HM Inspectorate of Prosecution in Scotland

Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995

October 2022

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Introduction

The aim of this inspection was to assess Crown Office and Procurator Fiscal Service (COPFS) practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. These provisions regulate the use of evidence relating to the sexual history or character of complainers in sexual offence trials, and are designed to protect complainers giving evidence from irrelevant and often distressing questioning.

Following recent developments in case law regarding sexual history and character evidence and the publication of a report on the issue by the Equality and Human Rights Commission,[1] I had discussions with both the then Lord Advocate and the Commission about the possibility of HM Inspectorate of Prosecution in Scotland (IPS) carrying out a review of COPFS practice in this area. In light of those discussions, the Lord Advocate referred the issue to me for inspection. We agreed that an inspection would be timely and in the public interest.

This report presents our findings on how COPFS makes and responds to section 275 applications to lead sexual history or character evidence. It focuses almost entirely on how the Crown manages section 275 applications in High Court cases although brief consideration has also been given to practice in the Sheriff Court. It is worth noting at the outset that this can be a complex area of the law that prosecutors, defence counsel and judges find challenging. They nonetheless share a strong desire to ensure that complainers are not subject to inappropriate or unnecessary intrusions upon their dignity and privacy.

We found that COPFS responded swiftly to developments in case law, issuing new instructions to staff and creating a training course dedicated to sexual history and character evidence. This has led to a significant shift in practice regarding how section 275 applications are managed – complainers are now regularly told about section 275 applications, asked their views on the applications' contents, and those views are presented by the Crown to the court. We found the quality of Crown section 275 applications to be generally good, and we found that the Crown generally opposed applications made by the defence when it was appropriate to do so. Nonetheless, there remains scope for further improvement.

We have made nine recommendations, eight of which are directed at COPFS and one of which is directed at the Scottish Government. If implemented, the recommendations should support further improvements in the way in which COPFS makes and responds to section 275 applications. Four of the recommendations directly relate to the Crown's duty to engage complainers about section 275 applications.

We understand that some of our concerns may be addressed by ongoing work to update Chapter 9 of the Crown's Sexual Offences Handbook, a key source of guidance for staff. A draft was shared with us shortly prior to this report being finalised. We have recommended its urgent publication as there is a demonstrable need for it. While its publication would be a step forward, we also note that more work will need to be done to support its effective implementation.

A theme that arose during the course of our inspection was the ability – or rather inability – of complainers to 'tell their story' during proceedings. There was a widely held perception that there was now a stricter application of the law around sexual history and character evidence. While restrictions on inappropriate questioning of complainers during trials were welcomed, there was a concern among some we interviewed that complainers are being

[1] S Cowan, The use of sexual history and bad character evidence in Scottish sexual offences trials (EHRC, 2020).

prevented from telling their story of the incident and that this can be detrimental to the complainer, as well as to the Crown and defence in their efforts to present a case to a jury, and to the jury's understanding of the circumstances of the incident. Previous research has already highlighted that some victim-survivors feel they are unable to tell their story at trial.[2] It would be unfortunate if attempts to safeguard them from inappropriate and intrusive questioning were to compound this feeling and contribute to dissatisfaction with the justice process. This is a broader issue relating to complainers' experiences of the justice process and is not specific to COPFS. It would merit further consideration by those in the criminal justice system, including whether there is a need to better manage complainers' expectations around the purpose of a trial and whether some other mechanism is needed to ensure they feel heard.

We had originally intended to publish this report in Spring 2022, however the progress of our inspection has been significantly delayed by difficulties identifying and tracing key documents. We are grateful to Crown staff who assisted us in this task, as well as all of those staff and stakeholders who participated in our interviews, sharing their views and experiences with us.

Laura Paton
HM Chief Inspector of Prosecution
13 September 2022

[2] O Brooks-Hay, M Burman & L Bradley, Justice Journeys: informing policy and practice through lived experience of victims-survivors of rape and serious sexual assault (2019).

Key findings

There is a lack of data about section 275 applications. This limits the ability of COPFS to use data to inform policy and practice development. However, recently introduced processes may help address the absence of data, at least in part.

In a review of a sample of 123 High Court sexual crime cases in which 238 section 275 applications had been made, 38% of applications were made by the Crown and 62% by the defence. 78% of all applications were granted in full or in part.

Inadequate record keeping hampered the ability of COPFS personnel to manage their cases as effectively as possible.

In response to developments in case law regarding sexual history and character evidence, COPFS developed or revised and promptly published operational instructions to staff. The significance of key judgments and their impact on the Crown's approach to sections 274 and 275 were communicated quickly and clearly to staff.

Staff awareness of the key operational instruction on sexual history and character evidence was good, but staff were less aware of more detailed procedural requirements that were added to later versions of the instruction.

While operational instructions regarding the latest requirements were issued, the Crown's primary resource on prosecuting sexual crime had not yet been updated at the time of our inspection. This risked staff following out-of-date guidance.

A bespoke training course on sexual history and character evidence has been created by COPFS and is available to a range of staff. There is a need to accelerate the rollout of this training to all those who regularly make or respond to section 275 applications.

Staff who had attended the training found it useful, but some would welcome a more operational focus on managing section 275 applications and engaging with complainers as part of their training.

COPFS should give greater consideration to how it ensures policy and guidance are effectively implemented.

There is scope for the need for Crown section 275 applications to be identified and for applications to be drafted at an earlier stage in the preparation of cases. There is also scope for Crown applications to be lodged at an earlier stage, ideally with the indictment.

The quality of Crown section 275 applications is generally good. Most applications are focused and do not seek to lead any more evidence about sexual history or character than is strictly necessary. 85% of Crown applications we reviewed were granted either in full or in part.

In the cases we reviewed, the Crown generally opposed applications made by the defence when it was appropriate to do so. The Crown opposed more applications, or more parts of applications, than were refused by the court. 47% of defence applications were opposed by the Crown in full or in part.

It is essential that defence section 275 applications intimated to the Crown are shared with relevant personnel as soon as possible. The processes for doing so could be improved.

There has been a significant shift in practice in how section 275 applications are managed by the Crown in respect of complainers following *RR v HMA*. Complainers are now regularly told about section 275 applications and asked their views on the applications' contents.

However, further procedural requirements relating to engagement with the complainer are not yet being routinely implemented. Reasons for this include low awareness of certain requirements and the often limited timescales in which the duty of engagement must be carried out.

Staff would benefit from guidance on the circumstances in which it is not appropriate to engage a complainer about a section 275 application.

The timescales within which COPFS is required to engage with complainers about section 275 applications are often short. This affects how complainers are contacted, how precognitions are conducted and how much time complainers have to consider their position. The short timescales risk complainers being approached in a way which is not sensitive to their needs, supportive or trauma-informed.

The manner in which precognitions about section 275 applications take place should be complainer-led. Complainers should be routinely informed that they are able to have an advocacy worker or other supporter present.

Too often, complainers are not being told the outcome of section 275 applications made about them. They are also not routinely being advised by COPFS of the likely outcome of applications.

Overall, we assessed that the quality of engagement with complainers about section 275 applications was good for 43% of the complainers who were the subject of applications we reviewed. The quality of engagement was reasonable for a further 38% of complainers, but unsatisfactory in respect of 19% of complainers.

Recommendations

Recommendation 1
COPFS should clearly set out its expectations of staff regarding record keeping, and remind them that key decisions about a case should be recorded and that key documentation relating to a case should be imported into the relevant case file.

Recommendation 2
COPFS should urgently publish a revised Chapter 9 of the Sexual Offences Handbook to provide a single, easily accessible and up-to-date repository for all policy and guidance on managing section 275 applications.

Recommendation 3
Dedicated training on sexual history and character evidence should be mandatory for all COPFS personnel who are likely to regularly make or respond to section 275 applications in the course of their work.

Recommendation 4
COPFS should instruct staff that, wherever possible, section 275 applications should be lodged with the court and intimated to the defence at the same time as the indictment is served.

Recommendation 5
COPFS should identify the most efficient process for receiving and actioning section 275 applications intimated by the defence. It should communicate this process to defence counsel and encourage them to use it.

Recommendation 6
COPFS should provide staff with guidance on the circumstances in which it may not be appropriate to engage the complainer about section 275 applications.

Recommendation 7
The Scottish Government should consider seeking to extend the statutory time limits for making section 275 applications in the High Court, irrespective of whether a right to independent legal representation is introduced.

Recommendation 8
COPFS should ensure that the manner in which complainers are precognosced about section 275 applications is complainer-led, with options being clearly set out and complainers being invited to state their preference which should be facilitated.

Recommendation 9
COPFS should clarify who is responsible for notifying complainers of the outcome of section 275 applications and should ensure compliance with this requirement. In addition, COPFS should remind its staff that they are required to advise complainers of the likely outcome of section 275 applications.

1 Context and methodology

Legal context

1. Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 regulate the use of evidence relating to the sexual history or character of complainers in sexual offence trials. The provisions are designed to protect complainers giving evidence from irrelevant, intrusive and often distressing questioning.

2. Sometimes known as 'rape shield' laws, specific provisions to regulate the use of sexual history evidence were first introduced in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.[3] These provisions were later extended in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). In response to concerns about the operation of those provisions and following a consultation by the then Scottish Executive, the provisions in the 1995 Act were replaced by new sections 274 and 275 in 2002.[4]

Sections 274 and 275[5]

3. Sections 274 and 275 of the 1995 Act were intended to protect complainers in sexual offence trials from inappropriate questioning about their sexual history and character when giving evidence in court. In particular, they were designed to discourage the use of evidence of limited relevance, where the primary purpose of the evidence is to undermine the credibility of the complainer or divert attention from the issues that require to be determined at trial.[6] Sections 274 and 275 apply to trials for sexual offences heard under solemn and summary procedure, and apply equally to evidence sought to be led or elicited by either the Crown or the defence.

4. Section 274 creates a general rule that evidence or questioning falling within certain categories is not admissible in sexual offence cases. The categories cover evidence which shows or tends to show that the complainer:
   - is not of good character
   - has engaged in sexual behaviour not forming part of the subject matter of the charge
   - has engaged in other behaviour or been subject to any condition or predisposition that may lead to an inference that the complainer is likely to have consented to the acts forming the subject matter of the charge or is not a credible or reliable witness.

5. Section 275 allows the court, on application made to it, to admit evidence or allow questioning falling within the general prohibition at section 274, so long as the evidence meets three cumulative tests. Set out in section 275(1), these tests relate to the specificity, relevance and probative value of the evidence. Its probative value must be significant and must outweigh the risk of prejudice to the proper administration of justice, having regard to the protection of the complainer's dignity and privacy.

6. Sections 274 and 275 restrict the admissibility of evidence which would otherwise be permissible at common law. Thus, prior to considering whether evidence falls within the prohibited categories in section 274, the court must first consider whether the

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[3] Section 36 of the 1985 Act inserted provisions regulating the use of sexual history evidence into the Criminal Procedure (Scotland) Act 1975.
[4] Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[5] The follow paragraphs briefly summarise the provisions. The full text can be found at www.legislation.gov.uk.
[6] Sexual Offences (Procedure and Evidence) (Scotland) Bill: Policy Memorandum (2001).

evidence is admissible at common law. If inadmissible at common law, the evidence cannot be admitted via section 275.

7. Applications made under section 275 must be in writing, and must be made not less than seven clear days before the preliminary hearing in the High Court or 14 clear days before the trial diet in the Sheriff Court. Section 275(3) states that applications shall set out:
    - the evidence sought to be admitted or elicited
    - the nature of any questioning proposed
    - the issues at the trial to which the evidence is considered to be relevant
    - the reasons why that evidence is considered relevant to those issues
    - the inferences which the applicant proposes to submit to the court that it should draw from the evidence.

8. Where the court grants an application to admit evidence or allow questioning about the sexual history or character of the complainer, section 275(7) requires the court to state what evidence or questioning it is permitting, the reasons for its determination that the evidence or questioning is admissible, and the issues at trial to which the evidence is relevant. Section 275(6) permits the court to make its decision to grant an application subject to conditions.

9. Where the court grants a section 275 application made by the accused, section 275A states that, 'the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused'. Subject to an objection by the accused, previous convictions must be laid before the jury or, in summary proceedings, taken into consideration by the judge.

Recent case law

10. In recent years, a series of cases[7] have sought to clarify the import of sections 274 and 275 and to set out the correct approach to be taken to section 275 applications. These cases have been a response to challenges faced by the courts, the Crown and the defence in following the 'basic rules of evidence',[8] and some judges and sheriffs considering what is 'fair, looking primarily, if not exclusively, at the interests of the accused rather than, in addition to his Article 6 right to a fair trial, the wider interests of justice, including the rights of the complainer.'[9] Clarification has been required because, as Lord Turnbull has noted, the 'legislative provisions have consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application.'[10]

11. A review of the recent case law highlights some of the challenges encountered by all parties in making, responding to and determining applications regarding sexual history or character evidence, and the appropriate control of the nature and scope of questioning during trial. These include:
    - consideration of the common law rules of evidence before applying the statutory provisions[11]

[7] Including *RN v HMA* [2020] HCJAC 3; *CH v HMA* [2020] HCJAC 43; *Macdonald v HMA* [2020] HCJAC 21; *RR v HMA* [2021] HCJAC 21; *XY v HMA* [2022] HCJAC 2.
[8] *Macdonald v HMA* [2020] HCJAC 21 at para 47.
[9] *CH v HMA* [2020] HCJAC 43 at para 6.
[10] *CH v HMA* [2020] HCJAC 43 at para 109.
[11] *Kerseboom v HMA* [2016] HCJAC 51 at paras 10 and 16; *LL v HMA* [2018] HCJAC 35 at paras 9 and 22; *P(M) v HMA* 2022 SCCR 1.

- a lack of opposition by the Crown to some applications (either in whole or in part) made by the defence[12]
- deficiencies in the quality of applications, including failures to address all three tests set out in section 275(1) or fulfil the requirements of section 275(3)[13]
- a failure by the court in some cases to state or record reasons for the granting of applications[14]
- a lack of intervention or objection by the courts and the Crown to inappropriate or prohibited questioning during cross-examination of witnesses at trial.[15]

12. As the Lord Justice Clerk noted, recent cases have not been a restatement of the law, but will have led 'to an enhanced, if belated, appreciation of the full significance of the legislation and how it should operate'.[16]

13. In *RR v HMA*,[17] the court clarified the Crown's duties when engaging with complainers regarding section 275 applications. By virtue of the Victims and Witnesses (Scotland) Act 2014[18] and Article 8 (right to privacy) of the European Convention on Human Rights, the court held that the Crown has a duty 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 own attitude. This will require that the complainer must be told of the application, invited to comment on the accuracy of any allegations within it, and be asked to state any objections to the granting of the application.

Broader research and policy context

14. In August 2020, the Equality and Human Rights Commission (EHRC) published research carried out by Professor Sharon Cowan on the use of sexual history and bad character evidence in Scottish sexual offence trials.[19] This research provides an overview of the legislation, case law and literature, and compares the situation in Scotland with that in other jurisdictions. Professor Cowan notes that there appears to be room for improvement in the operation of the provisions regulating the use of sexual history and character evidence in Scotland, particularly in relation to protecting the dignity and privacy of the complainer. She highlights several areas for further work so that we can better understand how the law is being implemented and what change may be required. These include:
    - a review of COPFS practice in relation to sexual history and character evidence
    - the need for robust and transparent official statistical data on the operation of sections 274 and 275

[12] *Macdonald v HMA* [2020] HCJAC 21 at para 34; *LL v HMA* [2018] HCJAC 35 at para 11; *W(J) v HMA* [2021] HCJAC 41 at para 17; *CH v HMA* [2020] HCJAC 43 at para 27; *W(A) v HMA* 2022 SCCR 109 at paras 27, 41 and 43. In *Macdonald*, the Lord Justice General highlighted the importance of the Crown opposing defence applications which seek to admit evidence that is inadmissible at common law or under section 274 as, 'Without such opposition… the court may find it difficult to exclude the proposed evidence… when it is relatively ignorant, at the stage of determining the application, of the totality of the evidence which is to be adduced by the Crown at the subsequent trial.' (para 34).

