Judicial Institute for Scotland

Preliminary Hearings

Bench Book

Published 31 December 2025

Judicial Institute | Parliament House | Edinburgh

Contents

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 original work on this project. I commend the bench book to all.

Lord Justice General
The Right Honourable Lord Carloway
July 2020

User guide

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 it is kept up to date on the Judicial Hub. Lady Drummond became co-editor in 2023 and the sole editor from 4 February 2025.

Amendments will be intimated to judges through news items posted on the Judicial Hub. The most up to date version will also be published on the Judiciary of Scotland website.

Downloading and printing

If you elect to print the bench book or use a downloaded version saved on your computer, you should regularly check the Judicial Hub for updates (by news item) and should always refer to the latest version, whether printed or on the Judicial Hub.

Hyperlinks

An additional benefit of the online bench book is the hyperlinking found throughout – this means that wherever cases, legislation, or similar are referenced, users who have LINETS, Westlaw and LexisNexis open can easily follow these links to view the document in question, hosted on Westlaw, LexisNexis etc. The hyperlinked contents page allows all users easy navigation within the various sections of the bench book. Cross-references to other chapters or paragraphs within the body of the bench book are also hyperlinked for ease.

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]."

Copy and paste

We recommend that judges also consult Copy and Paste PDF – a guide to copying and pasting content from the PDF bench book into Word documents.

Questions or comments

If you require any further help with this bench book please contact the JI legal and secretariat team on: JIlegalsecretariat@scotcourts.gov.uk or for technical difficulties the Judicial Hub support team on: judicialhub@scotcourts.gov.uk.

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

This chapter examines the duties and powers conferred on the court and practitioners by statute, primarily sections 72 to 75 of the Criminal Procedure (Scotland) Act 1995, whilst also identifying other common practical issues which arise at preliminary hearing.

Please note; the effect of Criminal Courts Determination of 2022 (available on the Criminal Courts Practice Notes and Directions page of the scotcourts website) is that arrangements for preliminary hearings to be heard remotely are put on a more formal footing. It remains open to the court to direct that there should be a physical hearing and to a party to move the court to do so. Accordingly, the existing practice of holding a physical and in-person hearing when pleas of guilty are to be tendered and accepted will continue and an accused must attend such a hearing and will be directed by the court to do so.

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 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. Ordinarily this is a matter of discretion and will depend on the circumstances, but since 1 October 2022 there is a presumption in Criminal Courts Determination 2022, made under Coronavirus (Recovery and Reform) (Scotland) Act 2022, that an accused need not attend a preliminary hearing. However, paragraph 7(2)(b) of the schedule to the Act, preserves the court's power to direct a person to attend physically. The court can make such a direction of its own accord or in response to a motion, per paragraph 7(5)(a). It may revoke such a direction, per paragraph 7(5)(b).

Since 2021, the majority of preliminary hearings have been heard remotely and accused persons on bail are ordinarily excused attendance. If an accused in custody wishes to view the hearing, that can be done remotely from prison. If an accused on bail wishes to view the hearing, then a direction can be sought that the accused should attend in person in which case it would call as a physical hearing. Alternatively, the accused may be able to arrange to view a remote hearing with the instructed solicitor.

When the Crown will be accepting a plea of guilty, there must be a physical hearing with the accused in attendance at court. There are other circumstances in which it can be necessary to hold a physical hearing and judges may so insist in appropriate circumstances and make an appropriate direction under paragraph 7(2)(b) of the schedule.

For a hearing which calls in court as a physical hearing, relevant considerations in considering whether to permit an accused to be excused may include:

- Is the Crown seeking a warrant? (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.")
- 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 a preliminary hearing, at which the accused ought to have attended but failed to do so, 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 paragraph 2 of the High Court of Justiciary Direction No. 1 of 2022, (All Criminal Courts Practice Notes are available on the Criminal Courts Practice Notes and Directions page of the SCTS website) 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 (section 72(2)). An accused person cannot represent himself in any such case where evidence may be led (sections 288C and 288DC). The same applies in certain cases involving child witnesses who were under 12 when the indictment was served (section 288E). 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.

The appeal court has considered the residual category of cases per section 288C(3) and (4), cases not listed in subsection 2 as sexual offences but where the court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated in the same way as a listed sexual offence such that an order to that effect should be made (*HM Advocate v RS* [2022] HCJAC 41, 2023 JC 1).

The court noted that a section 288C order can appropriately be made even when an accused person was already represented. The court explained at paragraph [11] that the test is not whether the sexual element is a substantial part of the charge but whether the charge contains a sexual element which is itself substantial. The court noted that these provisions are different to those concerned with notification and that section 288C is concerned with the protection of witnesses. The court found it doubtful that the accused's motivation had been of any relevance.

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 (section 79(2)(a)):

- 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 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. (If the accused offers to plead guilty to some charges but his pleas are not accepted by the Crown, that fact is simply recorded). 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)(i) 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 (section 79(2)(b)):

- Separation or conjunction of charges or trials;
- A preliminary objection to certain statutory presumptions set out in section 79(3A) (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);
- 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, section 275 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 (section 72(6) (b)(ii). In practice most of these will be dealt with in chambers);
- Any section 275 application or application under section 288F(2) (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) which has been made timeously before the preliminary hearing or is permitted under subsection (8), which empowers the court to deal with a late s275 application if it meets the statutory criterion of special cause being shown (section 72(6) (b)(iii));
- 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 (section 72(6)(c)) 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 (section 72(6)(d)). 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 preliminary hearing; 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. From 7 September 2022, the written record forms require parties to identify not only child and vulnerable witnesses but also professional and police witnesses who can give evidence remotely (these forms can be accessed by following the link in the text, or going to the SCTS home page, clicking on the "Rules and Practice" dropdown menu, then "Forms", then "Criminal Procedure forms" and the 8th bullet point; "Preliminary hearings, high court of justiciary").

It was agreed in February 2023 that the PH judge will make a blanket order for professional and police witnesses to give evidence remotely if parties do not present a discriminating suggestion to the contrary (see below).

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 (section 72(6)(e)) 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 (section 72(6)(f)(i) and (ii)).

1.2.10 Is a further diet necessary?

Under section 72, 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) to (7) for custody cases appear significant as subsection (6)(a) makes it mandatory to fix the trial within the 140/320 day period if it is ready to proceed to trial (this rarely happens because it almost never suits the defence and there is almost never court capacity). 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. *HM Advocate v Abid* [2019] HCJAC 73, 2020 JC 33 seemed to suggest that an extension to the 140/320 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 (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). 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 at paragraph [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 paragraphs [11] to [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 (section 72D(4)).

1.2.14 Allocation of trial

PH judges do not allocate cases to colleagues or to themselves but can assist in identifying cases that would benefit from case management by a nominated judge. At the first calling of the Preliminary Hearing the judge should consider whether the case may benefit from allocation to a judge to case manage and preside at future hearings. A case may be suitable for allocation for many reasons. These include: the long trial protocol is to be engaged (PN 1 of 2018); the profile of the case may increase the trial judge's responsibilities beyond the norm; it involves complex legal matters; there are multiple applications for evidence by commission; the locus has been subject to an inquiry; the case is a murder trial expected to last over 8 days or when COPFS, the defence or the PH Judge indicates the case would benefit from case management.

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 (*GW v HM Advocate* [2019] HCJAC 23, 2019 JC 109 per the Lord Justice General at paragraph [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.").

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 should 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. In *LW v HM Advocate* [2023] HCJAC 18, 2023 JC 184, in delivering the opinion of the court the Lord Justice Clerk noted that it became apparent at trial that there was no issue of reasonable belief and suggested that the issue should have been explored at preliminary hearing.

Unless there is a real basis to consider that reasonable belief will be a live issue, then the notice should refer only to consent. **It is suggested that if the evidence at trial is such that an issue of reasonable belief arose on the evidence, the judge may give directions on reasonable belief regardless of mention of it in the notice, but to entitle the judge to do so counsel must seek leave to amend the terms of the special defence prior to the Crown speech; Thomson v HM Advocate [2024] HCJAC 30, 2025 JC 71 at paragraph [45].**

Thomson was tried before the current version of this section was published.

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] HCJAC 35, 2021 JC 236, at paragraph [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 Direction that a witness may attend trial remotely

The Coronavirus (Scotland) Act 2020, in schedule 4, made provision to allow a witness in a criminal trial to give evidence remotely but has now been repealed and, for this purpose, replaced by provisions in paragraphs 6 to 9 of the schedule to the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

The court can give a direction that a witness need not attend (paragraph 6(4)) and is empowered to do so on the motion of a party or of its own accord (paragraph 6(8)). Whilst initial practice was for written application by a party, as experience of these provisions has grown this has become unnecessary.

The effect of making such a direction is that the witness must attend by electronic means (paragraph 8(1)), but the Act is flexible and permissive. The power to issue a direction includes the power to revoke an earlier direction (paragraph 6(7)).

Professional/police witnesses: At a meeting of the PH judges with the Lord Justice General and Lord Justice Clerk on 27 February 2023, it was agreed that the preliminary hearing judge will make a blanket order for professional and police witnesses to give evidence remotely if parties do not present a discriminating suggestion to the contrary. In effect, the court will proceed on the basis that the absence of a discriminating list of witnesses justifies the assumption that the criteria in paragraph 6(6) of the schedule to the 2022 Act have been met.

This is on the understanding that the terms of the emergency legislation are very permissive, and the court can revoke a direction for a particular witness if it transpires that there is good reason for the witness to give evidence in person.

Whilst such directions can be and are properly made at trial, generally it is best if motions and decisions are made at preliminary hearing so that all concerned have certainty and arrangements can be made in advance of the trial. Such decisions being made at preliminary hearing allows citations to specify how a witness is to attend.

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

Whilst the court can make a direction of its own accord without hearing representations (paragraph 6(10)), in practice at some stage, the court must give all parties an opportunity to make representations (paragraph 6(11)) and it will generally be best, and most convenient, if a court hears parties at the preliminary hearing before making a direction.

The court's direction:

- Must set out how the person is to appear by electronic means (paragraph 8(4)(a)) 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 (paragraph 8(9)(b)) which would be achieved by a live TV link or Webex;
- May include any other provision the court or tribunal considers appropriate (paragraph 8(4)(b)).

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 adducing the witness 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 paragraph 6(6) 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.

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* [2014] HCJAC 48, 2015 JC 4 at paragraph [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."

Chapter 2: Defence statements

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 paragraph 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 (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") 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] HCJAC 47, 2013 JC 40. The court rejected a contention that the terms of section 70A were intrinsically non-compliant with the Convention. It confirmed in paragraph [17] that the requirements in section 70A are obligatory, but softened their effect by stating in paragraph [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 paragraph [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] HCJAC 1, 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* [2020] HCJAC 52, 2021 JC 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 paragraph [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.

Chapter 3: Disclosure obligations and recovery of information

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 (which is reproduced at Appendix G of Renton & Brown, Criminal Procedure) 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 (*HM Advocate v AM, JM* [2016] HCJAC 34, 2016 JC 127).

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 to 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 to 152. Provisions relating to the appeal and review of orders made under the PII part of the Act are at sections 153 to 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 (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)).

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] HCJAC 52, 2020 JC 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 paragraph [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 paragraph [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."

In *MA v HM Advocate* [2022] HCJAC 23 2022 JC 229, the appeal court found that where the defence had not listed a potential incriminee as a witness, there was no obligation on the Crown to disclose the incriminee's previous convictions under section 121, at common law or under article 6 of the Convention. The court also observed that granting the order would have been an unwarranted invasion of the incriminee's article 8 rights since there was no basis for deeming it of relevance in the trial.

