and the service copy sent to the accused – rarely encountered.

1.2.3 Thereafter pleas must be tendered

The Act envisages the accused tendering his pleas at this point, but in practice it is most often done at the start of the hearing. If there is a plea of not guilty the Act again envisages checking in an appropriate case (see above) that the accused has representation for trial.[7] If pleas of guilty are tendered and rejected, this offers an opportunity to press parties for further agreement of evidence on those charges which the accused does not dispute.

1.2.4 Dispose of any preliminary issues

Section 72(6)(b) requires the court to dispose of any preliminary issues of which timeous notice has been given and the Act envisages this being done at the preliminary hearing unless it is appropriate to do it at another hearing, which might be the case if evidence is required. Preliminary issues are[8]:

- Separation or conjunction of charges or trials;
- A preliminary objection to certain statutory presumptions set out in section 79(3A)[9];
- An application for a witness anonymity order;
- An objection to the admissibility of evidence;
- An assertion that the truth of the contents of certain documents or other facts ought to be agreed;
- Any other point which a party raises and which could be resolved with advantage before the trial.

1.2.5 Vulnerable witness notices, s275 applications, etc to be disposed of

The court is also expected to dispose of:

- any vulnerable witness notice or application which has been appointed to be disposed of at the preliminary hearing[10];
- any section 275 application or application under section 288F(2)[11] which has been made timeously before the preliminary hearing or is permitted under subsection (8), which empowers the court to deal with a late application if it meets the statutory criterion of special cause being shown[12].
- and importantly, any other matter which, in the opinion of the court, might be disposed of with advantage before the trial - section 72(6)(b) (iv) - which provides a wide case management power.

1.2.6 Is there any further objection to evidence?

The court must ascertain if there is any objection to evidence which has not been intimated and if so, decide whether to grant leave and if so to dispose of[13] it unless it considers it inappropriate to

do so at the preliminary hearing, which might be the case if evidence is required.

1.2.7 Which witnesses do parties require?

The court must ascertain which of the witnesses are required by the Crown and defence[14]. These should have been intimated in the written record, but it is worth asking the defence if they require any witnesses from the Crown list and having the response minuted.

In granting a Crown bill of advocation taken against a sheriff's decision to desert simpliciter, in a pre-trial decision of 19 January 2022, KD, the appeal court explained in its statement of reasons:

"More importantly, the sheriff says nothing about the fact that the defence had not alerted the Crown to the essential nature of the witness [X], which led to the motion to adjourn in December 2019; nor it seems had they alerted the crown to their need for the witness [Y] at the trial diet on the second indictment. The case of *HM Advocate v Dickson* 1980 SLT (News) 265 states that the defence are entitled to proceed on the basis that all of the witnesses on the list attached to an indictment will be cited and available. It is no longer good law. **The defence are now required in their written record to specify those Crown witnesses considered to be essential. Failing such specification the Crown are under no obligation to cite any particular witness."**

[Emphasis added]

Simply listing all of the witnesses on the indictment in the written record does not comply with this statutory duty. The court will expect parties to have determined with precision which witnesses are required to attend the trial. Where facts can be agreed by joint minute certain witnesses will not be required. The duties under section 257 in this regard must be complied with in advance of the PH; see generally paragraph 6.7 below.

Precise identification of witnesses required will prevent time being wasted on applications and arrangements for remote attendance by witnesses who will not be called.

Identification at preliminary hearing of the witnesses whose evidence cannot be agreed and will actually be required by the Crown to prove its case will assist parties and the court to make as accurate an estimate as possible of the time required for the trial which is more important than ever as the court manages the backlog of trials accumulated during the COVID-19 pandemic. Inaccurate estimates can leave trial courts empty or overloaded. Courts lying empty serve to lengthen the backlog and overloaded courts cause difficulties for all concerned.

1.2.8 Any further vulnerable witnesses?

Ascertain if any witness, including the accused, is likely to be a vulnerable witness and if so consider whether to make certain orders[15] including review of arrangements or ordaining a party to make a special measures application, or order that further special measures will apply after giving parties an opportunity to be heard.

1.2.9 State of preparation and compliance with duties to agree evidence

Ascertain, in so far as it is reasonably practicable, the state of preparation of the Crown and defence and ascertain the extent to which Crown and defence have complied with duties under section 257(1) relating to the agreement of evidence.[16]

1.2.10 Is a further diet necessary?

Under subsection 9, the court has power to refrain from disposing of any preliminary issue, application, notice, objection etc. It may appoint a further diet to be held before the trial or to be determined at the trial. In practice, whilst there can be a pre-trial diet where absolutely necessary, it is not common to leave loose threads to the trial diet but it could exceptionally be done for a matter expected to take little or no time.

1.2.11 Fix a trial and deal with any application re time limits

Section 72A provides that, having dealt with all of these issues, the court fixes a trial diet and, on application from the Crown, may extend any necessary time limits. The terms of subsections 5-7 for custody cases appear significant as subsection 6(a) makes it mandatory to fix the trial within the 140 day period if it is ready to proceed to trial.[17] That is rarely possible and will simply not be possible during and after the COVID:19 pandemic. It is suggested that the problem is solved by granting appropriate extensions before fixing the trial. This would require a Crown motion to extend but the absence or scarcity of trial diets would be capable of amounting to cause for such a course.

1.2.12 Review bail

Section 72A(9) creates an obligation to review bail after giving parties the opportunity to be heard and, if so advised, fix different bail conditions. This is something most judges would probably only do if invited by either of the parties, unless some very good reason stood out to raise the issue in which case the judge would need to be addressed by both sides. One recently issued appeal decision[18] seemed to suggest that an extension to the 140 day period, even quite a lengthy one, may not be sufficient reason to allow bail on ground of change of circumstances under a section 30(2) review[19].However, whilst not noticing *Abid*, the implications for bail of the COVID:19 pandemic were considered by the appeal court in *JD & BK v HM Advocate* [2020] HCJAC 15, where the court observed in para 11:

> "The length of time during which a person is likely to remain on remand is a factor in deciding whether to grant bail. This factor must be given greater weight than hitherto."

See generally paras 11-15 of the opinion.

1.2.13 Written record and court's powers

At a preliminary hearing the court is to take account of any written record lodged and the court is entitled to ask any question necessary to fulfil its duties under section 72[20].

1.3 Other issues

1.3.1 Check the form of any notice of special defence

The terms of the special defence should be in conventional and minimalist form.[21]

For reasons discussed in the Jury Manual, in most sexual offence cases and particularly cases of rape it is only consent which is a live issue and the absence of honest (common law) or reasonable

belief is rarely a live issue. That being so a preliminary hearing judge may inquire why both phrases are included in a notice of consent where the defence is that there was consent. In many cases only consent need be referred to in the notice.

1.3.2 Check the presence and terms of the defence statement

See Chapter 2 on Defence statements.

1.3.3 Consider how images with potential to traumatise jurors will be handled at trial

In *Smith v HM Advocate* 2021 J.C. 236, at para 26 of the opinion of the court, the Lord Justice General made observations about what should be done to seek to minimise the risk of traumatising jurors by repeatedly playing in the trial of graphic or violent CCTV footage etc.

> "The images of the murder of the deceased as recorded on the mobile phone were horrific; showing in graphic terms the stabbing of the deceased and its fatal aftermath. Great care must be taken by both prosecution and defence when deciding whether it is necessary to show such images to members of the jury, and to others in the court room. It may be that some may be familiar with this type of image, but many more will not. The lasting effects of viewing such images may be significant. Those effects must be considered and guarded against. If such images are deemed a necessary element of the proof, their use ought to be discussed by the parties and should be raised with the court at the Preliminary Hearing. There is no record of that happening in this case. The impression left by the trial judge's report is that the salient parts of the recording were shown repeatedly to the jury. Whether that was necessary and whether it was necessary to show the aftermath at all is doubtful. It is understandable that, faced with a plea of provocation, the Crown will reasonably deem it necessary to show the images to the jurors. The manner in which that should be done ought, in the future, to be the subject of a considered case management decision."

The "Written Record" form has been amended to ensure that this issue is given consideration by parties in their preparation for preliminary hearings in appropriate cases. The court, to the extent it can, should consider the issue at preliminary hearing and, where appropriate at this stage, make any necessary case management direction. In some cases it may be appropriate to continue consideration to the trial. At present the remote ballot offers an opportunity for the trial judge to review what is to be done in such circumstances. When physical balloting resumes, there will still be an opportunity to discuss this issue in the absence of potential jurors.

1.3.4 Applications for a witness to attend trial remotely

The Coronavirus (Scotland) Act 2020, in schedule 4, makes provision to allow a witness in a criminal trial to give evidence remotely.

The court can give a direction that a witness need not attend [22], and is empowered to do so on the motion of a party or of its own accord, para 2(6), but initial practice was for written application by a party. In response to the effects of the omicron variant of coronavirus, in January 2022 applications began to be made regularly on oral motion at the start of trials.

The effect of making such a direction is that the witness must attend by electronic means [23].

A witness protocol, reproduced as appendix 9, has been agreed between SCTS, COPFS, Faculty of Advocates and the Law Society of Scotland which governs how remote witnesses must behave.

Whilst no detailed procedure is specified in the 2020 Act, it would be useful if such applications, where possible, are made in advance of the preliminary hearing and resolved at preliminary hearing if they are contested.

The court must give all parties an opportunity to make representations [24] but the court could be satisfied of that if the applicant can demonstrate that an application has been intimated to the other party/parties and that there has been sufficient time, and seven days (or less where authorised by the court in situations of urgency) would be sufficient, to decide whether to make any representations.

In practice, pre-trial applications are made in writing and intimated to the other parties to the case and have almost invariably been agreed to by parties.

Nevertheless, there are statutory criteria which must be met and they should be addressed in the application.

The applicant is inviting the court to make a direction under para 2(3) of schedule 4 of the 2020 Act, departing from the norm of physical attendance at trial and should enable the court to conclude that the statutory criteria are met for granting it.

The court's direction:

- must set out how the person is to appear by electronic means [25] and this might be "live TV link" or "Webex";
- must provide for means that allow all of the parties, judge and jury to both see and hear the witness [26] which would be achieved by a live TV link or Webex;
- may include any other provision the court or tribunal considers appropriate [27].

In this regard, parties must consider carefully which
productions a witness will or may need to refer to in their evidence.

An important practical issue for both parties and the court is how a witness will view any necessary productions. Webex allows this to be done from the court electronically, but it restricts the view of both the witness and the jury. The best and most common method is for the party who is calling the witness to make available copies of those productions to which reference will be made. The witness protocol prohibits unauthorised access to productions which have been made available for the purpose of a witness giving evidence remotely.

If a copy of a production is to be supplied to the witness electronically or in writing, the party making the application should ensure that any pagination matches that on the production being used by the court and the parties.

Advocacy judgement is called for on the part of representatives seeking to have a witness attend remotely. Experience to date suggests that if there is important CCTV evidence to be spoken to by

a police officer who has studied it and is anticipated to give evidence about what it shows, this will generally work better if the witness attends court in person.

The effect of para 2(5) is that the court can only issue such a direction if it considers that allowing the witness to attend by electronic means would not prejudice the fairness of proceedings, or otherwise be contrary to the interests of justice. The applicant must be in a position to assert that these criteria are met but need not do so in great detail.

The court has considerable experience of evidence, often highly contentious, being given remotely in the case of vulnerable witnesses for whom it is a standard special measure, or on commission, without infringing fairness or countering the interests of justice. However, the court must consider the statutory criteria under the 2020 Act in the individual case and the application should include a brief description of what kind of evidence the witness is to give.

Where an application is insisted on in the face of opposition the applicant should provide the court with any relevant witness statement, report or production not less than 48 hours before the preliminary hearing or other hearing of the application.

1.3.5 Where preliminary hearing does not proceed or is deserted

This is not an issue which arises frequently and reference should be made to section 72C if it does.

1.3.6 Appeals from decisions at preliminary hearings

Reference should be made to section 74 of the Act. This sets out the sorts of decisions which can and which cannot competently be appealed and which require leave of the court which made the decision. Whether or not to grant leave is a matter for judicial discretion but there are a number of factors to be borne in mind. See the discussion in *Haashi v HM Advocate* 2015 JC 4 at para 9:

> "[9] A degree of care is required when determining whether leave to appeal from a preliminary decision should be granted, especially where the decision has been a discretionary one or one primarily for the judgment of a first instance court, depending upon particular facts and circumstances, rather than one involving a point of law (see, eg Reid v HM Advocate, Lord Justice-General (Emslie), p 392; Hogg v HM Advocate, Lord Justice-General (Rodger), p 146). This is because an appeal at the preliminary stage will inevitably disturb the standard procedure leading to trial. Although there is no statutory restriction on the circumstances in which leave might be granted (and they may be highly variable), leave should not normally be granted at the preliminary stage unless the court is satisfied that the appeal has a realistic prospect of success and that it is in the interests of justice that the point taken be resolved in limine as a matter of practicality rather than being advanced (if still relevant) after the trial. The court is unable to see what point could have been taken in this case which could have had any such prospect.

1.3.7 Appeal by bill of advocation is not competent

Section 130A of the 1995 Act provides that:

"It is not competent to bring under review of the High Court by way of bill of advocation a decision taken at [a first diet or] a preliminary hearing."

[1] Section 102A(2): "In proceedings on indictment, where an accused person fails to appear at a diet of which the accused has been given due notice (apart from a diet which the accused is not required to attend), the court may grant a warrant to apprehend the accused."

[2] All Criminal Courts Practice Notes are available on the Criminal Courts Practice Notes and Directions page of the SCTS website.

[3] Section 72(2)

[4] Sections 288C and 288DC

[5] Section 288E

[6] Section 79(2)(a)

[7] If the accused offers to plead guilty to some charges but his pleas are not accepted by the Crown, that fact is
simply recorded.

[8] Section 79(2) (b)

[9] Subsection (3A). For the purpose of subsection (2)(b)(ii), the provisions are—(a) section 27(4A)(a) or (4B),
90C(2A), 255 or 255A of this Act, (b) section 9(6) of the Antisocial Behaviour etc. (Scotland) Act 2004 or that
section as applied by section 234AA(11) of this Act, (c) paragraph 6(5)(b) of schedule 1 to the Criminal Justice
(Scotland) Act 2016 (d) section 1A(2)(b) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 or
section 7(2)(b) of the Domestic Abuse (Scotland) Act 2018.

[10] Section 72(6) (b)(ii). In practice most of these will be dealt with in chambers.

[11] An application for an order in a non sex case in which there is a vulnerable witness prohibiting the accused from conducting his case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.

[12] Section 72(6) (b)(iii)

[13]

Section 72(6) (c)

[14] Section 72(6)(d)

[15] Section 72(6)(e)

[16] Section 72(6) (f) (i) and (ii)

[17] This rarely happens because it almost never suits the defence and there is almost never court capacity.

[18] *HM Advocate v Abid* 2020 J.C. 33 decision of 4 September 2018 but published only on 11 November 2019.

[19] Section 30(2): A court shall, on the application of any person mentioned in subsection (1) or (1A) above, have power to review (in favour of the person) its decision as to bail, or its decision as to the conditions imposed, if — (a) the circumstances of the person have changed materially; or (b) the person puts before the court material information which was not available to it when its decision was made.

[20] Section 72D(4)

[21] *GW v HM Advocate* 2019 SCCR 175 per LJG at para 34 is dealing specifically with a notice of consent, but the dicta probably apply to all special defences: "All that should be stated in such a defence is that the complainer consented to the conduct libelled or that the accused had a reasonable belief that she had consented to that conduct. The defence, which is intended only to provide notice to the Crown, should not be used as a vehicle in which to provide the jury with a narrative of the accused's account of events in advance of, and potentially in the absence of, testimony to that effect from the accused or other witnesses."

[22] schedule 4 para 2(3)

[23] para 3(1)

[24] para 2(7)

[25] para 3(4)(a)

[26] para 3(7) (b)

[27] para 3(4)(b)

Chapter 2: Defence statements

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Whilst there is no reference to defence statements in section 72, they were subsequently introduced from June 2011 by section 124 of the Criminal Justice and Licensing (Scotland) Act. They require to be referred to at para 8 of the defence written record and will feature at preliminary hearing. Section 124 introduced the new section 70A of the 1995 Act:

2.1 Section 70A

1. This section applies where an indictment is served on an accused....

...

3. **The accused must lodge a defence statement at least 14 days before the preliminary hearing.**
4. At least 7 days before the trial diet the accused must —
    a. where there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a statement stating that fact,
    b. where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a defence statement.
5. **If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.**
6. **Where subsection (5) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.**
7. The accused may lodge a defence statement —
    a. at any time before the trial diet, or
    b. during the trial diet if the court on cause shown allows it.
8. As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.
9. In this section, “defence statement” means a statement setting out —
    a. the nature of the accused's defence, including any particular defences on which the accused intends to rely,
    b. any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

c. particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,
d. any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
e. by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and
f. the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

Note that the change of circumstances provisions[28] could also be relevant at preliminary hearing or a continued preliminary hearing.

2.2. Section 124 in solemn proceedings

Before amending the 1995 Act with section 70A, section 124 provides:

1. This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.
2. As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must —
    a. review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
    b. disclose to the accused any information to which section 121(3) applies....

The effect of section 128(1)(a) is that the accused can only seek a ruling on disclosure under section 128 where a defence statement has been lodged.

The appeal court examined section 70A in *Barclay v HM Advocate* 2012 SCCR 428. The court rejected a contention that the terms of section 70A were intrinsically non-compliant with the Convention. It confirmed in para 17 that the requirements in section 70A are obligatory, but softened their effect by stating in para 19:

- that the statement need not advance a positive defence; and
- that the accused's position in his statement might simply be that he denies the charges and puts the Crown to their proof.

The court also explained at para 18 that a defence statement is not available as evidence against the accused, but is a procedural step designed to ensure that the Crown's duty of disclosure is appropriately directed to such defence as the accused may adopt at his trial and that the statute did not expressly authorise any wider use of the statement. A defence statement is not available as evidence against the accused and so it cannot be used as a prior inconsistent statement.

In *McClymont v HM Advocate* 2020 SCCR 160 the court identified certain consequences for the accused where the defence failed to lodge a defence statement. No defence statement had been lodged at any stage. Accordingly a statutory application for disclosure under section 128 of the 2010 Act could not be made. This contributed to the sheriff being entitled to grant an extension of the 12 month limit in the face of defence opposition.

In *McCarthy v HM Advocate* 2021 J.C.100, summarised in more detail in section 3.3 infra, the appeal court explained that where a defence statement was bland and uninformative, it could not be assumed that a further statement would be treated as validly received or given effect in the absence of adequate explanation of what circumstances had changed. The court emphasised, at para. 22, that if an accused wishes the Crown to make proper disclosure, he must comply with the obligations in the statutory scheme of disclosure under the 2010 Act. A pro forma response of the kind first intimated in this case failed to do so where it had stated that the accused took issue with all facts and inferences pointing to guilt when it was later revealed that he accepted that drugs etc were found in a search of his flat.

Apart from anything else, the defence statement provides a basis for measuring the relevance of any defence inquiries which are proposed at preliminary hearing, or evaluating suggestions that disclosure has not been forthcoming.

[28] See Renton & Brown at 13A-22
"Section 70A of the 1995 Act, as inserted by s.124(3) of the 2010 Act, requires the accused in solemn proceedings to lodge a defence statement at least 14 days before the first diet or preliminary hearing. In addition, at least seven days before the trial diet, the accused must either lodge a further defence statement if there has been a material change in circumstances relating to the defence since the lodging of the original statement or lodge a statement to the effect that there has been no such change of circumstances. If there is any subsequent change of circumstances, the defence must lodge a defence statement before the beginning of the trial or, if the court allows it on cause shown, during the trial. A copy of any defence statement, or of the statement that there has been no change of circumstances, is to be sent to the Crown and any co-accused.

Chapter 3: Disclosure obligations and recovery of information

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3.1 Disclosure generally

The disclosure obligations on the Crown and police, whilst originally derived from both common law and ECHR article 6 fairness which includes equality of arms, are now enshrined in Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 and the Code of Practice[29] issued by the Lord Advocate under section 164 of the 2010 Act. Subject to section 166(3), the new provisions supersede the common law in this regard.

This chapter first examines the Crown's statutory obligation of disclosure before considering the residual common law remedies which remain open to an accused person: commission and diligence where the information is in the hands of a third party and an order for production where the information is held by the Crown itself.

When an issue of disclosure or access arises it should be checked whether the parties have applied their minds to the nature of the problem. It should be recalled that productions which have already been lodged are under the control of the court, not the Crown[30].

3.2 Criminal Justice and Licensing (Scotland) Act 2010

Under section 121, the obligation to disclose arises in relation to information which:

- would weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused;
- would materially strengthen the accused's case;
- is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

Sections 141-149 deal with applications to the court for orders preventing or restricting disclosure essentially on grounds of public interest immunity ("PII"). The Crown can apply under section 145 and the Secretary of State under section 146. Provision is made for special counsel by sections 150-152. Provisions relating to the appeal and review of this part of the PII part of the Act are made at sections 153-159.

It is not thought that the PII provisions are sufficiently common to merit discussion in the Bench Book. If the issue arises, regard can be had to the sections themselves; Renton and Brown at sections 13A-30 to 41; and the relevant provisions of the Act of Adjournal within Rule 7A.

Section 121 deals with the prosecutor's duty to disclosure information and provides:

1. This section applies where in a prosecution —
    a. an accused appears for the first time on petition,
    b. an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or…
2. As soon as practicable after the appearance … the prosecutor must —
    a. review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
    b. disclose to the accused the information to which subsection applies.
3. This subsection applies to information if —
    a. the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
    b. the information would materially strengthen the accused's case, or
    c. the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

N.B. For the purposes of preliminary hearings it is important to note that all of the disclosure obligations on the Crown imposed by the Act require to be performed only once[31].

Section 122 provides as follows:

1. This section applies where by virtue of subsection (2)(b) of section 121 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.
2. As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 121(2)(b) but which may be relevant to the case for or against the accused.
3. The prosecutor need not disclose under subsection (2) details of sensitive information.
4. In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of —
    a. causing serious injury, or death, to any person,
    b. obstructing or preventing the prevention, detection, investigation or prosecution of crime, or
    c. causing serious prejudice to the public interest.

The effect of section 122 is that in solemn proceedings, the Crown is also obliged to disclose information which may be relevant to the case for or against the accused which does not fall within the scope of section 121, other than sensitive information, defined in 122(4).

The obligations imposed by sections 121 and 122 are continuing duties under section 123 and a further duty of review arises on the lodging of a defence statement. Section 124 makes provision

in respect of defence statements in solemn proceedings:

1. This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.
2. As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must —
    a. review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
    b. disclose to the accused any information to which section 121(3) applies."