[13] *HMA v JG* [2019] HCJ 71 at paras 35 and 43; *RN v HMA* [2020] HCJAC 3 at paras 6, 7, 8 and 26; *W(J) v HMA* [2021] HCJAC 41 at para 28; *HMA v Selfridge* 2021 SLT 976 at paras 40-41; *CH v HMA* [2020] HCJAC 43 at paras 42-44.

[14] *RN v HMA* [2020] HCJAC 3 at para 20; *Macdonald v HMA* [2020] HCJAC 21 at para 36.

[15] *Macdonald v HMA* [2020] HCJAC 21 at para 47; *Dreghorn v HMA* [2015] HCJAC 69 at para 39.

[16] *W(J) v HMA* [2021] HCJAC 41 at para 26.

[17] *RR v HMA* [2021] HCJAC 21. The case of *RR* and the Crown's duty of engagement with the complainer is discussed in more detail at Chapter 5.

[18] Section 1(3)(a) and (d) of the Victims and Witnesses (Scotland) Act 2014 require that the complainer be able to obtain information about what is happening in proceedings and, in so far as is appropriate, be able to participate effectively in them.

[19] S Cowan, The use of sexual history and bad character evidence in Scottish sexual offences trials (EHRC, 2020).

- a programme of research on the use of sexual history and character evidence at trial
- consideration of further legal and procedural reform, including whether complainers should have access to state funded independent legal representation in section 275 hearings.

15. Professor Cowan is currently undertaking further research on sexual history and character evidence which she expects to publish in 2023.

16. In 2021, the Lord Justice Clerk, Lady Dorrian, published a report on improving the management of sexual offence cases.[20] The report was the product of a review group chaired by Lady Dorrian and comprising representatives from a range of organisations operating in the criminal justice system, including COPFS. The report notes that a number of themes emerged during the review group's discussions including, for example, the provision of information to and communication with complainers, delays in the processing of cases, and concerns over privacy and the risk of re-traumatisation. The report makes a range of recommendations, including the creation of a specialist sexual offences court using trauma-informed practices and procedure, greater use of pre-recorded evidence and improved communication with complainers. The report also recommends that independent legal representation be made available to complainers in connection with section 275 applications and any appeals therefrom.[21]

17. A recent consultation by the Scottish Government on improving victims' experiences of the justice system has sought to address some of the recommendations in Lady Dorrian's report.[22] The consultation proposed the introduction of a right to publicly funded independent legal representation for complainers in relation to section 275 applications.

Scope of inspection

18. During this inspection, we have examined how the Crown makes and responds to section 275 applications. We have focused almost entirely on the Crown's approach in High Court sexual offence cases as this has been where the majority of section 275 applications have arisen. However, we have also given brief consideration to the Crown's approach to section 275 applications in the Sheriff Court. We have considered:
    - what data is available about the operation of section 275 and the extent to which this is used to inform practice or policy development (chapter 2)
    - how well COPFS has responded to recent case law and the court's clarification of its role in respect of section 275 applications (chapter 3)
    - how well COPFS supports its staff to manage section 275 applications appropriately. This has included consideration of the policy, guidance and training available to support staff in their decision making and the extent to which staff understand the issues and are aware of their role and what is expected of them (chapter 3)
    - whether there is an appropriate process in place for managing section 275 applications and the extent to which that process is being followed (chapter 4)

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[20] SCTS, Improving the management of sexual offence cases: Final report from the Lord Justice Clerk's Review Group (March 2021).
[21] On independent legal representation, see also E P H Keane & Tony Convery, Proposal for independent legal representation for complainers where an application is made to lead evidence of their sexual history or character (2020).
[22] Scottish Government, Improving victims' experiences of the justice system: consultation (May 2022). The outcome of the consultation was not yet known at the time of writing this report.

- how well the Crown is fulfilling its duty to engage with complainers as set out in *RR v HMA* (chapter 5)
- how section 275 applications are managed by the Crown in the Sheriff Court, briefly highlighting practice which varies from that in the High Court (chapter 6).

Methodology

19. To support our inspection, we gathered evidence from a range of sources including:
    - a review of Crown policies, guidance, procedures, data and other documentation relating to sections 274 and 275
    - interviews with over 40 COPFS personnel involved in managing section 275 applications, including case preparers, deputes, senior managers, administrative staff and advocate deputes
    - observation of the training on sexual history and character evidence delivered to COPFS staff
    - interviews with external stakeholders including members of the judiciary, defence counsel and Rape Crisis Scotland[23]
    - a review of cases in which section 275 applications had been made.

20. Our case review was split into three phases:
    - Phase 1 – we reviewed a statistically significant, random sample of 123 High Court sexual crime cases in which section 275 applications had been made
    - Phase 2 – we carried out a more in-depth review of 15 cases that had already been reviewed at Phase 1, with a particular focus on how the Crown engaged with complainers regarding applications
    - Phase 3 – we reviewed a small number of Sheriff Court cases in which section 275 applications had been made.

21. The purpose of our case review was to:
    - better understand how the Crown makes and responds to section 275 applications
    - assess how and to what extent policy and guidance on section 275 applications is being implemented in practice.

22. An additional objective of Phase 1 was to gain a broader understanding of recent section 275 applications and contribute towards addressing the gap in knowledge and the lack of data about section 275 applications highlighted by Professor Cowan in 2020.

23. Further details about our case review and our findings can be found at Appendix 1. The findings are also referred to throughout this report.

24. Our inspection did not include observation of prosecutors at preliminary hearings at which section 275 applications are heard or of sexual offence trials. This was because carrying out court observations would have significantly extended the scale of our inspection and the resources required, and because court observations will form a key part of Professor Cowan's further research on sexual history and character evidence. Given that both our inspection and her research are financed by the public purse, we were keen to avoid duplication of effort and maximise value for money.

[23] While we sought to engage with a range of organisations who may support complainers about whom section 275 applications had been made, we were unable to hear the views of complainers directly. This was due to similar activity being carried out by Professor Cowan around the same time and the wish to avoid duplication and over-consultation.

2 Data on section 275 applications

25. During our inspection, we considered what data is available about the operation of section 275. We were keen to obtain data on section 275 applications for the following reasons:
    - to better understand how often the Crown and defence make applications, how often the Crown opposes applications, what applications are about and how often applications are granted or refused
    - to help identify cases in which section 275 applications had been made so that we could review how those applications had been managed by COPFS
    - to assess the extent to which COPFS uses available data to inform policy or practice development.

26. At the outset of our inspection, we were aware that there was a lack of publicly available data, as highlighted by Professor Cowan in 2020:

    > 'There is an absence of robust and transparent official statistical data, published regularly, on how sections 274 and 275, and accompanying procedural rules, operate in practice. Without this sort of data, there is little we can say with confidence about basic aspects of how the current legislation is working.'[24]

27. Our inspection confirmed that as well as an absence of published data, there was a lack of internal data within COPFS regarding section 275 applications. This meant there was little opportunity for the organisation to gain a strategic understanding of how often it is making applications, whether those applications are successful, how often it is opposing applications and whether such opposition is supported by the court. Moreover, there was little opportunity to use any quantitative data to inform learning for staff or to inform policy or practice development. New administrative processes introduced during the course of our inspection may help to address the absence of data, at least in part (see paragraph 51).

What did we know about section 275 applications?

28. Despite the lack of robust and regularly published statistical data, there is some limited data available about section 275 applications.

29. In 2007, Burman *et al* published research on the operation of sections 274 and 275 following their revision by the Sexual Offences (Procedure and Evidence) Scotland Act 2002.[25] Commissioned by the then Scottish Executive, the purpose of the research was to evaluate the impact of the legislation. It involved mapping all sexual offences indicted to the High Court over 12 months in 2004-05 as well as analysis and observation of a sample of sexual offence trials. It found that:
    - 45% of the 231 cases featured a section 275 application (not all of the cases proceeded to trial)
    - 72% of trials included a section 275 application
    - 30% of trials included multiple applications, although in no case did the Crown make more than one application
    - 25% of applications were made by the Crown and 75% by the defence
    - 19% of trials included applications by both the Crown and the defence

[24] S Cowan, The use of sexual history and bad character evidence in Scottish sexual offences trials (EHRC, 2020).

[25] M Burman, L Jamieson, J Nicholson & O Brooks, Impact of aspects of the law of evidence in sexual offence trials: an evaluation study (2007).

- only 7% of applications were not allowed, although others were partially refused, amended or restrictions were imposed meaning that a significant proportion of applications were modified
- in the 88 trials that included applications, there were 118 applications – a rate of 1.3 per trial
- the Crown objected to defence applications in 31% of the applications the researchers studied in detail
- the type of evidence sought to be led under section 275 applications made at trial most often related to the general character of the complainer, the sexual history of the complainer (other than with the accused) and the complainer's past sexual history with the accused.

30. In 2016, the Cabinet Secretary for Justice published data on section 275 applications following a three-month monitoring exercise by COPFS and the Scottish Courts and Tribunals Service (SCTS) (see Table 1).[26] This data shows that 91% of applications were made in the High Court, 11% of applications were opposed and 84% of applications were granted in full or in part. Only 16% of applications were refused in their entirety.

Table 1 – Data on section 275 applications (11 January 2016 to 11 April 2016)

Court	Number of applications	Number of applications opposed	Number of applications granted	Number of applications granted in part	Number of applications refused
High Court	52	4	42	5	5
Sheriff Court	5	2	1	0	4
Total	57	6	43	5	9

31. More recently, in their paper on a proposal for independent legal representation for complainers about whom section 275 applications are made, Keane and Convery cite data supplied by SCTS in response to their freedom of information request (see Table 2).[27] This data shows that 90% of applications were made in the High Court. Although not directly comparable, the data also suggests a substantial increase in the frequency of section 275 applications since 2016.

Table 2 – Number of section 275 applications

Court	2018-19
High Court	286
Sheriff Court	31
Total	317

What did we find out about section 275 applications?

32. To support our inspection, we made our own request to SCTS regarding the number of section 275 applications each year between 2018-19 and 2020-21, and asked for part-year data between 1 January 2021 to 30 June 2021 (see Table 3). The part-year data was to match the sample period from which we planned to draw cases for review (see paragraph 38).

[26] Cabinet Secretary for Justice, Letter to Margaret Mitchell MSP, Convenor, Justice Committee (29 June 2016).
[27] E P H Keane & T Convery, Proposal for independent legal representation for complainers where an application is made to lead evidence of their sexual history or character (2020) at page 35.

Table 3 – Number of section 275 applications

Court	2018-19	2019-20	2020-21	1 January 2021-30 June 2021
High Court	286	311	227	139
Sheriff Court (Solemn)	31	38	16	20
Total	317	349	243	159

33. Table 3 shows an increase of 10% in the number of applications between 2018-19 and 2019-20, before a significant decrease of 30% between 2019-20 and 2020-21. This decrease is likely associated with the delays experienced in progressing cases to trial as a result of the Covid-19 pandemic. The data for the first six months of 2021 suggests an increase in the frequency of section 275 applications to a level more similar to that pre-pandemic.

34. It is worth noting that the Sheriff Court data supplied by SCTS relates only to Sheriff Court solemn cases, but section 275 applications are also made in summary cases.

35. As noted above, one reason we sought data on section 275 applications was so that we might identify the cases in which they had been made and review them as part of our inspection methodology. Reviewing the cases would help us assess how section 275 applications are being managed by the Crown.

36. During our initial discussions with COPFS about this inspection in 2020, we became aware that in addition to an absence of data on section 275 applications, COPFS was not able to easily identify cases in which section 275 applications had been made. We therefore requested that COPFS staff manually collect data on such cases between 1 January 2021 and 30 June 2021. We asked for the details of cases with section 275 applications at High Court, sheriff and jury, and summary levels. We are grateful to the COPFS staff who assisted in this task, though it should be noted that the manner in which the data was collated risks the data set being incomplete.[28]

37. We selected our sample period in an effort to strike a balance between recent cases and those in which sufficient time had passed before we commenced our review that we could assess how they had been progressed. In particular, we were mindful of recent changes to COPFS policy on section 275 applications in response to the developing case law and we were keen to ensure the cases we reviewed reflected current practice, rather than processes or practice that had been rendered obsolete.

38. From the manual data collection exercise carried out on our behalf by COPFS staff, 127 High Court cases were identified which had section 275 applications made between 1 January 2021 and 30 June 2021. This included applications made by both the Crown and the defence. From two additional sources, we were able to identify a further 52 cases in which section 275 applications had been made during the relevant period.[29] This gave a total of 179 cases in which section 275 applications had been made during our sample period. Each of the cases may have had one or more applications. It should be noted that this is significantly more than the 139 applications recorded by SCTS during the same period. We were not able to identify

[28] We were notified of only a few cases at sheriff and jury and summary levels and from only some sheriffdoms, making it clear that this data in particular was only partial. We have a higher degree of confidence in the data compiled for High Court cases.
[29] The two additional sources were (1) a log of section 275 applications made in relation to dockets, following the introduction of Operational Instruction 2 of 21 in March 2021; and (2) a 'petition tracker' maintained by COPFS to record various types of applications made in High Court cases. While there was some duplication in the section 275 applications recorded in each source, each source also identified applications not identified anywhere else.

the exact reason for this variation, although it seems likely that differences in the methods of data collection will have played a role.

39. Also from the manual data collection exercise carried out on our behalf, six sheriff and jury and five summary cases in which section 275 applications had been made were identified (featuring 14 applications). This is fewer than the 20 applications recorded by SCTS.

40. To support our inspection, we sought to review cases in which section 275 applications had been made. Our case review was split into three phases:
    - Phase 1 – we reviewed a statistically significant random sample of 123 High Court sexual crime cases in which section 275 applications had been made[30]
    - Phase 2 – we carried out a more in-depth review of 15 cases that had already been reviewed at Phase 1 to assess how they had been managed by COPFS, including how COPFS had engaged with complainers regarding applications. We purposively sampled cases for review at Phase 2 taking into account a range of information gathered about each case at Phase 1[31]
    - Phase 3 – we reviewed all (11) of the sheriff and jury and summary cases in which section 275 applications had been made and about which we had been notified.

41. The results of our High Court case review are set out in detail at Appendix 1. The headline findings from the High Court cases are set out below. Given the small number of sheriff and jury and summary cases reviewed, their results are included in Chapter 6. We would like to highlight some caveats about the data:
    - the initial population sample from which cases were selected may have been incomplete due to the manner in which it was collated (see paragraph 36)
    - during our six-month sample period, there was a policy change in respect of applications relating to dockets[32] (see paragraph 59). This likely resulted in an increase in Crown applications regarding dockets from 30 March 2021 (the midpoint of our sample period)
    - as will be seen, 55% of High Court cases had more than one application. When we reviewed each case, we considered *all* the section 275 applications in the case, regardless of whether some had been made before or after our sample period. This was to ensure that we built up a full picture of how sexual history and character evidence in each case had been managed
    - the sample period coincided with the growing court backlog associated with the Covid-19 pandemic. This meant that COPFS continued to manage cases for a longer period of time due to delays in cases reaching trial. This afforded an opportunity for the applications made in those cases to be revisited prior to the trial commencing. For example, applications that had previously been granted at a preliminary hearing could be revisited while the case awaited trial in light of developments in case law. On occasion, this led to applications being withdrawn or revised.

[30] The results of our Phase 1 case review are statistically significant with a confidence interval of 95%±10%.

[31] For example, in Phase 2, we only reviewed cases where the outcome of the section 275 applications was known, and we sought a balance of cases with particular features identified at Phase 1, such as cases where there had been single and multiple applications, where applications had been made by the Crown or defence or both, etc.

[32] Docket evidence is added to an indictment to give notice of the Crown's intention to lead evidence of a crime not libelled. The approach is necessary for the application of mutual corroboration in order to link the criminal conduct in the docket with the crime on the indictment.