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 JC 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 (see also *Ramzan v HM Advocate* [2013] HCJAC 21, 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) 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 (*JC, Petitioner* [2018] HCJAC 77, 2020 JC 155).

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 paragraph [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, 2016 SLT 359, 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 paragraph [27] the court noted the complete absence of any specification for the basis of the appellant's beliefs about the complainer and at paragraph [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".

Chapter 4: Time limits affecting preliminary hearings

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 (*Murphy v HM Advocate* [2012] HCJAC74, 2013 JC 60 at paragraphs [25] to [30]).

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 section 67 notice to defence of name and address of witness or details of production (sections 67(5) and 67(5A) of the 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 (section 78(4) of the 1995 Act).	Not less than 7 clear days before the preliminary hearing.
Presumption as to condition of productions: Where a person who has examined a production is lead in evidence about it and	Where the production was lodged at least 14 days before the preliminary hearing.

the production has been lodged, it is presumed that: a. the production was received by the witness in the condition in which it was taken possession of by the police or procurator fiscal and returned by the witness after examination to the police or fiscal; and b. that the production examined by the witness is that taken possession of by the police or procurator fiscal (section 68 1995 Act).	
If a party wishes to rebut the presumption, a written notice must be given, stating that the accused does not admit that the production was received or returned or that it is that taken possession of (section 68 of the 1995 Act):	At least 7 days before the preliminary hearing.

4.2 Notice of previous convictions

Objection to previous conviction (section 69 of the 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 the accused has, at least 2 days before the diet, intimated objection to the procurator fiscal.

4.3 Defence statements

<table>
<tr><td>Defence statements must be lodged (section 70A(3) of the 1995 Act).</td><td>At least 14 days before the preliminary hearing.</td></tr>
<tr><td>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 (section 70A(4) of the 1995 Act).</td><td>7 days before the trial diet.</td></tr>
<tr><td colspan="2">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 (section 70A(5) of the 1995 Act). 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 (section 70A(6) of the 1995 Act).</td></tr>
<tr><td colspan="2">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 (section 70A(7) of the 1995 Act).</td></tr>
</table>

4.4. Other issues at the preliminary hearing

Where the accused intends to plead a special defence (diminished responsibility, automatism, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent) a plea or notice must be lodged and intimated (sections 78(1) and (3) of the 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 (section 72(3) of the 1995 Act. The meanin of 'preliminary pleas' can be found in s79(2) of the 1995 Act).	Not less than 7 clear days before the preliminary hearing.
Preliminary issues (section 72(6)(b)(i) of the 1995 Act. The meaning of 'preliminary issues' can be found in section 79(2) of the 1995 Act).	Not less than 7 clear days before the preliminary hearing.
A vulnerable child witness and deemed vulnerable witness (the meaning of 'vulnerable witness' in this context is defined in section 271 and (13A)(b)(i) of the 1995 Act) notice under section 271A(2) of the 1995 Act. **Note that an objection to a vulnerable witness ("VW") application under section 271A(4A) must be intimated not later than 7 days after lodging of the VW notice.**	No later than 14 clear days before preliminary hearing. The court may on cause shown allow a vulnerable witness notice or an objection to the notice to be lodged after those time limits (section 271A(4) and (4B) of the 1995 Act).

A vulnerable witness (other than a child or deemed vulnerable witness) application under sections 271C(2) and (12) of the 1995 Act. Note that an objection to a VW application under section 271C(4A) must be intimated not later than 7 days after lodging of the VW notice.	No later than 14 clear days before the preliminary hearing. The court may on cause shown allow a vulnerable witness notice or an objection to the notice to be lodged after those time limits (sections 271C(4) and (4B) of the 1995 Act).
An application under section 275(1) of the 1995 Act to admit such evidence or allow such questioning set out in section 274 of the 1995 Act (see section 275B(1)(a)).	No later than 7 clear days before the preliminary hearing, unless on special cause shown.
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.

Chapter 5: Time bars and extensions

5.1 Section 65 of the 1995 Act

The time limits in section 65 were changed during the Covid-19 pandemic, first by the Coronavirus (Scotland) Act 2020 and then by the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

Although the 2020 Act has been repealed, its effect on time bars in cases in which the accused appeared on petition **before 1 October 2022** was preserved by section 56(1)(a) of the 2022 Act. In effect, for cases in which the accused appeared on petition before 1 October 2022 the extended time limits based on the "suspension period" of six months introduced during the pandemic were retained.

For cases where the accused appeared on petition **on or after 1 October 2022**, section 50 of the 2022 Act introduced new time bars, essentially extending the pre-pandemic time limits by 180 days or six months on a temporary basis, until 30 November 2025 at the latest.

Thereafter, the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Saving Provisions) Regulations 2025, which comes into force on 30 November 2025, preserves the extended time limits for an accused who first appears on petition before the end of 30 November 2025, and, for custody cases, where full committal takes place before the end of 30 November 2025.

The relevant time limits are dependent on the date of first appearance in bail cases and full committal in remand cases. The following table summarises the legislative changes to the time limits:

Where accused at liberty on bail			
Date of first appearance on petition	**Preliminary hearing to be commenced within**	**Trial to be commenced within**	**Legislative provision**
Before 1 October 2022	17 months from first appearance	18 months from first appearance	Suspension period as preserved by section 56(1)(a) Coronavirus (Recovery and Reform) (Scotland) Act 2022
1 October 2022 to 30th November 2025	17 months from first appearance	18 months from first appearance	Section 65(1) of the 1995 Act as amended by Schedule 1 at paragraph 20 and section 50 Coronavirus (Recovery and Reform) (Scotland) Act 2022; and regulation 2(1) Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Saving Provisions) Regulations 2025
1 December 2025 onwards	11 months from first appearance	12 months from first appearance	Section 65(1) of the 1995 Act

Where accused committed until liberated in due course of law (remand)				
Date of full committal	**Indictment to be served within**	**Preliminary hearing to be commenced within**	**Trial to be commenced within**	**Legislative provision**
Before 1 October 2022	260 days from full committal	290 days from full committal	320 days from full committal	Suspension period as preserved by section 56(1)(a) Coronavirus (Recovery and Reform) (Scotland) Act 2022
1 October 2022 to 30 November 2025	260 days from full committal	290 days from full committal	320 days from full committal	Section 65(4) of the 1995 Act as amended by schedule 1 at paragraph 22 and section 50 Coronavirus (Recovery and Reform) (Scotland) Act 2022; and regulation 2(2) Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Saving Provisions) Regulations 2025
1 December 2025 onwards	80 days from full committal	110 days from full committal	140 days from full committal	Section 65(4) of the 1995 Act

NB – if any remand period is to be extended so it is longer than 12 months (18 months for cases prior to 30 November 2025) an application to extend the time limit is required under section 65(3) as well as section 65(5).

Over the course of recent years, there has been significant evolution in the reasoning of the appeal court concerning the correct approach in deciding on applications to extend the 12 (18) month time limit. The relevant cases and principles are examined at paragraph 5.3.2.

Section 65

"(1) Subject to subsections (2) and (3) below, an accused shall not be tried on indictment for any offence unless,

(a) 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

(aa) where an indictment has been served on the accused in respect of the sheriff court, a first diet is commenced within the period of 11 months;

(b) 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.

(1A) If the preliminary hearing (where subsection (1)(a) above applies), the first diet (where subsection (1)(aa) above applies) or the trial is not so commenced, the accused

(a) shall be discharged forthwith from any indictment as respects the offence; and

(b) 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,

(a) 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 any period specified in subsection (1) above; or

(b) in any other case, the sheriff may, on cause shown, extend any period specified in that subsection.

(3A) 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—

(a) 80 days, unless within that period the indictment is served on him, which failing he shall be entitled to be admitted to bail;

(aa) 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) where an indictment has been served on the accused in respect of the sheriff court,

(i) 110 days, unless a first diet 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.

(4A) 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–

(a) 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

(b) 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.

(5A) 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.

(5B) 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.

(8A) 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–

(a) in a case where an indictment has not yet been served on the accused, a single judge of the High Court; or

(b) in any other case, the court specified in the notice served under section 66(6) of this Act.

(8B) 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.

(8C) 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.

(8D) Where such an application is made but is refused and the prosecutor appeals against the refusal, the accused–

(a) 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

(b) 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) a first diet shall be taken to commence when it is called; and

(c) a trial shall be taken to commence when the oath is administered to the jury.

(10) In calculating any period specified in subsection (1) (including any such period as extended)] there shall be left out of account any period during which the accused is in lawful custody, 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."

5.2 Custody cases

5.2.1 The 80, 110 and 140 day rules

References to the 80, 110 and 140 day rules apply equally to the 260, 290, and 320 limits depending on the date of full committal per the table above.

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. (1995 Act s.65(4)–(9), as amended by 2004 Act s.6.) 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. (*HM Advocate v Walker*, 1981 J.C. 102.) An extension may be granted by a single judge of the High Court if no indictment has been served 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. (1995 Act s.65(5). The provisions of s.65(5A) and (5B), supra, para.9-27.1, apply.) Either party may appeal to the High Court against the single judge's decision. (1995 Act s.65(8). The form for an appeal by the accused is contained in Form 8.1–B of the 1996 Act of Adjournal.

"An extension may be granted after the period has expired. (*Farrell v HM Advocate*, 1985 S.L.T. 58.)

"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. (*McCluskey v HM Advocate*, 1993 S.L.T. 897.)"

5.2.2 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, or in sheriff court cases a first diet, 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. (1995 Act s.65(4), as amended by 2004 Act, and s.71B, as inserted by 2016 Act s.81(4). References to the 12 month and 140 day periods include references to those periods as extended: see 1995 Act s.65.)

"In *HM Advocate v Clarke* 2017 S.C.C.R. 301. 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. (*HM Advocate v McPhee*, 2007 S.C.C.R. 91 at [31]. The charge may be time barred even where the Crown undertake not to use any evidence relating to the charge on the petition: ibid. at [44].)

"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. (1995 Act s.65(8A)–(8D) inserted as above; presumably he can be heard only on the proposed conditions of bail.)

"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. (1995 Act s.65(8D), as inserted by 2004 Act s.6(9).) 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. (1995 Act s.65(8D), as inserted by 2004 Act s.6(9).)

"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. (1995 Act s.25A, as inserted by 2004 Act Sch. para.7. This would appear to mean that there could be a situation in which an accused

continued to be detained beyond the statutory time limits, despite the apparently peremptory terms of s.65(4).)

"Section 28 of the 1995 Act (infra, para. 10-19.) 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. (1995 Act s.28(4A), (4B), as inserted by 2004 Act Sch. para.9. For the standard conditions, see infra, para. 10-09.1.)

"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. (1995 Act s.32(7B), as inserted by 2004 Act Sch. paras 10 and 11.)"

5.3 Bail cases

5.3.1 The 11 and 12 month time bars

Reference to 11 and 12 month time bars apply equally to 17 and 18 month time bars depending on the date of first appearance as set out in the table 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. (1995 Act s.65(1), (3).)