Section 161 entitles the Crown to redact information which it is not obliged to disclose when making disclosure.

Section 160 permits the Crown to make disclosure by any means and reads as follows:

1. This section applies where by virtue of this Part the prosecutor is required to disclose information to an accused.
2. The prosecutor may disclose the information by any means.
3. In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.
4. Subsection (5) applies if the information is contained in —
    a. a precognition,
    b. a victim statement,
    c. a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or
    d. where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.
5. In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.
6. Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and —
    a. the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or
    b. the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.
7. In complying with the requirement, the prosecutor must disclose a copy of the statement (but subsections (2) and (3) continue to apply).
8. This section is subject to any provision made by an order under section 145(7), 146(11), 155(6) or 156(6)."

3.3 Ruling on disclosure

The accused can seek a ruling on disclosure under section 128 of the 2010 Act, but only if a defence statement has been lodged. The application must be made in writing and it must specify:

- the charge or charges to which the application relates,

- a description of the information in question, and
- the accused's grounds for considering that section 121(3) applies to the information in question.

Both Crown and defence must be given an opportunity to be heard on the application. If the application is refused and the accused becomes aware of "secondary" information that was unavailable to the court at the time it made its ruling which might have made a difference he can apply for review under section 129. Both the prosecutor and defence have a right of appeal against the court's decision under section 128.

In *McCarthy v HM Advocate* 2020 J.C. 100, in giving the opinion of the court, the Lord Justice General examined the procedural consequences of a defence statement which was bland and uninformative in its terms, all as described in para [8] of the opinion. The defence statement narrated, inter alia, that the accused was not guilty and that he took issue with all matters of fact relied on to found an inference of guilt. The statement had been intimated shortly before the preliminary hearing on 28 September 2018. After much further procedure, on 8 October 2019, new agents now representing the accused lodged a "supplementary defence statement" repeating that his defence may involve coercion but adding that he had been entrapped by a state agent. He sought disclosure of information about two people he was only partially able to identify and confirmation that one of them was a police officer or CHIS, failing which disclosure of all information which underlay the granting of a search warrant in May 2018. He explained that one of these persons had coerced him to store drugs and the other was a witness, but also that he had been entrapped by the person who coerced him. The Crown advised his lawyers and the court that the person he was describing was not a police officer and the police did not have the information he sought.

On 29 October 2019 the appellant sought a ruling under section 121(3) of the 2010 Act on whether the Act applied to the information requested. The Crown advised the court at a hearing on 1 November that the information sought did not exist and that no covert tactics had been used. The judge found that what was sought did not fall within the scope of section 121(3) and refused the application. The basis of the appeal was that the judge should have ruled that the information sought was relevant which would have encouraged the Crown to keep looking for it.

On appeal, the court explained that for the disclosure scheme in the 2010 Act to operate, the defence must lodge the requisite statement at least 14 days before the preliminary hearing. The court went on to explain at para 22 that:

> "Where no statement is lodged timeously, or if it takes the form of the type which was lodged in this case, it should not be assumed that the court will regard a later statement as validly lodged in terms of section 70A(4)(b) or (5). Such a statement is only competent if it stems from a material change of circumstances. It ought accordingly to narrate what that change of circumstances has been, in order to enable the court to take a view on competence. No such change was advanced in this case and the judge at first instance would have been entitled to reject the new statement as invalid."…

And:

> "A pro forma response, such as that employed here, [did not comply with the obligations in the statutory scheme of disclosure under the 2010 Act] where, as subsequently revealed,

the accused, for example, accepts that the drugs, cash and associated paraphernalia were in his flat when the search warrant was executed."

Section 121(3) is designed to operate where the Crown is in possession of information and there is a dispute about whether it materially weakens the Crown case or strengthens the defence case. In this case the information did not exist and the accused had no reasonable basis for asserting that it did. The ruling sought served no purpose.

The court observed that any such application for recovery of information should have been directed to the police by application for commission and diligence."

Sections 128, 129 and 130 provide as follows:

"128 Application by accused for ruling on disclosure

1. This section applies where the accused —
    a. has lodged a defence statement under section 70A of the 1995 Act or section 125 or 126 of this Act, and
    b. considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 121(3) applies (the "information in question").
2. The accused may apply to the court for a ruling on whether section 121(3) applies to the information in question.
3. An application under subsection (2) is to be made in writing and must set out —
    a. where the accused is charged with more than one offence, the charge or charges to which the application relates,
    b. a description of the information in question, and
    c. the accused's grounds for considering that section 121(3) applies to the information in question.
4. On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
5. However, the court may dispose of the application without appointing a hearing if the court considers that the application does not —
    a. comply with subsection (3), or
    b. otherwise disclose any reasonable grounds for considering that section 121(3) applies to the information in question.
6. At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.
7. On determining the application, the court must —
    a. make a ruling on whether section 121(3) applies to the information in question or to any part of the information in question, and
    b. where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.
8. Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial."

"129 Review of ruling under section 128

1. This section applies where —
    a. the court has made a ruling under section 128 that section 121(3) does not apply to an item of information (the "information in question"), and
    b. during the relevant period —
        i. the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and
        ii. the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 121(3) does apply to the information in question.
2. The accused may apply to the court which made the ruling for a review of the ruling.
3. An application under subsection (2) is to be made in writing and must set out —
    a. where the accused is charged with more than one offence, the charge or charges to which the application relates,
    b. a description of the information in question and the secondary information, and
    c. the accused's grounds for considering that section 121(3) applies to the information in question.
4. On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
5. However, the court may dispose of the application without appointing a hearing if the court considers that the application does not —
    a. comply with subsection (3), or
    b. otherwise disclose any reasonable grounds for considering that section 121(3) applies to the information in question.
6. At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.
7. On determining the application, the court may —
    a. affirm the ruling being reviewed, or
    b. recall that ruling and —
        i. make a ruling that section 121(3) applies to the information in question or to any part of the information in question, and
        ii. where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.
8. Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.
9. Nothing in this section affects any right of appeal in relation to the ruling being reviewed.
10. In this section, "relevant period", in relation to an accused, means the period —
    a. beginning with the making of the ruling being reviewed, and
    b. ending with the conclusion of proceedings against the accused.
11. For the purposes of subsection (10), proceedings against the accused are taken to be concluded if —
    a. a plea of guilty is recorded against the accused,
    b. the accused is acquitted,
    c. the proceedings against the accused are deserted simpliciter,
    d. the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,

e. the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
f. the proceedings are deserted pro loco et tempore for any reason and no further trial diet is appointed, or
g. the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation."

"130 Appeals against rulings under section 128

1. The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section 128, appeal to the High Court against the ruling.
2. Where an appeal is brought under subsection (1), the court of first instance or the High Court may —
    a. postpone any trial diet that has been appointed for such period as it thinks appropriate,
    b. adjourn or further adjourn any hearing for such period as it thinks appropriate,
    c. direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.
3. In disposing of an appeal under subsection (1), the High Court may —
    a. affirm the ruling, or
    b. remit the case back to the court of first instance with such directions as the High Court thinks appropriate.
4. This section does not affect any other right of appeal which any party may have in relation to a ruling under section 128."

3.4 Common law applications

The law is found in *McLeod v HM Advocate* 1998 J.C. 67 in which the Lord Justice General (Rodger) gave the leading opinion, explaining:

> "I consider, however, that an accused person who asks the court to take the significant step of granting a diligence for the recovery of documents, whether from the Crown or from a third party, does require to explain the basis upon which he asks the court to order the haver to produce the documents. **The court does not grant such orders unless it is satisfied that they will serve a proper purpose and that it is in the interests of justice to grant them. This in turn means that the court must be satisfied that an order for the production of the particular documents would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. The accused will need to show how the documents relate to the charge or charges and the proposed defence to them**. Such a requirement imposes no great burden on an accused person or his advisers: the averments in the petition may be relatively brief and the court will take account of any relevant information supplied at the hearing. Moreover such a test is, I believe, consistent both with our native authority in cases such as Slater, Smith and Hasson and with the approach of the European Court in Edwards and Benendoun." [Emphasis added]

He also observed that in many cases a simple order for the production of the documents in the hands of the Crown, as a party to the proceedings, would be the appropriate remedy rather than a commission and diligence.

The case law would tend to support the view that the defence are not entitled to expect the court to assist them in a fishing expedition. The material sought must be capable of serving a proper purpose in the trial[32] and the common law exclusion of irrelevant and collateral evidence, as well as the provisions of section 275 and its interpretation may mean, in many cases at least, that there can be no proper purpose in obtaining the information sought.

Where such an application was granted for no sufficient reason, the complainer's petition to the nobile officium was upheld and, in giving the opinion of the court, Lord Turnbull examined some of these issues in some detail [33].

In *JC*, the preliminary hearing judge had granted an order for the recovery of the complainer's medical records in a case where the charges relating to her included rape and sexual assault under the 2009 Act, stalking per section 39 of 2010 Act and common law assault. She presented a petition challenging that decision.

The specification which had been granted was in the following terms:

> "Medical records of [complainer] date of birth (given) relevant to any mental health issues, psychiatric conditions or anger management issues which she has had."

The basis of the application was the accused's belief that the complainer had anger management issues based on his experience of living with her, she lied all the time, may have a personality disorder and had serious mental health problems. He also founded on information in the complainer's statement to the effect that she had struggled with her mental health since she was a teenager and it got worse during her relationship with the accused. He proposed that her mental health would explain her making allegations against him which he maintained were false.

At para 15 of the opinion, the court noted that such an application engaged the complainer's right to respect for her private life, home and correspondence as guaranteed by ECHR article 8. With reference to Lord Glennie's decision reported at WF v Scottish Ministers [2016] CSOH 27, the court noted the view that the complainer had the right to be heard on such an application, noting also that the Scottish Ministers had accepted the decision and had made legal aid available to a complainer to do so. In the absence of any challenge the court proceeded on the basis that there was such a right and that a decision could competently be challenged by petition to the nobile officium.

The court quoted the passage from *McLeod* which is reproduced above. In para 27 the court noted the complete absence of any specification for the basis of the appellant's beliefs about the complainer and at para 28 considered what legitimate purpose the material could be put to, noting that the court would have to be satisfied that the material sought was capable of being used evidentially in the manner contemplated in the application. It was proposed to be capable of undermining the credibility and reliability of the complainer's evidence. Having made the following observations, the court concluded that this was a fishing diligence and that the application should not have been granted:

"[29] This raises the question of how production of a complainer's medical records could be used to undermine his or her credibility or reliability. At common law matters of credibility and reliability fall to be decided upon a jury's view of the demeanour of the witnesses in court, the inherent unlikelihood of the truth or accuracy of their testimony and, often most important, how that testimony compares and contrasts with other evidence in the case which the jury finds acceptable – see the opinion of the Lord Justice Clerk (Carloway) in CJM v HM Advocate *2013 SCCR 215* at paragraph [41].

[30] If a witness has an objective medical condition bearing upon his or her credibility or reliability then (and only then) expert medical evidence of that condition and its general effects may be admissible at common law (CJM paragraph [38]). The terms of section 275(1)(a)(ii) of the Criminal Procedure (Scotland) Act 1995 permit, in certain circumstances, the leading of evidence of "a condition or predisposition". Those provisions do not introduce any lower test. The statutory exception requires the "condition or predisposition" to be one which is objectively diagnosable in medical, notably psychiatric, terms. The exception cannot be applied in the absence of medical evidence to that effect – (CJM paragraph [46]). In DM v HM Advocate *[2015] HCJAC 4*, in upholding the decision of the sheriff to refuse an application by an accused for the recovery of a psychiatric report relating to the complainer, the court stated at paragraph [5]:

> "For material in a psychiatric report to be relevant in this case, it would either have to support the proposition, which is nowhere stated, that the appellant's mental state is such that she is unable to distinguish between right or wrong, or that she is suffering from some specific condition which causes her to lie or to be unreliable".

[31] In the present case those who act for the accused appear not to possess any medical advice vouching the contention that the description of the complainer's mental health, as provided either by the accused or by the complainer herself in her statement to the police, was consistent with any known medical condition which would manifest itself in a lack of reliability or truthfulness. There are no averments in the petition suggesting that she suffers from any particular condition, beyond the possibility that she may have a "personality disorder". There are no averments to vouch the proposition that any particular personality disorder is known to cause those who suffer from it to lie or be unreliable. The first instance judge was presented with no medical opinion and appears to have been invited to proceed upon the proposition that mental illness of any nature equated to a propensity to lie or fantasise".

[29] Which is reproduced at Appendix G of Renton & Brown, Criminal Procedure

[30] HM Advocate v AM, JM 2016 JC 127

[31] Section 127(2). The prosecutor need not disclose anything that the prosecutor has already disclosed to the accused in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

[32] See also Ramzan v HM Advocate 2013 SCCR 143. In a prosecution for MTIC VAT fraud, the

appellant's defence was that he was merely an innocent dupe and he applied for commission and diligence calling for the recovery of material which the Crown might have relating to the activities of others in the chain which might help to establish his defence. He also sought material relating to the investigation of certain Crown witnesses and any discussions between HMRC or the Crown and these witnesses, including any undertakings not to prosecute them. The court held that it was a given that there was such a chain, that it was for the Crown to show that the appellant was not only a participant in the chain, but that in participating in it he knew that it was designed to achieve fraudulent ends, that the fact that others were also involved and that they were, as it might be put, 'bigger fish' than he, would neither assist nor hinder his defence, and that the judge of first instance was not wrong in holding that it would be inappropriate to grant commission and diligence.

[33] *JC, Petitioner* 2020 J.C. 155

Chapter 4: Time limits affecting preliminary hearings

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Please
note that as a generality, the following time limits apply to the preliminary hearing to which the accused was initially indicted and not to some later continued hearing [34].

The accused must lodge a defence statement where either:

- there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged,
- where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged. s70A(4), 1995 Act

4.1 Productions	
If Crown wish to amend the indictment after it has been served, it is not competent to simply amend the indictment by adding additional witnesses/productions. The prosecutor must give s67 notice to defence of name and address of witness or details of production s67(5) and s67(5A) 1995 Act	Not less than 7 clear days before the preliminary hearing or such later time, before the jury is sworn to try the case, as the court may, on cause shown, allow.
Defence productions and witnesses must be given to the Crown Agent if the trial is to be held in the High Court. s78(4) 1995 Act	Not less than 7 days before the preliminary hearing.
Presumption as to condition of productions: It is presumed that: a. productions examined by a witness after their recovery by the police or lodging with the procurator fiscal were	Where the production was lodged at least 14 days before the preliminary hearing.

produced to the witness in the same condition as when recovered or lodged, and b. that the articles produced to the witness were those seized by the police or procurator fiscal provided that these documents were provided to the witness: s68 1995 Act	
If a party wishes to rebut the presumption, a written notice must be given, stating that he does not admit that the production was received or returned or that it is taken possession be lodged: s68 1995 Act.	At least 7 days before the preliminary hearing.
4.2 Notice of previous convictions	
Objection to conviction s69 1995 Act	At least 7 days before the preliminary hearing, the objection must be given to the Crown agent.
Objection to conviction after guilty plea at any diet	No objection shall be entertained unless he has, at least 2 days before diet, intimated objection to the procurator fiscal.
4.3 Defence statements	
Defence statements must be lodged: s70A(1) 1995 Act	At least 14 days before the preliminary hearing.
The accused must lodge a defence statement where either: a. there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, b. where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged. s70A(4) 1995 Act	7 days before the trial diet.
If after lodging a defence statement, there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement. Such a defence statement must be lodged before the trial diet unless on cause shown the court allows it to be lodged during the trial diet. s70A(5) 1995 Act	
The accused may lodge a defence statement at any time before the trial diet or during the trial diet if the court on cause shown allows it. s70A(7) 1995 Act	
4.4. Other issues at the preliminary hearing	

Where the accused intends to plead a special defence,[35] a plea or notice must be lodged and intimated: s78(1) and (3) 1995 Act	By lodging the plea or notice with the Clerk of Justiciary and by intimating the plea or notice to the Crown Agent and to any co-accused not less than 7 clear days before the preliminary hearing.
Preliminary pleas[36] s72(3) 1995 Act	Not less than 7 days before the preliminary hearing.
Preliminary issues[37] s72(6)(b)(i) 1995 Act	Not less than 7 days before the preliminary hearing.
A vulnerable child witness and deemed vulnerable witness[38] notice under s271A(2) 1995 Act Note that an objection to a vulnerable witness ("VW") application under s271A (4A) must be intimated not later than 7 days after lodging of the VW notice	No later than 14 days before preliminary hearing.
A vulnerable witness (other than a child or deemed vulnerable witness) application under section 271C(2) 1995 Act Note that an objection to a VW application under S 271C (4A) must be intimated not later than 7 days after lodging of the VW notice	No later than 14 days before preliminary hearing.
An application under s275(1) 1995 Act to admit such evidence or allow such questioning set out in s274 of the Act, See s275B(1)(a).	No later than 7 days before the preliminary hearing.
Devolution or compatibility issue Rule 40.2 Criminal Procedure Rules	The minute must be lodged with the clerk of court and served on the other parties no later than 14 clear days before the preliminary hearing.

[34] Murphy v HM Advocate 2013 JC 60 at paras 25-30

[35] Diminished responsibility, automatism, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent.

[36] The meaning of 'preliminary pleas' can be found in s79(2) of the 1995 Act.

[37] The meanings of 'preliminary issues' can be found in s79(2) of the 1995 Act.

[38] The meaning of ‘vulnerable witness’ in this context is defined in s271 of the 1995 Act.

Chapter 5: Time bars and extensions

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5.1 Section 65 of the 1995 Act

This section reads as follows:

1. Subject to subsections (2) and (3) below, an accused shall not be tried on indictment for any offence unless,
    i. where an indictment has been served on the accused in respect of the High Court, a preliminary hearing is commenced within the period of 11 months; and
    ii. in any case, the trial is commenced within the period of 12 months, of the first appearance of the accused on petition in respect of the offence.
    A. If the preliminary hearing... or the trial is not so commenced, the accused
        i. shall be discharged forthwith from any indictment as respects the offence; and
        ii. shall not at any time be proceeded against on indictment as respects the offence.
2. Nothing in subsection (1) or (1A) above shall bar the trial of an accused for whose apprehension a warrant has been granted for failure to appear at a diet in the case.
3. On an application made for the purpose,
    i. where an indictment has been served on the accused in respect of the High Court, a single judge of that court may, on cause shown, extend either or both of the periods of 11 and 12 months specified in subsection (1) above; or
    ii. in any other case, the sheriff may, on cause shown, extend [either or both of the periods of 11 and 12 months specified in that subsection.

A. An application under subsection (3) shall not be made at any time when an appeal made with leave under section 74(1) of this Act has not been disposed of by the High Court.

4. Subject to subsections (5) to (9) below, an accused who is committed for any offence until liberated in due course of law shall not be detained by virtue of that committal for a total period of more than —
    1. 80 days, unless within that period the indictment is served on him, which failing he shall be [entitled to be admitted to bail
    2. where an indictment has been served on the accused in respect of the High Court –
        i. 110 days, unless a preliminary hearing in respect of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or
        ii. 140 days, unless the trial of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or

    [(b)…] unless the trial of the case is commenced within that period, which failing he shall be entitled to be admitted to bail.

    A. Where an indictment has been served on the accused in respect of the High Court, subsections (1)(a) and (4)(aa)(i) above shall not apply if the preliminary hearing has been dispensed with under section 72B(1) of this Act.

5. On an application made for the purpose –
    i. in a case where, at the time the application is made, an indictment has not been served on the accused, a single judge of the High Court; or
    ii. in any other case, the court specified in the notice served under section 66(6) of this Act, may, on cause shown, extend any period mentioned in subsection (4) above.
    A. Before determining an application under subsection (3) or (5) above, the judge or, as the case may be, the court shall give the parties an opportunity to be heard.
    B. However, where all the parties join in the application, the judge or, as the case may be, the court may determine the application without hearing the parties and, accordingly, may dispense with any hearing previously appointed for the purpose of considering the application.

...

8. The grant or refusal of any application to extend the periods mentioned in this section may be appealed against by note of appeal presented to the High Court; and that Court may affirm, reverse or amend the determination made on such application.
    A. Where an accused is, by virtue of subsection (4) above, entitled to be admitted to bail, the accused shall, unless he has been admitted to bail by the Lord Advocate, be brought forthwith before –
        i. in a case where an indictment has not yet been served on the accused, a single judge of the High Court; or
        ii. in any other case, the court specified in the notice served under section 66(6) of this Act.

B. Where an accused is brought before a judge or court under subsection (8A) above, the judge or, as the case may be, the court shall give the prosecutor an opportunity to make an application under subsection (5) above.
C. If the prosecutor does not make such an application or, if such an application is made but is refused, the judge or, as the case may be, the court shall, after giving the prosecutor an opportunity to be heard, admit the accused to bail.
D. Where such an application is made but is refused and the prosecutor appeals against the refusal, the accused –
i. may continue to be detained under the committal warrant for no more than 72 hours from the granting of bail under subsection (8C) above or for such longer period as the High Court may allow; and
ii. on expiry of that period, shall, whether the appeal has been disposed of or not, be released on bail subject to the conditions imposed.

9. For the purposes of this section,
A. where the accused is cited in accordance with subsection (4)(b) of section 66 of this Act, the indictment shall be deemed to have been served on the accused;
B. a preliminary hearing shall be taken to commence when it is called; [(ba) ...]
C. a trial shall be taken to commence when the oath is administered to the jury.

10. In calculating the periods of 11 and 12 months specified in subsections (1) and (3) above there shall be left out of account any period during which the accused is detained, other than while serving a sentence of imprisonment or detention, in any other part of the United Kingdom or in any of the Channel Islands or the Isle of Man in any prison or other institution or place mentioned in subsection (1) or (1A) of section 29 of the Criminal Justice Act 1961 (transfer of prisoners for certain judicial purposes)."

5.2 COVID-19 emergency legislation

Note the following in relation to solemn time-limits, provided for by The Coronavirus (Scotland) Act 2020, schedule 4, at para 10. It adds, on a temporary basis, subsections 11, 12 and 13 to section 65.

3. "Section 65 (solemn proceedings: prevention of delay in trials) has effect as if after subsection (10) there were inserted —"
11. In calculating any of the periods specified in subsection (12), no account is to be taken of the suspension period.
12. Those periods are —
a. any period mentioned in subsection (1), including any such period as extended —
i. under subsection (3),
ii. on appeal under subsection (8), or
iii. under section 74(4)(c),
b. any period mentioned in subsection (4), including any such period as extended —
i. under subsection (5), or

ii. on appeal under subsection (8).