Headline findings
High Court case review

123 cases

238 applications
(almost 2 per case)

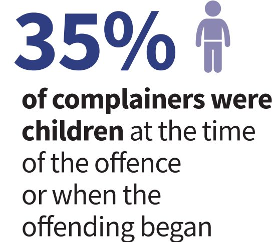
55% cases
featured **more than one application**

Rape was the main charge in **94% of cases**

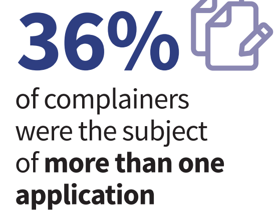
173 complainers

were the subject of applications

94%
of complainers were **women and girls**



35%
of complainers were children at the time of the offence or when the offending began



36%
of complainers were the subject of **more than one application**

238 applications

Applications were made on behalf of 126 accused
100% of accused were male

100%

38%
of applications were made **by the Crown**

62%
of applications were made **by the defence**

44%
of cases featured applications made **by the Crown and the defence**

66% of applications were **unopposed**

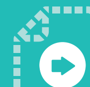
The Crown opposed 47% of defence applications in full or in part

The defence opposed 7% of Crown applications

78%
of applications were **granted in full or in part** (85% of Crown applications; 74% of defence applications)

15%
were refused (6% of Crown applications; 20% of defence applications)

7%
were withdrawn (9% of Crown applications; 6% of defence applications)



Applications most often sought to lead evidence relating to the complainer's behaviour at or around the time of the alleged offence, followed by the complainer's general character and the complainer's past sexual history with the accused

Applications seeking to lead evidence about **the complainer's behaviour with the accused at or around the time of the offence** were **most likely to be granted**.

Applications seeking to lead evidence about **the sexual history of the complainer with someone other than the accused** were **most likely to be refused**.

42. During our inspection, we were not able to establish what proportion of High Court cases feature section 275 applications. No such data was available. However, we asked those we interviewed to estimate the proportion, based on their experience of managing cases daily – their estimates ranged from around half to three quarters of High Court sexual offence cases involve section 275 applications. However, some thought that the volume of defence applications was reducing in light of recent case law, while the number of Crown applications may be increasing as a result of changes in the Crown's approach (see paragraph 59).

43. Despite these caveats, we hope that the results of our case review go some way towards addressing the lack of data identified by Professor Cowan and towards informing further policy discussions around the use of sexual history and character evidence and the implementation of sections 274 and 275.

Record keeping

44. In any of our inspections, our ability to review cases is facilitated by inspectorate staff having direct access to COPFS systems, including its case management system which should contain all documentation pertaining to each case. For the purposes of our inspection, we required sight of key documents, notably the section 275 applications themselves as well as written records from the Crown and defence, Crown reports of preliminary hearings, the court's own minutes and records relating to engagement with the complainer about applications. All such information should be stored in the electronic case management system but was not.

45. We experienced considerable challenges in tracing key documents when carrying out both Phases 1 and 2 of our case review. This was most often because they had not been imported into the case management system. There were instances where key documents were found in the personal files of staff, inaccessible to others. Indeed, documents were missing in every case we reviewed and it was not common to find a case in which the section 275 application had already been imported. Where applications had been imported, it was sometimes difficult to know whether they were the draft or final versions. The 123 cases we reviewed at Phase 1 featured 238 applications but we were not able to trace five of those applications in the time available. These difficulties caused our inspection to be considerably delayed, although we appreciated the significant efforts that COPFS personnel made to assist us in tracing missing documents.

46. Record keeping issues hampered our ability to efficiently review cases but, more importantly, hampered the ability of COPFS personnel to manage their cases effectively and in full possession of all relevant information. For example, at the time of our case review, some key documents were stored in folders accessible only to advocate deputes but not case preparers. This meant case preparers were sometimes unsighted on developments in the case.

47. Critically, not all Crown or defence section 275 applications were stored on the primary case management system. Staff told us that, historically, there was a lack of clarity regarding who was responsible for importing key documents, including the applications. There were significant inconsistencies between cases regarding how and where documents were stored. There was also a lack of consistency on whether and where a note of key discussions and decisions made in respect of applications were recorded in the pathway document.[33] While some said they recorded information about section 275 applications on the pathway, others did not. There was

[33] The pathway document is an electronic 'living' document designed to record key milestones and the progress of a case in one place.

also uncertainty about whether a note of any discussions with the complainer about applications should be recorded in the pathway.

48. Almost all the staff we interviewed agreed that effective record keeping was a challenge. They cited difficulties with using the current case management system, noting that implementing naming conventions is challenging, documents are difficult to locate and the system itself occasionally fails to save documents or only grants access to a particular case file to one person at any given time. Because of the problems faced in using this system, various workarounds have been implemented, but these risk information in case files being incomplete, and some staff not being able to access information that is relevant to their role in a case.

49. COPFS is aware of the deficiencies of its case management system. It has previously sought to procure a new system but these efforts were brought to an end several years ago as a result of the loss of capital funding following the financial crisis. Currently, COPFS has plans to replace the current system by designing and implementing a next generation case management system using innovative digital technology to meet the delivery needs of a modern prosecution service. This new system is much needed. In the shorter term, COPFS should consider what it can do to manage the limitations of its current case management system and, in particular, ensure that staff are clear about their responsibilities in relation to record keeping.

50. Some of the issues that we encountered in relation to record keeping should be addressed by responsibility for the lodging and intimating of section 275 applications recently having been allocated to a Lodging and Indicting Team. As well as lodging applications, this team has been asked to import both Crown and defence applications into the case management system. While this is a welcome development, further work still requires to be done to ensure that other key documentation, such as records of engagement with the complainer about section 275 applications and court minutes, are imported into case files. Case preparers and solemn legal managers should also be able to access all documentation about their cases.

51. A further benefit of the Lodging and Indicting Team's involvement in section 275 applications is that they have recently been asked to record key data about section 275 applications. This includes recording who made the application, the dates the application was lodged and served on the accused, and the outcome of the application. This creates potential for some basic data to be gathered and analysed for trends.

Recommendation 1
COPFS should clearly set out its expectations of staff regarding record keeping, and remind them that key decisions about a case should be recorded and that key documentation relating to a case should be imported into the relevant case file.

3 Responding to case law and supporting staff

52. During our inspection, we considered how COPFS had responded to recent case law and the court's clarification of its role in respect of section 275 applications. We also considered how well COPFS supports its staff to manage section 275 applications appropriately. This included consideration of the policy, guidance and training available to support staff in their decision making and the extent to which staff understand the issues and are aware of their role and what is expected of them.

Responsiveness to developments in case law

53. In recent years, a series of cases have noted concerns about the manner in which complainers have been questioned about their sexual history and character at trial, have sought to clarify the import of sections 274 and 275 and have set out the correct approach to be taken to section 275 applications.[34] This recent case law has prompted COPFS to revise its operational instructions and to enhance the training offered to staff in respect of sections 274 and 275.

54. In *Donegan v HMA*, the court noted that the complainer was 'subjected to a lengthy, unjustified and sometimes insulting cross-examination' and expressed surprise that the prosecutor did not object.[35] Citing a desire to improve the experience of those giving evidence, the court reminded prosecutors, defence counsel and judges of their role in keeping the examination of a witness within proper and reasonable bounds.[36] In response, COPFS issued Operational Instruction 2 of 2019 (OI 2/19) on the protection of witnesses from unfair or oppressive questioning. The instruction reminded prosecutors of their responsibility to object to questioning of witnesses by the defence where cross-examination is abusive or aggressive.

55. In *HMA v JG*, it was stated that while the court itself ought to notice deficiencies in defence section 275 applications and take appropriate action, there was also an obligation on the Crown to draw the court's attention to any obvious failure to comply with the statutory requirements.[37] In *Macdonald v HMA*, the Appeal Court expressed various concerns about the manner in which the trial had been conducted, including deficiencies in determining applications and the questions that were put to the complainer.[38] In relation to the Crown, the Appeal Court highlighted the Crown's duty to oppose defence applications which seek to admit evidence which is inadmissible at common law or under section 274.[39] In response to these cases, COPFS issued Operational Instruction 13 of 2020 (OI 13/20) in June 2020 on protecting witnesses in sexual offence cases. Addressed to legal staff and case preparers, this instruction reminded staff of the importance of adhering to both the common law rules of evidence and sections 274 and 275 to ensure that trials are properly focused and that complainers are not subject to intrusive or inappropriate questioning.

56. OI 13/20 was updated in November 2020 to take account of further case law, including *CH v HMA*[40] and *RR v HMA*.[41] It reminds staff again of the need to first assess the admissibility of evidence at common law before considering admissibility

[34] Including *RN v HMA* [2020] HCJAC 3; *CH v HMA* [2020] HCJAC 43; *Macdonald v HMA* [2020] HCJAC 21; *RR v HMA* [2021] HCJAC 21; *AW and HB v HMA* [2022] HCJAC 16.
[35] *Donegan v HMA* [2019] HCJAC 10 at para 54.
[36] *Donegan v HMA* [2019] HCJAC 10 at para 56.
[37] *HMA v JG* [2019] HCJ 71 at para 36.
[38] *Macdonald v HMA* [2020] HCJAC 21 at para 2.
[39] *Macdonald v HMA* [2020] HCJAC 21 at para 34.
[40] *CH v HMA* [2020] HCJAC 43.
[41] *RR v HMA* [2021] HCJAC 21.

under sections 274 and 275, and of the need to apply those statutory requirements robustly. More significantly, the updated instruction also advised staff of the outcome of *RR v HMA*, in which the court stated that it is the duty of the Crown to ascertain the complainer's position in relation to a section 275 application and to present that position to the court. This second version of OI 13/20 provides guidance to staff on how this duty should be fulfilled and advises them of new forms of written record issued by SCTS. The new forms required the Crown to address questions regarding the complainer's view on section 275 applications.[42]

57. Operational instructions were developed or revised and published promptly in response to case law developments. The significance of the judgments and their impact on the Crown's approach to sections 274 and 275 were communicated quickly and clearly to staff. In our case review, we found evidence of immediate efforts being made to comply with the court's ruling in *RR* even in the brief period between the judgment and the updated instruction being published. Staff sought to fulfil their duty to engage with the complainer not only in applications made after *RR*, but also in respect of applications that had previously been drafted or even granted. This led to some Crown applications being withdrawn and revised, and defence applications being reconsidered by the courts.

58. OI 13/20 was further updated in February 2021 and August 2021, including in response to feedback from organisations that support complainers in sexual offence cases which we welcome.

59. A further operational instruction regarding section 275 applications was published in March 2021 after the Crown reassessed its practice in relation to the leading of docket evidence. It considered that to lead evidence of sexual matters in a docket relating to a complainer who features in a charge engages section 274 (because the evidence relates to sexual behaviour which is not the subject matter of the charge). COPFS therefore published Operational Instruction 2 of 2021 (OI 2/21) requiring that, in all cases where a complainer features in both a charge and a docket, a section 275 application must be lodged by the Crown to cover the sexual matters in the docket. Such applications had not previously been made. OI 2/21 applied with immediate effect, prompting COPFS to review all ongoing cases and to make applications where necessary, even where the applications might already be late. We found evidence in our case review of immediate steps being taken to identify all relevant cases and to make applications and seek the views of complainers on their contents.

60. In our interviews with COPFS staff, we asked how well policy and guidance on sections 274 and 275 support them to carry out their role effectively. Staff were generally aware of OI 13/20, but less aware of OIs 2/19 and 2/21. Even where general awareness of OI 13/20 was good, staff sometimes lacked awareness of specific aspects of the instruction, particularly procedural requirements that were added to later versions of OI 13/20. This could be a result of four versions of OI 13/20 being published in a 17-month period and staff not being alert to specific changes.

61. While staff said the operational instructions were useful, some felt OI 13/20 discussed the case law and some procedural matters, but they would welcome more operationally focused guidance that sets out who is responsible for what, including guidance for specific roles such as indicters. OI 13/20 is addressed to legal staff and

[42] *Form 9A.4: Form of written record of state of preparation* in High Court cases; and *Form 9.3A: Form of joint written record of state of preparation* in sheriff and jury cases. Section 5A of both forms address section 275 applications.

case preparers, but those working in Victim Information and Advice (VIA) wondered if they have any role in relation to section 275 applications and whether simpler, less complex information about sections 274 and 275 could be made available to them should they need it.

62. When looking for guidance on sexual history and character evidence, staff said their primary source of information was Chapter 9 of the Crown's Sexual Offences Handbook. The handbook is intended to be the central repository for all guidance on prosecuting sexual crime, with Chapter 9 focusing on sexual history and character evidence. However, we found that Chapter 9 had not been updated since 2020. It makes no reference to key developments in case law or the latest operational instructions, and contains outdated styles of applications. We were advised prior to our inspection that Chapter 9 was being revised to take account of the latest developments, but it had still not been published at the time of writing. Some staff we spoke to were under the mistaken impression that the handbook available on the COPFS intranet was the updated version.

63. We have previously expressed concern about time lapses in updating the handbook and removing out of date material[43] and would reiterate those comments here. While we appreciate that updating a comprehensive handbook takes time and resources, in an area that has seen significant developments in the law and the Crown's approach, there is a risk that staff will mistakenly refer to and apply outdated law and practices. Other sources of guidance, such as a manual for advocate deputes and preliminary hearing handbook, also appeared to contain guidance on section 275 applications that was out of date.

64. COPFS does make considerable efforts to ensure staff are kept abreast of the latest developments. Staff working in Knowledge Bank[44] and the appeals and policy teams work together to monitor developments and disseminate information to staff via the intranet, bulletins and emails. These efforts are welcome, but rely on staff self-briefing or being briefed by their supervisors, and then recalling key developments when needed. An up-to-date central repository for all relevant information, as the handbook is intended to be, is essential to ensuring staff have quick and easy access to the latest guidance.

Recommendation 2
COPFS should urgently publish a revised Chapter 9 of the Sexual Offences Handbook to provide a single, easily accessible and up-to-date repository for all policy and guidance on managing section 275 applications.

65. Other external sources of information on sexual history and character evidence, such as the Preliminary Hearing Bench Book[45] and the Jury Manual,[46] were well known to and used by advocate deputes and other senior staff. Awareness of them was low amongst other staff however and they were not linked to in relevant COPFS materials, despite them being excellent sources of case law and information on section 275 applications.

66. As noted above, Chapter 9 of the Sexual Offences Handbook includes styles, or templates, of applications that are out of date. COPFS staff hugely appreciate styles

[43] IPS, Thematic review of the investigation and prosecution of sexual crimes (2017), para 47.
[44] Knowledge Bank is a COPFS information database containing legal and non-legal guidance.
[45] Judicial Institute for Scotland, Preliminary Hearings e-Bench Book (June 2022).
[46] Judicial Institute for Scotland, e-Jury Manual (August 2022).

that they can adapt to suit the circumstances of a particular case. They highlighted the need for a new bank of approved styles that reflect the latest developments and which can be made available to all staff and updated when required. Currently, staff are storing and sharing previous applications they have drafted or seen which, unless anonymised, may risk personal data being shared unnecessarily. We understand that new styles which are more relevant to current practice will be included in the revised Chapter 9, which staff would welcome.

Training

67. As well as issuing operational instructions to staff regarding developments in case law, COPFS introduced a training course focused on sections 274 and 275. Previously, issues relating to sexual history and character evidence may have been addressed during a broader course on prosecuting sexual crime, but an additional, dedicated course was thought necessary.[47]

68. The training course was developed by staff at the Scottish Prosecution College and was first delivered in June 2021. It is a half-day session covering issues such as:
    - the common law rules on admissibility of evidence
    - the prohibitions on sexual history and character evidence in section 274
    - the requirements of section 275
    - the identification of common scenarios in which the need for a section 275 application may arise
    - anticipating and responding to defence applications.

69. We were able to observe a training course delivered in early 2022. The course we observed featured an input from an experienced advocate depute who provided insights into current practice in the High Court and who answered questions on best practice. The course was attended by a range of staff, including deputes working on cases in the High Court and Sheriff Courts, solemn legal mangers, indicters and an Assistant Procurator Fiscal. Previous attendees had included case preparers and advocate deputes.

70. We interviewed a range of staff involved in making and responding to section 275 applications. We were surprised that many staff seemed unaware of the training, and a surprising number had not yet attended despite section 275 applications being a regular feature of their work. Some staff had a strong desire to attend and felt it would be useful, but felt unable to do so due to pressures of business. At the course we observed, we were pleased to see a number of staff working in the Sheriff Court attending, but were surprised at the low number of High Court staff, particularly case preparers. The training needs of staff should be identified during performance reviews and incorporated into training plans. We heard that the course was only delivered twice in 2021, but note that its delivery has been accelerated in 2022 with four courses delivered at the time of writing and another two scheduled.