"**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 (Or cited in accordance with s.66(4)(b) of the 1995 Act (see infra, at para.11-08).) cannot be tried on indictment unless a preliminary hearing (infra, Ch.17. A preliminary hearing starts when it is called: 1995 Act s.65(9)(b), as amended by 2004 Act s.6(10).) has started within 11 months (unless the hearing has been dispensed with under s.72B(1) of the Act (1995 Act s.65(4A), as inserted by 2004 Act s.6(6).), 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. (*MacDougall v Russell*, 1985 S.C.C.R. 441; cf. *Potts v Gibson* (SAC), 2016 S.C.C.R. 412.)

"**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, (1995 Act s.65(2) as amended by 2004 Act s.6(3).) whether the warrant was granted at any diet in the case (unless, perhaps, it was granted in error when the accused was actually present (*HM Advocate v Campbell*, 1988 S.L.T. 72.)) or whether it was granted on a petition charging the accused with failure to appear. (*HM Advocate v Lang*, 1992 S.C.C.R. 642, holding also that a warrant granted at a trial diet remains in force even if the diet is subsequently deserted.) 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). (*HM Advocate v Taylor*, 1996 S.L.T. 836.) The rules do not apply if the accused is arrested on the warrant and then released on bail. (*Kelly v HM Advocate*, 2001 S.C.C.R. 534.) 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."

5.3.2 Grounds for extension of 11 and 12 month time bars

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

The law was clarified and restated in decisions of the appeal court in July and August 2022, most importantly in *Barr v HM Advocate* [2023] HCJAC 9, 2023 JC 79, in which the opinion of the court was delivered by the Lord Justice General.

In paragraph [1] of the opinion, the court explained that it was necessary to dissuade the judiciary and parties from continued reliance on dicta in *Swift v HM Advocate* 1984 JC 83 and *Early v HM Advocate* [2006] HCJAC 65, 2007 JC 50. The court also noted an apparent disregard of the more modern approach taken in *HM Advocate v Graham* [2022] HCJAC 1, 2022 SLT 673 and *Uruk v HM Advocate* [2014] HCJAC 46, 2014 SCCR 369. In *Uruk* and *Graham* the court examined and gave effect to the implications of the changes in court structure, procedure and management introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004 since *Swift* was decided.

As the court put it:

> "Greater clarity is required in order to assist first instance courts with the appropriate modern approach."

In addition to explaining changes of law and procedure, the court pointed out the narrow factual circumstances applying in both *Swift* and *Early*. Moreover, the court observed that *Early* proceeded on a Crown concession that the approach in *Swift* was applicable in the circumstances of that case about which the Lord Justice Clerk (Gill) plainly had reservations.

Given the importance of the decision in *Barr*, extensive parts of the reasoning are set out below in quotes from the opinion. In essence, the court explains that in determining whether cause is shown for granting an extension, the true question for the court when being asked to stop a prosecution in a solemn case because of the non-appearance of a crucial witness at a trial diet is: where do the interests of justice lie?

The background in that case was the absence of a witness, but the reasoning of the court demonstrates that the decision of the court has wider application as can be

seen in a pre-trial decision of 19 August 2022 which is referred to after the ensuing discussion of the decision in *Barr,* which is examined first.

In posing the interests of justice question, the court explained at paragraph [21] that it ought to be answered by balancing the interests of the accused in being brought to trial within the statutory time limit with those of the complainer and the public in general in allowing the system of justice to determine the charges libelled on their substantive merits as opposed to on grounds that are essentially procedural in nature.

If the interests of justice dictate that the time bar ought to be extended, cause to do so will have been shown.

Barr involved a prosecution of quite serious conduct brought under section 1 of the Domestic Abuse (Scotland) Act 2018. The effect of the pandemic had led to considerable delays and procedure during which the complainer had disengaged and had failed to attend at two trial diets. It was at a subsequent first diet that the sheriff made the decision to extend the 12 month time bar which was the subject of the appeal.

In examining the procedure, the court expressed its concern that a warrant should have been sought for a vulnerable witness, noting that such an approach did not appear to comply with internal COPFS guidance. Nor was it consistent with the spirit of observations made by the court in *Graham*, at paragraph [20], to the effect that, "the execution of a warrant to arrest a complainer in a sexual offences case should not be regarded as a satisfactory solution" and that other procedural options ought to be explored.

The court explained its decision that the sheriff had not erred in granting the extension, even though he had erred in applying the two-stage test from *Swift* and *Early*, with a comprehensive analysis which is worth reading in full:

> "[11] The twelve month time limit on the commencement of trials in section 65 of the Criminal Procedure (Scotland) Act 1995 is, in comparison to those ancient and embedded provisions applicable to persons in custody (ibid s 65(4)), a relatively recent statutory innovation. It was introduced by the Criminal Justice (Scotland) Act 1980 (s 14(1)). The language of section 65(3) gives the judge or sheriff power to extend the period simply "on cause shown". Such language is not, in other contexts, normally regarded as imposing a high test, such as that applicable in a custody case (on which see

HM Advocate v MacTavish 1974 JC 19), or one with more than one stage. Nevertheless, this is what has been taken from *HM Advocate v Swift* 1984 JC 83, in which *MacTavish* was used as an exemplar, and has been explained in *Early v HM Advocate* 2007 JC 50.

"[12] In *HM Advocate v Graham* 2022 SCCR 68, the court (LJG (Carloway), delivering the opinion of the court, at para [15] et seq), explained, under reference to *Uruk v HM Advocate* 2014 SCCR 369 (LJC (Carloway), delivering the opinion of the court at para [10]), that the dicta in *Swift* and *Early* must be read according to the context of, first, the criminal justice system in place at the time, in comparison to that in the current era, and, secondly, their facts.

"[13] At the time of *Swift*, control of the progress of cases was almost exclusively in the hands of the Crown; an arm of the executive. The availability of court diets was, at least in part, under the control of the Scottish Courts Administration, which was then another arm of the executive. The courts' concern in the early 1980s and beyond was to ensure that the Government was funding the criminal justice system at a level which ensured that the twelve month time bar operated in practice. That was at a time when fault on the part of the Crown, in prosecuting solemn cases timeously when an accused was in custody, could of itself result in an accused tholing his assize. No doubt that may still occur in some situations. The era was one in which the adjournment of trial diets was a rarity and heavily discouraged. The numbers of solemn trials were low in comparison to today. This was all before the increase in prosecutions, first, for concern in the supply of Class A drugs, notably heroin and cocaine, and, secondly, for sexual, and especially historical sexual, offences.

"[14] The situation in relation to the adjournment of trials had changed by the time of *Early*. By then the overloading of trial circuits by the Crown and the consequent churn of trial diets, had become a significant problem. The Bonomy Report (Improving Practice: 2002 etc.) led to the changes introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004. This in tum led to the court beginning to take over what had formerly been the Crown's role in progressing cases once the indictment, citing an accused to a Preliminary Hearing in the High Court (1995 Act s 72 as substituted in 2004) or a First Diet in the sheriff court, (1995 Act s 71B inserted in 2016), had been served. The provision of funding to accommodate trial diets remained a concern, in so far

as it was controlled by the executive until the Judiciary and Courts (Scotland) Act 2008 established (s 60) the Scottish Courts Service (now the Scottish Courts and Tribunals Service) as a judicially led body corporate. Thereafter it was for that body to provide the necessary funding to accommodate trial diets, albeit within a Parliamentary approved budget. In short, the need for judicial scrutiny of executive funding and control over the progress of individual prosecutions, from the point at which the indictment was served, has changed since not only *Swift* but also *Early*.

"[15] The idea that a sexual offences trial would not proceed, and the charge deserted, because of the non-appearance of a vulnerable complainer, was only beginning to be dispelled in the wake of the notorious "Glasgow Rape Case" (see *X v Sweeney* 1982 SCCR 161, LJG (Emslie) at 171). Since then, the measures which have been put in place to secure the testimony of vulnerable witnesses, rather than to discontinue the prosecutions prematurely, have been considerable (1995 Act, ss 271 et seq, as substituted/amended by the Vulnerable Witnesses (Scotland) Act 2004 and the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019).

"[16] The introduction of the twelve month limit, with its provision for an extension on cause shown, must now be viewed in light of the incorporation of the reasonable time requirement in article 6.1 of the European Convention into domestic law. Having regard to the jurisprudence on the interaction between the reasonable time requirement and the general right to a fair trial (*Spiers v Ruddy* 2009 SC (PC) 1), it may often be difficult to resist an application for an extension of the twelve month time bar when the trial remains due to start within what would be regarded as a reasonable time under the Convention, where a reason for an extension has been proffered and no additional prejudice to the accused is demonstrated.

"[17] In relation to the particular facts in *Swift* and *Early*, *Swift* was a fraud case in which the Crown failed to serve the indictment upon the accused in time to hold a trial within the one year period. That was the critical feature. The court (LJG (Emslie) at 88) did not purport to lay down a test, but it did say that in such cases it should ask, first, whether a sufficient reason for an extension had been shown and, secondly, whether that extension should be granted in all the circumstances. Whether these were ever intended to be two separate

questions to be applied as if encased in hermetically sealed compartments may be doubted.

"[18] The problem in *Early* was a failure (a clear drafting error by the Crown) to libel a locus in certain lewd and libidinous behaviour charges. *Early* (LJC (Gill) at para [5]) described what had been said in *Swift* as involving a two stage test. The reason why a Full Bench was convened in *Early* may not be difficult to surmise. However, the Lord Justice Clerk went on to observe (at para [20]) that:

> 'Over the years various members of this court have expressed misgivings about the decision in *HM Advocate v Swift* and have questioned whether it is necessary or appropriate that a simple provision that the court 'may on cause shown' grant an extension should require the court to apply the rigid two-stage test that I have described. These misgivings were alluded to, but not discussed, by the court in *Ellis v HM Advocate* [2001 JC 1151 (para 16). It was open to any of the parties in these appeals to raise the point; but the Advocate depute and counsel for the appellants in both this case and *Fleming v HM Advocate* [[2006] HCJAC 64] have based their submissions on the view that *HM Advocate v Swift* was rightly decided. In the absence of submissions to the contrary, I shall apply the *Swift* test in my consideration of this appeal.'

Early did not therefore affirm *Swift*: it proceeded on a concession that a two stage test should be applied. The appeal against the extension of time in *Early* was refused.

"[19] Neither *Swift* nor *Early* are about the adjournment of trial diets and consequent extensions of time to accommodate a new diet. Both involved faults in the service of the indictment or the content of the libel. The dicta in them should not readily be transposed into different situations. In particular they should not be applied to cases, such as the present, in which, in sharp contrast to *Swift* and *Early*, the Crown have brought the case to a trial diet within the twelve month limit.

"[20] The Crown indicted this case timeously; that is within twelve months from the first appearance on petition (1995 Act, s 65(1)(b)). Thereafter, control of the case passed to the court. The trial was fixed for January 2022 and the

complainer was duly cited. The reason that the trial did not go ahead was not because of some serious, systematic fault on the part of the Crown, but because the complainer did not respond to her citation. This is not an unusual situation in this type of case.

"[21] A new trial diet was fixed. The principal reason why it did not go ahead was again the absence of the complainer. It would seem that she was aware of the diet and had been given a citation for it too. It is said that the complainer's absence was the fault of the Crown, in the sense that they ought to have ensured that she was arrested under warrant of the court. This is unrealistic. It runs entirely contrary to the modern understanding of the inherent vulnerability of complainers in sexual and domestic abuse cases and the suitably cautious approach of the Crown Manual (above). It is quite inappropriate in sexual and domestic abuse cases for complainers, who may be regarded as vulnerable, to be arrested and thus kept in custody pending liberation at a court appearance, or perhaps even until the trial diet, thus adding to any trauma which they might have already sustained. The appropriate course is, at least initially, to persuade the complainer to attend the trial, no doubt by, amongst other things, putting in place vulnerable witness measures. Better still, as was made clear in *Graham* (at para [20]), steps should be taken to have the complainer's testimony taken on commission. It would certainly have been wholly unsatisfactory, in the circumstances narrated, effectively to end the prosecution, especially without knowing the reasons for the complainer's reluctance to appear in court.