13. For the purpose of subsection (11), the suspension period is the period of 6 months beginning with whichever is the later of —
    a. the day on which paragraph 10 of schedule 4 of the Coronavirus (Scotland) Act 2020 comes into force,
    b. the day on which —
        i. in relation to a period specified in subsection (12)(a), the accused first appears on petition in respect of the offence, or
        ii. in relation to a period specified in subsection (12)(b), the accused is committed for the offence until liberated in due course of law."

5.3 Custody cases

5.3.1 The 80-day rule

The following extract is from Renton & Brown:

> 14-04
>
> An accused may not be detained for a total period of more than 80 days by virtue of a warrant committing him for trial for any offence without being served with an indictment.
>
> If the indictment is not served by the time he has spent 80 days in custody he will be entitled to bail unless the period has been extended.[39]
>
> Where an indictment which has been served within the 80 days falls on a date outwith the 80 days, e.g. because it is not called at the trial diet, the accused must be bailed even if he is served immediately with another indictment in identical terms to those of the one which fell.2 An extension may be granted by a single judge of the High Court if no indictment has been serve by the time of the application. If an indictment has been served the extension may be granted by the court specified in the notice accompanying it. Extensions may be granted on cause shown.3 Either party may appeal to the High Court against the single judge's decision.4
>
> An extension may be granted after the period has expired.5
>
> Liberation under this provision does not prevent the subsequent service of an indictment on, and trial of, the accused; nor does his continued detention beyond the 80th day.6 "

5.3.2 The 110 and 140 day rules

The following extract is from Renton & Brown at 9-29 onwards:

> 9-29
>
> An accused who has been served with an indictment is entitled to bail if he has been detained for a total period of 110 days unless a preliminary hearing … has commenced

within that period, or in any case for a total of 140 days unless his trial has commenced within those periods, or those periods as extended.

In HM Advocate v Clarke an extension was refused where the Crown sought time to include additional charges against one of a number of accused, partly because it was not necessary.

9-29.0.1

An accused charged with an offence on indictment will be treated as having first appeared on petition in respect of that offence when he appeared on petition on a charge which was either framed in the same or similar terms to the charge on the indictment or was based on evidence which formed all or part of the evidential basis of the charge on the indictment.

9-29.1

Where an accused who has become entitled to bail under the new provisions (i.e. when the time limit for his detention has expired) has not been granted bail by the Lord Advocate, he has to be brought before the court at which he is required to appear on any indictment with which he has been served, or, if he has not been so served, before a single judge of the High Court. The court will give the prosecutor an opportunity to apply for an extension of the relevant period, but if no such application is made, or an application is made and refused, the court is obliged to admit the accused to bail after giving the prosecutor an opportunity to be heard.

Where the prosecutor appeals against the refusal of his application for an extension, the accused will remain in custody under the original committal warrant for no more than 72 hours or such longer period as the High Court may allow. On the expiry of that period the accused will be released on bail on the conditions imposed whether or not the appeal has been disposed of.

If the accused does not accept the conditions of any bail granted under these provisions he will continue to be detained under the committal warrant until he does accept them.

Section 28 of the 1995 Act applies, mutatis mutandis, to breach of bail granted under these provisions. When an accused who is in breach of bail is brought before the court which granted the bail, the prosecutor may apply for an extension of the applicable time limit, and if it is not extended the court may release the accused under the original bail order or may vary that order so as to contain any conditions thought necessary to secure compliance with the standard conditions.

9-29.2

The prosecutor is entitled to apply for the review of, or appeal against, any conditions attached to the bail order. Where he appeals, the accused may continue to be detained under the committal warrant for not more than 72 hours or such longer period as the court allows, after which he is to be released on the original conditions, whether the appeal has been disposed of or not.

5.4 Other cases

5.4.1 The 11 and 12 month time bars

See section 65, which is replicated at 5.1 above.

The following extract is from Renton & Brown at 9-28.2 to 9-29.4:

> **9-28.2**
>
> An accused who has been served with a High Court indictment is to be discharged and not be proceeded against on indictment unless a preliminary hearing has commenced within 11 months, and his trial has commenced within 12 months, of his first appearance on petition in respect of the offence. Where he has been served with a sheriff court indictment the same right to discharge and freedom from proceedings on indictment apply unless a first diet has commenced within 11 months of his first appearance on petition, unless these periods are extended.
>
> **9-28.3**
>
> In terms of s.65(1) and (1A) of the 1995 Act, as amended or inserted by s.6 of the 2004 Act, an accused who has been served with a High Court indictment cannot be tried on indictment unless a preliminary hearing has started within 11 months (unless the hearing has been dispensed with under s.72B(1) of the Act), and his trial has started within 12 months, of his first appearance on petition in respect of the offence. In the case of a sheriff court indictment an accused cannot be tried on indictment unless his trial has started within 12 months of his first appearance on petition.
>
> These provisions do not apply where the accused has never appeared on petition. Nor do they prevent his being tried on summary complaint after the expiry of the relevant periods, unless the trial would be oppressive.
>
> **9-28.4**
>
> The rules do not apply if a warrant has been issued for the arrest of the accused for failure to appear at a diet in the case, whether the warrant was granted at any diet in the case (unless, perhaps, it was granted in error when the accused was actually present) or whether it was granted on a petition charging the accused with failure to appear.8 The rules do not apply even where the non-appearance in respect of which the warrant was granted was excusable. The accused's remedy in such a case is to seek suspension of the warrant: so long as it stands unsuspended it excludes the operation of s.65(1). The rules do not apply if the accused is arrested on the warrant and then released on bail.10 Where a warrant has been granted the accused can be tried at any time, subject of course to the operation of the 40, 110 and 140 day rules if he is subsequently detained in custody."

5.4.2 Grounds for extension of 11 and 12 month time bars

See generally Renton & Brown at 9-36 to 9-38.

The leading case is the full bench decision Early v HM Advocate 2007 J.C. 50 but in Uruk v HM Advocate 2014 SCCR 369, the court pointed out that there have been substantial changes in court structure, procedure and management since the leading cases were decided.

In *Early*, in line with the submissions of parties, the court proceeded on the basis that HM Advocate v Swift 1984 J.C. 83 was correctly decided.

The court in *Swift* determined that the question whether cause for an extension had been shown by the Crown was to be decided by a two-stage test:

- At the first stage the court had to consider whether the Crown had shown a reason that might be sufficient to justify the extension.
- If they had, the second stage was for the court to consider whether, in the exercise of its discretion, it should in all the relevant circumstances grant the extension for that reason.

In cases where the Crown was not at fault, the court in *Early* proceeded on the basis expressed in para 7 of its opinion:

> "In such cases the court decides the matter on a consideration of the whole circumstances. This may involve a consideration of the interests of parties other than the Crown and the accused. For example, in Ashcroft v HM Advocate an extension was granted to spare a young girl the ordeal of giving evidence twice about an alleged indecent assault upon her. An important factor is whether the circumstances founded on could have been avoided by the Crown (cf Mejka v HM Advocate). If they were unavoidable, the court will normally be satisfied that the first-stage test is met; but the decision depends in every case on the facts and circumstances."

Where there was error on the part of the Crown:

> 22. …**an error on the part of the Crown is not necessarily fatal to an application of this kind**. All that Stenton v HM Advocate decides is that it is not enough for the Crown merely to show that an error was made. They must explain why it was made and, before any question of discretion arises, the explanation must satisfy the court that the error is capable of being excused (Stenton v HM Advocate at p 598A–D; cf HM Advocate v Swift at p 227."

And:

> 26. In the light of an extensive review of the cases on section 65(3) and its predecessor, and with the benefit of counsel's submissions, **I have come to the conclusion that it is unhelpful and inappropriate for the court to decide the question at stage 1 by classifying the Crown error as major or minor**. In my view, there is no useful yardstick by which such a distinction can be applied. It requires the court to make a value judgment of the most uncertain kind. It leads to the making of fine and possibly unconvincing distinctions (cf Lyle v HM Advocate and HM Advocate v Freeman} and sometimes it leads to surprising results. For example, a failure by the Crown to specify the locus in a charge has been held to be a major error (Stenton v HM Advocate), whereas an improper comment by a prosecutor, made in ignorance of the law, which causes a trial to be aborted has been held not to be (McCulloch v

HM Advocate).”

27. But leaving aside these practical difficulties, I consider it wrong in principle that the question should turn on the single issue of whether the error is major or minor. **In my view, the court should simply decide the question on a consideration of the whole circumstances, as it does when the Crown is not at fault. The degree of gravity of the error is of course a relevant factor, but it is only one of many: for example, how the error came to be made; how readily it could have been avoided; how readily it could have been detected; the circumstances in which it came to light; whether the defence has contributed to the delay in the accused's being brought to trial (Dobbie v HM Advocate; HM Advocate v McGinlay); whether the defence was aware of the error and said nothing; whether the application could have been avoided if the Crown had taken another course (Squires v HM Advocate at p 920B–C), and so on. In short, the court should take into account all the circumstances that pertain to the commission of the error itself and to the subsequent history of the prosecution. On this approach, therefore, the court could hold that a grave error was excusable or that a lesser error was not**.”
28. In HM Advocate v Crawford the error was so fundamental as to invalidate the indictment. Nevertheless the appeal court was more concerned with the reasons why the error was made and persisted in rather than with its degree of gravity. In that case the error could have been remedied if the objection had been taken promptly. In the court's view, it was significant that for at least two years before then the accused and his advisers were well aware of the charges that he was facing and were obviously preparing to meet them. The case had been the subjectof numerous adjournments, none of which related to any deficiencies in the indictment, and the point was not taken until the eventual diet of trial.
29. In my opinion, the court was entitled in these circumstances to take the view that the error could be excused. I would hold that HM Advocate v Crawford was rightly decided.
30. In the course of the discussion the advocate depute suggested that the gravity of the charge should be a relevant consideration at stage 1; otherwise there could be the undesirable consequence that the accused could escape prosecution on a grave charge. In my opinion, that suggestion is unsound. **If the procedural history would lead the court to conclude that the error was otherwise inexcusable, I cannot see why the gravity of the charge can make it excusable. In my opinion, in enacting section 65 and its predecessor, the legislature has foreseen and accepted the possibility that a failure by the Crown to bring an accused person to trial within the time-limit may have the consequence to which the advocate depute referred**. The point is not novel. It was recognised as long ago as 1852 (Frasers) that a failure to comply strictly with procedural requirements may mean that a well-founded prosecution comes to grief. It is that very discipline, of course, that should serve to ensure scrupulous adherence by the Crown to procedural requirements and time-limits; but in these and in other kinds of cases experience shows that the Crown are capable of surprising administrative weaknesses; for example, the confiding of serious responsibilities to junior and unqualified staff (eg HM Advocate v Weir) and the failure of checking systems to pick up elementary errors in indictments (eg HM Advocate v Crawford).
31. **In HM Advocate v Crawford the court took into account the gravity of the charges, but only when considering whether or not to exercise its discretion in favour of the Crown. That, in my view, is the correct approach. The same**

approach applies to the question of prejudice to the accused and to the question of the length of the extension sought. It reflects that consistent approach of the court in all cases in which the point has arisen (eg Swift at p 227; HM Advocate v Willoughby at p 76; Lyle v HM Advocate at p 604; Rennie v HM Advocate at p 195; HM Advocate v Freeman)." (all emphasis added)

In Mitchell v HM Advocate 2013 SCL 409, LJC Carloway, giving the opinion of the court, observed in a sheriff court case:

> "….in the interests of efficiency, the Crown and the court are entitled to make reasonable predictions on whether a trial can be so accommodated. This inevitably involves the potential for some degree of "double booking". It was, quite correctly, not contended for the appellant that an extension could not be granted where the Crown had acted reasonably in predicting that a trial would be called within the 12 month time limit but circumstances, which could not reasonably have been anticipated, had prevented this from happening. It is plain that such events can provide "cause" for an extension and the sheriff presiding over the sitting is best placed to assess the reasonableness of the Crown's actions (Skead v HM Advocate 1999 SLT 1357, Lord Coulsfield, delivering the Opinion of the Court, at 1999 S.L.T., p.1359)."

Uruk v HM Advocate 2014 SCCR 369 was a case in which the court recognised the implications of the reorganisation of court structures and management. LJC Carloway pointed out that many of the leading cases on extensions pre-dated these reforms. The following synopsis, taken from the rubric, gives the gist of the reasoning:

> "Held, that the cases commonly cited in this area are fact sensitive (para.15); that this was not a case in which it was alleged that, when the indictment was originally allocated to the sitting, it was anticipated that it would not take place (para.17); and appeal refused.
>
> Observed:
>
> 1. that the various cases on extension of time come from an era when there was substantial concern amongst some judges about the organisation of business by the Crown Office and Procurator Fiscal Service (para.10) and may have been influenced by the idea, now discredited, that unreasonable delay in the sense of art 6(1) ECHR, resulted in the termination of the prosecution (para.11);
> 2. that it is the central feature of the protection in s.65 that there is an obligation on the Crown to ensure that their processes are sufficient to ensure that a trial can be commenced within the 12-month limit (para.15);
> 3. that when an initial trial diet is lost, the process comes under judicial control and that it is for the court to determine, in the interests of justice, what is to happen with the case so far as a further diet is concerned (para.16);
> 4. that if it were demonstrated that a trial had been placed into a sitting in which there was no reasonable expectation that it would take place, the court may be inclined to refuse an application for an extension of time which is required only because the trial could not take place in that sitting because of the anticipated level of business (para.17); and
> 5. that the appeal court will place great weight on the views of the sheriff, who is far

better placed to assess whether there is systemic failure in the sheriffdom; and that the appeal court was not in a position to say, in the absence of a view from those presiding in the sheriff court, that the practice of indicting 34 cases for a two-week sitting before a single sheriff is entirely unreasonable (para.18)."

It is no longer the Crown which selects the trial diet, it is the court. Time limits which were mostly fixed in 1701 are frequently insufficient in the 21st century where preparations by Crown and defence may include the recovery and investigation of phone records, DNA analysis and the copying and disclosure of much of the investigation can be very time-consuming. The constitutional imperative is not quite the same in the context of a system which has removed the power of the Crown to fix the trial diet and placed it in the hands of the judiciary.

The Crown's primary obligation is simply to indict to a first diet or preliminary hearing scheduled within the 110 day or 11 month period. That requirement will continue to be enforced as envisaged in *Early v HM Advocate*. However, for the reasons explained in detail in *Uruk v HM Advocate*, the obligation to fix and start the trial now effectively rests with the court and that of providing resources is in the hands of the independent Scottish Courts and Tribunal Service, albeit in the context of its budget allocation. The court requires to manage its case load according to its particular funding. Unless and until it can be said that the resources provided to the SCTS are, as a generality, inadequate to bring an accused to trial within a reasonable time, in an Article 6 sense, it is difficult to envisage a time bar argument succeeding in relation to the diet selected by the court, according to its programming, for the trial.

An illustration of the principle is seen in *HMA v Graham* [2022] HCJAC 1. A sheriff had refused to extend the 12 month time bar when a complainer in a sexual offences trial had failed to attend in response to a citation where the Crown knew that she was reluctant, failed to get to grips with the situation and started another trial. In giving the opinion of the court the LJG observed that:

"…. In a perfect system, that might have occurred and the Crown could have taken earlier steps to encourage the complainer to attend court. .."

and went on to conclude that this was not a fault of such magnitude that the cause of the trial not proceeding should be attributed to the Crown rather than the complainer and there was sufficient reason which might justify the grant of an extension which, in the circumstances of the case should have been granted. The court noted that there was another complainer and that it was only a relatively short extension of 6 weeks which was sought.

[39] 7 April 2020

Chapter 6: Judicial culture at preliminary hearing

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The following key principles are covered in this chapter:

- Preliminary hearing is intended to mark the end of preparation, not the start
- Continuation of a preliminary hearing is a last resort and an exceptional course
- Deadlines for procedural steps are preferable to continuations
- Fix a trial when preliminary hearing first calls in all but exceptional circumstances
- Press for a realistic estimate of trial duration; err on the low side
- Analyse carefully if recovery of information justifies delay
- Examine whether defence mental health inquiries merit delay
- Scrutinise section 75A applications carefully before granting
- Insist on timeous agreement of evidence and production of joint minutes
    - Explore if more agreement is possible
    - Get joint minutes signed at preliminary hearing if possible
- Insist on timeous preparation in commission cases

6.1 Preliminary hearing is intended to mark the end of preparation, not the start

Looking at what parliament already requires to be done in advance of the preliminary hearing, and bearing in mind that substantial disclosure ought to have been made months previously, it is plain that the preliminary hearing is not the starting gun for preparation; it is intended to be the finishing line[40].

6.2 Practice Note 1 of 2005

The purpose of the Practice Note [41] is set out in para 5 and what is expected of practitioners in para 6.

> 5. The purpose of this practice note is to give guidance as to —
>
> a. what practitioners must do in preparation for the preliminary hearing;
>
> b. how the preliminary hearing will be conducted; and
>
> c. the issues that the court will expect practitioners to be able to address at the preliminary hearing.
>
> 6. In order to meet the requirements of the relevant statutory provisions it will be necessary for practitioners to carry out detailed preparations before the preliminary hearing. If, without reasonable excuse, a practitioner fails —
>
> a. to be fully prepared for a preliminary hearing,
>
> b. to have full instructions for a preliminary hearing, or
>
> c. otherwise to be in a position to engage in discussion of the issues that may arise at the preliminary hearing that state of affairs will be regarded by the court as unacceptable. The court will investigate, and record the reasons for, any such failure."

Practice Note 1 of 2005 is still in force and was intended to drive preparation for preliminary hearing. All involved in preliminary hearings should be familiar with the entire Practice Note.

Several of its key points are mentioned in the following paragraphs before some general observations are made about what judges might usefully focus on in their case management at preliminary hearing in the course of which further references are made to paragraphs from the

Practice Note.

Para 8 sets out the court's expectations for preparation by Crown and defence. Prior to communicating with the Crown as required under section 72E, the defence are expected to have obtained full instructions. Each party is expected to have considered in detail the evidence they may have to lead in the trial. Parties are expected to agree as much evidence as possible in accordance with their duties.

Para 15 stipulates that if there are preliminary pleas, parties will be ready to present full submissions having lodged lists of authorities in compliance with para 29. It is rarely complied with, but the court should insist that it is.

The Practice Note at para 17 acknowledges that the court may fix such further hearing as seems appropriate if the case is not ready to go to trial. The court may make such orders and give such directions as may be necessary for the purpose of managing the case effectively.

Para 25 articulates the court's expectation that parties can make full submissions on preliminary issues, vulnerable witness notices, child witness notices, objections, section 275 applications.

Para 33 is important and sets out that if there is proposed to be an evidential hearing, the court will expect to be told the nature and ground of the objection; the identities of the witnesses required; and the time likely to be required.

Para 36 requires parties to be able to tell the court which witnesses are required at the trial and if there are any difficulties anticipated with their attendance.

Note:

The preliminary hearing judge should always:

- explore whether the hearing of evidence is really necessary because it is not always and parties do not always apply their minds fully to this issue.
- press parties to reduce the time required by agreeing such facts as are not in dispute; and

Para 42 gives parties the responsibility of ensuring that arrangements are in place for the availability of equipment necessary for the presentation of evidence.

Para 49 is in these terms:

> "The final decision as to the date and location of the trial diet will always remain the responsibility of the court."

6.3 Continuation of a preliminary hearing is a last resort and an exceptional course

See generally Lord Bracadale's decision in *Forrester* 2007 SCCR 216, reproduced as Appendix 3, in which he stated, at para 17:

> "**In my opinion continuation of the preliminary hearing should be regarded as an**

exceptional course rather than the rule. It follows that in support of any motion for a continuation an explanation will be required as to why the particular line of enquiry giving rise to the motion was not, and could not reasonably have been, completed prior to the preliminary hearing. Where a continuation is granted, the reasons for the continuation must be fully and accurately minuted, and, where there are any further motions to continue the preliminary hearing, these must be examined in the light of the history of the case as disclosed in the minutes. In the course of discussion before me it became clear that defence counsel had not seen any of the minutes of the previous hearings. Minutes are sent to the parties immediately after the preliminary hearing. It seems to me reasonable to expect that at any continued preliminary hearing counsel should be in possession of a copy of any earlier minute and be in a position to address the court on the matters recorded in the minute." [Emphasis added]

It is suggested at para 6.6.6 below, that, in certain circumstances, the possibility of fixing an earlier date for evidence to be taken on commission may justify the calling of a preliminary hearing in order to fix the commission date as early as possible even if not all preliminary hearing issues can be resolved at that hearing, necessitating a continued preliminary/ground rules hearing.

6.4 Fix a trial when preliminary hearing first calls in all but exceptional circumstances

Whilst para 4 of Practice Note 1 of 2005 states that the court will not appoint a trial diet unless it is reasonably satisfied that the trial will proceed at that diet, **in practice now, available diets are so far in the future that in almost all cases a trial diet can and should be appointed at the first calling of a preliminary hearing**.

6.5 Press for an accurate and realistic estimate of trial duration

Para 46 outlines an expectation that the parties can give a considered estimate of the number of days the trial will last.

Please note the following important matters:

6.5.1 Time needed for the trial

The estimate of how long the trial will take is important and can have a significant impact on the availability of trial courts. So long as it can be anticipated that there is a remote ballot day, account must be taken of the extra day in estimating the length of the trial. At one time the view developed that it was best to overestimate so that the trial judge would not be critical should the trial exceed its estimate. That has never been helpful and it is inimical to the efficient administration of the High Court because there are too many cases and trial courts should never be sitting empty, which can happen if timings are overestimated. Parties will suggest that judges should assume that things will go wrong, but most of the time that does not happen and judges should estimate on the basis that things will go smoothly.

Rigorous and precise compliance with the duty to identify which witnesses will actually be called at trial, and with the duties under section 257 to agree facts which are not in dispute, ought to

ensure that estimates are as accurate as they can be.

6.5.2 Availability of counsel

The court may be asked to fix a trial later than the earliest available date to accommodate counsel's availability. Crown and defence often view it as cost-free to delay a case but it is not cost-free from the point of view of the administration of justice. Evidence rarely improves with age and it tarnishes the reputation of the court if there is more delay than necessary.

The starting point must be the statutory time limits, especially in a custody case. It is a matter for the preliminary hearing judge's discretion and there can be good reason to accommodate the availability of a particular counsel in a particular case. However in a case with child or other vulnerable witnesses the trial should be fixed as early as possible and the court should be very slow to allow unnecessary delay in that situation.

The following observations in a discussion with preliminary hearing judges in 2018 encapsulate the problem and the principles which remain valid. The time between preliminary hearing and trial diet is significantly greater now and the COVID-19 pandemic will inevitably give rise to substantial delays so judges will require to scrutinise such requests very carefully.