71. Those we interviewed who had attended the training course told us they found it useful and informative. Some said that while they welcomed hearing about the law on sexual history and character evidence, they would like the training to have a more operational focus, with discussion of the practicalities of drafting applications and engaging with complainers. They wondered whether the training could incorporate a 'workshop' element, where staff work on case studies and explore the issues in a more interactive way. In particular, those who precognosce complainers on the content of section 275 applications said they wanted to know more about trauma-

[47] Prior to the dedicated section 275 training course being developed, a one-off training session for indicters on section 275 applications was also delivered by an advocate depute.

informed practice, how to better manage difficult conversations with complainers and how to support complainers who may become distressed or upset. Even VIA staff, who engage with complainers most often, told us they would benefit from such training.

72. Some staff told us that they had learned about section 275 applications 'on the job', by learning from colleagues and participating in team discussions. This approach is, however, unsustainable when so many staff work from home and around half of case preparers working on High Court sexual crime cases have less than two years' experience. These staff have been appointed during the pandemic and some were external applicants without prior knowledge of the criminal justice system. Given their lack of experience, they will rely more on their managers and on clear guidance and formal training than ever before. Some new staff we spoke to said they had never seen a colleague conduct an in-person precognition, or attended a court. They felt they would benefit from observing a preliminary hearing at which a section 275 application is heard.

73. We welcome the dedicated training course COPFS has introduced on sexual history and character evidence. We encourage COPFS to consider the feedback we heard from those who had attended and to continue to seek and act upon feedback from staff to ensure training meets their needs.

74. During our inspection, we regularly heard that the law around sexual history and character evidence is complex and challenging, even for experienced prosecutors. Even members of the judiciary we interviewed said sections 274 and 275 tend to be some of the most complex matters they encounter. Given this complexity, and given the desire to ensure that complainers in sexual offence cases are not subject to inappropriate or unnecessary intrusions upon their dignity and privacy during questioning, we consider that training on sections 274 and 275 should be mandatory for all personnel who are likely to regularly make or respond to applications during the course of their work. Mandatory training will help the Crown to ensure that the statutory requirements relating to sexual history and character evidence are adhered to and that its duty to engage complainers about section 275 applications is fulfilled. Through training, staff should also be supported to engage with complainers in a trauma-informed way. We understand that COPFS is exploring how best to embed trauma-informed practice in its work, linked to the forthcoming knowledge and skills framework for those working in the justice sector in Scotland.[48]

Recommendation 3
Dedicated training on sexual history and character evidence should be mandatory for all COPFS personnel who are likely to regularly make or respond to section 275 applications in the course of their work.

75. The dedicated training course on sexual history and character evidence is open to a range of COPFS personnel. We noted that some advocate deputes had attended. We also heard that advocate deputes benefit from regular seminars on a range of topics, including sections 274 and 275, and that new advocate deputes have received training on section 275 applications during their induction. This focus on section 275 applications is welcome, however there may be scope to better align the training provision for advocate deputes to that provided to other staff, ensuring that

[48] The Victims Taskforce has commissioned a knowledge and skills framework on a Trauma Informed and Responsive Justice Workforce for Witnesses. The draft framework was shared with key justice sector organisations in March 2022 for consultation and review.

advocate deputes and those involved in the preparation of cases have a consistent approach and a shared understanding and expectation of each other's roles.

Understanding and awareness

76. Operational instructions are intended to be a means of alerting relevant staff to updated policy or guidance. Developed and published by the COPFS policy team in consultation with others, we heard that operational instructions are intended to be high level and not overly prescriptive, leaving managers to direct practice within teams and define who is responsible for what. While this approach is acceptable in theory, we were concerned that in the context of managing section 275 applications, it has resulted in a lack of clarity regarding some issues, unnecessary variations in practice and, on occasion, staff choosing not to follow the operational instruction. This raises a broader issue about how COPFS ensures policy and guidance are effectively implemented. This will rely on the policy and guidance being clear, accessible and consistent; effective awareness raising of and training on policy changes; supervisory and peer support and feedback for staff implementing changes; and monitoring implementation through, for example, data analysis, audit and quality assurance. While some of these were in place to support developments in managing section 275 applications, COPFS should consider what more it can do to ensure policy and guidance is followed in practice.[49]

77. For advocate deputes, we heard that there is useful peer support in place, including through mentoring for new or less experienced advocate deputes. We also heard that advocate deputes will regularly circulate information about decisions on section 275 applications amongst themselves, so that any learning about the courts' evolving interpretation of the law is shared. There may be scope to cascade this information to others involved in the preparation of cases for court, including indicters, solemn legal managers and case preparers.

[49] This is discussed further, with examples, in Chapter 5.

4 Processes for managing section 275 applications

78. During our inspection, we considered whether there are appropriate processes in place for managing section 275 applications and the extent to which those processes are being followed. We considered both how the Crown makes and responds to applications.

Making Crown applications

79. In Scotland, the statutory provisions regulating the use of evidence relating to the complainer's sexual history or character apply equally to the Crown as to the defence. This is unlike the situation in, for example, England and Wales, where the equivalent statutory restrictions apply only to the defence. Thus, if the Crown in Scotland wishes to lead or elicit evidence relating to the complainer's sexual history or character that is prohibited by section 274, it must make a section 275 application.

80. In Phase 1 of our case review, we reviewed 123 cases in which section 275 applications had been made. These 123 cases featured 238 applications. We were not able to trace and review five applications. Of the remaining 233 applications, 89 (38%) were made by the Crown. In Phase 2 of our case review, we reviewed 15 cases in more detail. These cases featured 37 applications. Twelve (32%) of these were Crown applications.

Identification and drafting of Crown applications

81. During our inspection, we heard that a variety of people in different roles and at different stages in the preparation of the case may identify the need for a section 275 application. This includes:
    - the prosecutor who initially marks the case
    - the solemn legal manager (SLM) who drafts the investigative agreement,[50] allocates the case to a case preparer and reviews the work of the case preparer
    - the case preparer who investigates and prepares the case for prosecution
    - the indicter who quality assures the case and finalises the indictment
    - the advocate depute who conducts the preliminary hearing
    - the advocate depute who conducts the trial.

82. Because a range of people involved in the case may identify the need for a section 275 application, some uncertainty has arisen as to where the responsibility primarily lies. Ideally, the need for a Crown section 275 application would be identified as early in the preparation of the case as possible. Indeed, COPFS guidance states that, 'it is important the Crown addresses the need to make an application under section 275 at an early stage'.[51] In relation to who should draft applications, the guidance goes on to state that, 'Applications must be drafted by the case preparer under the supervision of the SLM during the case preparation process, for consideration by the indicter'.[52]

83. While the need for Crown section 275 applications should be identified as early in the preparation of a case as possible, we heard that too often this happened in the latter stages of the case. During our interviews, we heard that many cases were reported for Crown Counsel's instructions either without consideration having been given to the need for a section 275 application or, where the need had been identified, without

[50] The investigative agreement sets out a strategy for the investigation and preparation of a case. It sets out key matters relevant to the prosecution, including the charges to be investigated, how these will be proved, the parameters of the investigation and how the evidence will be presented.
[51] OI 13/20, para 9.
[52] OI 13/20, para 9.

Standard progress of a High Court sexual offence case

a draft application. We also heard that, rather than reviewing already drafted applications, indicters and even advocate deputes were drafting applications themselves.

84. We note that in some cases, the need for an application may only become apparent at a later stage – for example, once forensic evidence becomes available. We also note that identifying whether a section 275 application is necessary may not always be easy – this can be a challenging and complex area of the law where views may vary. Nonetheless, there was a perception among those we interviewed that identifying the need for and drafting applications could in the majority of cases be done at an earlier stage, in line with current guidance.

85. There was also a perception, however, that this may be beginning to change – some of those we interviewed said there was an increasing awareness among case preparers and SLMs of the need for section 275 applications, reflected in a rising number of draft applications being submitted for consideration at the reporting stage.

86. Two additional developments within COPFS should assist in a shift to the earlier identification and drafting of section 275 applications:
    - the High Court pathway document has recently been amended to include questions on whether there are any facts or circumstances which could give rise to either a Crown or a defence section 275 application. This is a useful prompt which should assist the early identification of the need for a Crown application.
    - minimum standards for the preparation of High Court cases are being developed. These standards will make clear what needs to be done and who is responsible for each task. When a case is reported for Crown Counsel's instructions, the standards will require SLMs to confirm whether the need for a Crown section 275 application has been considered.

87. One potential barrier to the earlier identification and drafting of section 275 applications by case preparers is their level of expertise and confidence. As already noted, the law around sexual history and character evidence can be complex and nuanced, and has proved challenging even for members of the judiciary, experienced prosecutors and defence counsel, as recent case law has shown. Some case preparers we spoke to said they felt 'out of their depth' drafting section 275 applications and felt this was a role for legally qualified staff (while some case preparers are legally qualified, many are not). Others felt that non-legally qualified case preparers were equally as capable of drafting applications and were best placed to do so given their in-depth knowledge of the case.

88. In Phase 2 of our case review, the 15 cases featured 12 Crown applications. The identity of the person who drafted two of the applications was unknown. Of the remaining 10:
    - seven were drafted by case preparers, four of which were drafted by non-legally qualified case preparers
    - three were drafted by advocate deputes.

89. We consider that case preparers should be able to identify the need for applications and be able to draft them. However, this is contingent on them being trained in the identification and drafting of applications and having sufficient support and supervision from SLMs. The extent of the training and support required will vary according to the skills and experience of individual case preparers. The complexity of the application to be drafted may also dictate the level of input they require from SLMs. Case preparers (and SLMs) would also benefit from feedback on their draft

applications – we heard that sometimes they may not be aware if their applications are later revised by indicters or advocate deputes or whether their applications are granted or refused by the court. This information would provide a useful learning opportunity.

90. Overall, while there has been some confusion as to where responsibility for the identification and drafting of Crown section 275 applications primarily lies, there are indications that this is becoming increasingly clear and that case preparers and SLMs are becoming more proactive, with indicters being able to revert to their revising role. Recent developments should further cement this shift to earlier identification and drafting. Inevitably there will be a small number of cases where new information or developments necessitate the drafting of a section 275 application in the latter stages of case preparation. In these cases, indicters and advocate deputes act as a safeguard to ensure that applications are made where necessary.

Quality of Crown applications

91. A recurring theme in our interviews with COPFS personnel was that the drafting of section 275 applications is challenging and can be time-intensive. Some personnel had benefited from recent training which helpfully described four situations which typically arise and in which the Crown should consider making a section 275 application. These were:
    - where the complainer is named in a docket and the Crown wishes to lead evidence of sexual matters contained in the docket
    - where the Crown wishes to lead evidence that the complainer engaged in sexual behaviour immediately prior to or during the incident which does not form part of the subject matter of the charge (such as consensual kissing and touching immediately prior to the non-consensual sexual activity alleged in the charge)
    - where the Crown wishes to lead evidence that the complainer and the accused were in a relationship
    - where the Crown wishes to lead the accused's police interview and it contains evidence which is prohibited by section 274.

92. While frequently arising, these four situations are not an exhaustive list of when the Crown may require to make a section 275 application. There are other situations where case preparers and SLMs will require to rely on their experience, training and knowledge of the law on sexual history and character evidence to determine whether an application may be necessary.

93. Many of the COPFS personnel we interviewed spoke of the difficulties they faced in drafting applications. Many said they found it difficult to determine whether the evidence the Crown sought to lead was admissible at common law. They often thought it would be helpful to lead evidence that would provide a jury with the context of the incident including, for example, how the complainer and the accused came to be together at the locus at the time of the charge. However, recent case law has indicated that 'context' is not required.[53] Many of those we interviewed also found it difficult to determine whether evidence the Crown wishes to lead falls within the restrictions contained in section 274.

94. An approach that may assist with the quality of applications is to draft an application per complainer rather than applications featuring multiple complainers. While we saw only a few examples of the latter, we noted single complainer applications tended to be clearer and more likely to address all parts of section 275(3) in a manner sufficient to satisfy the court.

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[53] *SJ v HMA* [2020] HCJAC 18; *HMA v JW* 2020 SCCR 174.

95. In Phase 1 of our case review, we found that the Crown was more likely to make targeted applications relating to only one category of evidence (74% of its 89 applications) than to make complex applications relating to multiple categories of evidence (26% of its applications). In contrast, 58% of the defence applications related to more than one category of evidence. In relation to the Crown applications, however, it may be possible that those we reviewed contained a higher proportion than normal of docket applications due to a change of policy during our sample period. By their nature, docket applications are more likely to be focused, seeking to lead evidence about a specific incident.

96. In Phase 2 of our case review, we sought to assess the quality of Crown section 275 applications with reference to:
   a) whether the application complied with section 275(3)
   b) whether the evidence sought to be admitted or elicited was relevant at common law
   c) if admissible at common law, whether the evidence was prohibited by section 274
   d) if prohibited under section 274, whether the evidence met the tests for admission under section 275(1)(a) (that is, the evidence related only to a specific occurrence or occurrences) and section 275(1)(b) (that occurrence or those occurrences were relevant to establishing guilt)
   e) whether the probative value of the evidence was significant and likely to outweigh any risk of prejudice to the proper administration of justice, including the protection of the complainer's dignity and privacy (section 275(1)(c)).

97. It is worth noting that our assessment was based on the application itself. A court making its own assessment of the application would benefit from the application itself as well as oral submissions by the parties. Of the applications we assessed, all had been lodged but not all had been determined by a court (for example, some were ultimately withdrawn).

a) Compliance with section 275(3)

98. Section 275(3) requires that all applications be in writing and shall set out:
   - the evidence sought to be admitted or elicited
   - the nature of any questioning proposed
   - the issues at the trial to which that evidence is considered to be relevant
   - the reasons why that evidence is considered relevant to those issues
   - the inferences which the applicant proposes to submit to the court that it should draw from that evidence.

99. Of the 12 Crown applications we reviewed in Phase 2, 11 fully complied with the requirements of section 275(3). Only one application did not address all of the requirements. The application, concerning the complainer's use of cannabis, was lacking in detail and did not explain the issues at trial to which the evidence was considered to be relevant. The application was ultimately withdrawn by the Crown at the fourth preliminary hearing in the case.

b) Relevance at common law

100. Recent case law has reiterated that the evidence sought to be admitted or elicited in a section 275 application must be admissible as relevant at common law.[54] Of the 12 Crown applications we reviewed, we considered:
   - the evidence in 10 applications to have been admissible at common law

[54] See paras 55-56.

- the evidence in one to have been partly admissible [55]
- the evidence in one to have been inadmissible at common law. This was the same application noted at paragraph 99 that did not meet all the requirements of section 275(3). This application, concerning the complainer's use of cannabis, did not sufficiently explain why the evidence the Crown sought to admit was relevant.

c) Prohibited by section 274

101. Section 274 creates a general rule that evidence or questioning falling within certain categories is not admissible in sexual offence cases. If the Crown wishes to lead evidence falling within those categories, it must make a section 275 application. If the evidence the Crown wishes to lead does not fall within those categories, no application is required. Of the 12 Crown applications we reviewed, two applications sought to elicit or admit some evidence which we did not consider to have been prohibited by section 274.[56] During our interviews, staff told us that views can vary on whether an application is necessary or not. Where there is uncertainty, they said they tend to be over-cautious and make an application.

d) Specificity and relevance under sections 275(1)(a) and s275(1)(b)

102. Of the 12 Crown applications we reviewed, 11 sought to admit or elicit evidence that related to a specific occurrence or occurrences. Again, it was the application which sought to admit evidence relating to the complainer's use of cannabis that we considered did not have sufficient specificity to comply with section 275(1)(a). The application had sought to lead evidence that the complainer smoked cannabis over a significant period of time, unrelated to the charges in the case. When considering the statutory test of relevance regarding the evidence in the Crown applications, the same issues arose as are highlighted at paragraph 100 in relation to the common law test of relevance.

e) Significant probative value

103. We considered that 11 of the 12 Crown applications sought to admit or elicit evidence which had significant probative value and which was likely to outweigh any risk of prejudice to the proper administration of justice. We considered that only one application was not of significant probative value. Again, it was the application relating to the complainer's use of cannabis which did not appear to have significant probative value.