"[22] In order to succeed in this appeal, the appellant requires to persuade the court that the sheriff erred in granting the extension of time; ie that the Crown had failed to show 'cause". Since the fundamental reason for the trial not taking place was the absence of the critical witness, who had been duly cited, that test was met. As has been explained at some deliberate length, *Swift* and *Early* must now be understood as being from a different era. They each involved different circumstances, both in relation to the system in place at the time and on their facts. It may still be valuable to pose the two questions which were desiderated in *Swift*, but the single true question for the court, when it is being asked effectively to stop a prosecution in a solemn case because of the non-appearance of a crucial witness at a trial diet, is: where do the interests of justice lie? This will involve a balancing of the interests of the

> accused in being brought to trial within the statutory time limit with those of the complainer and the public in general in allowing the system of justice to determine the charges libelled on their substantive merits as opposed to on grounds that are essentially procedural in nature. If the interests of justice dictate that the time bar ought to be extended, cause to do so will have been shown."

Lord Pentland delivered the opinion of the court with a differently constituted bench in a pre-trial decision, *Appleby v HM Advocate* [2023] HCJAC 27. The appellant was one of four accused facing trial on serious drug charges in the High Court and he was not present for trial because, as the Crown ought to have known and had been informed shortly before the trial, he was serving a prison sentence in England. The Crown's belated attempt to persuade the prison authorities to have him transferred had been unsuccessful.

The court examined *Graham*, *Uruk,* and *Barr* and endorsed those decisions as correct statements of the modern law and applied the interests of justice test, upholding the decision of the trial judge to grant an extension, albeit she had applied the *Swift/Early* two-stage test.

Paragraph [19] of the opinion perhaps encapsulates the court's reasoning where, having noted that the issue arose at a trial due to be commenced within the 12 month time bar unlike the situation in *Swift* and *Early*:

> "…Following Graham and [Barr], it would not be appropriate to apply a two stage test. The right approach, in a case such as this, is simply to examine the single issue of whether cause has been shown for granting an extension of the 12 month time bar. That is a question that falls to be answered by considering whether it is in the interests of justice to do so. Factors such as the wider public interest in the effective prosecution of crime, the existence of any genuine prejudice to the accused in his trial being delayed, and the importance of ensuring that the trial takes place within a reasonable time are likely to be in play. It is important not to treat a motion to extend the 12 month time bar as providing an opportunity to apply a sanction of disapproval to the Crown merely because a mistake has been made at some stage in the prosecution of the case."

In an embargoed pre-trial decision on the T drive, *Kelt and Colvan v HM Advocate* 8 May 2025, (HCJAC 2025/055 and 058) in the opinion of the court delivered by the

Lord Justice Clerk, Lord Beckett, the court upheld a sheriff's decision to extend the 11 month and 12 month time limits by a significant period. The two appellants had appeared before the sheriff court in 2002 and 2003, but neither was indicted. On 27 January 2025, well over 20 years later, the sheriff granted the prosecutor's opposed motion to extend the time limits. The appellants were served with an indictment charging them with murder on 28 August 2002. In refusing the appeal the court noted that in recent times, different benches of the appeal court have expressed considerable doubt about the need to apply the two-stage *Swift* test (paragraph [38]). The court shared the doubts expressed and considered that the interests of justice test ought to be the criterion in all applications for the extension of the 12-month time limit. They noted that as a bench of three they remained bound by *Swift* but observed that its two-stage test may appear to be out of kilter with modern conditions and radical changes that have occurred since 1984 and which have increased the time necessary for preparation by prosecution and defence lawyers. Ultimately the court did not require to remit to a full bench to consider whether *Swift* should be overruled as it agreed with the sheriff's decision to extend the time limits having applied the *Swift* test and found it was met.

Whilst the foregoing cases are now the most important decisions further illustrations of contemporary reasoning can be seen in other cases from the last decade.

In *Mitchell v HM Advocate* [2013] HCJAC 30, 2013 SCL 409, the Lord Justice Clerk (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 was a case in which the court examined 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 court's 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)."

The circumstances in *Graham* were these. 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 (at paragraph [17]):

> "….; 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.

A further illustration is seen in *BS v HM Advocate* [2023] HCJAC 5, 2023 JC 33. The court noted, at paragraph [19] that:

> "…when granting an extension of time under section 65(3) of the 1995 Act, there is a statutory requirement that the court "shall give the parties an opportunity to be heard".

The case had a long history of delay with a multitude of ineffective first diets and trial diets about which the court expressed strong disapproval. However, the appeal arose from the granting of an extension of the 12 month limit following upon the fiscal moving for an extension and an adjournment in the absence of both the accused and his solicitor who was known to be in the building. The court viewed this as a substantial irregularity for which there was no satisfactory explanation, but went on to examine what would have happened had the accused and/or his agent been present, reaching the following conclusion:

> "[21] Notwithstanding the seriousness of the failure, the court requires to be satisfied that, had the appellant's agent been present, a different decision might have been reached. Such a decision would have been, in effect, to bring an end to this prosecution of a fire raising which took place at an educational centre where some 100 people, mostly children, were present. Having regard to the procedural history, which includes considerable delay at least some of which has been attributable to the appellant's belated amendment to the defence statement and consequent application for an excessive degree of

disclosure, that is not a consequence which would be consistent with the interests of justice. For these reasons, the court will affirm the determination to extend the time bar in terms of section 65(8)…"

Chapter 6: Judicial culture at preliminary hearing

The court has specifically endorsed the case management practices proposed in this chapter for both the High Court and sheriff court: *Clarkson v HM Advocate* [2024] HCJAC 13, 2024 JC 345, Lord Justice Clerk (Dorrian) delivering the opinion of the court at paragraph [26]. This chapter identifies the following key principles:

- 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
- 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 (Lord Bracadale, *HM Advocate v Forrester* [2007] HCJ 4, 2007 SCCR 216 at paragraph [16] approved by the appeal court in opinions given by Lord Carloway as Lord Justice Clerk in *Murphy v HM Advocate* [2012] HCJAC 74, 2013 JC 60 and as Lord Justice General in an unreported pre-trial appeal decision of 5 August 2022 (which judges can find in 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)).

Lord Justice General Carloway made further important observations in delivering the opinion of the court in *Robertson v HM Advocate* [2024] HCJAC 45, 2025 JC 91, particularly at paragraph [29]. Notices must be intimated at the appropriate time prior to the first preliminary hearing. Beyond that:

> "…The court retains a discretion to allow late applications in certain circumstances. However, a change in the accused's counsel or solicitor advocate at or about the time of the trial diet is not a sound basis for re-setting the clock whereby the new legal representative is entitled to review matters, which should have long since been dealt with, and to lodge applications as if the PH had never taken place. Although there will be exceptions, where the interests of justice so require, any new representative must have regard to what has occurred prior to his or her involvement and to the duty which is owed to the court in assisting the progress of the trial."

6.2 Practice Note 1 of 2005

The purpose of the Practice Note (all Criminal Courts Practice Notes are available on the Criminal Courts Practice Notes and Directions page of the SCTS website) is set out in paragraph 5 and what is expected of practitioners in paragraph 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.

Paragraph 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.

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

The practice note at paragraph 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.

Paragraph 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.

Paragraph 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.

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.

Paragraph 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.

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

Paragraph 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*, reproduced as Appendix 3, in which he stated, at paragraph [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 paragraph 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 paragraph 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.**

In *Clarkson*, the Lord Justice Clerk (Dorrian) at paragraphs [22] to [26] of the opinion of the court and offering advice for pre-trial hearings in both the High Court and sheriff court, took a very critical view of needless delay over a series of first diets. At paragraph [25] she stressed the importance of avoiding churn, and endorsed the advice in this chapter that, generally, trials should be fixed rather than continuations of PH or first diet permitted.

6.5 Press for an accurate and realistic estimate of trial duration

Paragraph 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. It can never be an exact science and generally trial estimates prove to be correct for about a quarter of cases, an over-estimate in another quarter and an under-estimate for about half of all trials.

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 always to overestimate so that the trial judge would not be critical should the trial exceed its estimate. That was never 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 in too many cases. Parties may 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.

Under-estimating causes its own problems and judges should be careful before reducing the time allocated for the trial from that proposed by parties unless careful analysis makes it clear that the duration is indeed an over-estimate.

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.

In March 2024, in light of continuing problems arising from inaccurate estimates the Lord Justice Clerk and first instance administrative judge for crime agreed that parties should be in a position to address the court on the following. In providing an estimate, parties should consider each issue so far as relevant to the particular case.

The preliminary hearing judge, or any judge fixing a trial diet, should also note:

> "Please ensure that parties give an estimate which includes the ballot day. The time allocated for trial must include the ballot day ie a 5 day trial is a trial which will start with a ballot on a Monday and conclude on a Friday."

Parties should be prepared to answer questions in respect of their estimate as follows:

- Is there any pre-recorded evidence (Evidence by commission or JII) to be played at the trial diet?
- If so what is the duration, or anticipated duration, of that evidence?
- Is there agreement of evidence?
- How many witnesses does the Crown intend to call?
- Bearing in mind any joint minute of agreement, what is the time each witness to be adduced by the Crown will take in examination in chief?
- And in cross-examination?
- If the accused may give evidence, how long is it estimated it would last?
- Will the defence adduce additional witnesses?
- Will the Crown agree the facts which the defence seek to establish from each defence witness?
- If not, or if there is good reason to adduce a witness or witnesses, how long will each witness take?
- Are there any section 275 applications still to lodged and determined?
- Is there any anticipated problem in securing the attendance of key witnesses?
- How long will the crown speech and (each) defence speech take?
- Does either/any party anticipate any peculiarities in law which would significantly add to the duration of the charge to the jury?"

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.

Where the accused is young or otherwise vulnerable it is desirable that trial is fixed sooner rather than later. In September 2022, the appeal court was very troubled to learn that a young accused was kept in custody for four months longer than necessary to accommodate the availability of counsel for a co-accused who was on bail. This has led to an instruction being issued to High Court staff that the preliminary hearing judge should be told of the first date available in the court diary in addition to the date being proposed as suitable to counsel.

The availability of instructed counsel is a relevant consideration but cannot be sacrosanct and judges should be proactive in seeking to fix an early diet where there is a relevant competing interest such as a young person being kept in custody. The vulnerability and availability of witnesses is also an important consideration.

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 that the COVID-19 pandemic has given rise to extraordinary 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 paragraph 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.

Paragraphs 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 *Forrester*, Lord Bracadale observed at paragraph [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, for example 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 09:30am 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 Avoiding continuation of preliminary hearing where plea likely

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 or her benefit by fixing continued hearings.

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 (see Chapter 3 on Recovery of documents).

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

See generally *Clarkson* at paragraphs [22] to [26].

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 practice was endorsed in *Clarkson* (Lord Justice Clerk Dorrian) at paragraphs [25] and [26],

with reference to *BS v HM Advocate* [2023] HCJAC 5, 2023 JC 33 at paragraph [11] (Lord Justice General Carloway).