> "When fixing a trial, the extent to which the exigencies of counsel's diaries should be taken into account is often a difficult question. In each case it must always be a matter for the judge to make a decision based on the all relevant factors including the accused, witnesses and the public.
>
> Without being a decisive factor, the availability of chosen defence counsel is a relevant factor to be taken into account. If the accused is willing to allow resolution of his case to be deferred for that purpose, even if it means a slightly extended time in custody, the court can accede to a request to accommodate that counsel.
>
> However, all of this must be within reason, and subject to considerations such as the length of time involved and the interests of others. A period of 2-3 months from the date of the (first) procedural hearing may be acceptable, given the timescales which currently apply when fixing a trial diet, unless the interests of justice require otherwise.
>
> A longer period **may** be acceptable if there are no particular reasons for the case to be dealt with sooner, and where the interests of witnesses (especially vulnerable witnesses) may not be unduly impinged upon. Even then, the question will be one of balance. The accused may also be vulnerable. Factors such as the nature of the case, its history, its complexity, the number of accused, and the number of witnesses may all have a bearing. The views of the crown, on where the public interest lies, will be relevant. The court will expect the crown to bring to its attention any difficulties relating to the vulnerability or availability of witnesses. There is no hard and fast rule. Where the balance rests will always be a question for the individual judge to be determined according to the interests of justice, which includes the efficient programming of court business. Practitioners are reminded of para 49 of PN No 1 of 2005, that "The final decision as to the date and location of the trial diet will always remain the responsibility of the court…"."

6.5.3 Location

It is useful to find out where the majority of witnesses are coming from. Sending Glasgow cases to Edinburgh and vice versa may sometimes be unavoidable but has considerable potential to cause delay come the trial, at least in some cases. Not all witnesses are motivated to travel somewhere they do not much want to go.

6.5.4 Pleas of guilty

If there is a plea of guilty it is expected that a written narrative has been agreed and will be presented to the clerk in hard copy and in a word document which can be made available to the preliminary hearing judge.

Paras 23 and 24 narrate that if there is a plea of guilty, the accused's counsel should be in a position to address the court on the facts of the case and fully address the court on all issues if there will not need to be an adjournment for reports.

6.6 General observations

As noted above, in HM Advocate v Forrester 2007 SCCR 216, Lord Bracadale observed at para 17 that continuation of the preliminary hearing should be the exception rather than the rule and that an explanation would be required as to why enquiry had not been completed prior to the first hearing if a continuation was sought.

Where it is necessary to continue, in an appropriate case – e.g. one which has involved substantial reading, a commission application which cannot be resolved immediately or where the judge has got part way through considering a section 275 application but it cannot be concluded - a preliminary hearing judge should consider if it is practical to keep the case for a 0930 hearing, whatever their duties may be on that occasion. This would spare another judge reading all of the same material, which is plainly inefficient. The original judge will know what it is all about and will be able to ensure that parties have done what they said they would do to progress the case and solve any problems. We have the option of that hearing taking place remotely which may be more convenient for all concerned.

6.6.1 Pressure of business and avoiding continuations of preliminary hearings

If the court is asked to continue a preliminary hearing because there is likely to be a plea, the judge should point out that the discount meter is running down and that it is in the accused's interest to plead there and then. The case could be called later in the day. If it is said that there is more negotiating to be done, that will rarely be sufficient reason to continue a preliminary hearing. A different approach might reasonably be taken if there were a large number of witnesses to be cited for trial, or anxious child witnesses - although that has become less common with their evidence usually being taken on commission - or some other particularly good reason.

Generally, judges should tell defence counsel that they should see if they can resolve the case on the day and if they cannot do so, the case will be continued to trial and they can protect their client's position by intimating a section 76 letter which ought to fix the stage for discount purposes if the plea is accepted. It is also open to the defence to seek to accelerate a trial diet by section 75A procedure to plead guilty early.

It is up to the accused to plead guilty, not for the court to adjust its programme for his benefit.

6.6.2 Analyse carefully if recovery of information justifies delay

If the defence indicate that they have just decided that they wish to recover a complainer's medical or social work records, that may not be a good reason to continue a preliminary hearing and still less to adjourn a trial. First of all there is the question of why the enquiry is only being made at this late stage and secondly whether it will serve any useful purpose.[42]

In early 2020 the gap between preliminary hearing and trial was rarely less than three months for any case and was usually five months or so for a bail case. As a result, there is a great deal of time available in which parties can complete preparations. **So the current approach in nearly all cases is to fix a trial at the first preliminary hearing which calls rather than continuing to another hearing for some step to be taken by parties**. The long interval until an available trial slot can be found will only get longer if a trial diet is not fixed at the first preliminary hearing.

[N.B. Following the resumption of jury trials after the COVID-19 lockdown in 2020 these intervals have grown considerably.]

This is the general approach which preliminary hearing judges take but there are some cases, particularly those within the scope of the Long Trial Protocol, which require closer and more active judicial case management and in which a series of continued preliminary hearings may be necessary. Even then, it may be possible to fix a trial at the first hearing.

6.6.3 Deadlines for procedural steps are preferable to continuations

If the court is told that the defence are still awaiting an expert report, the judge should fix the trial and set a deadline to intimate it to the Crown as well as securing an undertaking from the Crown that there will be no objection to its late lodging. Setting a deadline serves as an encouragement not to delay preparation.

The deadline can be set sufficiently far in advance of the trial so that the Crown will have time to instruct any counter expert or determine if they have any objection. It is useful to discuss with Crown and defence how long they might need and take that into account in setting a deadline.

Since the defence are wanting to lodge something late, they need to show cause and so it is perfectly reasonable for the court to impose conditions before allowing late lodging. Para 17 of the Practice Note of 2005 envisages that the court may make such orders and give such directions as may be necessary for the purpose of managing the case effectively.

The following observation was made by an earlier group of preliminary hearing judges, perhaps in 2007 in "An agreed judicial approach to the conduct of preliminary hearings" at para 5:

> "Expert reports, which are the principal reason for delays in many cases, should always be the subject of explanations, if appropriate, as to why the need for such reports was not identified at the earliest possible stage. The judge should expect practitioners to accomplish with the minimum of delay:
>
> i. Identification of the expert
> ii. His or her submission of fee levels
> iii. The seeking of sanction from SLAB

iv. Consultation with the expert
v. The preparation and production of the reports.

Where the delays caused by the commissioning of such reports will be significant or require the extension of a statutory time limit, the preliminary hearing judge should inquire into the relevance, significance and necessity of the reports."

6.6.4 Examine whether defence mental health inquiries merit delay

Perhaps the most common reason for parties to seek to continue a preliminary hearing is concern about the accused's fitness for trial. Whether the issue arises at a preliminary hearing or in a section 75A application parties and judges are encouraged to bear in mind the following.

If it is suggested that advice is being sought from a psychiatrist or psychologist about the accused's mental state, there is a legitimate question as to why that is still being done at this late stage. It may be that there is a proper concern which requires to be investigated. However, the judge should enquire quite closely as to what the condition is thought to be and what significance it is thought to have. At this stage, it really only matters to the court if it is an issue of fitness to stand trial, the related issue of whether adjustments to the trial process will be necessary or if there is an issue of criminal responsibility. Close enquiry may reveal that it is simply hoped that something mitigating might turn up which is not a good reason to continue a preliminary hearing or delay a trial.

Even if there is thought to be a real issue concerning fitness for trial, it is suggested that a trial should be fixed. The position would be different if there was a plea in bar of trial which could be disposed of and upheld at the preliminary hearing in which case an examination of facts would be fixed. Such a circumstance is vanishingly rare.

In almost every case, whether the accused is or is not fit to plead, there will either be a trial or an examination of facts. The witnesses will be much the same whatever kind of hearing is required. There will rarely be any point in refraining from fixing a trial and simply continuing the preliminary hearing. Continuing the hearing in such circumstances only causes delay for accused and witnesses alike and adds to the pressure on the preliminary hearing court and everyone who works in it; solicitors, defence counsel, prosecutors, clerks and judges alike.

The fixing of a trial does not signal resolution of the question of fitness to plead. It can be converted to an examination of facts at any time as section 54(1) (b) of the 1995 Act makes clear in stating what happens when a court, at any time, is satisfied that the accused is unfit for trial. The court shall;

> *"(b) discharge the trial diet or, in proceedings on indictment where the finding is made at or before the first diet (in the case of proceedings in the sheriff court) or the preliminary hearing (in the case of proceedings in the High Court), that diet or, as the case may be, hearing and order that a diet (in this Act referred to as an "an examination of facts") be held under section 55 of this Act."*

There is no statutory provision allowing immediate conversion of an examination of facts into a trial.

The accused is required to state how he pleads[43] and unless his plea of guilty is accepted a trial diet is to be appointed.[44] If an accused is unable or refuses to plead then at common law this is treated as a plea of not guilty[45] and the court would be entitled to appoint a trial.

It is suggested that ordinarily there need be no continued preliminary hearing fixed on appointing the trial diet. There will be a trial unless and until the court upholds a plea in bar of trial on grounds of fitness to plead in which event there will be an examination of facts. If the defence reach a stage where they have an evidential basis to present a plea in bar of trial, then a plea in bar of trial can be intimated and an application made under section 75A to accelerate the trial to a preliminary hearing (whilst reserving the trial slot which can be used for trial or examination of facts as the case may be.) At the accelerated diet the court can take whatever steps are necessary to determine the question of fitness whether by fixing an evidential hearing or otherwise. If the court finds that the accused is fit, then the trial will simply proceed.

Parties must focus on pursuing investigations quickly and effectively and must communicate with each other as to progress.

Judges may usefully consider setting deadlines for work to be done and any issue of fitness to be intimated to the court.

If an ongoing investigation threatens the trial or examination of facts proceeding on schedule, parties should bring it to the attention of the court in a section 75A minute containing a full explanation of what has been done, what still requires to be done and why it has not been completed.

6.6.5 Scrutinise section 75A applications carefully before granting

Pre-pandemic statistics suggested some success in restricting the number of continuations, but as often is the case with statistics they are only as useful as the data input. These figures do not include the hearings which have not called in court because they have been continued administratively by section 75A procedure which is done on paper.

If the issue relates to the accused's fitness for trial, consideration should be given to what is outlined at para 6.6.4 above.

The position of cases in which there is a commission application is examined at 6.6.6 below.

When given a section 75A application to consider, judges should insist on access to the judge's file in order to see the whole procedural history and how the reasons for the application relate to the charges on the indictment. A judge can refuse it, or require a hearing. If refusing, judges should note brief reasons. If granting it, judges should check whether the parties have worked out any proposed appropriate extensions to any applicable time bars.

6.6.6 Avoid delay in fixing commission hearings

From February 2022, both Crown and defence have been encouraged to refrain from seeking to postpone a preliminary hearing at which a commission application could be granted forthwith. If such an application is made by section 75A application the presence of a commission application must be specified and an explanation given why the application could not yet be granted.

Postponing the preliminary hearing rather than dealing with the commission application at the scheduled preliminary hearing can cause needless delay in the fixing of, and therefore the hearing of, a commission. This undermines the purpose of securing best evidence whilst minimising trauma for vulnerable witnesses. The younger and more vulnerable the witness, the more important an early commission hearing will be.

The new approach may sometimes create the need for both the preliminary hearing and a continued preliminary hearing to call in the same case but this may be an acceptable price to pay where necessary in order to ensure that delays in fixing and hearing commissions are reduced to the minimum extent which is reasonably possible.

Accordingly, even if it looks as though there are areas of preparation outstanding which would prima facie justify postponing a preliminary hearing, in any case where a commission application could be granted at the first, or next, preliminary hearing the case should call in order for the commission application to be granted and a hearing date fixed.

In some cases it will be possible to deal forthwith with all matters relevant to the commission and thus to conjoin the instant preliminary hearing with a ground rules hearing.

In other cases, for example if a complainer's response is awaited to a section 275 application, it will still be possible to grant the application and fix the hearing date but it will be necessary also to fix a continued preliminary hearing (which in an appropriate case may be a conjoined ground rules hearing) at which remaining issues can be resolved.

6.7 Agreement of evidence

The agreement of evidence is fundamental to effective case management. It is the most effective means of reducing the time required for trial and thus addressing the length of delay in reaching trial and the pandemic backlog. It avoids unnecessary attendance at court by witnesses with obvious benefits to both witnesses and the public interest. It introduces certainty that the facts which a party seeks to establish will be conclusively proved. Accordingly judges will insist on the timeous agreement of evidence and production of joint minutes at preliminary hearing and will explore if more agreement is possible.

The duty under section 257 on each party is primarily to identify the facts in his own case which he would seek to prove, and which are unlikely to be disputed and about which he does not wish to lead oral evidence. The duty then extends to taking all reasonable steps to secure the agreement of the other parties and all parties shall take all reasonable steps to reach such agreement.

Section 257 reads as follows:

> 1. Subject to subsection (2) below, the prosecutor and the accused (or each of the accused if more than one) shall each identify any facts which are facts—
>   a. which he would, apart from this section, be seeking to prove;
>   b. which he considers unlikely to be disputed by the other party (or by any of the other parties); and
>   c. in proof of which he does not wish to lead oral evidence,
>
> and shall, without prejudice to section 258 of this Act, take all reasonable steps to secure the agreement of the other party (or each of the other parties) to them; and

the other party (or each of the other parties) shall take all reasonable steps to reach such agreement.

When section 257(1) is read along with section 72(6)(f)(ii),[46] it is clear that **in advance of the preliminary hearing** partiesought to have identified facts they seek to prove in their own case and facts which their opponent seeks to prove which are not in dispute or could reasonably be agreed. The Crown has to prove the case and will adduce the vast majority of the evidence so they should make the running for the agreement of evidence. It is the court's duty to encourage this. The Crown ought to produce an ambitious draft joint minute before the preliminary hearing. That does not happen as often as it should and preliminary hearing judges should consistently remind advocate deputes of this requirement. Most will take the hint and produce useful draft joint minutes thereafter.

Until the scope of agreement is known, then it is not really possible to know with any confidence how long a trial will last.

As the court confronts the vast backlog of cases caused by the COVID:19 pandemic, judges must be even more energetic and creative in encouraging and facilitating the agreement of evidence. Judges must encourage parties also to be more diligent and creative. Defence counsel will often decline to agree evidence from a witness because they wish to elicit some other evidence from that witness but the judge can usefully point out that this need not prevent agreement. If the Crown is prepared to agree the facts of interest to the defence, the defence have the advantage of knowing that those facts will be conclusively proved in the trial and the public interest is served by a witness not requiring to come to court and court time will be saved.

The defence also have duties under section 257 of the 1995 Act. Whilst there may be room for judgment in the particular circumstances of a case, as a matter of generality, slavish acceptance of a client's instructions to refuse to sign a joint minute setting out indisputable facts may be a breach of the duties which section 257(1) imposes on defence lawyers. Such an instruction is unlikely to be binding on them.[47] In *Scott v HM Advocate* [2021] HCJAC 22, the court confirmed at para 46 of its opinion, with reference to the full bench case of *Ashif*[48] that:

> "...*It was not necessary for senior counsel to take the instructions of the appellant before signing the joint minute*..."

There are some powerful judicial dicta in appeal cases about the duties on lawyers in this regard of which parties might be reminded from time to time. These are reproduced in 6.7.2 below.

At the hearing, the court can sometimes usefully do the parties' thinking for them. The Crown may be prepared to agree facts on which the defence seek to found and which the Crown is not in a position to dispute but for some reason the defence have not enquired. For example, if the defence wish to prove that their client was injured, they may seek to continue whilst they await medical evidence, which can be a long wait. However, if the Crown know that the accused came into custody with a bruise on his face or cut on his hand, they will be likely to agree that fact and no medical evidence may be required at all.

In a case where the defence is alibi or incrimination, the fact that the complainer in an assault case was severely injured and permanently impaired may not be in dispute. If medical evidence can be

agreed, there is plainly a saving of a doctor's valuable time but it will also avoid the common situation of a mid-trial adjournment to await the witness's availability. If an accused or complainer in a rape case was medically examined and no injury was noted, then those facts, and the absence of any significance in negative findings, could be agreed. In a case of rape, if there is a defence of consent, it is reasonable to expect parties to agree the fact of penetration which may obviate the need for forensic evidence.

In historical cases, and particularly in commission cases, parties should be encouraged to agree issues such as the family tree, the layout of a house, addresses lived at and schools attended and associated dates. These facts are rarely in dispute, but it can take a long time to ask a child or other vulnerable witness about them, often to little useful effect, whether the questioning will take place in the trial or at a commission.

In drugs cases, the scientific analysis of the drugs and their quantities ought in most situations to be capable of agreement. Evidence of what was recovered in searches and the findings of first attending paramedics are not usually in dispute. No doubt there are other examples. Getting the Crown and defence in the habit of thinking in a way which complies with their obligations under section 257 is something which the court should continuously strive to achieve.

It should be remembered what the purpose of a joint minute is. There is a recurring concern about the content of joint minutes and the agreement of matters which are meaningless for the jury.

Have regard to the observations in Liddle v HM Advocate 2012 SCCR 478, which concerned identification parades, where the court noted that agreeing that a report is a "true and accurate record" of the parade is generally a pointless exercise.

The observations there are equally relevant to agreement on other issues. What really matters is to agree the facts in question.

An agreement about the accuracy or veracity of a document is of absolutely no value if the relevant document, or relevant part of it, is not to be read to the jury.

As the court concluded in Liddle:

> "If it is intended to agree a fact then that fact should be stated in clear terms and the terms stating that fact should be read to the jury".

Unless there is some particular reason for it, in a trial for rape, parties should not agree scientific evidence about DNA on swabs and the like if they are agreeing that sex took place.

6.7.1 Get joint minutes signed at preliminary hearing if possible

Whilst it is not always possible, it is good practice to get parties to sign a joint minute at the preliminary hearing which provides the court, parties and witnesses with certainty in a way which "agreement in principle" does not.

6.7.2 Dicta referred to at 6.7

> "...It is incumbent upon court practitioners, wherever possible, to avoid the unnecessary

attendance of witnesses and the unnecessary use of valuable court time to address matters of fact which are not in dispute."

Hunter v Brown 2012 SLT 665, per Lord Mackay of Drumadoon at para 6

In HM Advocate v B 2012 JC 283, a case of tax evasion and money laundering with almost 3000 business documents in relation to which there was difficulty relating to certification, one possible solution was a joint minute which the defence had declined to sign citing lack of instructions. The then Lord Justice Clerk, Lord Gill, stated in para 38 that:

"…Those who defend in trials of this kind have a responsibility as officers of the court to cooperate with the Crown in reaching the greatest possible measure of agreement on the facts. That is in the interests of justice."

He made it plain that unless defence lawyers have some serious reason to dispute all or any of the matters on which agreement is sought in the proposed joint minute it ought to be agreed.

In MacDonald v HM Advocate 2014 HCJAC 121, Lord Bracadale, giving the opinion of the court on an appeal against the extension of the 12 month time bar, referred to the importance of section 257 and noted that the fact that defence had failed to agree the identification of the accused by the complainer in a case where self-defence was pled, and where she would give evidence by CCTV, had led to an earlier trial being adjourned was a factor, amongst others, in justifying the extension.

6.8 Preparation by the defence

There are duties on the defence and not just the Crown in preparation of criminal cases. Some practitioners seem to think that the Crown's duty extends to preparing the defence case but that is not so. A reminder of the true position was given by Lord Rodger of Earlsferry[49].

"The Crown's duty of disclosure is not its principal duty. The Crown's job is to prosecute, not to defend: defending is the job of the accused's representatives and Art 6 contains guarantees which are designed to ensure that they are in a position to do their job. The success of our adversarial system of trial depends on both sides duly performing their respective roles."

Most practitioners are responsible and will engage in the process if the court makes it clear what is expected and when. Most practitioners would prefer to have a good relationship with the court and prefer praise and approval to embarrassment. Responsible practitioners will be aware of the terms of para 6 of Practice Note 1 of 2005:

"In order to meet the requirements of the relevant statutory provisions it will be necessary for practitioners to carry out detailed preparations before the preliminary hearing. If, without reasonable excuse, a practitioner fails —

a. to be fully prepared for a preliminary hearing,
b. to have full instructions for a preliminary hearing, or

c. otherwise to be in a position to engage in discussion of the issues that may arise at the preliminary hearing,

that state of affairs will be regarded by the court as unacceptable.

The court will investigate, and record the reasons for, any such failure."

Experienced counsel and solicitors will not wish to be called to account for shortcomings in front of their client and their peers.

6.9 Insist on timeous preparation in commission cases

In cases where it is obvious that written questions will be required, per Practice Note 1 of 2019, the court should insist on early preparation and that questions are drafted and made available in advance of the preliminary hearing in order to avoid the need for continuation.

See Chapter 8 on Vulnerable Witnesses and Evidence on Commission for more discussion of this issue.

[40] Lord Bracadale, HM Advocate v Forrester 2007 SCCR 216 at para 16

[41] All Criminal Courts Practice Notes are available on the Criminal Courts Practice Notes and Directions page of the SCTS website.

[42] See Chapter 3 on Recovery of documents

[43] section 72(4)

[44] section 72A (1)

[45] Macdonald Criminal Law at page 278, cited in Renton and Brown at para 18-31

[46] Paragraph (f)(ii) requires that the court shall ascertain, so far as is reasonably practicable… the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of the Act.

[47] *Ashif v HM Advocate 2016 SCCR 437* at paras 70-73

[48] Ibid

[49] McDonald v HM Advocate 2010 SC. (PC) 1

Chapter 7: Fitness for trial

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7.1 Section 53F

This section provides:

1. A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.
2. In determining whether a person is unfit for trial the court is to have regard to —
    a. the ability of the person to —
        i. understand the nature of the charge,
        ii. understand the requirement to tender a plea to the charge and the effect of such a plea,
        iii. understand the purpose of, and follow the course of, the trial,
        iv. understand the evidence that may be given against the person,
        v. instruct and otherwise communicate with the person's legal representative, and
    b. any other factor which the court considers relevant.
3. The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge."

7.2 Section 54

This section provides:

1. Where the court is satisfied[50] that a person charged with the commission of an offence is unfit for trial so that his trial cannot proceed or, if it has commenced, cannot continue, the court shall, subject to subsection (2) below —
    a. make a finding to that effect and state the reasons for that finding;
    b. discharge the trial diet or, in proceedings on indictment where the finding is made at or before the first diet (in the case of proceedings in the sheriff court) or the preliminary hearing (in the case of proceedings in the High Court), that diet or, as the case may be, hearing and order that a diet (in this Act referred to as an "an examination of facts") be held under section 55 of this Act; and
    c. remand the person in custody or on bail or, where the court is satisfied —

i. on the written or oral evidence of two medical practitioners, that the conditions mentioned in subsection (2A) below are met in respect of the person; and

ii. that a hospital is available for his admission and suitable for his detention, make an order (in this section referred to as a " temporary compulsion order ") authorising the measures mentioned in subsection (2B) below in respect of the person until the conclusion of the examination of facts.