104. Our case review shows that the quality of Crown applications is generally good and those we interviewed suggested the quality is improving. This view was echoed by the senior staff and stakeholders we interviewed who felt that the Crown applications were generally of a high standard and were continually improving. There was a general sense that most Crown applications are focused, and do not seek to lead any more evidence about sexual history or character than is strictly necessary. This is likely to be a result of the renewed focus on section 275 applications following recent case law and the Crown's subsequent response, including changes to policy and guidance and the introduction of training specifically on section 275 applications.

105. In support of this conclusion, it is worth noting that 85% of Crown applications we reviewed at Phase 1 were granted either in full or in part (where the result was known). Only 6% were refused while 9% were withdrawn. Given the small number (five) of Crown applications that were refused, it is difficult to identify any broader themes or learning points. Nonetheless, it is worth noting that three Crown

[55] This was subsequently withdrawn.
[56] The parts of the applications that we considered to be unnecessary were subsequently withdrawn.

applications were refused because they were deemed unnecessary (that is, the evidence sought to be admitted or elicited was not prohibited by section 274), one was deemed irrelevant and one was refused because it was late.

106. The defence fully or partly opposed 7% of Crown applications. The low rate of opposition suggests that the defence considers Crown applications are generally appropriate or at least not worth opposing. It is worth noting that many Crown applications are considered non-controversial or straightforward compared to those made by the defence – around a third of Crown applications related to dockets for example (100% of which were granted), while others sought to lead evidence of the accused's police interview or the complainer's behaviour at the time of the incident.

107. We were pleased to note in our case review that in respect of ongoing cases, there was evidence that the Crown reviewed its own applications (or asked the court to review previously granted defence applications) in light of the developing case law. This resulted in some applications being withdrawn, some new applications being made and some previously granted applications being refused.

Lodging and intimating section 275 applications

108. Section 275 applications made by the Crown require to be lodged with the court and intimated to the defence. The 1995 Act requires that section 275 applications in High Court cases should be lodged no later than seven clear days prior to the preliminary hearing. This has been interpreted as meaning the first preliminary hearing.[57] Late applications will only be considered where special cause is shown.[58]

109. In the cases we reviewed, it was not always possible to identify the exact date when Crown applications were lodged with the court or intimated to the defence. However, more recently, COPFS has instituted a welcome new process for lodging and intimating section 275 applications. Responsibility for this process now lies with the Indictment and Lodging Team in the Crown's High Court Division. The process includes recording the date applications are lodged and intimated to the defence, as well as notifying all those involved in the case that the application has been lodged.

110. Section 275 applications could be lodged as early as when the indictment is served. While this happens on occasion, we heard that it was infrequent and that applications are generally lodged closer to the statutory deadline (or later). Lodging may be delayed in cases where the need for an application is only identified at a later stage in case preparation, or where an application is particularly complex and requires significant input from indicters or advocate deputes. Data only available since the introduction of the new lodging and intimation process noted above suggests that Crown applications are lodged at various points between the day of the service of the indictment and the day of the preliminary hearing itself.

111. Section 275 applications should be lodged and intimated to the defence as early as possible. The goal should be to, wherever possible, lodge and intimate the application at the same time the indictment is served. This allows the defence sufficient time to review and consider the application, and allows the Crown additional time to fulfil its duty to engage the complainer regarding the application's contents.

112. An effective process, achievable in many cases, would be for the case preparer to draft the application under the supervision of the SLM, the SLM countersigns the

[57] Judicial Institute for Scotland, Preliminary Hearings e-Bench Book (June 2022) at 9.3.3.
[58] Section 275B(1), 1995 Act.

application, the marking advocate depute reviews and instructs the application, the indicter revises the application if necessary, and the application is lodged and intimated to the defence when the indictment is served.

Recommendation 4
COPFS should instruct staff that, wherever possible, section 275 applications should be lodged with the court and intimated to the defence at the same time as the indictment is served.

Late lodging of section 275 applications

113. Nine of the 12 Crown applications we reviewed in Phase 2 of our case review were lodged late (that is, less than seven clear days before the preliminary hearing). Five of the late applications related to a change in COPFS policy on 30 March 2021,[59] midway through the period from which we sampled cases to review. This policy instructed staff to make a section 275 application to cover sexual matters contained in a docket in all cases where a complainer features in both a charge and a docket. The policy change caused COPFS to revisit ongoing cases to check whether an application should now be made, resulting in five late applications.

114. In relation to the remaining four Crown applications which were late:
- one was late as a result of an administrative error regarding the lodging of the application
- one was late because it was a revised Crown application, lodged after the initial application had been debated and withdrawn at the first preliminary hearing
- no reason was recorded for the lateness of two applications.

115. During our interviews, we heard that late Crown applications can arise when those involved in the preparation of the case have considered that there is no need for an application, but the advocate depute conducting the preliminary hearing takes a different view. However, in those circumstances, there is no guarantee that the court will allow the late application to be admitted as it may determine that special cause in terms of section 275B(1) has not been met.[60]

116. Excluding those applications which were lodged late as a result of the policy change, all of the Crown's late applications were lodged at either the first or second preliminary hearing.

Disclosure of the complainer's precognition

117. The Crown has a duty to engage the complainer to establish her views on the contents of a section 275 application.[61] The complainer's views are established during an interview known as a precognition. Where the complainer provides new information during the precognition, the Crown may be under a duty to disclose it to the defence (for example, if the new information is material exculpatory evidence).

118. During our interviews with COPFS personnel, we heard that practice varied with regard to disclosure of precognitions about section 275 applications. Often, the full content of the complainer's precognition was disclosed, irrespective of whether the complainer had provided new material information. Sometimes, only new material information was disclosed. There was also variation as to who instructed or carried

[59] OI 2/21.
[60] The meaning of 'special cause' was examined in an as yet unreported pre-trial case in September 2022, the details of which will be available in the Preliminary Hearings e-Bench Book.
[61] This duty is discussed further at Chapter 5.

out disclosure to the defence. While some case preparers proactively carried out disclosure, others awaited instructions from an advocate depute. Occasionally, advocate deputes undertook disclosure themselves which we heard risks the disclosure not being carried out via the secure disclosure website.

119. While there is extensive guidance available on disclosure generally, it appears COPFS personnel would benefit from greater clarity on what should be disclosed and who should instruct and carry out disclosure specifically in relation to section 275 applications.

Responding to defence applications

120. In Phase 1 of our case review, 62% of the 233 applications we reviewed were made by the defence. The defence were more likely to submit complex applications covering multiple types of evidence. Defence applications were more likely to be refused than those made by the Crown (20% compared to 6%). Among those we interviewed, including defence counsel, there was a perception that the volume of defence applications is reducing as a result of recent case law and what is seen as a more strict application of sections 274 and 275 by the courts. Defence counsel felt applications were now more likely to be refused, and so they were less likely to make them.

121. Nonetheless, of the defence applications we reviewed more closely at Phase 2, we still saw examples of applications that were unlikely to be successful. For example, we considered that eight of the 25 (32%) defence applications attempted to admit or elicit evidence that was not admissible under common law. These included evidence relating to the complainer's behaviour with the accused at various points after the incident, and the complainer's mental health or drug and alcohol use (these applications were either refused by the court or withdrawn).

122. It is not our role to assess the quality of defence applications, but their contents are relevant to our assessment of how they are managed by the Crown. For example, we would expect applications that seek to admit evidence that is not relevant to be opposed. It is also worth noting that the Crown has a duty to engage the complainer about such applications, even if it anticipates they will be refused by the court. In Phase 2 of our case review, there were eight defence applications which sought to lead evidence we considered not to be relevant at common law. Where the Crown's attitude towards the applications was known (five applications), it was reassuring that the Crown fully opposed the applications.

Intimation of defence applications to the Crown

123. In Phase 2 of our case review, we found that nine (36%) of the 25 defence applications were lodged late. Of the applications that were lodged timeously it was difficult to identify the date of lodging as this information was not routinely recorded. There was however a perception among COPFS personnel that most defence applications were lodged very shortly before the deadline of seven clear days before the preliminary hearing, if not late. The court requires both the Crown and defence to complete a written record regarding their state of preparation and to submit this to the court not less than two days before the preliminary hearing. The written record must record the views of the complainer regarding any section 275 application.

124. It is therefore clear that the Crown often has a very limited timeframe in which it must review a defence section 275 application, consider its attitude towards it and precognosce the complainer on its contents. It is critical that any defence application intimated to the Crown is sent to the case preparer without delay.

125. We heard that defence section 275 applications are intimated to the Crown via several routes. Defence counsel we interviewed did not recall receiving any instruction on how section 275 applications should be intimated to the Crown, hence the variation in approach. In the majority of cases, defence counsel email applications to the advocate depute conducting the preliminary hearing and the Crown's High Court Division. On receipt, the advocate depute forwards the application to the relevant case preparer and requests they ascertain the complainer's position on the application. The effectiveness of this approach relies on the advocate depute being able to react immediately on receipt of the defence application, thereby maximising the amount of time the case preparer has to contact and precognosce the complainer. Less frequently, defence counsel may deliver or post a section 275 application to either the High Court Division or the local COPFS office relative to where the offence took place. COPFS administrators should upload the application into the electronic case file and forward it to those involved in the case. Again, the effectiveness of this process relies on those who initially receive the application taking immediate action and forwarding it to the most appropriate person.

126. There is scope for the processing of defence applications to be more robust. Where applications are sent to advocate deputes in the first instance, the advocate depute may not always be in a position to deal with it promptly due to being engaged in a trial or in other matters. Where applications are sent to COPFS mailboxes, the correct mailbox may not be used causing delays. Similarly, hard copy applications received at local offices may not be processed immediately. While these delays may not be substantial, they may have a significant impact given the usually very limited timescales in which the case preparers must contact and precognosce complainers.

127. To maximise the time the Crown has to act upon defence applications, and to minimise the risk that defence applications are not actioned immediately upon receipt, the Crown should identify the most appropriate mechanism for receiving and actioning defence applications. It should communicate this process to defence counsel and encourage them to use it.

Recommendation 5

COPFS should identify the most efficient process for receiving and actioning section 275 applications intimated by the defence. It should communicate this process to defence counsel and encourage them to use it.

Liaison between the Crown and the defence

128. We found there to be very little, if any, communication about section 275 applications between the Crown and the defence prior to cases being indicted. Once applications are lodged, however, we heard that advocate deputes and defence counsel will discuss them. Most often, this will be to ascertain the other party's attitude towards the applications and whether they are likely to be opposed. There appear to be discussions about applications while they are being drafted only rarely.

Crown opposition to defence applications

129. Recently there has been some criticism of the Crown's failure to oppose defence applications when appropriate.[62] We therefore sought to identify the Crown's attitude towards section 275 applications during our case review. Of the defence applications we reviewed at Phase 1, the Crown opposed 47% either in full or in part. There was only one defence application which was unopposed by the Crown and which the

[62] See para 11.

court refused. It was refused on the basis that it did not engage section 274 and therefore was not necessary.

130. Generally, the Crown opposed more applications, or more parts of applications, than were refused by the court. Where the Crown did not oppose a defence application, this was almost always supported by the court. This could suggest that the Crown's opposition or lack thereof is generally appropriate. It could also suggest that the Crown's stance influences the court's decision making, although those we interviewed felt very strongly that the Crown's stance was not determinative and that the obligation to assess the admissibility of evidence lies clearly with the court.[63]

131. The fact the Crown opposes some applications in a case but not others, or some parts of an application but not others, suggests it is taking a nuanced approach and is carefully considering the merits of each application or each piece of evidence sought to be admitted by the defence.

132. There may be scope for the Crown to oppose more late applications by the defence on the basis that the applications are lodged outwith the requisite timeframe and that special cause has not been shown. In Phase 2 of our review, nine defence applications were lodged late. The Crown's position is only known in relation to five of these applications – none of the five were opposed.

133. During our interviews, we heard anecdotal evidence that the Crown is now more inclined to oppose defence applications in light of recent case law and supported by OI 13/20 which encourages Crown opposition to deficient defence applications.

'Mirror' applications

134. It is worth noting that on some occasions when either a defence application was refused or a Crown application was withdrawn, this was done on the basis that the other party had made its own application in much the same terms and it was therefore considered that a second application regarding the same evidence was not necessary. This appears to reflect a misunderstanding of the law and the court's (usual) application of it. The court has made clear that where the Crown and the defence wish to admit or elicit the same evidence (sometimes referred to as mirror or same fact applications) separate applications are required. This is because the reasons for wishing to lead the evidence and the inferences to be drawn will be different for each party and these require to be addressed under section 275(3) before the court will reach a decision.[64]

135. Mirror applications may also arise where a defence application is granted and the Crown subsequently lodges a late application to admit or elicit the same evidence as that already covered by the defence application. The Crown may wish to lead the evidence itself, rather than having the evidence come out during cross-examination of the complainer. The Crown will require to demonstrate that these circumstances amount to special cause.

Appeals

136. Either party may appeal the decision of the court in respect of a section 275 application. COPFS policy states that, 'Where an application is granted, in whole or in part, in the face of Crown opposition, leave to appeal should be sought

[63] See, for example, *RN v HMA* [2020] HCJAC 3 – '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.'
[64] Judicial Institute for Scotland, Preliminary Hearings e-Bench Book (June 2022) at 9.3.2.

immediately'.[65] This approach appears to leave advocate deputes with no discretion as to whether leave to appeal should be sought and does not appear to be followed in practice.

137. The advocate deputes we interviewed, as well as others who had a view on this issue, felt that the Crown should not be required to appeal every decision by the court to grant a defence application in the face of Crown opposition. They felt advocate deputes should have more discretion to decide whether to seek leave to appeal. They might not seek leave to appeal where, for example, the decision to oppose an application had not been clear cut, or where the advocate depute agrees with the court's reasoning for granting applications following debate.

138. COPFS may wish to review its guidance on appealing decisions to grant applications in the face of Crown opposition to ensure it is fit for purpose and is followed in practice.

Trials

139. In March 2019, the Crown issued OI 2/19 in relation to the protection of witnesses from unfair and oppressive questioning. It reminds prosecutors of their responsibility to object to questioning of complainers where it strays beyond proper bounds.

140. We did not observe how the Crown managed section 275 applications at trial as part of our inspection. This is because it would have been particularly resource-intensive and would not have been proportionate, particularly taking into account the concurrent research being carried out by Professor Cowan on sexual history and character evidence which does involve trial observations.

141. Anecdotally however, we heard during our interviews with COPFS personnel and stakeholders that there is an increasing awareness among advocate deputes that they require to be continually alert to the leading of evidence that may engage section 274. They said trials are now being conducted in a manner which is more mindful of whether section 275 applications have been granted or refused, of whether any restrictions have been imposed on how evidence is elicited, and of the admissibility of evidence relating to the sexual history and character of complainers more generally. However, there were also suggestions, including from a member of the judiciary, that there remained scope for further improvement.

Previous convictions

142. Where a defence section 275 application is granted by the court, section 275A requires the Crown to place before the judge a list of the accused's relevant previous convictions.[66] The judge has discretion as to whether relevant previous convictions are laid before the jury.[67]

143. We asked those we interviewed whether the Crown routinely alerts the judge to the accused's relevant previous convictions. We heard that there is very rarely a need to do so – section 275 applications are unlikely to be made on behalf of an accused who has relevant previous convictions. Indeed, we identified no such cases among the cases we reviewed in depth at Phase 2. In Phase 1, we noted three applications (all in the same case) which were withdrawn after the Crown indicated that it would place the accused's previous convictions before the judge.

[65] OI 13/20, para 25.
[66] A previous relevant conviction is a conviction for an offence falling within the scope of section 288C of the 1995 Act – a sexual offence or one with a significant sexual aspect.
[67] Judicial Institute for Scotland, Preliminary Hearings e-Bench Book (June 2022) at 9.6.

5 Engaging with the complainer

The Crown's duty

144. In the case of *RR v HMA*, decided on 7 October 2020, the court clarified the Crown's duty when engaging with complainers regarding section 275 applications.[68]

145. The case arose from a petition to the *nobile officium* of the court.[69] The petitioner was the complainer in criminal proceedings in which the accused had been charged with rape. A section 275 application to lead evidence relating to the complainer's sexual history with the accused was made by the defence and partially granted at a preliminary hearing. The petitioner was not advised that the application had been made, and was only told of it four months later when the Crown sought to precognosce her. The court noted that the petition raised an important issue of principle in relation to a complainer's right to participate in criminal proceedings.