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. Paragraph 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. See also *Clarkson* and *BS* referred to above.

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 paragraph 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 (section 72(4)) and unless his plea of guilty is accepted a trial diet is to be appointed (section 72A(1)). If an accused is unable or refuses to plead then at common law this is treated as a plea of not guilty (Macdonald, Criminal Law, at page 278, cited in Renton and Brown at paragraph 18-31) 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.

The appeal court in an embargoed decision on the T drive (*McElwain v HM Advocate*) was critical of lax case management in the sheriff court whereby a case drifted through a series of unnecessary first diet hearings for the defence to investigate the appellant's physical and mental health. The appellant had been remanded in custody and investigations into any condition that might have a bearing on his fitness for trial or, more probably what adjustments might be necessary at trial, ought to have commenced when he was remanded. Citing this paragraph of the Preliminary Hearings Bench Book, the appeal court emphasised the first diet is the end point of preparation and that a trial should have been fixed at the initial first diet (paragraph [4]).

6.6.5 Scrutinise section 75A applications carefully before granting

It is vitally important that all of the information presented in a section 75A application is accurate and that the court is given the full picture as it really is and not as a party hopes it is or wishes it was. It goes without saying that oral submissions must also be candid and accurate. If standards fall short in these respects, there is a risk of trust being lost by the court. It would be cumbersome and undesirable if the court required independent vouching of every averment in such an application but that is what could happen if the court finds that it has been misled by careless assertions which lack foundation.

Where it is proposed that a trial be postponed by section 75A minute, the court will require the application to specify the earliest date which the court diary can accommodate. If the new date proposed is a later date, the application must include an explanation why further delay is considered to be necessary.

If it is being suggested that there is no-one with rights of audience available to conduct a trial which a party seeks to postpone or adjourn, the court will require to make its own enquiry with the Faculty of Advocates and the Society of Solicitor Advocates because experience shows that availability can change by the minute. Decisions should only be made on up to date and reliable information.

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 paragraph 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. If judges are not alerted to these matters, a great deal of time can pass before a trial is fixed and at the point of fixing a trial an available slot for the trial will be many months in the future. A judge can refuse the application or require a hearing. If refusing, judges should note brief reasons. If granting, 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 prove will be conclusively established. 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), (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) it is clear that **in advance of the preliminary hearing** parties ought 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 take the initiative with 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 (*Ashif v HM Advocate* [2015] HCJAC 100, 2016 JC 7 at paragraphs [70] to [73]). In *Scott v HM Advocate* [2021] HCJAC 22, the court confirmed at paragraph [46] of its opinion, with reference to the full bench case of *Ashif* 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, and what an accused person said to them, 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.

Parties should have regard to the observations in *Liddle v HM Advocate* [2012] HCJAC 68, 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.

In *McClymont v HM Advocate* [2020] HCJAC 1, 2020 SCCR 160, the appeal court observed that where possible a joint minute should have been completed and signed

at first diet and, in commenting on delay being caused at trial, explained that: "in any other circumstances joint minutes ought to be prepared outwith court hours."

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] HCJAC 42, 2012 SLT 665, per Lord Mackay of Drumadoon at paragraph [6].

In *HM Advocate v B* [2012] HCJAC 13, 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 paragraph 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 (*McDonald v HM Advocate* [2008] UKPC 48, 2010 SC (PC) 1).

> "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 paragraph 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.

Chapter 7: Fitness for trial

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 [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] 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 –

(i) to the health, safety or welfare of the person; or

(ii) 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 – […]

(i) 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

(ii) 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 (*Patrick v HM Advocate* [2021] HCJAC 37, 2021 SCCR 207). 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 illustrated starkly in *Patrick* 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 JC 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 the person's vulnerability. Special measures may have to be discussed with parties if they have not already addressed the issue. That said, it is primarily for the accused's lawyers to make a suitable application where appropriate under section 271F of the 1995 Act; *Robertson v HM Advocate* [2024] HCJAC 45, 2025 JC 91 at paragraph [31].

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.

Chapter 8: Vulnerable witnesses and evidence on commission

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 Schedule3 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

(d) an offence the commission of which involves domestic abuse, or

(e) an offence of stalking, or

(f) 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):

(2) 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; section 271F of the 1995 Act and see also *Robertson v HM Advocate* [2024] HCJAC 45, 2025 JC 91 at paragraph [31].

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, now replaced by Practice Note No. 1 of 2024, and No. 1 of 2019 govern 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 paragraphs 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. In most cases best practice is to conjoin the ground rules hearing with the preliminary hearing at which the VW application for evidence on commission is granted. What has to be done at the ground rules hearing is affected by what is done at the preliminary hearing, e.g. 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.

Some of the issues which can arise are considered below but experience has shown that not all of 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.

Section 271I(4A) provides that it is not necessary for an indictment to have been served before a vulnerable witness application is made and for the court to authorise evidence to be taken on commission. The court has previously granted a pre-indictment commission application by the crown involving the rape of an elderly complainer. But there are practical difficulties in holding a pre-indictment commission where the terms of the indictment are not known. It is likely to be sought sparingly and most likely in acute circumstances such as where a witness may emigrate, die or is unlikely to be able to give evidence at a later stage. It is most likely to be practical where there is a single charge envisaged which closely reflects the charge on petition.

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. This is not with a view to doing the Crown and defence's job for them, it is a necessary step in order to engage in a meaningful way

in what questions ought to be permitted and/or what lines of questioning are relevant as the practice notes require.

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 09:30am 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 271I

Section 271I deals with the taking of evidence by a commissioner and provides:

> "(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 [emphasis added]**

(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 [emphasis added]** 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, [emphasis added]**

(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, [emphasis added]**

(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 [emphasis added] —**

(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. [emphasis added]**

(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] 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 1 of 2024 at paragraphs 12 to 15.

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 paragraphs 12 to 16 of Practice Note 1 of 2024

Preliminary hearing judges should note carefully the terms of paragraph 16, which provides that consideration should only be given to fixing a post-commission hearing when it is known that the court will have to address questions of admissibility which have been reserved at the commission.

It is not common for there to be problems at commission hearings and, in the vast majority of cases, parties 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, problems, particularly relating to the quality and audibility of commission recordings, became more common. There have been instances of trials being reached before parties become aware that a recording is inaudible.

In order to ensure that problems are identified well in advance of trial, Practice Note 1 of 2024 at paragraph 13 requires:

- the court to direct that, within 14 days of parties being advised that a copy of the commission recording is available for borrowing, parties are to confirm to the court in writing that they have viewed and listened to the recording of the

commission and confirm that it is of sufficient quality without headphones for use at the trial;

- the court to 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 before the trial diet, use section 75A procedure by accelerating the trial to convene a preliminary hearing at which any issue can be resolved. The trial diet can be reserved and re-fixed at the conclusion of the preliminary hearing;
- if at the trial the recording is found to be deficient, the court to expect to be addressed on why this was not identified sooner.

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 the commission 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 pilot started on 9 July 2024 will use AI to provide transcripts of commission hearings and these may be available in the near future).

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 notes. 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 by '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 paragraphs 12 to 15 of Practice Note 1 of 2024 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.

> "12. If the court appoints the VW notice or application to be disposed of at a hearing, the solicitor must, forthwith, inform the Clerk of Justiciary and the Electronic Service Delivery Unit of Scottish Courts and Tribunal Service of the intention to seek authority to have the evidence of a vulnerable witness taken by a commissioner and check the availability of a suitable venue.
>
> 13. 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:

- 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; [emphasis added]**
- 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, wording and scope of questions to be asked. The court may consider asking parties to prepare questions in writing (see Practice Note 1 of 2019 "VULNERABLE AND CHILD WITNESSES: written questions"); [emphasis added]**
- 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 s 275 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 confine the issues to be addressed;
- 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.
- 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, eg "body maps";
- **if a statement in whatever form is to be used as the evidence in chief of the witness, what arrangements are to be made for the witness to see this well in advance of the commission (i.e. how, where, and when), not on the day of the commission; [emphasis added]**
- whether any such statement requires to be redacted or edited 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;
- how the judge/parties should introduce themselves to the witness in advance, when this will take place, having regard to the needs and preferences of the witness

- whether the parties should speak to the witness after the commission;
- the court will direct that parties may access a copy of the recording once available on standard conditions:

  (i) that copies will not be made of any recording, disc(s) or storage device (s);

  (ii) that no disclosure of the recording or contents of the disc(s) or storage device(s) will be made unless necessary in the legitimate interests of the accused;

  (iii) that the disc(s) or storage device (s) will be returned at the end of the proceedings;

  (iv) that except when being viewed, the disc(s) or storage device(s) will be kept in a locked, secure container and not unattended or otherwise unprotected; and

  (v) that the accused can view the recording, disc(s) or storage device (s) only under the supervision of their legal representatives.
- the court may impose other conditions as seems appropriate;
- the court will direct that, within 14 days of parties being advised that a copy of the commission recording is available for borrowing, parties are to confirm to the court in writing that they have viewed and listened to the recording of the commission and confirm that it is of sufficient quality without headphones for use at the trial;
- the court will 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 before the trial diet, use section 75A procedure by accelerating the trial to convene a preliminary hearing at which any issue can be resolved. The trial diet can be reserved and re-fixed at the conclusion of the preliminary hearing.
- if at the trial the recording is found to be deficient, the court will expect to be addressed on why this was not identified sooner.

14. The court may make directions about these matters, or any other matters which might affect the commission proceedings (including

specifying any other steps which will facilitate the giving of evidence by the witness), or which may be required for the effective conduct of the commission [emphasis added]. If combined special measures are sought, the court will address how this is to work in practice.

15. Witnesses report a benefit from meeting practitioners before the commission itself. Accordingly where practitioners are to meet a witness before the commission, it will be presumed that defence counsel will make themselves available to do so unless they have given notice to the contrary at the PH/GRH, and satisfied the court at that hearing of the reason."

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.

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.

Paragraph [51] of *R v Lubemba* was quoted with approval by the High Court of Justiciary in *Begg* v *HM Advocate* [2015] HCJAC 69, 2015 SLT 602. The decisions by the first instance judge which were the subject of appeal in *Lubemba* are set out in paragraph [34] and the Court of Appeal's decision on them are at paragraph [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 was 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 *Moir v HM Advocate* 2005 1 JC 102 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 271I(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.

A memorandum from the Lord Justice General (January 2020) explains what might be done where an accused who is on bail fails to attend a commission hearing. In short, the accused does not have to attend and it is competent, and may well be

appropriate, to proceed with the commission in the absence of the accused. It may be incompetent to grant a warrant to arrest.

Commissions to start on time/adjournments of commissions to be avoided/editing the recording

Paragraph 17 of Practice Note 1 of 2024 provides that "having regard to the vulnerability of the witness, parties are expected to make every effort to avoid adjournment of a commission, particularly on the day of the commission itself." If counsel becomes unavailable to conduct the commission, every effort should be made to ensure, well in advance, that alternative counsel is made available (paragraph 18). It is important for the commission to start on time and avoid witnesses having to wait before giving their evidence. Paragraph 19 of the PN provides that commission hearings **must commence on time.**

If in the commission it is apparent to the commissioner that the commission recording should be edited before trial, the commissioner should inform parties of the issue and invite them to ensure it is done (paragraph 20).

Chapter 9: Sections 274 and 275

9.1 Fairness of the statutory scheme

The UK Supreme Court has determined that the scheme set out in sections 274 and 275 is capable of being applied consistently with a fair trial (*Daly v HM Advocate; Keir v HM Advocate* [2025] UKSC 38 (paragraph [167]).