2. Subsection (1) above is without prejudice to the power of the court, on an application by the prosecutor, to desert the diet pro loco et tempore.

2A The conditions referred to in subsection (1)(c)(i) above are –

a. that the person has a mental disorder;
b. that medical treatment which would be likely to –
    i. prevent the mental disorder worsening; or
    ii. alleviate any of the symptoms, or effects, of the disorder, is available for the person; and
c. that if the person were not provided with such medical treatment there would be a significant risk –
    a. to the health, safety or welfare of the person; or
    b. to the safety of any other person.

2B The measures referred to in subsection (1)(c)(i) above are –

a. in the case of a person who, when the temporary compulsion order is made, has not been admitted to the specified hospital, the removal, before the [end of the day following the] 7 days beginning with the day on which the order is made of the person to the specified hospital by – […]
    ii. a person employed in, or contracted to provide services in or to, the specified hospital who is authorised by the managers of that hospital to remove persons to hospital for the purposes of this section; or
    iii. a specified person;
b. the detention of the person in the specified hospital; and
c. the giving to the person, in accordance with Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), of medical treatment.

3. The court may, before making a finding under subsection (1) above as to whether a person is unfit for trial, adjourn the case in order that investigation of his mental or physical condition may be carried out."

However, the option of a temporary compulsion order can only be made on the basis of the written or oral evidence of two medical practitioners. This is something of which a PH judge must be wary. In a suitable case it may be appropriate to refrain from making the section 54(1) finding and continuing the PH until there is appropriate medical evidence available.

Subsections (4) and (5) make provision for review, confirmation or revocation of such an order and consequential orders and for proceeding in the absence of the accused.

Sections 55 and 56 make further provision as to examinations of fact ["EoF"]. If the court finds the facts established in the EoF then it can only do six things, which are set out in section 57(2). This subsection reads as follows;

> Subject to subsection (3) below, where this section applies the court may, as it thinks fit –
>
> a. subject to subsection (4) below, make a compulsion order (whether or not authorising the detention of the person in a hospital);
> b. subject to subsection (4A) below, make a restriction order in respect of the person (that is, in addition to a compulsion order authorising the detention of the person in a hospital); (bb) subject to subsections (3A) and (4B) below, make an interim compulsion order in respect of the person;
> c. subject to subsections (4C) and (6) below, make a guardianship order in respect of the person;
> d. subject to subsection (5) below, make a supervision and treatment order (within the meaning of paragraph 1(1) of Schedule 4 to this Act) in respect of the person ;
> e. or make no order.

One of those disposals is to make no order, which is the only order that could be made in the absence of appropriate psychiatric evidence.

The other five will all require medical evidence as to whether mental health disposals, which range from a compulsion order with restrictions down to a supervision and treatment order, are appropriate. A psychologist alone cannot provide such evidence and this can create an awkward situation at the end of the EoF.

A preliminary hearing judge may seek to avoid that problem by continuing the preliminary hearing until a point in time when there are two suitable medical reports which would allow the court to make a mental health disposal or be satisfied that only a no order disposal could be made. At that point, the EoF can be fixed.

However, an alternative approach is to leave it to the judge who hears the EoF. That judge could continue it till the reports were available. Psychiatric reports which are suitable for determining fitness to plead may not be entirely appropriate for the purposes of disposal in due course, but it would certainly be of assistance if all reports did at least identify what disposal might ultimately be appropriate. It is competent to continue an EoF until the court either makes a disposal under section 57(2)(a) to (d) or a decision under section 57(2)(e) to make no order. [51] The situation in that case underlines that great care is called for in working out the correct procedure.

There is something of a trend at the moment for the defence to wish to investigate fitness for trial relying on reports from psychologists. The Crown will sometimes instruct a psychologist to respond. As noted above, this may deprive the court of the medical evidence necessary to make a temporary compulsion order, which will in some cases be appropriate, in addition to creating the problem of disposal which was illustrated starkly in *Patrick v HM Advocate* [2021] HCJAC 37 where the accused spent a very long time remanded in custody having been found unfit for trial. The facts were established at an EoF. Inquiry of appropriate psychiatrists into potential disposals revealed that he was actually fit for trial. The proceedings were deserted and a new hearing on his second plea in bar of trial was fixed. The court applied the reasoning of the court in Stewart v HM Advocate (No 2) 1997 J.C. 217, where the appellant was permitted to raise a further plea in bar of

trial based on fitness in the light of new medical information which had not been presented when his original plea in bar had failed.

It should be borne in mind that even if it is not established that an accused person is unfit to plead there may arise issues concerning his vulnerability. Special measures may have to be discussed with parties if they have not already addressed the issue.

The issue of disposal following an EoF is not really something for preliminary hearing judges as such and is considered to be beyond the scope of this work. However, the making of temporary compulsion orders under section 54(1) is something which will, from time to time, have to be considered at preliminary hearings and reference should be made to that section for its terms.

Since it arose for consideration in a recent appeal for which no opinion was published, it is worth noting that if a guardianship order under section 58 is to be made, one of the matters to which the court is to have regard is a report by a Mental Health Officer based on an interview and assessment of the accused carried out no more than 30 days before the order is made; section 58(6)(a). A report by an MHO which was available for a preliminary hearing would in practice be unlikely to comply with this requirement by the time of an EoF.

[50] N.B. Until 2012, such a finding could only be made on the basis of evidence from two medical practitioners
but that is no longer a requirement.

[51] *Patrick v HM Advocate* 2021 SCCR 207

Chapter 8: Vulnerable witnesses and evidence on commission

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8.1 General

The definition of “vulnerable witness” can be found in section 271 of the 1995 Act:

1. For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if —
    a. the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,
    b. there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of —
        i. mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or
        ii. fear or distress in connection with giving evidence at the hearing,
    c. the offence is alleged to have been committed against the person in proceedings for —
        i. an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003,
        ii. an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.)
        iii. an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for

exploitation),

a. an offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015),(iv) an offence the commission of which involves domestic abuse, or

iv. an offence the commission of which involves domestic abuse, or

v. an offence of stalking, or

2. there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings….."

The definition includes "persons under 18 at the "commencement of proceedings"", which is defined in subsection 3:

3. For the purposes of subsection (1)(a), section 271B(1)(b) and sections 271BZA to 271BZC , proceedings shall be taken to have commenced —
   a. where it is relevant to a court's consideration of whether to authorise the use of the special measure of taking evidence by commissioner (on its own or in combination with any other special measure) and the accused has appeared on petition, on the date when the accused appeared on petition, or
   b. in any other case, on the date when the indictment or, as the case may be, complaint is served on the accused."

It should be remembered that vulnerable witnesses can include an accused person.

Even before the commencement of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, it had become common to encounter vulnerable witness applications under section 271I to take evidence on commission, often in combination with section 271M, giving evidence in chief in the form of a prior statement.

Practice Notes No. 1 of 2017 and No. 1 of 2019 have been governing how such applications are to be dealt with, and they are referred to in more detail below.

In the case of children under 12, and certain other vulnerable witnesses, the questions which parties wish to ask will require to be reduced to writing for the approval of the court at the preliminary hearing/ground rules hearing.

In paras 4 and 5 of the protocol set out in Practice Note 1 of 2019, the underlying principles to be applied are set out:

4. The taking of evidence from child and vulnerable witnesses should entail the least number of questions consistent with the duties of counsel. It should be carried out as speedily as is possible. Questions should be simple and straightforward. The language used should be understandable to the witness. The questioner should avoid tagged or hypothetical questions and complex syntax. Regard will be paid to the best interests of the witness."
5. A child under 12 is not put on oath. As a general rule, in the case of such children written questions will be called for. In the case of witnesses with significant communication or comprehension difficulties, whether as a result of learning

disability or a mental health condition or otherwise, written questions will generally be called for. The court will consider each such case on its merits and will, when appropriate, dispense with the requirement for written questions on being satisfied that the evidence of the witness can be properly adduced without prior approval of questions. In the case of children of 12 and over, written questions may be required, having regard to the child's best interests and the information available as to the child's abilities."

8.2 Ground rules hearings

See section 5 of 2019 Act, which amended section 271I.

The amended section 271I and section 271M are reproduced at para 8.3 below. In effect, when granting an application for evidence to be taken on commission, the court must fix a ground rules hearing. Although not mandatory, it is thought appropriate for that hearing to be conjoined with the preliminary hearing at which the VW application for evidence on commission is granted, because what has to be done at the ground rules hearing is affected by what is done at the preliminary hearing, eg the determination of any section 275 application. Whether and when there is to be a commission will also have an impact on the timing and duration of a trial diet. However, the extent to which it will continue to be possible to combine the hearings given the volume of business is as yet unknown.

Some of the issues which can arise are considered below but experience has shown that not all the documents required to enable the court to manage hearings effectively, such as records of Joint Investigative Interviews, are lodged timeously, if at all. This is primarily a matter for the Crown and preliminary hearing Judges should not be slow to ask their clerk to check with the Crown to ensure that such documents are made available sufficiently in advance of preliminary hearings to allow them to be read and digested. This problem can only be expected to become more acute with the passing of the 2019 Act and the inexorable increase in business. Preliminary hearing judges are encouraged to keep an eye on this and report any problems to the senior preliminary hearing judge.

Following the introduction of the 2019 Act[52] it is possible, if not probable, that the court will be presented with applications for evidence on commission in cases which have not yet been indicted. This will present challenges where the terms of the indictment are not known.

8.3 Section 271M

This section deals with giving evidence in chief in the form of a prior statement, and provides:

1. This section applies where the special measure to be used in respect of a vulnerable witness is giving evidence in chief in the form of a prior statement.
2. A statement made by the vulnerable witness which is lodged in evidence for the purposes of this section by or on behalf of the party citing the vulnerable witness shall, subject to subsection (3) below, be admissible as the witness's evidence in chief, or as part of the witness's evidence in chief, without the witness being required to adopt or otherwise speak to the statement in giving evidence in court.
3. Section 260 of this Act shall apply to a statement lodged for the purposes of this

section as it applies to a prior statement referred to in that section but as if –

a. references to a prior statement were references to the statement lodged for the purposes of this section,
b. in subsection (1), the words "where a witness gives evidence in criminal proceedings" were omitted, and
c. in subsection (2), paragraph (b) were omitted.

4. This section does not affect the admissibility of any statement made by any person which is admissible otherwise than by virtue of this section.
5. In this section, "statement" has the meaning given in section 262(1) of this Act."

It is essential that the statement or transcript proposed as evidence in chief is lodged with the vulnerable witness application. The judge will need time to see it and digest it. Section 271A (13) (b) requires the application to be presented no later than 14 clear days before the preliminary hearing. It is the Crown which most commonly makes such an application and must ensure that the statement, showing any proposed redactions, is presented with their vulnerable witness application.

The preliminary hearing judge will need to see its content in all cases before deciding whether to grant the application. The court is being asked to authorise the statement as evidence. In a section 288C case, the court is prohibited from admitting evidence which contravenes section 274 in the absence of a section 275 application being granted. If the statement is not available to a judge, this judicial obligation cannot be fulfilled.

Prohibited evidence cannot be admitted. Whilst the primary obligation to ensure that the statement does not contain inadmissible evidence is on the parties, the court still has an interest in ensuring that it does not, unless there is a good reason why such evidence might be permitted by the court e.g. where the defence are content to bring out that the accused was in custody for some evidential reason.

The preliminary hearing judge must carefully read the statement or transcript proposed as evidence in chief.

The preliminary hearing judge may usefully check it for inadmissible material as it cannot be assumed that parties will have done so with complete success.

Statements presented as evidence in chief have been found by preliminary hearing judges to contain:

- Evidence contravening the prohibition in section 274 of the 1995 Act for which there was no section 275 application;
- Evidence of crimes not charged;
- Evidence of the accused's bad character, including references to the accused being in jail; and
- Inadmissible hearsay.

Preliminary hearing judges must be alert to such problems and do what is possible to fix them at the preliminary hearing or ground rules hearing. If having read a substantial amount of material for a preliminary hearing and the hearing requires to be continued, a preliminary hearing judge

should consider if it is practical to keep the case for a 0930 hearing, whatever their duties may be on that occasion. This could spare another judge reading all of the same material, which is plainly inefficient and to be avoided if possible. The original judge will know what it is all about and will be able to ensure that parties have done what they said they would do to solve any problems.

8.4 Section 271(I)

Section 271(I), as amended by the 2019 Act, deals with the taking of evidence by a commissioner and at the date of writing provides as follows:

1. Where the special measure to be used is taking of evidence by a commissioner, the court shall appoint a commissioner to take the evidence of the vulnerable witness in respect of whom the special measure is to be used.

(1ZA) A court which appoints a commissioner under subsection (1) must —

a. **fix a date for the proceedings before the commissioner, and**
b. **fix a date for a hearing (to be known as a "ground rules hearing") for the purpose of preparing for the proceedings.**

(1ZB) The ground rules hearing is to be presided over by —

a. **a judge of the court which appointed the commissioner if —**
    i. **the court directs that the ground rules hearing be conjoined with another hearing or diet that is to be held before the date of the proceedings to which the ground rules hearing relates and that hearing or diet is presided over by a judge, or**
    ii. it is not reasonably practicable for the ground rules hearing to be presided over by the commissioner appointed to preside over the proceedings to which the ground rules hearing relates, or
b. in any other case, the commissioner appointed to preside over the proceedings to which the ground rules hearing relates.

(1ZC) In cases where a judge presides over a ground rules hearing in accordance with subsection (1ZB)(a), references to the commissioner in subsection (1ZD) are to be read as references to the judge.

(1ZD) The commissioner presiding over a ground rules hearing must —

a. **ascertain the length of time** the parties expect to take for examination in-chief and cross-examination, including any breaks that may be required,
b. to the extent that the commissioner considers it appropriate to do so, **decide on the form and wording of the questions that are to be asked of the vulnerable witness**,
c. if the commissioner considers it appropriate to do so, authorise the use of a supporter at the proceedings, in accordance with section 271L,
d. **if the commissioner considers that there are steps that could reasonably be taken to enable the vulnerable witness to participate more effectively in the proceedings, direct that those steps be taken,**
e. **subject to section 72(8) which applies in relation to the commissioner as it applies**

in relation to the court, dispose of any application that —

i. has been made under section 275(1) or 288F(2), and

ii. has not yet been disposed of by the court,

f. consider whether the proceedings should take place on the date fixed by the court and postpone the proceedings if the commissioner considers that it is in the interests of justice to do so having regard to all the circumstances, including —

i. whether the parties are likely to be ready for the proceedings to take place on the date fixed by the court and if not, the reasons for that,

ii. any views expressed by the parties on whether the proceedings should be postponed, and

iii. whether postponement is in the interests of the vulnerable witness, and

g. **consider and, if appropriate, make a decision on, any other matter that the commissioner considers could be usefully dealt with before the proceedings take place.**

(1A) Proceedings before a commissioner appointed under subsection (1) above shall, if the court so directed when authorising such proceedings or it was so directed at the ground rules hearing , take place by means of a live television link between the place where the commissioner is taking, and the place from which the witness is giving, evidence.

2. Proceedings before a commissioner appointed under subsection (1) above shall be recorded by video recorder.
3. An accused –
    a. shall not, except by leave of the court on special cause shown, be present —
        i. in the room where such proceedings are taking place; or
        ii. if such proceedings are taking place by means of a live television link, in the same room as the witness, but(b) is entitled by such means as seem suitable to the court to watch and hear the proceedings.
    b. is entitled by such means as seem suitable to the court to watch and hear the proceedings.
4. The recording of the proceedings made in pursuance of subsection (2) above shall be received in evidence without being sworn to by witnesses. (4A) It is not necessary (in solemn cases) for an indictment to have been served before —
    a. a party may lodge a vulnerable witness notice which specifies the special measure of taking evidence by commissioner as the special measure or one of the special measures which the party considers to be the most appropriate for the purpose of taking the witness's evidence,
    b. a court may make an order authorising the use of the special measure of taking evidence by commissioner, whether on its own or in combination with any other special measure specified in the same vulnerable witness notice,
    c. a court may appoint a commissioner under subsection (1), or
    d. proceedings may take place before a commissioner appointed under subsection (1).
5. Sections
    a. 274;
    b. 275;
    c. 275B except subsection (2)(b);
    d. 275C;

e. 288C;
f. 288E; and
g. 288F,

of this Act apply in relation to proceedings before a commissioner appointed under subsection (1) above as they apply in relation to a trial.

6. In the application of those sections in relation to such proceedings —
    a. the commissioner acting in the proceedings is to perform the functions of the court as provided for in those sections;
    b. references —
        i. in those sections, except section 275(3)(c) and (7)(c), to a trial or a trial diet;
        ii. in those sections, except sections 275(3)(e) and 288F(2), (3) and (4), to the court, shall be read accordingly;
    c. the reference in section 275B(1) to 14 days shall be read as a reference to 7 days.
7. In a case where it falls to the court to appoint a commissioner under subsection (1) above, the commissioner shall be a person described in subsection (8) below.
8. The persons are —
    a. where the proceedings before the commissioner are for the purposes of a trial [which the court (when it appoints the commissioner) expects will be]8 in the High Court, a judge of the High Court; or
    b. in any other case, a sheriff."

Subsection 1ZD places particular duties on the preliminary hearing judge, some of which overlap with the requirements of Practice Note of 2017 at paras 11-13.

8.4.1 Obligations of particular importance under subsection 1ZD.

It is of the first importance that the time estimates required under subsection 1ZD(a) are realistic and given in minutes after close enquiry by the preliminary hearing judge to ascertain how long questioning will really last. There have been gross overestimates, such as requiring a day for questioning which took 10 minutes, or requiring half a day for questioning which defence counsel decided he did not want to pursue at all, which causes serious programming problems and inefficiencies. There is no reason in principle why more than one commission hearing cannot be fixed for the same day but it should be borne in mind that vulnerable witnesses should not be left hanging about unnecessarily. This reinforces the need for accuracy. Particularly where there are written questions it should be possible to estimate the time reasonably accurately.

Note also the terms of subsection 1ZD(b) which gives statutory authority to the power already to be found in the practice notes to require written questions:-

> "(b) to the extent that the commissioner considers it appropriate to do so, decide on the form and wording of the questions that are to be asked of the vulnerable witness."

A general power is given in subsection 1ZD(g) to, "consider and, if appropriate, make a decision on, any other matter that the commissioner considers could be usefully dealt with before the

proceedings take place."

8.4.2 Decisions to be made at preliminary hearing under paras 11-13 of Practice Note 1 of 2017

Preliminary hearing judges should note carefully the terms of para 13, which simply requires consideration of the need for a post-commission continued preliminary hearing and not the fixing of it. It is not necessary to fix a post-commission continued preliminary hearing as a matter of course. It should only be fixed when there is reason to expect that a matter will require to be resolved after the commission hearing.

Experience has shown that it is rarely necessary to hold a post-hearing continued preliminary hearing, the vast majority of them being discharged by section 75A application, and appropriate permissions for access to the commission recording can be made at the preliminary hearing / ground rules hearing / which grants the VW application. It is not common for there to be problems at commission hearings and, in reality, if there are difficulties then parties in the vast majority of cases will be able to resolve any problem between them. If a post-commission hearing becomes necessary, there is no difficulty in accelerating the trial by section 75A minute to create a hearing whilst reserving the trial slot, then re-fixing the trial diet for the original date.

As the numbers of commissions have increased, by spring of 2021, problems, particularly relating to the quality and audibility of commission recordings, have become more common. There have been instances of trials being reached before parties become aware that a recording is inaudible.

Para 13 of Practice Note 1 of 2017 [53] proceeds on an expectation that on gaining access to the commission recording parties will check that it is audible and fit for use in the trial.

In order to ensure that problems are identified well in advance of trial, the Lord Justice Clerk considers that preliminary hearing judges should, on granting a commission application, make appropriate orders and directions per Practice Note 1 of 2005 at para 17. The court should:

- order that within 14 days of being advised that a copy of the commission recording disc is available for borrowing, each party must advise the court in writing that they have viewed and listened to the recording and can confirm that it is of sufficient quality to be audible at trial; and
- direct that in the event that there is a problem with the commission recording, parties should seek to solve it and, if the intervention of the court is required, use section 75A procedure by accelerating the trial to convene a hearing at which that issue can be resolved.

Forms have been prepared for this purpose and are reproduced at Appendix 8. A separate form should be completed by the Crown and by the defence. In a multiple accused case a form must be completed and returned by those representing each accused on whose case the commission has a bearing.

The form should be submitted for cases next calling:

- in Glasgow to highcourtglasgow@scotcourts.gov.uk; and
- for cases next calling in any other location to firstinstancehighcourt@scotcourts.gov.uk.

In the event that that recording is inaudible, in whole or in part, parties should consider whether

an acceptable solution is to produce an agreed transcript and, if so, to prepare one.

A useful practice has developed of parties completing a checklist before the preliminary hearing which addresses all relevant issues, and the checklist indicates that a number of aspects of the arrangements are governed by standard protocols which are treated as default assumptions. It has been refined and expanded in the light of experience and is concerned with rather more than just the practicalities set out in the practice note. The purpose of the checklist is to have parties apply their minds to all issues which are necessary for the effective processing of a vulnerable witness application which includes evidence on commission and for the smooth and effective operation of the commission hearing itself.

The checklist is reproduced as Appendix 7, and the standard protocols recorded within it are these:

> "DEFAULT ARRANGEMENTS FOR COMMISSION HEARING
>
> - Pre-commission familiarisation will take place according to standard protocols operated by VIA.
> - Wigs and gowns will not be worn.
> - The accused will watch proceedings by way of a video link from the nearest court /CCTV room.
> - There are standard protocols in place that communication will take place b 'phone/text between the solicitor (sitting with the accused) and the counsel/solicitor advocate (sitting in the commission room). In many cases SLAB have granted sanction for two solicitors to be available to facilitate communication between the viewing room and the commission room.
> - Standard protocols are in place for VIA to ensure that the witness and the accused will not come into contact with each other.
> - Standard protocols will apply to the arrangements for parties to view the recording after the Commission hearing.
> - At the preliminary hearing at which an application for commission is granted, the court will stipulate the arrangements."

Whilst the terms of paras 11, 12 and 13 of Practice Note 1 of 2017 are set out below, some of these issues will have been resolved by parties and may not require further intervention by the preliminary hearing / ground rules hearing judge. The passages emphasised in bold are those most likely to require thought at the preliminary hearing/ground rules hearing.