146. In reaching its decision, the court considered the Victims and Witnesses (Scotland) Act 2014 as well as Article 8 of the European Convention on Human Rights (the right to privacy). Section 1 of the 2014 Act sets out principles to which the Lord Advocate and others must have regard when carrying out their functions in relation to complainers. The principles include that a complainer should be able to obtain information about what is happening in her case (section 1(3)(a)) and that, in so far as it would be appropriate to do so, a complainer should be able to participate effectively in the proceedings (section 1(3)(d)).

147. The court held that, by virtue of the complainer's rights under both the 2014 Act and Article 8, '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 own attitude to the application.[70] The court further stated the duty will almost always mean that the complainer must be:
(1) told of the content of the application
(2) invited to comment on the accuracy of any allegations within it
(3) asked to state any objections which she might have to the granting of the application.

148. These three requirements have been characterised as the Crown's duty to engage with complainers in relation to section 275 applications. In practice, the complainer's views are established by the Crown during an interview known as a precognition.

Relevant policy

149. At the time *RR* was decided, the Crown's policy on engaging with complainers about section 275 applications was set out in the first iteration of Operational Instruction 13 of 2020 (OI 13/20). The operational instruction appears to focus only on applications made by the defence, stating that when a section 275 application is intimated to the Crown, the complainer should 'as a general rule' be advised that the application has been received and that it will be considered by the court. The question of whether the complainer required to be precognosced on the application's contents was to be addressed on a case-by-case basis.

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[68] *RR v HMA* [2021] HCJAC 21.
[69] The *nobile officium* is the extraordinary equitable jurisdiction of the High Court of Justiciary (or the Court of Session in civil cases) to provide a remedy where none exists.
[70] *RR v HMA* [2021] HCJAC 21 at para 52.

150. This first iteration of OI 13/20 was dated 9 June 2020, before *RR* was decided but *after* the section 275 application in respect of the complainer in *RR* had been made and partially granted. The Crown policy in place at that time could be found in its Sexual Offences Handbook. The handbook says that complainers should be informed of all section 275 applications, whether made by the Crown or the defence, but that they need only be precognosced on the issues raised in applications on the instruction of a senior member of staff or Crown Counsel. Despite the guidance set out in the handbook, the case of *RR* suggests that the Crown was not routinely informing complainers when section 275 applications were made.

151. In response to *RR*, the Crown revised OI 13/20 to reflect its duty to engage with complainers regarding section 275 applications as set out by the court. The operational instruction now clearly frames engagement with complainers as a duty incumbent on the Crown, rather than simply a procedure to be followed as had previously been the case. The latest iteration[71] of OI 13/20 states that there is a strong presumption that the complainer will be advised when a defence section 275 application is intimated to the Crown or when a Crown application is lodged, and that the complainer will be precognosced to establish their position on the facts and attitude to the application.

152. The current iteration of OI 13/20 sets out how the Crown should fulfil its duty to engage with complainers regarding section 275 applications. The essential elements are that:

- the complainer should be informed of the application
- the complainer should be invited to a meeting to discuss the application and to be precognosced on its contents
- the complainer should be accompanied to the meeting by an advocacy or support worker or another person if they wish
- the complainer should be advised of the full content of the application
- the complainer should be asked about their position in relation to each relevant point in the application and their attitude to the application
- the complainer should be advised that their position on the facts and attitude to the application will be made known to the court
- the complainer should be advised of the Crown's view on the likely outcome of the application
- a careful note should be made of what the complainer was told and what the complainer said
- if time permits and the complainer wishes it, the Crown should write to the complainer immediately following the precognition regarding what was discussed and what will be done with the information
- following the hearing, the complainer must be advised of the outcome of the application
- a record of all attempts to engage with the complainer should be kept, including any issues encountered which may lead to delay or failure to obtain the required information.

153. The operational instruction also reminds Crown personnel of the need to fulfil the duty of engagement in a way which accommodates and responds to the vulnerabilities or other requirements of the complainer.

[71] COPFS first revised OI 13/20 in November 2020 in the immediate aftermath of *RR*, and then updated it again in February 2021 and August 2021.

Implementation of the Crown's duty

154. During our inspection, we considered the extent to which the Crown had implemented its duty to engage with complainers regarding section 275 applications. We also considered the extent to which it adhered to its own policy and procedures, as described in OI 13/20 and set out at paragraph 152. We did this by speaking to a range of Crown personnel as well as external stakeholders about how the Crown engaged with complainers and by considering the implementation of its duty and its policy in Phase 2 of our case review.[72] This involved reviewing 15 cases in which the Crown required to engage with 26 complainers regarding 37 applications.

155. The revision of OI 13/20 in response to *RR* has prompted a transformation in how section 275 applications are managed by the Crown in respect of complainers. While no baseline data is available on the extent to which complainers were informed of and precognosced about applications prior to *RR*, it was clear from our interviews that there has been a significant shift in practice since the judgment.[73] Complainers are now regularly told about section 275 applications and are asked their views on their contents. The duty to engage the complainer about section 275 applications is usually carried out by case preparers, often on the instruction of an advocate depute.

156. In Phase 2 of our case review, there were 34 occasions on which the Crown should have engaged the complainer about a section 275 application. On 29 (85%) of these occasions, the Crown engaged or sought to engage the complainer.[74] While there were five occasions on which the complainer should have been engaged but was not, we consider in light of our discussions with staff that practice has further developed since these applications were dealt with and that they would likely be managed differently today. Nonetheless it is useful to set out the circumstances so as to avoid similar situations arising again. Of the five occasions on which complainers were not engaged:
    - on two occasions, a decision was made not to engage the complainer about a docket application because its content had been the subject of an earlier discussion with the complainer and the complainer's views were already known. We consider that the complainer should nonetheless have been advised of the existence of the application
    - on two occasions, the complainer was not notified of a section 275 application relating to a docket. The instruction to engage complainers about docket applications had only recently come into effect although should nevertheless have been followed
    - on one occasion, the complainer was not engaged about a revised defence application which was an expansion of the original application about which she had been engaged. It was our view that the revised application merited further discussion with the complainer.

157. Generally, we consider that the requirements of *RR* are being put into practice by the Crown and that engaging complainers about section 275 applications is now routine. However, in OI 13/20, the Crown has set out several more detailed steps which it considers to be part of the engagement process some of which are not yet being routinely implemented. These are described further below. There are a range of reasons why some of these steps are not yet being fully implemented, including low

[72] We assessed cases against the version of OI 13/20 that was in place at the relevant time.
[73] While no comprehensive baseline data is available, it is worth noting that there were five occasions in the cases we reviewed at Phase 2 on which the application was lodged and heard prior to *RR* – no precognition was instructed on any of the five occasions.
[74] On two of the 29 occasions, relating to two applications about the same complainer, the Crown sought to engage the complainer but she declined all contact.

awareness of certain requirements and the often very limited timescales in which the duty of engagement must be carried out. For some staff, including many case preparers who carry out the duty of engagement with complainers, a better understanding of the reasons a duty of engagement with the complainer exists would assist their approach to section 275 applications, particularly when they are uncertain about a particular course of action or whether a specific step in OI 13/20 is strictly necessary in the context of a case.

158. The fact that the steps outlined in OI 13/20 are being implemented to varying degrees raises a broader issue about how the Crown puts policy into practice. The policy set out in OI 13/20 is a good reflection of the requirements of *RR* and has been developed and refined in consultation with stakeholders, which we welcome. The challenge for the Crown is ensuring that good policy is consistently applied in practice. This is discussed further at paragraph 76. In the context of OI 13/20, a particular challenge for staff may have arisen from it being revised regularly in a short space of time, with the fourth iteration of the instruction being published within 17 months of the first. This required staff to keep abreast of each version, and may account for the low awareness of some requirements that were added or clarified more recently.

159. Given that OI 13/20 sets out numerous steps to be followed when engaging complainers about section 275 applications, several of those we interviewed suggested that a checklist or aide-memoire might be helpful for staff to ensure that all steps are considered. They also said a checklist or aide-memoire would help them explain the complexities of the law on sexual history and character evidence to complainers in a way which might be more easily understood. One person we spoke to said they had developed their own checklist to ensure they were following the operational instruction.

When not to engage with complainers about section 275 applications

160. In *RR*, the court said that the Crown's duty to engage the complainer will 'almost always' mean that the complainer must be told of the application, invited to comment on the accuracy of any allegations within it, and be asked to state any objections to its granting. OI 13/20 states that it is clear the court expects cases where the Crown does not engage with the complainer to be 'exceptional' and that there is a 'strong presumption' the complainer will be advised of an application and precognosced on its content. Where it is considered that there are exceptional reasons not to engage the complainer, or where the application relates to evidence to be taken from a child witness, instructions should be sought from Crown Counsel.

161. OI 13/20 notes that work is ongoing within COPFS to develop more detailed guidance around circumstances in which it may not be appropriate to engage the complainer about a section 275 application. At the time of our inspection, such guidance had not yet been made available to staff but was much needed.

162. The circumstances in which it may not be appropriate to engage the complainer about an application was an issue that generated considerable discussion and a variety of views during our interviews. While some thought the duty to engage complainers was required in every case regardless of the circumstances, others felt that such a blanket approach was not appropriate. They suggested various scenarios in which it may not be appropriate to engage complainers, which generally fell into two categories:
(1) where they considered there was no value in telling complainers about an application or precognoscing them on its contents. These tended to be Crown applications where the evidence to be led was drawn from previous statements or

precognitions of the complainer. They queried whether there was any value in asking a complainer about this evidence on a second occasion.
(2) where they were concerned that the application may cause distress to the complainer due to its sensitive contents or intrusive nature.

163. In respect of the second category, some Crown personnel were hesitant to engage complainers about an application that might cause distress, while others thought the likelihood of distress on its own was insufficiently exceptional to justify not engaging the complainer. This latter group thought only a combination of the following factors would merit not engaging the complainer:

- that the complainer is particularly vulnerable and there is a real risk of harm being caused as a result of being told about the application **and**
- that the application itself is a particularly egregious invasion of a complainer's privacy, such that the Crown considered it unlikely that it will be granted.

164. In these circumstances, some advocate deputes said they would not instruct a precognition of the complainer and would explain their reasoning to the court at the preliminary hearing. Only if the court then directed that the complainer be precognosced would the advocate depute request that it be carried out.

165. Many of the discussions we had with Crown personnel about the circumstances in which it may not be necessary to engage complainers arose out of genuine concern for the wellbeing of complainers and a desire not to waste complainers' time or cause unnecessary upset. Some appreciated that this was a paternalistic approach, that risked professionals substituting their views on what is best for the complainer for the views of complainers themselves. It risked giving insufficient attention to complainer empowerment and choice, key elements of trauma-informed practice. It also appeared to be at odds with the *ratio* in *RR* – that the duty of engagement arises from the complainer's rights to information and to participate in proceedings. These are rights which the Crown should safeguard.

166. It was clear from our interviews that Crown personnel were keen to have more guidance and would welcome examples of the exceptional circumstances when it was not necessary to engage the complainer. The absence of guidance risks Crown personnel developing their own, inconsistent, approaches. We understand that such guidance may be included in a revised Chapter 9 of the Sexual Offences Handbook which has not yet been published.

Recommendation 6
COPFS should provide staff with guidance on the circumstances in which it may not be appropriate to engage the complainer about section 275 applications.

167. There will be some cases where the Crown is unable to engage the complainer about a section 275 application. This could include, for example, where the complainer does not respond to efforts made to contact her. In such cases, compliance with the requirement in OI 13/20 that a record is kept of all attempts to engage the complainer and any issues encountered will ensure that the Crown is able to address the court as to the reasons why the complainer's views on the application are not known.

Timescales

168. Section 275B(1) of the 1995 Act requires that in the case of proceedings in the High Court, section 275 applications shall be made no later than seven clear days before

the preliminary hearing. Late applications will only be considered where special cause is shown.

169. Given that the indictment is served not less than 29 clear days before the preliminary hearing, there is a short window in which section 275 applications should be made. While it is possible that a Crown application could be lodged at the same time as or shortly after the indictment is served (although this does not always happen in practice[75]), the defence will require time to assess the indictment, take instructions from their client and draft an application. It is often the case, therefore, that section 275 applications are made at or very close to the deadline of seven clear days before the preliminary hearing. Moreover, those who instruct or carry out the precognition of the complainer are not always immediately made aware of a defence application being lodged, further shortening the time before the preliminary hearing.[76] This leaves little time for the Crown to fulfil its duty to engage the complainer regarding section 275 applications. This was one of the most commented on issues during our interviews with COPFS personnel, with almost all of those working on High Court cases saying that more time is needed to ensure the duty can be fulfilled in a way which takes account of the complainer's needs.

170. Indeed, in our Phase 2 case review, we found that it was not uncommon for applications to be made seven days or less before the hearing. This resulted in the duty to engage the complainer being carried out at short notice. Of the 26 occasions in our case review on which complainers were precognosced about a section 275 application, 20 (77%) took place seven days or less before the next hearing in the case. On two of those occasions, the precognition took place one day before the hearing.

171. The short timeframe in which the Crown must engage with complainers about section 275 applications has an impact on the manner in which complainers are contacted, how precognitions are conducted, how much time complainers have to consider their position and whether complainers receive any written information about applications. Many of those we interviewed felt under pressure to engage complainers as quickly as possible, and were concerned they were not approaching it in a way that would be sensitive to complainers' needs and which would best support complainers, including by giving complainers time to consider the application rather than expecting an immediate response. They were particularly worried about causing complainers to disengage from the justice process.

172. In some cases and for some complainers, the short timescales are not problematic. For example, some section 275 applications – particularly those made by the Crown – may not be particularly contentious from the complainer's perspective. In those cases, complainers may be happy to give an immediate view on the application's contents. However, where an application contains intimate or contentious allegations about a complainer, great care should be taken to engage with the complainer in a sensitive and trauma-informed manner and to ensure appropriate support is available.

173. We heard that the Lord Advocate had indicated that preliminary hearings should be adjourned where there was insufficient time to engage complainers in an appropriate way. However, only some personnel appeared to be aware of this and the Lord Advocate's preferred approach is not yet reflected in OI 13/20 or other guidance. Thus, while some case preparers were willing to advise an advocate depute that

[75] See para 110.
[76] See from para 125.

more time was needed to engage the complainer, others felt they had to meet the deadline at all costs. Similarly, some advocate deputes were willing to seek an adjournment of the preliminary hearing, whereas others were not.

174. This resulted in some complainers being approached inappropriately. We were concerned about instances where, after unsuccessful attempts to reach the complainer by phone, COPFS personnel had instructed the police to attend the complainer's address to ensure she was available for precognition in order for her views to be made available to the court at the preliminary hearing. We do not consider this is what the court envisaged as a consequence of *RR*. Our view was shared by many of those we interviewed including senior leaders in COPFS and members of the judiciary. This approach cannot be said to be a trauma-informed and person-centred approach to justice.

175. Some complainers were also described as not engaging with the section 275 application process – while this may have been true of some, it appeared to us as though complainers who were simply not available to speak to COPFS in a very short timeframe were being described in this way, with insufficient consideration being given to complainers' circumstances (such as being unable to answer the phone due to work or other commitments).

176. As the system currently operates, there is insufficient time in many cases for COPFS to engage with complainers in a sensitive and trauma-informed way. The Scottish Government has recently consulted on adjusting the statutory time limit for making section 275 applications.[77] This was in the context, however, of a broader consultation on introducing independent legal representation for complainers regarding section 275 applications and the assumption that complainers will need additional time to secure representation. It is our view that, regardless of whether independent legal representation is introduced, the statutory time limit for making section 275 applications in the High Court should be extended. This will provide COPFS with additional time in which to engage complainers appropriately and would be more in keeping with a trauma-informed and person-centred approach, as set out in the Scottish Government's Vision for Justice in Scotland.[78] It would also allow the Crown to better reflect the general principles in section 1A of the 2014 Act in its approach to complainer engagement, including that victims should be treated in a respectful, sensitive and tailored manner and should have their needs taken into consideration.