That finding is consistent with the observations of Lord Hope in *DS v HM Advocate* [2007] UKPC 36, 2007 SC (PC) 1, who observed at paragraph [27] that:

> "The sections seek to balance the competing interests of the complainer, who seeks protection from the court against unduly intrusive and humiliating questioning, and the accused's right to a fair trial. They lean towards the protection of the complainer. The protection is very wide."

The overall scheme has previously been examined and found to be fair, and compliant with article 6, by Lord Macfadyen at first instance (in *Moir v HM Advocate* 2005 1 JC 102), and by the High Court on Appeal (Lord Justice Clerk Gill, Lord Osborne, Lord Johnston also 2004 SCCR 658 at page 680).

In *DS v HM Advocate* the Judicial Committee of the Privy Council, 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 paragraph [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 paragraph 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."

In *Judge v UK* (2011) 52 EHRR SE17, the European Court of Human Rights said this at paragraph [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."

The UK Supreme Court in *Daly* and *Keir* made no criticism of the statutory scheme. At paragraph [166] it stated:

> "[the European Court in *Judge*] ..described the statutory scheme established by sections 274 and 275 as "careful and nuanced", observing that it "does not place an absolute prohibition on the admission of such evidence" – i.e. evidence of sexual history or bad character – "but allows for its admission when that history or character is relevant and probative" (paragraph 29). It added that "the legislation recognises that there may be circumstances in which such questioning is necessary for the proper conduct of the defence; instead of prohibiting such questioning, it places it under judicial control and accords a margin of discretion to the presiding judge in allowing such questioning". The court noted that the prohibition in section 274 was not confined to matters relating to the complainer's sexual history but, as in Judge itself, excluded other forms of evidence which were intended to cast doubt on the character of the complainer. In that regard, the court observed that "there may be strong reasons for allowing such evidence", and that, "subject to a test of relevancy, the prohibition should not be applied without due regard for the right of the defence to challenge effectively the evidence of a complainer" (ibid)."

The Supreme Court held at paragraph [167] that, contrary to the tenor of the submissions on behalf of the Lord Advocate, the cautiously expressed decision by the European Court in *Judge* did not give carte blanche approval to the scheme set out in

sections 274 and 275. Like all decisions and judgments of the European Court, it was concerned with the individual case before the court. The decision merely established that the statutory scheme is capable of being applied compatibly with article 6 and had been so applied in the case before the court.

The Supreme Court further noted that the European Court in *Judge* was not concerned with the approach adopted by the Scottish Courts to the common law since *CJM v HM Advocate* [2013] HCJAC 22, 2013 SLT 380 and its decision could not be regarded as implying the court's common law approach was compatible with article 6 (paragraph [168]).

9.1.1 HM Advocate v Daly; HM Advocate v Keir: The approach to the common law following CJM v HM Advocate is liable to result in violations of accused's rights under article 6

In *Daly and Keir* the Supreme Court, whilst dismissing the appeals before it on the facts, determined that the approach of the Scottish courts to the common law, as applied following *CJM v HM Advocate*, is liable to result in violations of the rights of the accused under article 6 and should be modified (paragraphs [181] and [192]).

The target of the appeals was the common law of evidence (paragraph [36]). The court considered the development of the law in Scotland on relevant evidence, collateral issues and bad character. It referred to English caselaw particularly *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 and Canadian authority (*R v Seaboyer* [1991] 2 SCR 577) which it described as providing instructive examples of the demise of a blanket exclusion on evidence. It considered early Scottish case law under section 274 and section 275 in *Moir v HM Advocate* and *DS v HM Advocate* as well as more recent developments, starting with *CJM*.

The court was critical of decisions beginning with *CJM* which appeared to equate collateral evidence with irrelevant evidence and to assume that all evidence going to credibility is irrelevant since it does not have a direct bearing on the subject matter of the prosecution. The court explained that, generally speaking, relevant evidence – that is, evidence which has a reasonably direct bearing on the matter under investigation – is admissible at trial. The courts may exclude relevant evidence for a

number of reasons including evidence which concerns a collateral fact or issue to avoid a distracting and disproportionate inquiry into peripheral issues. Evidence bearing on the credibility or reliability of a witness is generally considered to be collateral and inadmissible, but it may be admitted if it has a direct bearing on a fact in issue in the case (paragraphs [38] to [44], and [115]).

This distinction – between inadmissible evidence which is concerned only with the witness' credibility, on the one hand, and admissible evidence which is also relevant to a fact in issue, on the other – is particularly difficult to draw in trials for rape and other sexual offences. The offence generally takes place in private with no other witnesses present, so the credibility of the complainer's testimony often becomes the decisive issue at trial (paragraphs [45] to [49]).

The court criticised the approach in cases following *CJM*, particularly *Thomson v HM Advocate* unreported 13 December 2019*; HM Advocate v JW* [2020] HCJ 11, 2020 SCCR 174 and *CH v HM Advocate* [2020] HCJAC 43, 2021 JC 45.

It considered that the High Court of Justiciary in its capacity as an appeal court had developed the common law concepts of relevant and collateral evidence so that evidence concerning the complainer's credibility or previous or subsequent sexual behaviour is almost always excluded from trials for sexual offences (paragraphs [104] to [149]).

At paragraph [124], the Supreme Court explains that if the credibility of the complainer's evidence is decisive of the issue, then justice to the accused requires that it should be possible in principle for the accused to challenge the complainer's credibility, where grounds for such a challenge exist. Clearly, there have to be limits to such challenges, if the trial is not to be overwhelmed by the investigation of collateral issues; but a complete exclusion (extract convictions apart) is unlikely to be compatible with a fair trial.

The court further explains that sections 274 and 275 should be read together as a unified statutory scheme. It may be misleading to describe section 274, as it has been described in the recent Scottish case law, as creating a strong statutory prohibition against the admission of certain evidence. Section 274 has to be read together with the equally important power to admit such evidence which is given by section 275 (paragraph [88]).

The early domestic and European case law is clear that the provisions should not be viewed as imposing an absolute prohibition on the introduction of evidence or

questioning which concerns the character, behaviour or sexual history of the complainer. Rather, the legislation recognises that the relevance and probative value of evidence of this kind will depend on the circumstances of each case. It therefore gives trial judges the discretion to allow such evidence and questioning to be introduced where it is required in the interests of justice. (paragraphs [92] to [103], [165] to [168], and [178]).

Article 6 guarantees a fair trial so that the accused can present a full defence to the charge against him. To do this, the accused needs to be able to call evidence to establish his defence and to challenge the evidence called by the prosecution. Excessive restrictions on the evidence or questioning which may be led at trial can therefore be incompatible with the right to a fair trial article 6 requires judges to adopt a nuanced approach which pays due regard to the right of the defence to challenge the evidence of a complainer (paragraphs [170] to [171], and [180]).

The court observed that it may be inevitable that a fair trial for sexual offences will require the complainer to be asked some intrusive questions about her private life. In an adversarial criminal justice system, by pleading not guilty, the accused is necessarily challenging the complainer's version of events. The defence should consequently be able to seek to undermine the credibility of the complainer's testimony, and to rely on evidence of her behaviour, sexual or non-sexual, before or after the events in question if it is relevant to the question of consent (or the accused's reasonable belief in consent) (paragraphs [173] and [175]).

At the same time, the interests of complainers are important and must be given proper weight. The law must therefore ensure that any intrusion into a complainer's privacy is no more than is necessary to ensure that the accused receives a fair trial. The courts should not allow the jury's fact-finding process to be distorted by the admission of evidence whose probative value to the defence is outweighed by the risk which its admission presents to the proper carrying out of that process (paragraphs [175] and [176]).

The court considered that there is a difference between the accused being able to mount a proper defence, such as one of consent or of a reasonable belief in consent, and the accused trying to secure an acquittal by prejudicing the jury against the complainer, for example by encouraging them to adopt a "censorious attitude" towards her behaviour. Section 275(1)(c) enables the court to guard against that risk. It is however a provision which needs to be applied with care where evidence is of

significant probative value. The possibility should be borne in mind that the risk of prejudice consequent on the admission of such evidence may be capable of being addressed. As Lady Hale observed in *DS v HM Advocate*, at paragraph [94], in relation to evidence admitted under section 275A, the answer does not have to be to withhold the evidence from the jury; they can be given clear and careful directions about how to use it. Such directions can be given under s275(6) and (8), which enable a judge to make any decision admitting evidence subject to conditions. The conditions may consist of a limitation on the extent to which the evidence may be argued to support a particular inference specified in the condition (paragraph [176]).

9.1.2 Some key points following Daly and Keir

- Section 274 and section 275 must be read together as a unitary statutory scheme (paragraph [88]).
- There is no absolute prohibition on the introduction of evidence or questioning which concern the character, behaviour or sexual history of the complainer (paragraph [77]).
- Relevant evidence is evidence which has a reasonably direct bearing on the matter under investigation (paragraph [39]).
- Relevant evidence may be excluded on a variety of grounds reflecting the interests of justice including if it concerns a collateral issue, ie if it concerns a fact which has only an indirect bearing on the subject matter of the case, and will open up a disproportionate inquiry into a matter (paragraphs [39] to [41], and [125]).
- Evidence bearing on the credibility or reliability of a witness is generally considered to be collateral and therefore inadmissible, but it may be admitted if it has a direct bearing on a fact in issue in the case (paragraphs [38] to [44], and [115]).
- The relevance and probative value of the evidence will depend on the circumstances of each case.
- The legislation establishes a nuanced test which requires account to be taken of the probative value of the evidence on the one hand, and any risk of prejudice to the proper administration of justice on the other hand. 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… 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 (paragraph [118]); the interests of complainers are important and must be given proper weight. Courts must ensure that any intrusion into a complainer's privacy is no more than is necessary to ensure that the accused receives a fair trial (paragraphs [175] to [176]).

- In particular courts should not allow the jury's fact-finding process to be distorted by the admission of evidence whose probative value to the defence is outweighed by the risk which its admission presents to the proper carrying out of that process (paragraph [176]).
- The statutory scheme gives judges the discretion to allow evidence if the tests in section 275 are met, including giving clear and careful directions about how to use it (in accordance with section 275(6) and (8)) (paragraph [176]).
- Compliance with article 6 requires a more nuanced approach than was applied in cases following *CJM* which did not leave any scope for consideration of the interests of justice, and which pays due regard to the right of the defence to challenge effectively the evidence of a complainer (paragraph [180]).

9.1.3 The decisions on the facts in Daly and Keir

Notwithstanding the criticisms of the Scottish approach following *CJM*, the Supreme Court arrived at the same conclusion on the facts as the Scottish courts in *Daly* and *Keir* and refused the appeals. The court's reasoning may provide helpful illustrations of the correct approach.

Daly v HM Advocate

Mr Daly was convicted of charges including the rape of the first complainer when she was 5 to 7 years old. On appeal he argued that his trial was unfair because the Crown did not charge him with the first complainer's further allegation that he had raped her when she was 13 years old, that she had become pregnant as a result of the rape and had given birth. Mr Daly claimed that this allegation was false on the basis of other evidence he wished to lead. Because he was unable to discuss this allegation at his trial, he was prevented from leading evidence showing that the first complainer was not credible or reliable.