> 11. At the hearing the court will expect to be addressed on all matters set out in the VW notice or application. Parties will be expected to be in a position to assist the court in its consideration of the following matters:
>   - whether the witness will affirm or take the oath; [or be admonished to tell the truth]
>   - the location of the commission which is the most suitable in the interests of the witness;
>   - **the timing of the commission which is the most suitable in the interests of the witness;**
>   - pre-commission familiarisation with the location;
>   - where the accused is to observe the commission and how he is to

communicate any instructions to his advisors;
- if the commission is to take place within a court building in which the witness and the accused will both be present, what arrangements will be put in place to ensure that they do not come into contact with each other;
- the reasonable adjustments which may be required to enable effective participation by the witness;
- **the appropriate form of questions to be asked (the court may consider asking parties to prepare questions in writing);**
- **the length of examination-in-chief and cross examination, and whether breaks may be required;**
- **how requests for unscheduled breaks may be notified and dealt with;**
- **potential objections, and whether they can be avoided;**
- **the lines of inquiry to be pursued;**
- **the scope of any questioning permitted under s275 of the 1995 Act, and how it is to be addressed;**
- **the scope of any questions relating to prior statements;**
- **where any documents or label productions are to be put to the witness, how this is to be managed and whether any special equipment or assistance is required;**
- **whether any special equipment (for example, to show CCTV images to the witness) may be required;**
- **the scope for any further agreement between the parties which might shorten the length of the commission or the issues to be addressed; 45**
- **where there are multiple accused, how repetitious questioning may be avoided;**
- **the extent to which it is necessary to "put the defence case" to the witness (parties are invited to have regard to the observations of the Court of Appeal in** R v Lubemba [2015] 1 WLR 1579 **and** R v Barker [2011] Criminal LR 233**)**[54]**;**
    - **how that is to be done;**
    - **whether the parties have agreed how this issue may be addressed in due course for the purposes of the jury;**
- any specific communication needs of the witness;
- whether any communication aids are required, e.g. "body maps";
- if a statement in whatever form is to be used as the evidence in chief of the witness, whether and what arrangements should be made for the witness to see this in advance of the commission (i.e. how, where, and when);
- whether any such statement requires to be redacted in any way;
- **in such a case, whether, and to what extent, there should be any examination in chief of the witness;**
- the court may also make directions as to the circumstances in which visually recorded prior statements may be made available to the defence;
- the wearing of wigs and gowns;
- whether the judge/parties should introduce themselves to the witness in advance, how and when this will take place preferably together;
- the arrangements to be made in due course for parties to view the resultant DVD prior to a post-commission hearing.

12. **The court may make directions about these matters, or any other matters which might affect the commission proceedings, or which may be required for the effective conduct of the commission. If combined special measures are sought,**

the court will address how this is to work in practice.

13. At the hearing, whether or not a trial has been fixed, the court will consider fixing a post-commission hearing at which the court may address:
    - any questions of admissibility which have been reserved at the commission;
    - any editing of the video of the commission which may be proposed (parties may request that the clerk allow the recording to be viewed prior to the further hearing to assess the quality of the recording, and the court may specify the conditions under which such viewing may take place);
    - the quality of the recording (and, where the quality is poor, whether transcripts are required); and
    - how the evidence is to be presented to the jury."

8.4.2.1 Discussion

Where for a child witness, as is usually the case, their JII forms evidence in chief, there is no doubt what that evidence is. Accordingly there is no useful purpose in having a witness repeat or confirm facts which are established to be their evidence. A preliminary hearing judge should encourage parties to agree by joint minute issues such as the family tree, the layout of a house, addresses lived at and schools attended and associated dates. These facts are rarely in dispute, but it can take a long time to ask a child about them, often to little useful effect.

In any case the court may be entitled to limit the time which will be permitted for the cross-examination of a witness, and that must be the case with a child or other vulnerable witness [55].

The view is fast developing in Scotland that it is not necessary to "put the defence case" to a child witness and perhaps to any witness. It does not prevent evidence being led and it is not a professional requirement in the Faculty of Advocates Code of Conduct. When this is attempted it often causes confusion and serves little or no purpose. The fact that the defence want the jury to hear the alternative version of events is not a justification for putting the defence case. The appeal court has recently made observations about the value of putting a position to a witness in the absence of evidence being given to support it [56].

Para 51 of *Lubemba* was quoted with approval by the High Court of Justiciary in *Begg*. The decisions by the first instance judge which were the subject of appeal in *Lubemba* are set out in para 34 and the Court of Appeal's decision on them are at para 51.

> "34. Ms Akuwudike has four main criticisms about the restrictions placed on her. First, given the nature of the case against the defendant, and the number of alleged acts of rape, she insists that she should have been allowed more than 45 minutes to cross-examine the complainant. Second, she complains that the judge prevented her from putting her lay client's case to the complainant, directing her on a number of occasions "don't put your case". Third, she alleges that the judge interrupted her cross-examination, thereby disrupting the flow of her questioning, and undermining her in the presence of the jury. Fourth, a number of the judge's comments, such as "she is only ten years old", she described as inappropriate. They may have alienated the jury from her and the defendant and attracted the sympathy of the jury towards the complainant.
>
> 51. In Lubemba, on the other hand, Judge Carr did not go too far in trying to protect a vulnerable witness. As we have already explained, a trial judge is not only entitled, he is

duty bound, to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate."

If this issue falls to be addressed, a preliminary hearing judge can first of all ask the Crown to confirm that if the defence case is not put to the witness at commission, the Crown will not comment on this omission at the trial and that assurance is always forthcoming. That gives the defence some comfort. If there exists an interview of the accused in which he denied the charge, the judge may suggest that it is led straight after the recording of the JII and commission recording are played to the jury. In these circumstances, there is plainly no need for the defence case to be put and no disadvantage in not putting it.

If the court is persuaded that it should be put, there is guidance in the toolkits as to how this can be done in a way which a witness may understand.

8.5 Requiring written questions

In addition to the content of the two Practice Notes, there is now statutory authority under the 2019 Act to *"decide on the form and wording of the questions that are to be asked of the vulnerable witness*." The court is entitled to require questions to be reduced to writing for consideration at the preliminary hearing / ground rules hearing and there should no longer be any resistance to this.

However, if resistance is encountered on this issue, it is important to recall that Practice Note 1 of 2019 confirms at para 3 that the protocol has been agreed by the Crown, Faculty of Advocates and Law Society of Scotland. Accordingly, if defence representatives are expressing reluctance at a ground rules hearing to agree to submit questions in an appropriate case, the court can point out that the position has been endorsed by their professional bodies. If they refuse in a case where questions are in the court's judgment merited in light of Practice Note 1 of 2019, then it may be a matter to report to Dean of Faculty or the Law Society of Scotland. The alternative may be to say that it is their choice whether they wish to cross-examine, but if they do wish to cross-examine they must provide questions, and if they do not then they will not be cross-examining. That appears to be the ultimate logic of the position but it is a serious step which might reasonably be considered as the last resort and it might be better to continue for the practitioner to seek professional advice from Dean/Law Society.

There have been occasional suggestions that the defence will not share their written questions with the Crown as they do not wish to show their hand. If in the court's judgement written questions are required, then the judge should insist that the Crown see them. It assists the court to have input from both parties and the Crown cannot be kept out of the loop if the system is to work. The notion that the defence have an inalienable right to ambush a witness and/or the Crown has no foundation.

On occasion concern has been expressed that if the Crown see the defence written questions they could go and precognosce a child witness about the matters to be raised in cross. The fact that the Crown will not usually ask any questions in chief might itself demonstrate that is not a real problem. It is doubtful that in practice the Crown will precognosce in response to questions. They rarely precognosce anyway and in most cases the witness will be under 12 or have some kind of learning or communication difficulty which will make the Crown reluctant to engage in such

interactions unless truly merited. So there are practical reassurances which can be given, but in law there is no merit in this complaint.

- In MM v HM Advocate 2004 SCCR 658 the court was satisfied that there is no fair trial right to ambush a complainer and it was viewed as perfectly proper for the Crown to precognosce a complainer on receipt of a section 275 application to seek relevant information which might be capable of rebutting the challenge under section 275.
- By statute, the defence ought to intimate defence witnesses by preliminary hearing. The Crown can precognosce them and, if so advised, re-precognosce Crown witnesses in the light of what they have learned.
- In a trial, if questions are put in cross, the Crown then has a chance to re-examine which means that the complainer would get a chance to offer any further relevant information prompted by the questions put by the defence. If something truly unexpected emerged then it may be that the Crown could adduce additional evidence from a witness not on the indictment.

In law there is nothing wrong in principle with the Crown going to precognosce after questions are intimated, but the Crown may sensibly choose to consider that pragmatism and restraint may be called for if the system is to work as well as it can.

8.6 Viewing the commission

Please note that whilst accused persons are entitled to view a commission hearing they do not have to do so. Section 271 I (3) (b) creates an entitlement and not an obligation. The commission hearing is not part of the trial in terms of section 92 of the 1995 Act and so does not have to take place in the presence of the accused.

If an accused person wishes to view the commission hearing, then arrangements are in place for those in custody to do so.

For accused persons on bail, and who wish to view the commission hearing, arrangements are in place for them to attend at court premises. For Glasgow commissions a bail accused who wishes to view a commission hearing should attend at the Saltmarket and for Edinburgh commissions at Parliament House.

Unless, exceptionally, the court has ordered otherwise, **an accused person must not attend at the actual Commission Centre**.

Solicitors must ensure that their clients understand these arrangements.

[52] Section 5(4) of the 2019 Act amends section 271 I by adding subsection 4A. The new section is reproduced
infra.

[53] All Criminal Courts Practice Notes are available on the Criminal Courts Practice Notes and Directions page of the SCTS website.

[54] See discussion at para 8.4.2.1

[55] Begg v HM Advocate 2015 SCCR 349 at paras 39 and 40

[56] Bakhjam v HM Advocate 2018 J.C. 127 at paras 33-35

Chapter 9: Sections 274 & 275

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9.1 Fairness of the statutory scheme

The scheme set out in sections 274 and 275 has been determined to be consistent with a fair trial at every level up to the European Court of Human Rights. The court is bound to apply the rules of evidence and a statutory scheme which has been found to be compatible with article 6.

The provisions were intended to be fair not only to the accused but also to complainers, and Lord Hope has observed that they lean towards the complainer whose protection is very wide[57]. The overall scheme has been examined and found to be fair, and compliant with article 6, by Lord Macfadyen at first instance[58], by the High Court on Appeal[59], by the Judicial Committee of the Privy Council[60] and the European Court of Human Rights[61]. In the Judicial Committee of the Privy Council ("JCPC") case of DS Lady Hale, made some emphatic comments, footnoted below. In short she saw no basis for considering that sections 274 and 5 were incompatible with article 6.

In *Judge v UK* 2011 S.C.C.R. 241, the European Court of Human Rights said this at para 28:

> "The statutory scheme enacted by the 2002 Act was the result of careful deliberation by the Scottish Parliament (the Parliament). The Parliament was fully entitled to take the view that, in criminal trials, evidence as to the sexual history and character of a complainer in sexual offences was rarely relevant and, even where it was, its probative value was frequently weak when compared with its prejudicial effect. It was also entitled to find that a number of myths had arisen in relation to the sexual history and character of a complainer in sexual offences and to conclude that these myths had unduly affected the dignity and privacy of complainers when they gave evidence at trial. Having reached these conclusions, it was well within the purview of the Parliament to take action to protect the rights of complainers and, in doing so, to prohibit in broad terms the introduction of bad

character evidence of complainers, whether in relation to their sexual history or otherwise."

A full bench considered these provisions in *CJM*[62] and again in a pre-trial decision of 13 October 2020, *CH v HM Advocate* 2021 J.C. 45.

It has been determined that evidence which is not admissible at common law cannot be admissible under section 275 and the common law excludes evidence which is collateral to the facts in issue. It was these considerations which led to the Lord Justice Clerk (Carloway) explaining at para 32 in CJM, that:

> "It is not, therefore, simply a matter of the judge at first instance determining "fairness" or "justice" in an individual case, but of applying the well tried and tested rule which exists for pragmatic reasons in connection with the administration of justice generally and for the protection of witnesses, notably complainers, who cannot be expected to anticipate, and defend themselves against, personal attack…."

He used very similar terminology in giving the opinion of the court in 2015 in a case reported as HM Advocate v (CJ) W 2017 SCL 145, at para 7[63]. In a different context, namely late objections under section 79A, in Bhowmick in 2018[64], a trial judge heard a late objection because she considered that application of the section might prejudice the fairness of the trial. In giving the opinion of the appeal court, Lord Turnbull said that the trial judge was not entitled to allow a late objection to be heard where it did not meet the statutory criteria.

9.2 How an application under section 275 is dealt with

A useful synopsis was set out by the Lord Justice General in giving the opinion of the court in *MacDonald*[65], at para 35:

> "… the court must decide:
>
> - first, whether the evidence sought to be admitted is admissible as relevant at common law.
> - Secondly, if it is admissible, the court must determine whether it is struck at by section 274 (an attack on character, engaged in unrelated sexual or other behaviour).
> - Thirdly, if it is struck at, the court must consider whether it meets the test for admission under section 275(1)(a) (specific occurrence of sexual or other behaviour or specific facts demonstrating character or condition/predisposition) and 275(1)(b) (relevance to proof of guilt).
> - Fourthly, the court must make a decision on whether the probative value of the evidence is significant and outweighs any risk of prejudice to the proper administration of justice (s 275(1)(c)), including the protection of the complainer's dignity and privacy."

9.2.1 Start with the common law

The starting point is the common law, in which it is established that if evidence is irrelevant or collateral, it is not admissible and it is not and cannot be rendered admissible per section 275.[66]

The law as explained in detail by the Lord Justice Clerk (Carloway) in *CJM*, was encapsulated in this way by the Lord Justice Clerk (Dorrian) giving the leading opinion of a full bench in *CH*[67]:

> "The decision in CJM may be summarised thus:
>
> i. evidence is only admissible if it is relevant;
> ii. evidence is relevant if it makes a fact in issue more or less probable: the testimony must have a reasonably direct bearing on the subject matter of the prosecution; this would exclude collateral evidence;
> iii. if evidence is inadmissible at common law it is inadmissible under the statute;
> iv. the very nature of the statutory provisions is to restrict the admissibility of evidence permissible at common law, not to expand it;
> v. the former common law exceptions regarding the moral character of complainers was "swept away" by the legislation;
> vi. the conditions for an exception within section 275 are cumulative."

At paras 9.7.3 infra, case law is examined which defines the meaning of the terms relevant and collateral and examples are given of appellate decisions both on relevance but also on the outcome which would be reached under section 275.

9.2.2 Is the evidence admissible at common law?

If so, the court must then consider if the evidence is prohibited by section 274.

Section 274 reads as follows:

> 1. In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit[68], 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);
>   b. has, at any time, engaged in[69] 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;
>   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."

9.2.3 Meaning of 'behaviour'

A course of cohabitation between the parties does not constitute sexual behaviour[70] and does not require an application.[71] In another obiter remark at para 35, the Lord Justice Clerk (Gill) seemed to envisage that a section 275 application would be required to introduce evidence of any other kind of sexual relationship.

Practitioners would be well advised to proceed on that basis and, if they consider that the accused ought to be permitted to adduce evidence of a sexual/intimate/affectionate relationship (and it cannot be assumed that he necessarily will be so permitted), and can demonstrate admissibility at common law, to present, timeously, a section 275 application unless and until the court delivers an opinion in which the ratio decidendi indicates otherwise.

Representatives may seek to suggest that certain obiter dicta in *CH*[72] may suggest that the approach proposed by Lord Gill, obiter, to a cohabiting relationship may be capable of being extended to the mere fact of "a long standing affectionate relationship" which is extant at the time of the libel or alternatively that in certain circumstances such evidence may have sufficient relevance to pass the tests in section 275, but this would generally not extend to sexual activity occurring in such a relationship[73].

However, the Lord Justice General's conclusions at paras 3, 5, 7 and 8 contain cautionary observations which should be borne in mind. In particular he noticed the change in attitude between an English case from 2002[74] which the full bench came to consider and contemporary thinking and values.

The Lord Justice Clerk's opinion, particularly at para 80, would seem to suggest that a section 275 application would be required. "Satisfy[ing] the court that the material falls into such a category in the circumstances of the case" is not going to be easily done at trial without delay and disruption. It ought to be done at preliminary hearing in a section 275 application so that the court can make a decision at the appropriate time, giving parties and the trial judge some certainty; subject to the flexibility that a court may need to exercise at trial as the case unfolds.

In considering the dicta on this subject in CH, it is also important to note that the Lord Justice General and the Lord Justice Clerk expressed their agreement with the conclusions of Lords Turnbull and Pentland in SJ v HM Advocate 2020 SCCR 227,particularly at paras 56, 57 and 79, quoted at 9.7.3 infra. The majority view in SJ was that growing intimacy, kissing [and an act of intercourse[75]] between accused and complainer in the week or two preceding the libel was irrelevant and inadmissible at common law.

In a currently embargoed opinion dated 28 January 2021 relating to two appellants [76], the court observed at para 43, admittedly in passing, that the use of the phrase "sexual relationship" in a section 275 application meant that that part of the application was struck at by section 274.

In *JW v HM Advocate* [77] the court found that the granting of section 275 applications ought to be revoked under section 275(9). The applications related to attempts to impugn the credibility and reliability of each of four complainers by eliciting evidence of ongoing sexual relationships which involved instances of sexual intercourse between accused and complainer subsequent to and in some cases concurrently with libels which, in each case, spanned a number of years. The appeal court considered the evidence to be entirely collateral.

9.2.4 Statements made by a complainer

Behaviour can, in some circumstances, be constituted by the complainer saying things, but it does not encompass prior inconsistent statements about the incident itself[78].

What a complainer may have said about something else which is not the subject matter of the charge may not be permissible even as a prior inconsistent statement if it seeks to elicit material prohibited by section 274 and will not be admissible if it seeks to introduce irrelevant or collateral material.[79] in which all of the judges agreed that the application to lead evidence
that the complainer may have lied to a Forensic Medical Examiner about sexual intercourse with a male other

than the accused should be refused as irrelevant.}} It should be recalled that section 263(4) requires that examination on any different statement must be "pertinent to the issue at the trial" which will have a bearing on judicial decision-making at both preliminary hearing and trial.

In *Kerseboom v HM Advocate* 2017 J.C. 47, the court considered that proposed evidence that the complainer was falsely stating to various people in the month following the incident giving rise to a charge of rape that she was thereby pregnant was evidence of character and as such prohibited under section 274. It was found to be inadmissible at common law as collateral and irrelevant. Even if relevant it would have failed to meet the cumulative tests in section 275.

In a currently embargoed pre-trial decision of 17 March 2021 [80], the court did not issue an opinion but approved a detailed interlocutor. In paragraphs (a) and (d) of the application the appellant sought to elicit that there had been an ongoing sexual relationship between the parties in the weeks immediately preceding the libel and that when they had been in a relationship the appellant was permitted to have sexual intercourse with the complainer from behind. The material in para (a) was said to be relevant to show that the appellant reasonably believed that the complainer would be likely to be receptive to intercourse and on both paras (a) and (d) he wished to prove contrary statements per section 263(4). The court concluded on the latter point that:

> *"The alleged lies by the complainer do not relate to what happened on [date of libel], or to her account thereof, but to past matters, which are clearly collateral, as well as being irrelevant. To allow the evidence referred to in paragraphs (a) and (d) would be to embark upon an inquiry, possibly extensive, into matters which have no bearing on the issues for the jury."*

To lead evidence that a complainer had told a psychologist that she is a pathological liar, was not likely to be available under section 263(4) and was irrelevant. Apart from anything else the complainer was not in a position to give admissible evidence as to whether any such tendency arose from a medical condition of the kind which might, exceptionally, be admissible [81].

9.2.5 Meaning of 'the subject matter of the charge'

See *CH v HM Advocate* 2021 J.C. 45 at para 74.

Unless a particular type of sexual conduct is libelled within the charge it cannot be the subject matter of the charge. Any other interpretation creates uncertainty and has the potential to defeat the objectives of the legislation which include that the complainer is not ambushed unfairly.

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 complainer is not the subject matter of the charge.[82]

9.2.6 Meaning of 'condition'

The type of condition which could arise under section 274(d) and be permitted under 275(1)(a)(ii) can only be one which is recognised by medicine and supported by medical evidence.

See CJMat para 46:

> "The next question relates to what is meant by the words 'condition or predisposition' in sections 274(1)(d) and 275(1)(a)(ii)). The appellant, of course, founds heavily upon the decision at first instance in HM Advocate v Ronald (No 1). However, **the words have to be understood in light of the common law position that what is admissible is evidence of an 'objective medical condition' (McBrearty v HM Advocate). It is clear, therefore, that to bring evidence within the exception in terms of section 275(1)(a)(ii), the 'condition or predisposition' requires to be one which is objectively diagnosable in medical, notably psychiatric, terms. The exception cannot be applied in the absence of medical evidence to that effect…"** [Emphasis added]

This issue arose for consideration in *HM Advocate v Selfridge* [83] in relation to a complainer who was said to have a diagnosis of Borderline Personality Disorder ("BPD"). The accused had sought to lead evidence of this from the complainer and a psychologist on the basis that it was an objectively diagnosed medical disorder as a result of which she "displays impulsive behaviour characterised by pathological lying."

The evidence was that lying was not a condition of BPD and the psychologist explained that there was no evidence based link in general between lying and BPD but in his opinion there was such a link in the complainer's case.

In para 29, the Lord Justice Clerk explained that evidence of character is generally inadmissible at common law on the ground that it is collateral, subject to an exception which relates to a medical condition which impacts upon the ability of the witness to give truthful evidence. The Lord Justice Clerk continued:

> *"...in order to bring the case within such an exception it is necessary to show that the witness suffers from an objectively diagnosed medical condition, that it is a recognised characteristic of the condition that it may have such an effect, and that it has in fact had this effect on the witness (*CJM v HMA 2013 SCCR 215*). The effect need not follow in every instance of the condition, but it must be a recognised sequela of the condition which has in fact resulted in the case of the witness. The condition may render the witness incapable of understanding or identifying the truth; or it may create a wholesale compulsion to lie, but the effect must be brought about by the illness, not by some general disposition or wilfulness of the witness. It would not be sufficient to show that the witness was simply a*

habitual liar (see for example MacKay v HM Advocate 2004 SCCR 278*)."*

In this case, the term "pathological" was used by the psychologist not to refer to a consequence of illness, but as a synonym for persistent or habitual. Ultimately the psychologist's evidence was no more than his "ipse dixit" and **there was an absence of a "clear diagnostic medical link between the condition of BPD and any tendency of the witness, in certain specified circumstances, to lie" so that the evidence referred to was inadmissible at common law**.