Recommendation 7

The Scottish Government should consider seeking to extend the statutory time limits for making section 275 applications in the High Court, irrespective of whether a right to independent legal representation is introduced.

177. Among those we interviewed, there was a general consensus (except among defence counsel) that lodging applications 14 days before the preliminary hearing would be preferable. There is a need to strike a balance between giving the Crown sufficient time to engage complainers and ensuring the defence have sufficient time post-indictment to prepare and lodge applications. Alternative solutions were also suggested to us, including extending the time between the service of indictments and preliminary hearings.

[77] Scottish Government, Improving victims' experiences of the justice system: consultation (May 2022). The consultation had only recently closed at the time of writing this report and the outcome was not yet known.
[78] Scottish Government, The Vision for Justice in Scotland (2022).

178. Whereas the short time limits were one of the issues raised with us most often by those working in the High Court, it is notable that it was rarely mentioned by those working in the Sheriff Court where applications must be lodged 14 days before the trial diet (see paragraph 243).

179. Pending any legislative change, there are other measures that can be taken by the Crown to maximise the time available to engage with complainers appropriately. These include lodging section 275 applications at the same time as the indictment wherever possible, ensuring defence applications are identified and responded to more quickly (see Recommendation 5) and consideration of an adjournment by way of a section 75A minute where more time is required to engage the complainer in a manner which is appropriate to their individual needs.

Arranging the precognition

180. In Phase 2 of our case review, of the 26 occasions on which complainers were precognosced:

- on 22 (85%) occasions, the precognition took place by telephone at the same time the complainer was advised that a section 275 application had been made
- on four (15%) occasions, the complainer was contacted and a precognition was arranged for another time.

181. This trend of complainers being precognosced at the same time as being notified of the section 275 application was confirmed in our interviews with case preparers who said complainers were often keen to 'get it over with'. While this is often at the request of complainers, we were concerned that these immediate precognitions give the complainer little time to consider the application and reflect on their position, particularly where the application is sensitive or intrusive. Writing to the complainer post-precognition to confirm their position allows time for reflection but this was seldom done (see paragraph 199). We heard about one complainer who felt they had been contacted 'out of the blue' about an application and then felt under pressure to give an immediate view. COPFS should consider how best to balance the needs of complainers with the need to carry out precognitions within often short timescales. It is hoped that an extension of the statutory time limits would allow more flexibility in this regard.

182. There is a clear expectation in OI 13/20 that complainers should be precognosced on the contents of a section 275 application at an in-person meeting. However, OI 13/20 also states that if the complainer does not wish to meet or if there is not sufficient time to meet, the discussion may take place by telephone. Given the date it was drafted, the operational instruction acknowledges the restrictions on in-person meetings caused by Covid-19, and refers to Crown guidance on conducting precognitions via Microsoft Teams.

183. In Phase 2 of our case review, there were 26 occasions on which complainers were precognosced:

- in 25 of the 26 (96%) occasions, the precognition took place via telephone. On one of these occasions, a precognition by Teams had been arranged but took place by telephone following a technical difficulty
- on the remaining one occasion, the precognition was conducted in person.

184. From our interviews and our case review, it was clear that few in-person meetings had taken place regarding section 275 applications. While restrictions associated with the pandemic have undoubtedly played a significant role, there does not appear

to have been a shift to in-person meetings commensurate with the easing of restrictions.

185. From our discussions with staff, it appeared the limited timescale in which precognitions must take place was also a key driver in meetings being conducted by phone rather than in-person. Staff said there simply was not enough time to contact a complainer to arrange an in-person meeting. Moreover, we heard that many complainers upon being contacted preferred to ‘get it over with’ on the phone, rather than scheduling another discussion. Other factors in the low number of in-person meetings included:
- it was often logistically easier for complainers to discuss matters by phone as this was less disruptive to work and child care arrangements and was easier for those living in more remote areas
- a lack of awareness among some staff that in-person meetings were deemed preferable in OI 13/20
- a perception among some staff that for ‘straightforward’ applications, in-person meetings were not merited. By ‘straightforward’, staff tended to mean applications which they did not deem to be particularly sensitive, or those – usually Crown – applications which were based on statements previously made by the complainer.

186. Some thought a precognition by Teams was preferable to one by telephone. However, the use of Teams appeared to be limited. It was not clear whether this was because it was not routinely offered as an option to the complainer or whether take-up from complainers was low. We heard from Rape Crisis Scotland that it regularly uses Teams to engage with survivors and they find it to work well.

187. We appreciate that pandemic-related restrictions have made meeting in person difficult or even impossible at times, and that telephone precognitions may be logistically easier for both complainers and COPFS. Nonetheless, we are concerned that there have not been more in-person meetings recently and that Teams has not been used more often. The means by which precognitions should take place should be complainer-led, rather than what may be quickest or most convenient for staff. Each complainer should have the options clearly set out and should be invited to state a preference which should then be facilitated. Consideration should also be given to the nature of the application to be discussed. Where the evidence sought to be led is sensitive and likely to cause distress, case preparers may wish to encourage complainers to attend an in-person meeting and to have a supporter present.

Recommendation 8
COPFS should ensure that the manner in which complainers are precognosced about section 275 applications is complainer-led, with options being clearly set out and complainers being invited to state their preference which should be facilitated.

Attendance of supporters

188. The latest iteration of OI 13/20 notes that when meeting with complainers to precognosce them about section 275 applications, complainers may be accompanied by an advocacy or support worker or another person if they wish. With the complainer’s consent, a support worker may also be notified by the Crown of the application so that the worker can provide the complainer with ongoing support. OI 13/20 notes that if a complainer who does not already have access to a support worker desires it, a referral should be made.

189. We welcome the recognition in the policy that the issues raised in a section 275 application may be upsetting for the complainer and that additional support may be required, and we understand this aspect of the policy was developed and refined following consultation with stakeholders. During our interviews, senior leaders within COPFS also emphasised the importance of complainers having access to advocacy and support workers, which we also welcome.

190. Nonetheless, it appears from the evidence we gathered that supporters are rarely present at meetings about section 275 applications. In Phase 2 of our case review, of the 26 occasions on which meetings and precognitions about section 275 applications took place, a supporter was only present at two. Both occasions were in respect of the same complainer. The complainer was a child who lived in a care home – contact was made with the child via a support worker, and the support worker was present during the meeting.

191. It was not clear why supporters were rarely present, although it may largely be due to the way in which the meetings are taking place. As noted above, upon first making contact with a complainer about a section 275 application, case preparers told us they rarely scheduled a meeting to which a supporter could also be invited. Instead, case preparers said complainers often preferred the meeting, including the precognition, take place immediately while on the phone.

192. It may also be the case that complainers are not routinely being informed of the option of having a supporter present – one person we spoke to said they would be happy to facilitate this, if asked. However, it seems unlikely to us that complainers would request the presence of a supporter unless they had already been made aware this was an option available to them. In contrast, some case preparers we spoke to said they routinely offered complainers the chance to have a supporter present, but it was not always taken up. They also said that if a complainer became distressed during the meeting, they would seek to signpost them to additional support, either directly or by asking VIA to make a referral. We heard from Rape Crisis Scotland that it had offered to provide support to any complainer who did not already have a support worker in place in respect of a section 275 application, but there was little awareness of this offer among case preparers.

193. Among those we interviewed, there was a degree of confusion as to whether a supporter should be present during all or only part of the meeting. OI 13/20 states that the person attending the meeting to provide support to the complainer should not generally be present when any substantive precognition takes place. Instead, they can be present immediately before and after any precognition, including when the complainer is advised of the application in her case and when the law and practice around section 275 applications is explained. Some of those we interviewed thought the supporter could and should be present throughout. It appeared that either they were unfamiliar with the policy, or that the policy has not kept pace with evolving practice. Those organising the meetings and carrying out the precognitions would benefit from clarity on this point.

Sharing of the 'full' application

194. As noted above, the Crown's duty to engage the complainer involves telling the complainer about the contents of the section 275 application and inviting their comments on the accuracy of any allegations within it. OI 13/20 notes that it will not generally be necessary to show the complainer a copy of the application, but that complainers should be advised of its 'full content'. Section 275(3) of the 1995 Act requires that applications must set out:

(a) the evidence sought to be admitted to elicited
(b) the nature of any questioning
(c) the issues at trial to which the evidence is considered relevant
(d) the reasons why the evidence is considered relevant
(e) the inferences which the applicant wishes to draw from the evidence.

195. There was some variation in the views and experiences of those we interviewed regarding how much of the application they shared with the complainer. While a few had shown or read complete applications to the complainer, others tended to summarise the contents. There was some dubiety among those we interviewed as to whether only (a) should be shared, and whether the contents relating to (b) to (e) should be shared in summary only or even at all. There was concern that they would be divulging the trial strategy (of either the Crown or the defence) if too much was shared, and that they might be perceived to be coaching a witness.

196. In contrast, others we interviewed felt there was no reason any part of an application should be held back from the complainer, saying this would be at odds with the complainer's right to information and to participate effectively in proceedings.

197. Despite OI 13/20 stating that complainers should be advised of the 'full content' of the application, it appears inconsistent practice has emerged. Those who are advising complainers of applications and their contents would benefit from further clarity on how this should be handled.

Writing to complainers post-precognition

198. Following the precognition, OI 13/20 states that if time permits, the precognoscer should write to the complainer with a short note of their understanding of what the complainer said and what will be done with the information provided. The complainer should be advised to contact the precognoscer urgently if they disagree with anything noted. The OI also states that this step should only be taken if the complainer confirms during the precognition that they are happy to be written to.

199. It was clear from our interviews and our case review that this step rarely happens. On only two of the 19 (11%) occasions in Phase 2 of our case review were the complainers written to following a precognition.

200. From discussions with COPFS staff, we noted that awareness of this aspect of OI 13/20 appeared low, and it did not appear that case preparers were asking complainers whether they would like to be sent a written summary of the meeting. Among those case preparers who were aware of this aspect of the operational instruction, many said there was simply insufficient time to write to complainers. This was due to the tight timescales in which they may become aware of applications and require to carry out and finalise the precognition. Some case preparers cited delays of up to several days in having letters to complainers printed by an office-based team while they worked from home, making this step impossible to achieve given the timescales. However, they appeared to have given no consideration to emailing the complainer instead, despite this being expressly provided for in OI 13/20. Several case preparers also expressed reservations about sending letters containing often sensitive details of the precognition in the post and were therefore choosing not to write to complainers.

201. Some case preparers felt that they complied with the spirit of this aspect of OI 13/20 by reading back to complainers their comments during the precognition itself, ensuring that they had taken an accurate record. While this approach is to be welcomed, it may not provide the complainer with sufficient time to consider the

section 275 application and their response in more detail, particularly where the precognition has taken place by phone during the initial contact by the case preparer.

202. While some complainers may not wish to be written to and we understand that case preparers are often required to conduct precognitions in very short timescales, our impression is that because writing to complainers post-precognition is not achievable in some or even many cases, consideration is therefore not being given to it even in cases where it is possible. For example, in cases where an early application is made by the Crown, it is entirely feasible for the complainer to be written to following a precognition. Case preparers should be reminded of this aspect in OI 13/20 and should have sufficient time allocated for them to complete this step. This is an area where a checklist of the steps to be taken under OI 13/20 would serve as a useful aide-memoire (as noted at paragraph 159).

Advising complainer of likely outcome

203. OI 13/20 states that complainers should be advised of the Crown's view on the likely outcome of the section 275 application. It is expected that the advocate depute who is to conduct the preliminary hearing will provide a view on the likely outcome and this will be passed on to the complainer by the case preparer during the precognition. OI 13/20 emphasises that the complainer must be advised that the outcome cannot be guaranteed as the decision as to whether the application should be granted is one for the court. Nevertheless, the advocate depute should indicate whether the application will be opposed in full or in part by the Crown, or whether it will be unopposed. The advocate depute should also indicate whether it is likely the court will grant or refuse all of the application, or grant or refuse only parts of it.

204. The requirement to advise complainers of the Crown's view on the likely outcome of applications was only added to the operational instruction in August 2021 and therefore did not apply to many of the cases we reviewed at Phase 2 as the precognitions had already taken place. Nonetheless, even on the three occasions where the precognition took place after August 2021, the policy was not followed and complainers were not advised of the likely outcome.

205. Our case review findings were largely echoed in our interviews. While we heard that some complainers were being advised of the likely outcome of applications, this was not happening routinely and awareness of this aspect of OI 13/20 was low. We heard that some advocate deputes did not share their view on the likely outcome with case preparers. One advocate depute told us she would let the case preparer know whether the Crown would oppose an application, but would not give a view on the likely outcome. One challenge that advocate deputes may face when forming a view is that their view may change depending on the complainer's position on the facts in the application and their attitude towards it, which will only be known post-precognition.

206. In the absence of a view on the likely outcome from an advocate depute, a small number of case preparers we spoke to suggested they would pass on their own view to the complainer. This was of concern, as we also heard during our interviews that case preparers were sometimes not aware of the actual outcome of applications in their cases. This meant they were not necessarily building up a detailed knowledge of what is likely to be granted or refused by the court, in contrast to advocate deputes who will have extensive personal experience of arguing applications and hearing the reasons for the court's decision making.

207. Even where advocate deputes do advise case preparers of the likely outcome of the application, we heard that some case preparers are reluctant to pass this on to

complainers. They were concerned about misleading the complainer in the event that the court took a different view of the application. There appeared to be a lack of confidence in their own ability to convey to the complainer that it is the Crown's view on the likely outcome, and that the court may take a different view. This is despite the OI being particularly detailed on this point and offering various forms of words that the case preparer can use depending on the Crown's view of the application. This failure to follow the policy routinely and a lack of confidence in conveying nuanced messages to complainers highlights the need for more operationally-focused training on managing section 275 applications, in addition to the existing training which primarily focuses on the law (see paragraph 71).

Advising complainer of actual outcome

208. Following a preliminary hearing, OI 13/20 states that complainers must be advised of the actual outcome of any section 275 application. This requirement has featured in OI 13/20 since its second iteration in November 2020 and therefore should be more well-established in practice.

209. In Phase 2 of our case review, the requirement was in effect for 26 occasions on which the complainer was precognosced about a section 275 application. However, in only 12 of those 26 (46%) occasions was the complainer informed of the outcome.

210. Moreover, it was clear from our interviews with COPFS staff that complainers are not routinely being advised of the court's decision. There appeared to be a range of reasons for this, including that there was a lack of awareness among some staff that advising the complainer of the outcome of the application was required. There was also a lack of clarity regarding who is responsible for notifying the complainer of the outcome. The operational instruction does not specify who should carry out this role, and views differed among those we interviewed. Some thought it should be the role of the case preparer given that it is case preparer who has previously engaged with the complainer regarding the section 275 application. Others thought it should be the role of VIA, given that VIA is responsible for updating the complainer on other developments in their case such as the scheduling of trial dates or the outcome of vulnerable witness applications. The lack of clarity regarding who is responsible for notifying the complainer of the outcome of a section 275 application means that there is no ownership of this requirement, with staff often assuming it is done by others.

211. There were also some practical challenges in ensuring that this requirement was fulfilled. For example, some case preparers said that they were not notified of the outcome of section 275 applications and were therefore unable to advise the complainer. This included not having access to the electronic files where the information might be stored. There were also delays in case preparers being told the outcome. Others said that there was sometimes poor recording of the outcome and the reasons for the court's decision in the reports of preliminary hearings or in court minutes, meaning it was difficult to work out what the outcome had been (we also found this to be an issue in some of the cases we reviewed). Two recent changes should have addressed some of these practical challenges. The first was that the post-preliminary hearing report, completed by a member of COPFS staff, must now specify the outcome of section 275 applications, and this report should be sent to case preparers. The second was that the Lodging and Indicting Team must now record the outcome of section 275 applications on the case management system. Despite these recent changes, however, some case preparers still seemed unsighted on the outcome of applications.

212. A small number of staff did not appear to appreciate why the complainer should be told the outcome and felt the complainer would get in touch with the Crown if she

wanted to know. A better understanding of why the Crown has a duty to engage with complainers, arising from the complainer's right to information and to participate effectively in proceedings, as well as a more trauma-informed approach to prosecuting cases, would have assisted in this regard.