The Supreme Court held that the allegation could only be relevant in so far as it might bear on the complainer's credibility. It was unclear whether the allegation was false, or at least had been a deliberate lie, on the material before the trial court. Ascertaining the truth would have required an investigation into an issue which was distinct in time and circumstances from the subject matter of the charges, prolonging the trial and potentially distracting the jury from the proper focus of their attention. The absence of the evidence did not prevent the defence from credibility of the complainer by cross examination and leading evidence. The credibility of her evidence could also be assessed in light of evidence given by another complainer who claimed the accused had sexually abused her when she was a child. In these circumstances the trial process provided sufficient for the accused to challenge effectively the evidence of the complainer. There had been no infringement of the accused's article 6 rights on the facts (paragraphs [182] to [185]).

Keir v HM Advocate

Mr Keir was convicted of sexually assaulting the complainer at his home while she was intoxicated, asleep and incapable of consenting, and of raping her when she awoke. Initially, Mr Keir was also charged with raping the complainer vaginally and orally in a pub toilet earlier the same evening, and with sexually assaulting her during a taxi journey on the way to his house. However, the trial court granted the Crown's application to drop these additional charges after the complainer was questioned about CCTV footage of the evening in question. Before his trial, Mr Keir made an application under section 275 where he sought to introduce evidence of consensual sexual activity between him and the complainer earlier in the evening, including the events shown in the CCTV footage. This part of Mr Keir's application was refused, and he was subsequently convicted at trial.

The Supreme Court held that the evidence of consensual sexual activity earlier in the evening could have had no bearing on the likelihood of whether the complainer was asleep or half asleep at the material time. The argument by the defence that the complainer's ability to consent to sexual activity earlier in the evening strengthened her ability to consent to similar activity later on, did not hold water (paragraph [189]).

The prosecution case was also that when the complainer awoke she was not in fact consenting. The accused's position was that the complainer had been actively consenting earlier in the evening and throughout the time of the events libelled. The UKSC held that evidence of the sexual activity earlier on was capable of providing

support for the defence case insofar as it might be relevant to the jury's assessment of the complainer's state of mind at the time of the events libelled. However, in the circumstances of the case, its probative value was very limited. The agreed evidence of her high level of intoxication undermined any inference which might have been drawn from her behaviour earlier in the evening. The CCTV evidence showing her unsteadiness on her feet further weakened any such inference. The court of appeal was therefore entitled to conclude that the probative value of the earlier behaviour was outweighed by the risk that it might prejudice members of the jury against the complainer and so distort the factfinding process. There had been no infringement of the accused's article 6 rights on the facts (paragraphs [186] to [191]).

9.2 Timing of a section 275 application

Applications must be made no later than 7 days before the preliminary hearing. 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..." (meaning the first preliminary hearing). See *Murphy v HM Advocate* [2012] HCJAC 74, 2013 JC 60 at paragraphs [25] to [30]."

A later application can only be made on special cause shown, the meaning of which was fully examined in *Doran v HM Advocate* [2023] HCJAC 15, 2023 JC 149. The opinion of the court was delivered by the Lord Justice General.

The court proceeded to allow an appeal against refusal to consider the section 275 application. In *Doran* the allegations under section 11 and sections 1 and 2 of the 2009 Act were that the appellant had administered to the complainer a stupefying substance in order to engage in sexual activity and had sexually penetrated and raped the complainer when she was asleep, intoxicated and incapable of giving or withholding consent. The defence was consent and the accused maintained that the complainer was awake, communicating and participating. He wished to question the complainer and potentially give evidence that she had requested him to perform oral sex on her during the incident giving rise to the section 1 and 2 charges.

A section 275 application which both the preliminary hearing judge and the appeal court considered had merit, had been intimated three days rather than seven days prior to preliminary hearing. No trial had been fixed. The preliminary hearing judge refused to consider the application on the view that counsel's mistake about dates, attributed to pandemic related pressure of business, did not constitute special cause and did not hear from the Crown on the matter. The Crown did not oppose the appeal against the decision at preliminary hearing.

The appeal court emphasised, at paragraphs [10], [11], and [12] the importance of such applications being lodged timeously, not least so that the complainer's views can be sought by the Crown without disrupting the court timetable.

The court explained, at paragraph [11], that the phrase "special cause" does not imply an enhanced level of cause. It means that the cause must be particular to the case, not one which applies in all or most cases. Pressure of business was not a speciality of this case, but the court considered that counsel's mistake was.

The court's reasoning is found at paragraphs [12] to [14] of the opinion:

> "[12] Provided that a speciality exists, the search is simply for a "cause". The test is not whether there is a reasonable excuse, or similar consideration, which explains why the application is late, although that will often be a factor in the equation. Cause will be shown if it is demonstrated that admitting the evidence is in the interests of justice (*Darbazi v HM Advocate* 2021 JC 158, Lord Justice General (Carloway), delivering the opinion of the court, at paragraph [20]). In order to assess that, regard must be had to the merits of the application. The stronger the merits, the more likely it is that the interests on justice will dictate that it should be granted. In this context, the purpose of the time limit should be considered that is the prevention of disruption to the criminal process, the need to ascertain the complainer's attitude to the evidence and the requirement to provide the complainer with advance notice of what she might be asked at trial. The attitude of the Crown is a factor to which regard must be had, although it is not determinative (*RN v HM Advocate* 2021 JC 132 (Lord Justice Clerk (Lady Dorrian), at paragraph [20])). The date of the trial is an important consideration.
>
> "[13] The speciality in this case was the error in identifying the correct date for the PH and hence the due date for lodging the application. Cause is shown because it is in the interests of justice to allow the appellant to introduce the

evidence, which the PH judge correctly regarded as relevant. There is no prejudice to either the Crown or the complainer. There would have been no enquiries necessary beyond that involving the complainer. The evidence relates only to a specific occurrence of sexual behaviour and that occurrence is relevant to whether the appellant is guilty of the offence charged. The probative value of this evidence is significant. It will outweigh any risk of prejudice to the proper administration of justice, including the protection of the complainer's dignity and privacy. The evidence concerns activity at the time of the alleged rape. Disabling the appellant from giving evidence about what happened during the course of the crime alleged would place him in a difficult position so far as presenting his defence is concerned. The court does not consider that allowing this evidence would deflect the jury's attention from the main issues to be resolved at trial.

"[14] For these reasons the court will allow the appeal. It will allow the section 275 application to be received late special cause having been shown. It will grant the application for the reasons given above."

Please note: Because the Crown requires to take the steps outlined below, 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 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] HCJAC 21, 2021 JC 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 article 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 paragraph [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 article 8 but the court's obligations in that regard will be complied with if the Crown adopts the procedure envisaged in paragraph [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 determines a section 275 application consistent with the approach in *Daly* and *Keir*.

At a preliminary hearing, judges must do what they can to ensure that the Crown has taken the steps required in paragraph [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

Whilst section 275B 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.

In addition to complying with the requirements identified in paragraph [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.

Whilst such information must be sought, it is not determinative of an application under section 275. As the Lord Justice Clerk (Gill) observed in *Moir*, 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 paragraph [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."

9.4 Requirements of a section 275 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 (*MacDonald v HM Advocate* [2020] HCJAC 21, 2020 JC 244, at paragraph [35]).

See *RN v HM Advocate* [2020] HCJAC 3, 2020 JC 132, at paragraph [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 HM Advocate* 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 HM Advocate* 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* at paragraph [41], the Lord Justice Clerk endorsed what was said by Lord Brodie in giving the opinion of the court in *HM Advocate v MA* [2007] HCJ 15, 2008 SCCR 84, at paragraph [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.]

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).

The reference in *RN* to there being an evidential basis for questioning, and the need to specify it, is important. In *MP v HM Advocate* [2021] HCJAC 48, 2022 SLT 194 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 in *HM Advocate v Selfridge* [2021] HCJAC 2, 2021 SLT 976, 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."

9.5 The court's obligations in determining an application under section 275

The court should apply the statutory scheme in section 274/5 in accordance with *Daly* and *Keir*. The court has obligations regardless of the position adopted by parties.

In *RN v HM Advocate* at paragraph [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." [Emphasis added]**

9.6 Limiting the extent of an earlier grant

Subsection 275(9) provides:

> "(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* [2021] HCJAC 41, 2022 JC 1 and it is clear that the power to limit can extend to a complete revocation of the earlier decision (*JW v HM Advocate*, at paragraph [20]). 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 paragraph [20] that this may be done during the trial.

The court observes at paragraph [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 paragraph [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 paragraph [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 paragraph [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 paragraph [19].

9.7 Unnecessary applications should be refused on that ground

The Lord Justice Clerk (Dorrian) explained, giving the opinion of the court in *MP v HM Advocate* 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 (see paragraphs [15] and [16] of the opinion). 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 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 (*MP v HM Advocate,* at paragraph [20]).

9.8 Both parties require an application to elicit the same evidence

Preliminary hearing judges sometimes encounter uncertainty, particularly on the part of some prosecutors, as to 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* 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 paragraph [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*, paragraph 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 paragraph 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.

The appeal court can be seen to be taking this approach in an unreported decision for which there is no opinion, but only an interlocutor *Jordan Garry v HM Advocate* 17 March 2021.

In part (b) of the application the defence had sought, and the preliminary hearing judge had refused, to admit evidence:

> "(b) that shortly before (c. 20 minutes) the alleged rape, whist they were playing Xbox the complainer rebuffed sexual advances by the appellant. He desisted and they continued playing the Xbox."

The reasoning and decision on the appellant's appeal, and the court's response to the Crown's submissions were as follows:

> "It was submitted that the inference to be drawn here was that shortly prior to charge 3 the complainer was able to rebuff the appellant's attempt to initiate sexual conduct, thus she was physically and mentally capable of resisting such efforts and the jury would be entitled to conclude that she was lying when she says she froze when he reinitiated such attempts and did not physically seek to resist.
>
> "This is in our view a preposterous inference to seek to draw from the evidence in question. The issue is not what happened during the first advance, but whether subsequently there was consent on the part of the complainer.
>
> "The Advocate Depute submitted that whilst the way in which paragraph (b) had been presented by the appellant would not justify allowing the evidence to be led for the inference claimed, the judge had erred on the issue of relevancy. In practical terms the effect of the crown submission appeared to be to invite us to revisit the decision of the PH judge in relation to the crown application which had sought to show the relevance of the evidence in another way. The only purpose in doing so would be so that they could rely on that evidence for certain inferences. **Even if we were to accede to the crown's request partially to revise the decision of the PH judge, this would not advance the crown position without a separate successful application setting out the inferences they seek to draw from it. The Advocate Depute eventually acknowledged that this was correct."** [Emphasis added]

9.9 How an application is dealt with

In *Daly and Keir*, the Supreme Court considered that it was not self-evident that the statutory scheme in sections 274 and 275 was intended to supplement the common law, rather than create a scheme governing the admissibility of evidence which it applies to. The court observed that section 274 is not qualified in its terms: on its

face, it applies to all evidence and questioning falling within its scope, whether such evidence would have been admissible at common law or not. Section 275 is equally wide in scope. Taken together, the two sections might be understood as establishing an elaborate scheme for assessing the admissibility of such evidence (paragraph [117]).

The court was critical of the High Court's development of the common law to restrict the admissibility of evidence after enactment of the statutory scheme, narrowing the scope of the statutory scheme and precluding consideration of it (paragraphs [119] to [123]). The Supreme Court considered at paragraph [122] that once the legislature has established a regime (*ex hypothesi,* partly common law and partly statutory) which it considers appropriate for the admissibility of evidence in such cases, it might be argued that it is no longer open to the courts, within the limits of constitutional propriety, to impose a different and more restrictive regime through the development of the common law, with the effect of rendering the statutory scheme largely or even partly redundant.