9.2.7 Indictments with both sexual and non-sexual charges

Whilst the prohibition relates to charges under section 288C, the case-law suggests that if there is a sexual crime on the indictment, but also other crimes on the indictment, the prohibition applies to the whole indictment[84].

9.3 An application under section 275

9.3.1 Does the application serve a proper purpose?

The Lord Justice Clerk explained, giving the opinion of the court in *MP v HM Advocate* [2021] HCJAC 48 that presenting an application which counsel considers is unnecessary in order to seek a general ruling on admissibility, is not appropriate and should not be done [85]. If an application is said to be unnecessary, or if it is incompetent, it should be refused on that ground.

If in response to submissions on a properly made application the court concludes that the evidence is admissible at common law, and is not prohibited by section 274, the wording of the decision should not say that the application is unnecessary, it should state that the evidence does not fall foul of any of the prohibitions in section 274 [86].

9.3.2 Do both parties require an application to elicit the same evidence?

Preliminary hearing judges have recently encountered some uncertainty, particularly on the part of some prosecutors, on whether the Crown requires its own application to elicit the evidence which may be elicited by the defence on the granting of a section 275 application.

For the reasons which follow, it is suggested that each party who wishes to elicit a particular piece of evidence, or ask questions, which would otherwise be prohibited by section 274 must seek permission via a section 275 application.

The requirements placed on the applicant by section 275(3), the evaluation to be undertaken by the court under section 275(1) and the requirements on the court in 275(7) and particularly 275(7)(b) all point in the direction of a requirement for separate applications. The 275(3) requirements explained by the Lord Justice Clerk in RN v HM Advocate 2020 J.C. 132 could not be met in the absence of an application by each party who wishes to elicit the particular piece of evidence or ask the particular question relating to material prohibited by section 274. At para 26, the Lord Justice Clerk explained of section 275(3) that:

> "…All the matters referred to therein should be included in the application and should be addressed separately in respect of each piece of evidence or proposed questioning…"

and

> "… Bald assertions will not be sufficient to meet the requirements of the subsection (see HM Advocate v JG, para 35). **Explanation is required. The explanation should lead naturally to being able properly to set out for the court in a clear and understandable way the inferences to which it is said the evidence reasonably gives rise**. In LL v HM Advocate it seems remarkable that neither at the PH nor in the appeal could counsel identify any proper inference which might be drawn, nor say how the evidence could bear on the question of free agreement. **These are issues which should be addressed at the time of drafting the application, since the court, before granting an application, must understand what these inferences are, and be satisfied that they are legitimate ones which could reasonably be considered by a jury on the basis of the evidence in question**. Deficiencies in an application may result in the court refusing to hear the application (see JG para 36)." [Emphasis added]

Whatever inference is invited will vary according to which party wants to ask the question or elicit the evidence. If the issue in the case is consent, the Crown will invite the inference that the complainer did not consent and the defence will invite the inference that there was consent. The court requires to examine the inferences which a party seeks to draw from the evidence and consider whether those inferences may be legitimate ones for a jury to draw – essentially each application is limited by the inferences according to which it was granted.

9.3.3 Timing

Applications must be made no later than 7 days before the preliminary hearing[87], (meaning the first preliminary hearing)[88].

A later application can only be considered on special cause shown, …

"The requirement for special cause, rather than cause, is tied to the nature of section 275 applications; their potentially intrusive and intimate nature; the ongoing anxiety and stress they can cause to complainers and the effort to ensure that is minimised as much as possible; and the potential for delay to the proceedings brought about by late applications. The need for applications to be timeous is intensified by the requirement for the views of the complainer to be obtained (RR v HM Advocate 2021 SLT 609). In addressing whether special cause has been shown the court must examine whether there are any special circumstances which explain the lateness of the application. In the context of a section 275 application, the court must be acutely aware that the interests of justice require consideration of appropriate protection of a complainer's dignity and privacy."

Please note:

For the reasons given at para 9.4.4, it is good practice and will reduce the likelihood of the preliminary hearing being continued if the defence make a section 275 application as soon as possible after the indictment is served.

9.3.4 Requirements of the application

Section 275(3) provides:

> 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."

The terms and implications of this subsection were recently examined in a pre-trial appeal hearing. The provisions constitute the minimum requirements of what must be contained in a section 275 application. The particulars stipulated in section 275(3) must all be clearly addressed within the application (see *RN* as quoted below).The application must be properly determined by the court at preliminary hearing.[89]

See RN v HM Advocate 2020 J.C. 132 at para 26:

> "…an application must, at a minimum, comply with the requirements of this subsection, and set out the requisite detail in a comprehensible manner. This is material which the court requires in order to understand why it is being invited to admit otherwise inadmissible evidence. All the matters referred to therein should be included in the application and should be addressed separately in respect of each piece of evidence or proposed questioning. Paragraph (a) is self-explanatory. Paragraph (b) is designed to enable the court to understand not only what is to be put but the evidential basis for doing so. Paragraphs (c) to (e) are particularly important. Paragraph (c) requires the application to explain what the issues at trial are to which the evidence is relevant, and paragraph (d) requires an explanation of why it may be considered relevant to those issues. The paragraphs hinge together, and it is singularly unhelpful simply to say "credibility and reliability" under (c) and make a mere assertion under (d) that the evidence is relevant. Bald assertions will not be sufficient to meet the requirements of the subsection (see JG v HMA 2019 HCJ 71, para35). Explanation is required. The explanation should lead naturally to being able properly to set out for the court in a clear and understandable way the inferences to which it is said the evidence reasonably gives rise. In LL v HMA 2018 JC 182 it seems remarkable that neither at the PH nor in the appeal could counsel identify any proper inference which might be drawn, nor say how the evidence could bear on the question of free agreement. These are issues which should be addressed at the time of drafting the application, since the court, before granting an application, must understand what these inferences are, and be satisfied that they are legitimate ones which could reasonably be considered by a jury on the basis of the evidence in question. Deficiencies in

an application may result in the court refusing to hear the application (see JG, paragraph 36)."

Both in *RN* and *CH v HM Advocate* 2021 J.C. 45 at para 41, the Lord Justice Clerk endorsed what was said by Lord Brodie in giving the opinion of the court in HM Advocate v MA 2008 SCCR 84, at para 8.

> "…regard should be had to the role of the application as an advocacy document, by which I mean a means of informing the court as to why the application is being made and as an aid in persuading the court that the tests … are met. Parties, it may be assumed, will be familiar with their respective cases. The court, on the other hand, while it may be able to gather something from the indictment, any special defence and the documentary productions, if available, cannot know precisely how it is proposed to prosecute and to defend the charge. If it is to make a decision on a section 275(1) application the court is likely to require some information, specific to the instant case, and in sufficient detail to allow it to understand why it is being invited to admit otherwise inadmissible evidence. **In my opinion, that information should be contained in the written application**." [Emphasis added.]

The reference to there being an evidential basis for questioning, and the need to specify it, is important. In *MP v HM Advocate* [2021] HCJAC 48 an application was refused in part because facts on which a party sought to found with a view to inviting an inference that a delayed disclosure was prompted by dissatisfaction at a development in family proceedings relating to the parties' child, were simply irrelevant and there was no evidential basis for averring a link between the proceedings and the making of the complaint to the police.

The importance of compliance with all of the requirements of section 275(3) was explained yet again by the Lord Justice Clerk, once again endorsing *RN*, *CH* and *MA* before concluding:

> *"[43] Compliance with section 275(3) in all its aspects is a necessary pre-requisite to the determination which the preliminary hearing judge must make under section 275(6) and (7). The fulfilling by the preliminary hearing judge of the obligation placed on him by section 275(7) is critical for the benefit of the trial judge, who must have a clear understanding of the extent to which questioning has been authorised."*

It would assist the court if applications contain a concise synopsis of this kind but it should be made plain in the application that it is a preamble as opposed to the narrative in which the applicant seeks to meet the requirements imposed by section 275(3).

9.3.5 The exceptions under section 275

Section 275 sets out the exception to section 274 and reads as follows:

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 [,[90]] 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

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."

9.3.6 The three cumulative tests which must be met

See *RN v HMA* 2020 J.C. 132, at para 24.

Section 275 requires, cumulatively:

- Specificity
- Relevance
- Significant probative value, outweighing any risk of prejudice to the proper administration of justice with its extended meaning.

Note RN at para 25:

> "That third limb of the test, referring to probative value, requires not just that the evidence is of significant probative value, but that the probative value is sufficiently significant that it is likely to outweigh any risk of prejudice to the administration of justice from its being admitted (Section 275(2)(c)). This is important to note because it is consideration of the interests of the administration of justice which requires the court to address two further matters, namely the appropriate protection of a complainer's dignity and privacy and the proportionality of admitting the evidence (section 275(2))."

9.4 The court's obligations in determining an application

See *CH v HM Advocate* 2021 J.C. 45 at para 41.

In *CH*, the Lord Justice Clerk concisely encapsulated the court's duties:

> "[41] Sections 274 and 275 together constitute a statutory scheme which provides a general rule that evidence within categories (a) – (d) of section 274 is not admissible in sexual cases. Section 274 provides that the court "shall not admit" such evidence. This constitutes a complete prohibition: unless the evidence comes within the specified exceptions, cumulatively, of section 275 the evidence remains inadmissible…."

9.4.1 The court has obligations regardless of the position adopted by parties

Section 274 places an obligation on the court not to allow the eliciting of prohibited material whether objection is taken or not and it is a responsibility which judges cannot avoid.

Judges must also keep in view that if evidence is not admissible at common law it cannot be admitted per section 275.

In RN v HM Advocate 2020 J.C. 132 at para 20 the Lord Justice Clerk, giving the opinion of the court and having examined what is expected of a judge in hearing a section 275 application, stated:

> "**It is not open to the court to abrogate responsibility for addressing these issues in detail simply because the Crown does not oppose an application**."

The court's obligation is well summarised in the rubric in this way:

> "…the Crown's stance in relation to any application under sec 275 of the 1995 Act was not determinative of whether the evidence should be allowed; the legislation was quite clear that evidence of the kind referred to in sec 274 of the Act was not admissible and, if such evidence were to be admitted, it could only be because the court had properly and carefully considered the matter and had been satisfied that all three aspects of the cumulative test in sec 275(1) had been met…"

9.4.2 Reasons for the decision and conditions

Section 275 subsections 6-8 read as follows:

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."

Subsection 6 requires the court to state its reasons but also empowers it to make its decision subject to conditions which may include compliance with directions issued by it. These may consist of a limitation on the extent to which the evidence or questioning allowed may be argued to support a specified inference.[91]

Subsection 7 requires the court if granting an application to explain:

- what is allowed,
- the reasons for it being deemed admissible and
- the issues to which it is relevant

9.4.3 The appeal court's application of these requirements

See RN at para 23:

> "…The legislation is quite clear that evidence of the kind referred to in section 274 is not admissible. **If it is to be admitted it can only be because the court has properly and carefully considered the matter and has been satisfied that all three aspects of the test in section 275(1), which are cumulative, have been met**. In addressing that issue the court will be conscious of the fact that the third leg of the test, which relates to the administration of justice, necessarily involves consideration of appropriate protection for the complainer's dignity and privacy, and a weighing up of the proportionality of admitting the evidence in the circumstances of the case (section 275(2)(b)). **Section 275(7) requires the court not only to state what evidence or questioning it is permitting, but also to state the reasons for "its conclusion" that the evidence is admissible. It is not open to the court to abrogate responsibility for addressing these issues in detail simply because the Crown does not oppose an application…**" [Emphasis added]

In RN, in the absence of a proper judicial determination of parts of the application at first instance, the court proceeded to refuse those parts of the application which had been granted without scrutiny.

9.4.4 The Crown must advise a complainer of the content of a section 275 application and seek certain information from the complainer

The full bench decision of *RR v HM Advocate* 2021 J.C. 167 on a petition to the nobile officium is concerned with the procedure which is necessary to ensure that the Crown complies with obligations under section 1 of the Victims and Witnesses (Scotland) Act 2014 and how the court respects a complainer's rights under ECHR art 8. It is important to note that the court declined to determine the section 275 application which was the subject of the petition.

The court explained, at para 43, that the Victims and Witnesses (Scotland) Act 2014 section 1 does not impose an obligation on the courts themselves. The position is different for ECHR art. 8 but the court's obligations in that regard will be complied with if the Crown adopts the procedure envisaged in para 52 of the opinion:

> "…it is the duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application. This will almost always mean that the complainer must: be told of the content of the application; invited to comment on the accuracy of any allegations within it; and be asked to state any objections which she might have to the granting of the application. The court may require to adjust its preliminary hearing procedure, and the relative form (Forms 9.3A and 9A.4) accordingly. It is only by doing this that the principle that the complainer should be able to obtain information about the case and to participate effectively in the proceedings, along with her Article 8 right of respect for her privacy, can be upheld."

and the court proceeds as described in para 50. In short, the court must determine a section 275 application in light of the common law criteria for admissibility of evidence and the provisions of sections 274 and 275 as they have been authoritatively interpreted in binding appellate decisions.

Judges

At preliminary hearing, judges must do what they can to ensure that the Crown has taken the steps required in para 52 before determining a section 275 application. However, the words "almost always" signal recognition that obtaining such information may not always be possible. Form 9A.4, the written record form, has been amended to require the Crown, at question 5A of schedule 1, to record what has been done in this regard

Defence

Whilst section 275 (B) requires that an application, unless on special cause shown, will not be considered by the court unless made not less than 7 days before the preliminary hearing, **it will be good practice for applications by accused persons to be intimated as soon as possible** after the service of the indictment in order that the Crown can complete necessary enquiries of the complainer in time for the preliminary hearing.

The Crown

In addition to complying with the requirements identified in para 52 of the opinion, where possible, it will be good practice for the Crown to have the relevant views of the complainer before presenting a section 275 application and certainly to ensure that, so far as possible, they can be made known to the court at the preliminary hearing.

NB:

Whilst such information must be sought, it is not determinative of an application under section 275. As the Lord Justice Clerk (Gill) observed in *MM*, there are public interest considerations, which go wider than the position of the individual complainer, which underlie the law in this area. He explained in para 7 of his opinion that:

> "…The policy priorities underlying law reform in this area have generally been to prevent juries from giving undeserved acquittals out of prejudice against the complainer, rather than on an objective view of the evidence, and to protect the complainer from being harassed by questions on intimate matters, in order both to protect her privacy and to prevent victims of such crimes from being deterred from reporting them."

In *CJM*, at para 44, the Lord Justice Clerk (Carloway) explained that sections 274 and 275 reflect a clear legislative "intent to restrict evidence in the wider interests of justice for all, and in particular complainers."

It is important to recall that the terms of section 275 require the court to consider the risk of prejudice to the proper administration of justice.

The starting point remains the common law. If evidence is not relevant at common law, it is not admissible, regardless of the attitude of the complainer.

The absence of dispute does not render evidence relevant. See for example *CH v HM Advocate* 2021 J.C. 45 at para 70 of the Lord Justice Clerk's opinion:

> "…Assuming for the moment the disputed assertion that consensual sex did take place on these other occasions, this would shed no light on the question whether at the time of the libel, the appellant acted in the way alleged. It is not therefore evidence "relevant to establishing whether the accused was guilty of the offence with which he is charged".

Nor does acceptance of certain facts necessarily prevent their being excluded as collateral[92] and similar considerations would arise again under section 275 (1) (c) and (2) (ii) which provides:

> b. "the proper administration of justice" includes —
> i. appropriate protection of a complainer's dignity and privacy; and
> 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**." [Emphasis added]

9.5 Limiting the extent of an earlier grant

See subsection (9).

Have regard to the following:

> 9. Where evidence is admitted or questioning allowed under this section, the court at any time may —
> 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."

This power could be exercised at a further preliminary hearing as well as at the trial.

The provision forms part of the statutory code in sections 274 and 275 which, as noted above, commences with a statutory obligation on the court itself. Section 274 (1) provides that the court, in a section 288C case, shall not admit, the categories of evidence or questioning specified in subsections (a), (b) and (c).

Subsection 275(9) has now been examined on appeal by the Lord Justice Clerk in *JW v HM Advocate* [93] and it is clear that the power to limit can extend to a complete revocation of the earlier decision [94]. The court would be obliged to do so if the effect of the earlier grant of a section 275 application would be to permit the admission of inadmissible material wholly irrelevant to the issues at trial and in breach of the protections bestowed by the statutory regime.

The court also confirms in para 20 that this may be done during the trial.

The court observes at para 21 that the statutory language points away from the power only being available in light of changed circumstances. The provision:

> *"not only allows the court to exercise the power "as it thinks fit", but enables it to do so "notwithstanding the terms of its decision under subsection (1) above" or any condition attached to the grant."*

In para 21, the Lord Justice Clerk reiterates that "*the court has a duty to ensure that the legislation is applied*."

As the Lord Justice Clerk puts it at para 24, in examining a judge's power to raise the issue of a subsection 9 limitation ex proprio motu:

> *"This may happen at a subsequent preliminary hearing, or more probably at trial. There may arise circumstances, such as the present case, where it is obvious that an unopposed application has resulted in the prospective admission of evidence which would be wholly irrelevant to the issues at trial. The reasons why a limitation on the grant may be appropriate may be more nuanced, resulting from developments at trial or the way certain evidence has emerged. Whether to invoke the power in section 275(9) will be a decision for the individual judge in these circumstances.* If there are sound reasons for believing that the effect of the approved application would be to admit evidence which was in reality inadmissible according to law, and in breach of the protections offered by the statutory regime, judges are obliged to review the matter under section 275(9)." [Emphasis added]

The court also explains in para 24 that whilst the court has a broad discretion, for a party, and almost invariably the party would be the Crown, to invite the court to exercise this power would require:

> *"..a sound basis for the proposed limitation, such as the prospect of the admission of clearly irrelevant and inadmissible evidence or some other material factor which is likely adversely to affect the fairness of the trial."*

This reference to the fairness of the trial is encompassing the public interest and that of the complainer as can be seen from the context provided by the Crown submissions summarised at para 19.

9.6 Previous convictions

See section 275A.

What are the implications of granting a s275 application?

N.B. There is substantial judicial discretion.

A literal reading of this section (relating to the disclosure of previous convictions where a section 275 application is granted) might suggest that the granting of an application would almost inevitably lead to the jury being made aware of any previous[95] relevant conviction of the accused. A previous relevant conviction is for an offence within the scope of section 288C; a sexual offence or one with a significant sexual aspect.

However, the provision has been interpreted by the High Court of Justiciary[96] and the JCPC[97] in a much more flexible way, leaving substantial discretion to the judge. In short, the defence have a right to object; there are limitations to what convictions are relevant in this regard; once there is an objection there is no presumption as to how the judge will decide the issue and the judge is concerned with the fairness of the trial; a previous conviction would certainly not be shown to the jury before evidence was sought to be adduced in the trial via the section 275 application.

A fuller analysis is found in Renton and Brown at 24.163.2-3:

> "**24-163.2**
>
> Where the court has allowed an accused charged with a sexual offence to attack the character of the complainer, the prosecutor is obliged to place any relevant previous conviction of the accused before the judge forthwith. Such convictions must be laid before the jury, or in a summary case taken into consideration by the judge, unless the accused successfully objects to such a course. A conviction is relevant where it is:
>
> a. one of the offences listed in s.288C(2) of the 1995 Act, or
> b. one in the commission of which there was a substantial sexual element.
>
> A conviction which is said to be relevant only in terms of (b) cannot be used unless an extract containing information which indicates that a sexual element was present in its commission was appended to the notice of previous convictions served on the accused which specified that conviction.
>
> An extract of the conviction may not be laid before the jury or taken into consideration by the judge unless the extract was appended to the notice of previous convictions served on the accused which specified that conviction
>
> There is a presumption that the previous conviction is admissible and the only grounds on which the accused can object to its being admitted are:

a. where the conviction bears to be relevant by virtue only of (b) above, that there was not a substantial sexual element in the commission of the offence;
b. that the disclosure or taking into consideration of the conviction would be contrary to the interests of justice;
c. that the conviction does not apply to the accused or is otherwise inadmissible, or in summary proceedings that the accused does not admit it.

Where, however, objection is taken to the use of a previous conviction on ground (b) or (c), the extract conviction may be laid before the judge, and in summary proceedings the judge may take it into consideration, for the purpose only of considering the objection. Where the objection is taken in a trial on indictment it is to be dealt with in the absence of the jury, the complainer, any person cited as a witness and the public.

There is a presumption that the use of the previous conviction is in the interests of justice.

It has been held that this provision is not incompatible with the accused's Convention rights, and that where necessary it should be interpreted in such a way as to be compatible with the accused's rights to a fair trial. The presumptions in the section have been said to require only that there should be some reason why the previous conviction should not be disclosed. Once such a reason exists it is for the presiding judge to decide which of the reasons for disclosure and non-disclosure is the stronger, and the most that the presumptions do is place an evidential burden on the accused.

An objection in a trial on indictment that a conviction does not apply to the accused or is otherwise inadmissible will not be entertained, unless notice of it was given under s.69(3) of the Act. Where objection is taken in summary proceedings on the ground that the previous conviction is not admitted, the prosecutor must either withdraw it or prove it.

24-163.3

Previous convictions led under these provisions are relevant to the accused's propensity to commit sexual crimes and not merely to his credibility, although the jury should be told that they are not available as corroboration of the complainer, and that they should not place undue reliance on them."

9.7 Relevance, collateral matters: appeal court guidance

9.7.1 As stated above, the starting point is the common law:

If evidence is irrelevant or collateral, it is not admissible and it is not and cannot be rendered admissible per section 275.

The following extracts from opinions of the Appeal Court illustrate the importance of determining admissibility at common law:

"The reason I have thought fit to set these matters out at some length is that upon any view of the matter having regard to the professed aims of the legislation any interpretation or construction of it must not expand the existing common law position at the time of its enactment and it is more likely that its intention was to limit it in its effect. **Accordingly,**

when consideration is given to a detailed application, at least conventionally, the starting-point should be whether or not it would have been permissible to maintain such line of questioning at common law before the enactment of the legislation. I consider that, if it was not admissible under the common law at the material time, section 274 should not arise whatever its phraseology. But in any event, section 275 if brought into play may exclude the questioning

[Emphasis added]

MM (No 2) 2007 S.C.C.R. 159, per Lord Johnston at para 27

"And, as has recently been stressed, the relevant sections in the 1995 Act (both before and after amendment) are designed not to replace the common law but to provide for further potential restriction (see, in particular, Moir v HM Advocate and, by way of illustration, HM Advocate v Ronald (No 1))…"

Thomson v HM Advocate 2010 J.C. 140, per Lord Kingarth at para 16

"22. It is therefore perhaps worth restating some basic principles. Before consideration of the statutory provisions arises, the court must be satisfied that the proposed evidence is relevant and admissible. The test of relevance was clearly stated in CJM, the fundamental question being whether the evidence sought to be led has "a reasonably direct bearing on the subject under investigation" (CJM, paragraph 28). Even evidence which may have a degree of relevance, prima facie, may nevertheless be inadmissible as collateral."

"23. If the evidence would be admissible at common law, then attention must turn to the statutory provisions. …"

RN v HM Advocate 2020 J.C. 132, per Lord Justice Clerk at paras 22-23

See also *MacDonald v HM Advocate* 2020 J.C. 244, para 35, quoted at 9.2 above and *CH*.

9.7.2 Is the proposed evidence irrelevant or collateral?

There is a full discussion of what this means in CJM at paras 27-35. Dicta from other cases on the exclusion of collateral matters are brought together in para 31 infra.

9.7.2.1 Relevance

"[28] **The starting point for a decision on whether this evidence is admissible is the general principle that evidence is only admissible if it is "relevant" (Dickson: Evidence (Grierson ed) i.1). Evidence is relevant when it either bears directly on a fact in issue (ie the libel) or does so indirectly because it relates to a fact which makes a fact in issue more or less probable** (see generally Walker & Walker: Evidence (3rd ed) paras 1.3 -1.5; DPP v Kilbourne [1973] AC 729, Lord Simon at 756; R v Kearley [1992] 2 AC 228, Lord Oliver at 263 citing Stephen: Digest of the Law of Evidence (12th ed) art 1; R v Watson (1996) 50 CLR (4th) 245)). The determination of whether a fact is relevant depends very much upon

its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled. It is a "matter of applying logic and experience to the circumstances of the particular case" (R v Graat [1982] 2 SCR 819, Dickson J at 835, quoted in McGrath: Evidence, para 1.06 fn 16). The question is one of degree; "the determining factor being whether the matters are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject under investigation (Bark v Scott 1954 SC 72, LP (Cooper) at 75-6).

[29] … **In Scots law, evidence of either good or bad character is, in general, inadmissible (Dickson (supra) at para 6; Hume: Commentaries i. 352-5; Alison: Practice 527) because it is collateral to the issues for decision as defined in the libel**." [Emphasis added]

9.7.2.2 Exclusion of collateral issues

[31] "The reason for this rule is that:

"...**it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand**." [Emphasis added]

A v B (1895) 22 R 402, per LP (Robertson) at para 31, as cited in Walker & Walker (supra) at para 7.1)."

Following on from that, it has been said that:

"A certain alleged fact may be relevant in so far that, if established, it might help a fair mind to come to a certain conclusion. Nevertheless, it may fall to be excluded if its ascertainment raises a separate issue from that which is being tried. The alleged fact if put in cross and admitted may be relevant, but nevertheless it may be of a kind which cannot otherwise be proved, for, if it is disputed, it would require to be tried as carefully as the issue before the Court, and the allowance of such collateral inquiries would make proofs endless."

Moorov v HM Advocate 1930 JC 68, per Lord Sands at 87.

Dealing with the issue from a pragmatic angle, the court has said:

"[It is] well settled - not perhaps on grounds of strict relevancy as on grounds of convenience and expediency that 'collateral issues' will not be allowed to be investigated"

Swan v Bowie 1948 SC 46, per LP (Cooper) at 51.

More recently, the rule and its justification have been phrased as follows:

"**The general rule is that it is not admissible to lead evidence on collateral matters in a**

> **criminal trial. Various justifications have been put forward for this rule. The existence of a collateral fact does not render more probable the existence of the fact in issue; at best a collateral matter can have only an indirect bearing on the matter in issue; a jury may become confused by having to consider collateral matters and may have their attention diverted from the true matter in issue. Whatever the justification for it, the general rule is clear**." [Emphasis added]
>
> *Brady v HM Advocate* 1986 JC 68, LJC (Ross) at 73.

In giving the leading opinion of a full bench in *CH v HM Advocate* 2021 J.C. 45 at para 38 the Lord Justice Clerk endorsed the following passage from Walkers' Evidence (4th ed) at para 7.1:

> "Generally speaking evidence of character and evidence regarding an issue which is collateral to the main issue is inadmissible. 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."

Accordingly, for counsel to pose these questions to a jury in speeches was an impermissible attack on character:

"What kind of person do you consider the complainer to be in terms of her honesty? What do you know about her?"

The trial judge should have made this clear to the jury.

9.7.3 Examples of evidence which has been found to be irrelevant or collateral

In *HM Advocate v JW* 2020 SCCR 174, the appeal court endorsed the report and the decision taken at first instance by Lord Turnbull.

His decision had been to the effect that the complainer texting the appellant in the days before an incident which included anal rape to say that she had a high sex drive and was enthusiastic about having anal sex was irrelevant to both the absence of consent and the question of reasonable belief because consent cannot be given in advance. Noting the decision of the court in Lee Thomson (details below), he did not consider that the decision in *Oliver v HM Advocate* 2020 J.C. 119 precluded his reaching these conclusions.

He had also determined that evidence which the accused proposed to lead to the effect that the parties had sex in a car between 9.30am and 10.30am had no bearing on whether there was consent in the earlier incident giving rise to the charge at the appellant's house between 4.30am and 7am. Again, noting the decision in Lee Thomson, he did not consider that the decision in Oliver precluded his reaching these conclusions. He added that even had he found the evidence relevant and admissible at common law he would have excluded it on applying the tests of significant probative value and proportionality in section 275.

Please note: Lee Thomson, decision of LJC, Lord Menzies [98] and Lord Turnbull dated 13 December 2019 is an important decision. It is not reported but is referred to in subsequent cases. The court upheld the preliminary hearing judge who had refused, as collateral, to admit evidence on a charge including anal rape:

- That in the 24 hours preceding the incident the complainer expressed willingness to have anal sex with the appellant; application; para (a).
- That the complainer continued to meet the appellant to have sex in the months following the charges; (c) and (e).
- That the complainer continued to send electronic communications to the appellant and sought to ascertain his whereabouts from his friends and family following the incident and over many months; (d) and (f).

The relevant part of the decision is contained in the interlocutor recording the refusal of the appeal.

> "…**As the PH judge identified, the fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion, either before or after the incident in question, save possibly, in particular circumstances in the immediate aftermath. Far less does the fact that on an earlier occasion a complainer discussed the possibility of one type of sexual conduct have a bearing on the question whether that individual later in fact consented to such activity. Given the nature of the dispute which exploration of paragraph (a) would involve… this raises a matter which is clearly collateral. The evidence sought to be admitted under paragraphs (a) and (c) to (f) is therefore not relevant at common law and is not admissible. The PH judge therefore arrived at the correct decision**."
>
> [Emphasis added]

The court also observed that the material would not have met the statutory tests of relevance and specificity and even if it could have met the test of relevance, it lacked sufficient probative value when appropriate protection of the complainer's privacy and dignity was considered.

A currently embargoed post-conviction but pre-retrial appeal opinion delivered by the Lord Justice Clerk relating to two appellants, dated 28 January 2021 [76] provides a clear indication of the court's views on relevance which fits in with a series of appeal decisions in which the court has sought to eliminate focus on peripheral matters in trials and confine it to the subject matter of the charge.

The first appellant sought to lead evidence at paragraphs a) to c) of his first application that:

a. For a period of 3 months some 5 years before the libel of a charge of rape the accused and complainer were in a sexual relationship during which they experimented with rough, forceful sex; she told him that she liked him to use force and to be spanked and knew that the accused enjoyed sadomasochistic sex.
b. In the 18 months preceding the libel the parties were in touch on social media and would meet up.
c. In the four months before the libel the parties maintained contact through Tinder and discussed meeting up for sex, discussing what activities they would like to engage in; and the complainer suggested she would like to engage in sex with two men.

All of which were said to be relevant to consent. At paragraph f) he sought to lead evidence:

> f. That the complainer had reported a phobia of doctors.

This was said to be relevant to distress exhibited during a medical examination.

In his second application, the first appellant sought to lead evidence that in the early hours prior to the libel, the complainer had, outside a nightclub, kissed and cuddled the first accused, said to show that she was interested in him sexually and supportive of consent to sexual intercourse.

The second accused sought to lead evidence that:

a. In the four months preceding the libel the complainer had communicated that she would like to have sexual activity with two men at the same time, and
b. Shortly before the incident she grabbed the appellant's penis and said "*Are you going to be my daddy*?"

This was said to be relevant to the complainer's credibility and reliability and to have some bearing on consent.

In para 43, the court observed that it would be impossible for any of these pieces of evidence to bear the inferences sought. The result of the allowance of this questioning was that the complainer was subjected to, "*the most egregious intrusion into her personal life*."

Lord Sands was quoted by Lady Dorrian, shortly before she became Lord Justice Clerk, in refusing an appeal in which the appellant[100] was seeking permission under section 275 to lead evidence to the effect that the complainer had lied about being pregnant consequent on the encounter giving rise to the charge of rape. The decision is useful because the court not only determined that the evidence was inadmissible at common law as collateral, but also considered its potential to pass the test in section 275(1)(b), whether the facts were relevant to establishing whether the accused was guilty of the offence, and found that it could not. The court explained at para 10 that:

> "It is not every matter which by any conceivable margin may bear on credibility which is relevant for this purpose. Evidence which is remote or collateral is not relevant to establishing whether the accused was guilty of the offence with which he is charged…"

Lord Brodie made a similar observation in LL v HM Advocate 2018 SCCR 189 at para 13 in discussing relevance under para 275(1)(b) and at common law:

> "… not every fact that has some conceivable connection, however distant, with the facts in issue is a relevant matter for enquiry."

In L the appeal court supported the preliminary hearing judge's decision endorsing some of the reasoning at first instance but adding some of its own. The court explained that evidence of consensual sex between the parties in October 2015 at the same locus was not admissible at common law and not relevant and not capable of passing the section 275 tests for a charge of rape in July 2016. The court indicated, at para 22, 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, relevance.

See also SJ v HM Advocate 2020 SCCR 227, where a comparison is made between the position in Scotland and that in England. The majority held that evidence of certain consensual activity between the appellant and the complainer around 10 to 11 days before the events specified in the charges, including kissing, cuddling and sexual intercourse, was irrelevant and collateral.

The following passages from the opinions of Lord Turnbull and Lord Pentland in *SJ* were approved and applied by a full bench in *CH v HM Advocate* 2021 J.C. 45:

Lord Turnbull:

> "[56] In my opinion, there can be no freestanding purpose, or relevance, in establishing that the friendship between the complainer and the appellant had included prior amorous or consensual sexual behaviour of a limited kind. Such evidence can only pass the test of relevance if it bears in some meaningful way on the issue at trial.
>
> [57] The issue at trial will be whether or not the complainer consented to the events of 11/12 January. To seek to demonstrate that the appellant and the complainer's 'real' level of prior association was one which included recent amorous and sexual contact, can only have any relevance to this issue if it is contended that evidence of prior sexual contact will illuminate the question of whether or not consent was present on 11/12 January. Senior counsel for the appellant expressly rejected the suggestion that this was the purpose in leading this evidence. However, it is fair to comment that, when pressed, counsel herself had some difficulty in articulating a proposition which identified where the relevance of the evidence lay."

Lord Pentland:

> "[79] In past practice this sort of peripheral and hence irrelevant evidence was sometimes led on the basis that the events that were the subject of the libel had to be put into a wider context. Recent authorities in this court, such as those to which Lord Turnbull refers, have brought a much sharper focus to bear on the question of whether evidence of other sexual behaviour, which I note is now the subject of a strong statutory prohibition in section 274(1)(b), is truly capable of assisting in the resolution of the real issues … Suppose that all of the matters sought to be led were proved at the trial to be factually accurate, what could one logically draw from them for the purpose of deciding whether the appellant and the complainer engaged in non-consensual sexual activity as alleged in charges 1 and 2? In my opinion, the answer to that question is: nothing."

All of the judges in SJ agreed that the application to lead evidence that the complainer may have lied to a Forensic Medical Examiner about sexual intercourse with a male other than the accused should be refused as irrelevant.

In *MacDonald v HM Advocate* 2020 J.C. 244, the court explained that much of the subject matter put to the complainer in cross-examination was inadmissible as irrelevant and incapable of passing the tests in section 275. This included evidence that on an unspecified occasion in the past the complainer had fallen off a roof drunk sustaining bruising and that she had on another occasion

had an altercation with the appellant which might have led to bruising when there was no basis for these events explaining the injuries found after the indicted sexual assault. Evidence that she had given cocaine to the appellant ought not to have been admitted (this was not subject of a section 275 application.) Evidence that she had once thrown a mobile phone at her boyfriend and that on the night when she was sexually assaulted she took a shower with a female friend was irrelevant.

In *RN v HM Advocate* 2020 J.C. 132 referred to above, the court's reasoning as to the admissibility of some of the evidence proposed is captured within the following extracts from the rubric.

> "The appellant was indicted with sexual offences against one of his young sons ('A') and against his former partner ('B'), the mother of the child. in advance of trial, the appellant lodged an application with the court, in terms of section 275 of the 1995 Act, to lead evidence that, inter alia, A had, on a number of specified occasions, made a series of false allegations of sexual abuse against teaching staff at his school and that his mother, B, had induced, or attempted to induce, both A and his brother to do so. Further, the appellant sought to elicit evidence of an interlocutor following a proof at which referral grounds relative to the false allegations made by A against the teaching staff were found to have been established by the sheriff. The Crown opposed the application in so far as it related to those matters. The sheriff refused those parts of the application as raising collateral matters and granted the application in respect of additional matters to which the Crown had no opposition. The appellant appealed against the refusal and argued that the sheriff had erred in concluding that the material was not admissible at common law and that, in any event, the evidence met the test for admissibility in terms of sec 275(1). The Crown contended that the evidence was not admissible at common law and that, even if the evidence were relevant, it was inadmissible as collateral.
>
> **Held that:**
>
> 1. **the evidence relating to allegations against teaching staff had no connection, direct or indirect, with the facts at issue and to admit it would involve derailing the trial on a side issue, and it was precisely the kind of evidence which was excluded for reasons of convenience and expediency and was inadmissible as collateral (para 16);**
> 2. **the interlocutor from the court was unclear and evidence of it was, in any event, inadmissible as collateral and even had it been capable of bearing any inference of the kind referred to by the appellant, it was well understood that a determination in one case was generally not admissible as evidence in another and, thus, there was a more fundamental objection to its admissibility and the sheriff had been correct to *133 refuse to allow the evidence to be admitted (paras 17, 18)**;
> 3. the Crown's stance in relation to any application under sec 275 of the 1995 Act was not determinative of whether the evidence should be allowed; the legislation was quite clear that evidence of the kind referred to in sec 274 of the Act was not admissible and, if such evidence were to be admitted, it could only be because the court had properly and carefully considered the matter and had been satisfied that all three aspects of the cumulative test in sec 275(1) had been met, and the evidence sought to be elicited in the additional paragraphs of the application should not have been admitted and the application fell to be refused in

its entirety (paras 20,27); and appeal refused."

In *CH*, the charge alleged the rape of a complainer who was so intoxicated as to be incapable of consenting and the appellant denied that the act of intercourse specified in the libel occurred at all. In para 3 of his opinion the Lord Justice General, who formed part of the majority, explained, in a passage which perhaps encapsulates the court's view of the effect of the provisions and case law, that:

> "In that state of affairs, the issues for trial are very straightforward: (1) was the complainer so drunk as to be incapable of giving consent; and (2) did the appellant have sexual intercourse with her while she was in that state. **Anything which does not bear upon these two issues is irrelevant**."

[Emphasis added]

The court concluded, by 4-1 majority, that evidence which the appellant sought to lead to the effect that sexual intercourse took place some hours before and some hours after an act of intercourse libelled as rape was irrelevant at common law and in any event incapable of passing the tests in section 275. Obiter remarks were made to the effect that it might have been different had his purpose been to explain DNA findings or injury.

In *JL*, whilst the court did not exclude the possibility that a section 275 application could conceivably be allowed in order to permit evidence of incrimination, it is suggested that it could only be permissible in circumstances where the sexual abuse could only have been committed by one person.[101]

[57] *DS v HM Advocate 2007 SCCR 222 para 27*

[58] By Lord McFadyen in MM v HM Advocate 2004 SCCR 658

[59] LJC Gill, Lord Osborne, Lord Johnston also 2004 SCCR 658 at page 680

[60] DS focussed in particular on section 275A, disclosure of accused's previous convictions following the grant of a section 275 application, which was read down in terms of section 3 of the Human Rights Act 1998. Lady Hale observed at para 93 that: "We were referred to nothing in the Convention jurisprudence which begins to suggest that Strasbourg would find a trial in which these provisions were invoked to be a violation of the right to a fair trial guaranteed by article 6" and at para 96" I find it quite impossible to say that the balance struck by the Scottish Parliament in enacting these provisions is incompatible with the Convention rights."

[61] Judge v United Kingdom 2011 SCCR 241

[62] *CJM v HM Advocate 2013 SCCR 215*, full bench

[63] "...The issue, in relation to admissibility at common law, is not of whether a particular judge considers it to be fair or in the interests of justice to allow certain evidence to be led, but one which involves the application of the rules of evidence. These exist for pragmatic reasons in connection with the administration of justice, including the protection of witnesses, notably complainers, who cannot be expected to anticipate and defend themselves against personal attack..."

[64] *Bhowmick v HM Advocate 2018 SCCR 35*

[65] *MacDonald v HM Advocate* 2020 J.C. 244

[66] *MM v HM Advocate (No 2)* 2007 JC 131 at para 27; *CJM v HM Advocate 2013 SCCR 215*; *CH v HM Advocate* 2021 J.C. 45, paras 34-36

[67] CH above, para 36.

[68] See *RN v HM Advocate* 2020 J.C. 132 at para 23:''It is worth noting the peremptory terms of section 274(1):
the court "shall not admit" questioning or evidence of the kind referred to therein. As was noted in DS v HM
Advocate 2007 SC (PC) 1; 2007 SCCR 222 at paragraph 71 (Lord Rodger of Earlsferry) the section "forbids" the
court to admit evidence or allow questioning designed to elicit evidence, of the kind referred to. The starting
point therefore is that such evidence is prima facie inadmissible."

[69] (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.

[70] DS, Lord Hope at para 46 and Lord Rodger at 75; *MM v HM Advocate 2005 1 JC 102; 2004 SCCR 658*

[71] LJC Gill's obiter remarks in MM at para 27

[72] Lord Turnbull at para 132 but it is important to note the final sentence: "*In totality those statements provide powerful support for the view that evidence of prior sexual relations between the parties will in general be treated as irrelevant and they contradict the suggestion that such evidence will often be relevant to the issue of consent*."

[73] *CH v HM Advocate* 2021 J.C. 45 at paras 3, 8, 79-80 and 125

[74] *R v A (No 2) [2002] 1 AC 45*

[75] In SJ, an attempt to elicit evidence of intercourse 10 days before the libel had been refused by the PH judge and was departed from by Senior Counsel for the appellant at the appeal hearing.

[76] Judges can find this Opinion on the T:drive in the "Appeal Opinions – Pre Trial" folder. For public readers of the Bench Book, a hyperlink to the opinion will be made available on this page in the next update of the Bench Book once the opinion has been published on the scotcourts website.

[77] 2021 SCCR 281

[78] *CJM* at para 45; DS, supra, per Lord Hope at para 46 and Lord Rodger at 76 and 77

[79] *SJ v HM Advocate* 2020 SCCR 227

[80] See the embargoed interlocutor dated 17 March 2021. Judges can find this interlocutor in the T:drive folder "Appeal Opinions – Pre-Trial"

[81] See paras 3 and 44 HM Advocate v Selfridge 2021 SLT 976

[82] *JL v HM Advocate* 2021 J.C. 83 at para 4.

[83] 2021 SLT 976

[84] *Stewart v HM Advocate* 2014 SCCR 1; *HM Advocate v JW* 2020 SCCR 174 in which the same approach appears to have been taken (see para 35) of finding relevance for part of the 275 application from an averment of assault separate from the actual rape, where the evidence was not relevant to the rape itself (albeit in *JW* a series of separate events featured in one charge.) In neither case did the court consider what was said, obiter by LJC Gill in *MM* at para 28.

[85] See paras 15 and 16 of the Opinion.

[86] Ibid, para 20.

[87] Section 275B, which provides "(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 (a) in the case of proceedings in the High Court, not less than 7 clear days before the preliminary hearing..."

[88] See *Murphy v HM Advocate* 2013 JC 60 at paras 25-30 and the embargoed opinion of 24 September 2021. Judges can find this Opinion on the T:drive in the "Appeal Opinions – Pre Trial" folder. For public readers of the Bench Book, a hyperlink to the opinion will be made available on this page in the next update of the Bench Book once the opinion has been published on the scotcourts website.

[89] *MacDonald v HM Advocate* 2020 J.C. 244 at para 35

[90] This subsection is to be read as if there were a comma after "behaviour", so that the words after "demonstrating" apply only to specific facts: HM Advocate v DS 2007 S.C. (P.C.) 1.

[91] Noted in *CH v HM Advocate* 2021 J.C. 45 at para 43.

[92] *LL v HM Advocate* 2018 JC 182 at para 21; *Brady v HM Advocate* 1986 JC 68; *CH v HM Advocate*

2021 J.C. 45 at para 38 following the relevant passage from Brady being quoted at para 37.

[93] 2021 SCCR 281

[94] Ibid, see para 20.

[95] So it seems not to include a subsequent conviction per section 101A, introduced in 2011; section 275A being introduced in 2002.

[96] HM Advocate v DS 2006 JC 47; 2005 SCCR 655

[97] DS v HM Advocate 2007 SC (PC) 1; 2007 SCCR 222

[98] Note that the opinion in Oliver was given by Lord Menzies who explained the circumstances of that case, and what he intended to convey, in *CH v HM Advocate* [2020] HCJAC 43 at paras 83-87. However, in the leading opinion, the Lord Justice Clerk cast doubt on the soundness of two aspects of the decision in Oliver; see *CH* paras 64 and 65 where she preferred the approach taken by Lord Turnbull in JW.

[99] Judges can find this Opinion on the T:drive in the "Appeal Opinions – Pre Trial" folder. For public readers of the Bench Book, a hyperlink to the opinion will be made available on this page in the next update of the Bench Book once the opinion has been published on the scotcourts website.

[100] Kerseboom v HM Advocate 2017 JC 47

[101] *JL* at para 3.

Appendices

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