It is suggested that following the reasoning in *Daly* and *Keir*, the former approach of starting with the common law and only proceeding to the statutory scheme if the proposed evidence was considered admissible at common law is problematic.

It is suggested that when decisions are made on applications, they are made under the statutory scheme in sections 274 and 275. Careful consideration will require to be given to the test of relevance under section 275 in light of the Supreme Court's judgment as well as the application of the tests of specificity and significant probative value weighed against any risk of prejudice to the proper administration of justice. In accordance with section 275(3)(c) and (d), an application should set out, amongst other things, the issues at trial to which the evidence is considered to be relevant and the reasons why it is considered relevant to those issues.

9.10 Is the evidence prohibited by section 274?

Section 274 provides:

> "(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer-
>
> (a) is not of good character (whether in relation to sexual matters or otherwise);
>
> (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—
>
> (i) is likely to have consented to those acts or
>
> (ii) is not a credible or reliable witness; or
>
> (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above."
>
> (2) In subsection (1) above "complainer" means the person against whom the offence referred to in that subsection is alleged to have been committed and the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature."

9.10.1 Meaning of 'behaviour'

Cohabitation

The Supreme Court in *Daly* and *Keir* referred without criticism to previous authority suggesting that the prohibition under section 274(1)(b) from leading evidence which shows or tends to show that the complainer has, at any time, engaged in "sexual

behaviour" not forming part of the subject matter of the charge, does not extend to prohibiting evidence of a course of cohabitation between the accused and complainer, without disapproval (paragraphs [97] and [101]). A section 275 application is therefore not required to lead evidence of cohabitation alone (*Moir v HM Advocate* per Lord Justice Clerk Gill obiter remarks at paragraph [27]. *DS v HM Advocate* per Lord Hope and Lord Rodger at paragraphs [46] and [75]).

Evidence of sexual relationship/previous or subsequent sexual activity

In *Daly* and *Keir*, the court also referred to speeches by Lord Steyn, Hope, Clyde and Hutton in *R v A (No 2)*, where the House of Lords held that evidence of a prior sexual relationship with the defendant might, in the circumstances of an individual case, be relevant to the issue of consent as well as reasonable belief in consent. The Supreme Court stated at paragraph [69]:

> "The speeches disclose a consensus that the relevance of prior sexual activity between the complainant and the accused does not lie in the bare fact of prior consent. It lies in the inference which may be drawn from the previous relationship between the complainant and the accused about the complainant's feelings towards the accused, and the bearing which that inference may have upon the jury's assessment of her state of mind at the time of the events which are the subject matter of the charge. Whether such an inference can be drawn, which would have a bearing on the assessment of the complainant's state of mind at the material time, evidently depends on the circumstances, as the speeches acknowledged. The paradigm case of irrelevant evidence was of a casual sexual encounter at some remote time in the past. There would be no meaningful connection between such an event and the complainer's state of mind at the material time. The paradigm case of relevant evidence was of consensual intercourse within the context of a close and affectionate relationship which was on foot shortly before the events in question. Between those two ends of the spectrum, a judgment would have to be made as to whether the evidence about the previous relationship between the complainant and the accused was capable of yielding an inference about the complainant's attitude towards the accused which might bear on the assessment of her state of mind at the material time."

When reviewing the Scottish cases beginning with *CJM*, the Supreme Court considered that the repeated view in the Scottish cases such as *SJ v HM Advocate*

[2020] HCJAC 18, 2020 SLT 642 and *CH v HM Advocate* that successive acts of intercourse between the same couple are "prima facie unrelated events" was overstated. It considered that such events may be related, and commonly are, since most sexual activity takes place within the context of relationships. The court referred to Lord Glennie's dissenting judgment in *CH* where he considered that the relevance of the existence of a prior sexual relationship between the complainer and the accused should be a matter of proper consideration in each case, without any predisposition to hold it irrelevant. The necessary gatekeeping exercise was better served by the application of section 275 (paragraph [147] of *Daly* and *Keir).* The Supreme Court noted that there is a requirement that a connection between those events be demonstrated in the section 275 application by averring the "particular circumstances" that would make the earlier activity relevant to the issue of consent at the material time (paragraphs [128] and [129]).

It is suggested that it is implicit in *Daly* and *Keir* that a section 275 application will be required if a party wishes to lead evidence of the existence of a sexual relationship or particular sexual activity which is not the subject matter of the charge. The section 275 application will need to explain the connection between the existence of the relationship/sexual activity which makes it relevant to the issue of consent (or other issue at trial), and fully address the test set out in section 275.

In *HM Advocate* v *MJ* [2024] HCJ 3, 2025 JC 85, a first instance opinion issued on 13 September 2024, the PH judge determined that section 274 does not prohibit questioning about the mere existence of a sexual relationship between an accused and complainer. The application was refused as unnecessary leaving questions of relevancy and admissibility to be determined later. The PH judge founded on *Moir* v *HM Advocate*, *DS* v *HM Advocate,* Lord Steyn in *R* v *A (No 2*) and an unreported first instance decision of Lord Turnbull, *HM Advocate* v *NB* 2020 (which judges can find on the T drive unreported appeal decisions).

However, it is suggested that it is implicit in *Daly and Keir* that the admissibility of evidence of a sexual relationship is governed by the statutory scheme and decisions as to whether to admit any such evidence and, if so, on what conditions, should be made following a section 275 application. A section 275 application being presented prior to trial will have the benefit of providing clarity as to what evidence is permitted as has been recognised in appeal cases (*Thomson* v *HM Advocate* [2024] HCJAC 30, 2025 JC 71, at paragraphs [39] to [40] and *AW v HM Advocate* [2022] HCJAC 16, 2022 JC 164, at paragraph [43]). If necessary, a judge could read down section 275 so as to

make it article 6 compliant. A judge who allows such an application can limit the inferences which might be invited per subsections (6) and (8), for example to exclude inferences. It is consistent with the case management reforms (Criminal Procedure (Amendment) (Scotland) Act 2004) which introduced preliminary hearings that such matters are dealt with at PH, providing certainty for all concerned at trial.

9.10.2 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 (*CJM,* at paragraph [45]; *DS*, per Lord Hope at paragraph [46], and Lord Rodger at [76] and [77]).

What a complainer may have said about something else which is not the subject matter of the charge may require to be assessed under section 274 and section 275.

In *Daly*, the Supreme Court held that an allegation by a complainer about an offence that was not the subject matter of the charge could only be relevant insofar as it might bear on the complainer's credibility. However, the court held that the truth would require the court to investigate the allegation and would prolong and distract the jury from the facts at issue.

In *Kerseboom v HM Advocate* [2016] HCJAC 51, 2017 JC 47, decided before *Daly and Keir*, 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 would have failed to meet the cumulative tests in section 275.

In *Jordan Garry v HM Advocate,* a pre-trial decision of 17 March 2021, decided before *Daly* and *Keir*, 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 paragraph (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 paragraphs (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 (see paragraphs [3] and [44] of *HM Advocate v Selfridge* [2020] HCJAC 43, 2021 SLT 976).

9.10.3 Reviewing/editing statements

As has been noted above, the statutory scheme in section 274/275 applies equally to Crown and defence. If either seeks to lead a transcript of a police interview of the accused, or other admissible statement by the accused, care must be taken to ensure that the jury does not hear evidence which has not been permitted under section 275 (or is not consistent with conditions imposed by the court) Similarly if parties make an application for a witness' evidence in chief to be by prior statement, care must be taken to ensure that it does not contain material that has not been admitted under section 275 (or is not consistent with conditions imposed by the court).

Statements/transcripts/joint investigative interviews must be carefully reviewed and, if need be, edited, to avoid this.

9.10.4 Meaning of 'the subject matter of the charge'

Previously, the High Court in *CH v HM Advocate* held that unless a particular type of sexual conduct is libelled within the charge it cannot be the subject matter of the charge. It followed that an accused had to make a section 275 application if the accused wished to present an account of what had occurred at the time which did not feature in the charge (paragraph [74]).

In *Daly and Keir*, at paragraph [145], referring to *CH* the Supreme Court observed that although this reasoning reflects a literal reading of the legislation, it is difficult to attribute to the legislature an intention that the accused should be prohibited from

giving his account of the critical events unless the court exercises the power under section 275(1) in his favour. Even if the legislation could otherwise be interpreted as enabling the court to prevent the accused from placing his account before the jury, such a reading would be incompatible with his Convention right to a fair trial.

The court does not go as far as finding that the court in *CH* is wrong on its interpretation of "subject matter of the charge" finding that it is consistent with a literal meaning. In practice, as the court observes, these applications are granted, and it is hard to conceive of circumstances where they could be refused without breaching article 6. On the basis that there is no current difficulty, it is suggested that there may be no need to alter current practice at least until there is a case more conclusively deciding the point.

Lord Mullholland, as criminal administrative judge, and at parties' request, has produced a note on the point expressing his preliminary views that a section 275 application should continue to be made and listing the benefits from having these matters determined in advance of the trial. The note has been added as 'Appendix 10'.

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 (*JL v HM Advocate* 2021 JC 83 at paragraph [4]).

9.10.5 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 *CJM* at paragraph [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* 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 paragraph [29], the Lord Justice Clerk stated:

> "…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 HM Advocate* 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.**

9.10.6 Indictments with both sexual and non-sexual charges

Whilst section 274 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, sections 274 and 275 apply to the whole indictment (*Stewart v HM Advocate* [2013] HCJAC 152, 2014 SCCR 1 and *HM Advocate v JW* in which the same approach appears to have been taken (see paragraph [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 Lord Justice Clerk Gill in *Moir* at paragraph [28]).

9.11 Section 275: the three cumulative tests that must be met

Section 275 provides:

"(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 [,(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*)] 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."

See *RN v HM Advocate*, at paragraph [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 paragraph [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))."

9.12 Examples of court decisions on section 275 applications

The Supreme Court in *Daly and Keir* identified problems inherent in the approach of the courts *beginning with CJM v HM Advocate*, specifically giving as examples *HM Advocate v JW*; *Thomson v HM Advocate,* unreported 13 December 2019, and *CH v HM Advocate*. These cases are therefore no longer listed as examples and should not be relied on for the correct approach. The caselaw from 2013 which predates *Daly and Keir* ought to be read subject to the Supreme Court's observations therein. The editor of the bench book will add reference to further cases decided by the courts following *Daly* and *Keir* when available.

9.13 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 (noted in *Daly* and *Keir* at paragraph [176]).

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

See *RN* at paragraph [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.

9.14 Consequences of granting the section 275 application: Judicial discretion re disclosure of previous convictions

See section 275A.

What are the implications of granting a section 275 application?

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 (so it seems not to include a subsequent conviction per section 101A, introduced in 2011 section 275A being introduced in 2002) 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, section 275A has been interpreted by the High Court of Justiciary (*HM Advocate v DS* [2005] HCJAC 90, 2006 JC 47) and the JCPC (*DS v HM Advocate*) in a much more flexible way, leaving substantial discretion to the judge. In short, the defence have a right to object and 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. The judge is concerned with the fairness of the trial, and 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. In practice judges rarely, if ever, authorise previous convictions to be laid before the jury. In a note by Lord Mulholland (appendix 10) it is suggested that it would never be appropriate to do so if the extent of the grant of a section 275 application went no further than allowing the accused to give their account of the sexual conduct that occurred on the occasion libelled.