213. We heard that COPFS is developing minimum standards for various aspects of the process for investigating and prosecuting sexual crime, which we welcome. This may include minimum standards for preliminary hearings and for post-preliminary hearings. Such standards could usefully include instructions for notifying complainers of the outcome of section 275 applications and setting out who is responsible for this task.

Recommendation 9
COPFS should clarify who is responsible for notifying complainers of the outcome of section 275 applications and should ensure compliance with this requirement. In addition, COPFS should remind its staff that they are required to advise complainers of the likely outcome of section 275 applications.

Overall assessment of engagement with complainer

214. We sought to make an overall assessment of how well the Crown engaged with complainers regarding section 275 applications. Where a complainer was the subject of more than one application and was contacted by the Crown on multiple occasions, we have based our assessment on all of the occasions on which they were contacted. Our assessment took account of the relevant law and policy at the time the section 275 applications were dealt with, including the requirements of *RR* and the relevant Crown policy. We assessed the engagement as either good, reasonable or unsatisfactory:

- good – the requirements of *RR* were fulfilled and the relevant policy was followed in full
- reasonable – the requirements of *RR* were fulfilled and the relevant policy was mostly followed but there was scope for further improvement
- unsatisfactory – either the requirements of *RR* were not fulfilled or key elements of the relevant policy were not followed.

215. We assessed the engagement with 21 of the 26 complainers. One complainer had died, and applications in respect of the remaining four complainers were dealt with prior to *RR* and therefore the new requirements were not applicable.[79]

216. We assessed the engagement regarding section 275 applications to have been good for nine (43%) of the 21 complainers. With the exception of one complainer who refused to engage despite concerted efforts by COPFS, these complainers were informed of the applications, precognosced on their contents and were advised of the outcome. The way in which the engagement was carried out tended to be complainer-led and, in some cases, additional support was offered or arranged.

217. We assessed engagement as being reasonable for eight (38%) complainers. A key issue for these complainers was that most were not informed of the outcome of the application. One complainer was not advised of an appeal regarding a section 275 application in her case, albeit the engagement was otherwise good.

[79] The reason these complainers and applications fell within our sample is that other applications in respect of the same or other complainers in the same case were dealt with at a later date.

218. We considered the engagement to have been unsatisfactory in respect of four (19%) complainers. This was generally because the complainer had not been told of the application or precognosced on its contents. For one 16-year-old complainer, we assessed the engagement as unsatisfactory as it did not appear that any consideration had been given to her age when advising her of an application relating to sensitive matters, she was not advised of the outcome, nor was she advised of a second application which was an amended version of the first.

Repeat precognitions

219. In Phase 1 of our case review, we found that 62 (36%) complainers were the subject of more than one section 275 application:

- 54 complainers were the subject of two applications
- six complainers were the subject of three applications
- one complainer was the subject of four applications
- one complainer was the subject of five applications.

220. Our case review shows that it is not unusual for more than one application to be made about the same complainer. This may happen for a range of reasons, depending on the circumstances of the case. The most common scenario is that both the Crown and defence make an application about the complainer. Sometimes, a case involves more than one accused, and each accused makes an application about the complainer. We also came across examples where repeat applications were made by the same party about the same complainer – for example, in one case, the defence lodged a second application after the first was refused.

221. Where there are multiple applications about the same complainer, the complainer would ideally be contacted once to discuss all of the applications. However, this rarely happens in practice. Applications are lodged at different times and the Crown generally makes contact with the complainer shortly after each application is lodged, rather than waiting to see if any further applications might be made. This approach seeks to maximise the time available to make contact with the complainer and seek their views. However, a consequence of this approach is that complainers may be contacted about section 275 applications on multiple occasions. For example, a depute told us about a case when she made contact with the complainer about a Crown application, and then made contact again when a defence application was lodged. However, following the preliminary hearing, an amended defence application was lodged, requiring the complainer to be contacted and precognosced for a third time. The depute described the complainer as becoming more upset with each contact and was concerned the complainer would disengage from the justice process.

222. In this case, as in many others, there was little the Crown could have done to avoid contacting the complainer on multiple occasions. The timing of the lodging of the defence applications was outwith its control. The key issue for Crown personnel is to be alert to the possibility of additional applications and, where repeat precognitions are required, to handle these sensitively and ensure the complainer has the necessary support. In the case described above, the depute ensured that following the third precognition, the complainer was provided with reassurance about the justice process and offered additional support.

Link between VIA and case preparers

223. To promote consistency in contact with complainers, a dedicated VIA officer is allocated to each High Court sexual crime case. The VIA officer maintains a record

(known as the VIA minute sheet) of all contact with complainers and is responsible for providing information about the justice process, updating complainers on key developments in their case and signposting them to support services. Complainers in High Court sexual crime cases are offered the opportunity to be contacted by VIA with an update on their case every eight weeks, or at more or less frequent intervals according to their needs. Case preparers will also make contact with complainers when needed however, including in relation to section 275 applications.

224. While some case preparers let VIA know that they have been in touch with a complainer about a section 275 application, either by copying VIA into correspondence or by updating the minute sheet, many do not. This means the dedicated VIA officer is often unsighted on the fact a section 275 application has been made and that the case preparer has been in touch with the complainer. They may also be unsighted on the impact this has had on the complainer. This is unhelpful where, for example, the complainer contacts VIA with follow-up questions about the section 275 application, or where VIA contacts the complainer about other matters but is not aware that a precognition with a case preparer has just taken place. In the 123 cases we reviewed at Phase 1, we rarely found reference to contact relating to section 275 applications on the VIA minute sheet. Because records relating to section 275 applications were often not imported into the case files, VIA officers were not able to easily access information that might inform their discussions with complainers.

225. There is scope to improve the communication between case preparers and VIA, so that dedicated VIA officers are more fully sighted on all communication with the complainer and able to tailor the service they provide as needed. This is particularly important in cases where the complainer has been upset or distressed by the section 275 application and further information or support would be helpful. Consideration should be given to how best to achieve this such as by case preparers copying VIA into relevant correspondence, by updating the VIA minute sheet or by some other means. Recent changes to lodging instructions mean VIA should be made aware when Crown applications are lodged at least, though they may still not be aware of when a precognition takes place or how it went, or of defence applications.

Appeals

226. There is scope to improve communication with complainers where there is an appeal about a section 275 application. In Phase 2 of our case review, leave to appeal was granted in relation to two defence applications. In relation to one, there appears to have been no communication with the complainer despite there being an instruction to make contact with her. In relation to the second, the case preparer was not even aware of the appeal and therefore had not been in contact with the complainer about it.

Witnesses who are not complainers

227. The protections of section 274 are only afforded to complainers. During our inspection, we heard about other witnesses who appear on dockets and who may be asked similarly sensitive questions about their sexual history or character. Several people we interviewed suggested that the statutory protections should be extended to them, while others were uncertain if a section 275 application was needed to lead evidence about a docket witness's sexual history.

228. Indeed, in our case review, we noted one case where the Crown had made a section 275 application in respect of a witness who was not a complainer but who appeared on a docket. This was despite Crown policy stating that section 275 applications are

neither required nor permitted in respect of witnesses who appear in a docket but not the charge.[80] It appears that the application was erroneously made but nevertheless was granted by the court.

229. While witnesses who appear on a docket do not currently enjoy the protections offered by section 274, other rules of evidence continue to apply such as the prohibition of irrelevant and collateral evidence and protection from unfair or oppressive questioning.

Independent legal representation

230. In 2021, the report of a review group led by the Lord Justice Clerk was published on improving the management of sexual offence cases.[81] The report recommended that independent legal representation (ILR) be made available to complainers in connection with section 275 applications and any appeals therefrom. In light of that recommendation, the Scottish Government has recently consulted on such a right to introduce ILR for complainers.[82]

231. While not the focus of our inspection, the issue of ILR came up regularly during our interviews. We heard mixed views, however most said they were either in favour of ILR or could see that that it would have benefits. Many pointed to the Crown's role in representing the public interest, which may or may not align with the complainer's interest. While the Crown is expected post-*RR* to present to the court complainers' views and attitudes toward an application, these can sometimes conflict with the Crown's own views. In Phase 2 of our case review, in nine of the 26 (35%) occasions on which the complainer was precognosced about an application, we found evidence of there being differing views between the complainer and the Crown. While some advocate deputes said they were comfortable presenting both views to the court, others were less so.

232. Other issues raised in our interviews included:
- the lack of understanding among some complainers that COPFS is not their own advocate whose role is to act in their interests. Some felt this lack of understanding may be perpetuated by the Crown having to seek the complainers' views on section 275 applications and present them to the court
- the Crown not being able to give the complainer legal advice when applications are being considered
- ILR would encourage a greater focus on the rights of complainers and would empower complainers, with one person querying whether a complainer can truly be said to be participating effectively in proceedings if she is not legally represented
- increasing awareness that complainers in other jurisdictions have ILR in connection with sexual history evidence (notably Ireland).

233. Regardless of whether those we interviewed were in favour of ILR, many were concerned about how ILR would work in practice citing issues such as the availability of skilled representatives, how ILR would be achieved during the limited timescales, the cost, disclosure and whether and how ILR would work at trials. Some felt that, based on their experience of precognoscing complainers about section 275 applications, only a few would want ILR.

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[80] OI 2/21.
[81] SCTS, Improving the management of sexual offence cases – Final report from the Lord Justice Clerk's Review Group (March 2021).
[82] Scottish Government, Improving victims' experiences of the justice system (May 2022).

6 Section 275 applications in the Sheriff Court

234. Our inspection focused almost entirely on the Crown's approach to managing section 275 applications in the High Court as this is where the majority of section 275 applications arise. However, data from SCTS suggests that between 2018-19 and 2020-21, 9% of section 275 applications were made in the Sheriff Court.[83] We have therefore given brief consideration to the Crown's approach to section 275 applications in the Sheriff Court and, in this chapter, highlight ways in which practice varies from that in High Court cases.

235. Our findings are based on interviews with staff working in the Crown's Local Court function (which manages sheriff solemn and sheriff summary cases), and a review of 11 cases heard in the Sheriff Court.

236. In Phase 3 of our case review, we sought to review Sheriff Court cases in which section 275 applications had been made. As noted elsewhere, COPFS systems did not allow for the easy identification of cases in which section 275 applications had been made. COPFS staff were therefore asked to notify us of relevant cases at sheriff and jury and summary levels between 1 January 2021 and 30 June 2021. Only 11 cases were identified. We are not confident that this was an accurate reflection of the actual number of cases with section 275 applications for various reasons, including:

- the manner in which the data was collated was not robust, and staff in some sheriffdoms seemed more likely to notify us of cases than others which was not commensurate with the likely volume of sexual offence cases in those sheriffdoms
- almost half of the cases identified were summary cases, but we heard in our interviews that applications at sheriff and jury level are much more common than at summary level
- only 11 cases at both sheriff and jury and summary levels were identified, but SCTS data suggests that during the same period, there were 20 cases at sheriff and jury level alone.

237. We chose to review all 11 cases that had been identified.

Guidance and training

238. The Crown's general approach to sections 274 and 275 ought to be the same regardless of the forum where a case is heard. This is because the protections afforded to complainers in sexual offence cases apply equally in the Sheriff Court as they do in the High Court. While the most serious offences are tried in the High Court, serious sexual offences may also be tried in the Sheriff Court – one of the Sheriff Court cases we reviewed, for example, featured a charge of sexual assault with intent to rape. We would therefore expect Local Court staff working on sexual cases to have the necessary awareness and understanding of the legal protections afforded to complainers regarding sexual history and character evidence, and that they are familiar with COPFS policy and guidance.

239. While COPFS guidance on sexual history and character evidence is equally as available to Local Court staff as to High Court staff, the guidance tends in places to be more targeted at those working in the High Court. For example, the guidance refers to roles and processes that exist in the High Court but not Local Court function, requiring Local Court staff to tailor aspects of the guidance to their own role.

[83] See para 32 and Table 3.

Headline findings

Sheriff Court case review

11 cases

6 sheriff solemn

5 sheriff summary

14 applications

Three cases featured **two applications**
Sexual assault was the **most frequently occurring** main charge (in **five cases**)

13

complainers featured in the applications (one complainer was the subject of **two applications**)
Applications were made on behalf of **12 accused**.

6
applications were made **by the Crown**

8
applications were made **by the defence**

1
case featured applications made **by the Crown and the defence**

7
The Crown opposed 7 of the defence applications in full or in part (the Crown's position on the remaining defence application was not yet known)

8
applications were **granted in full or in part**

3
applications were **refused**

3
The result of **three applications** was **unknown**

240. During our interviews, we found there was a variable level of knowledge about sections 274 and 275 among deputes and case preparers working on sheriff and jury cases. Most were aware of how to find the guidance, but were not familiar with the detail of it. In contrast, solemn legal managers – who supervise deputes and case preparers – had a good level of knowledge of the relevant law and guidance and provided oversight and scrutiny of their staff's cases.

241. Among those working on summary cases, we found knowledge of the law on sexual history and character evidence to be more limited. This is likely because section 275 applications are less common in their work, and also because staff working on summary cases are more likely to include trainee deputes and legal staff undergoing accreditation. However, some legal managers at summary level were also unfamiliar with the Crown's guidance on section 275 and were not aware of the common scenarios in which a Crown section 275 application may be required.

242. Staff working on High Court sexual offence cases were initially prioritised for the bespoke section 275 training developed by COPFS.[84] This is understandable, given the frequency with which they are required to manage applications. We are pleased to note that the training has now been made available to others and that a recent course had been well attended by those working on sheriff and jury cases. We welcome the initiative taken by some solemn legal managers to ensure that their deputes who work on sexual offence cases attend the training. We would encourage other solemn legal managers to do likewise. We would also encourage summary legal managers to attend, so they are able to act as a safeguard within their summary teams in identifying cases where sections 274 and 275 may be applicable.

Process for managing section 275 applications

243. Whereas section 275 applications require to be made not less than seven clear days before the preliminary hearing in High Court cases, applications in all other cases require to be made not less than 14 clear days before the trial diet. During our interviews with Local Court staff, we heard that it was rare for an application to be lodged close to trial and that almost all applications are lodged well in advance of the time limit.

244. We heard that nearly all applications are at least identified at the 'first' first diet. They may be dealt with fully at that hearing, but are more often decided at continued first diet hearings. While it is not generally good practice for first diets to be continued, this approach has nonetheless allowed the Crown more time to engage with complainers about section 275 applications (compared to the time available in High Court cases). We did not hear of, or review, any Sheriff Court cases in which staff were under pressure to precognosce complainers about applications within an unrealistic timescale. This gives Local Court staff greater flexibility to engage complainers about section 275 applications in a manner that is sensitive to their needs and personal circumstances.

245. During our inspection, we found little evidence of late lodging of applications in the Sheriff Court by either the Crown or the defence. We did note, however, that even where applications were raised timeously, some were not decided until the trial. This had the unfortunate effect of delaying a decision on a section 275 application for several months, and meant that the complainer was not informed of the outcome until very shortly before they gave their evidence.

[84] See from para 67.

246. At summary level, COPFS uses checklists to ensure they are in a sufficient state of preparation for intermediate diets. The checklists cover a range of issues, but there is no mention of section 275. While section 275 applications are rare at summary level, including them on the checklist, alongside other existing issues such as vulnerable witness measures, would be a useful safeguard to ensure sexual history and character evidence is considered.

247. We found the Crown's record keeping in Sheriff Court cases to be significantly better than that in High Court cases. Almost every case we reviewed had key documents stored in a single, easily accessible location. Unfortunately however, at Sheriff Court level there is not the practice of court interlocutors being sent by the clerks to COPFS.[85] Thus, no case file contained any official court minute detailing the court's decision on a section 275 application and its reasoning. There was therefore a reliance on notes made by the depute in court. These notes varied in detail and accuracy, meaning it would be difficult for any colleagues who subsequently prosecute the case to know the court's decision on the application, its reasons and details of any restrictions or conditions imposed.

Engaging with the complainer

248. Unlike in High Court cases, general precognitions of the complainer are relatively rare in Sheriff Court cases. Instead, a precognition of the complainer in relation to a section 275 application may be the only engagement of that type that the complainer has with COPFS. In High Court cases, we heard that case preparers generally make direct contact with the complainer regarding section 275 applications and that the precognition will often take place immediately upon contact. In contrast, we heard that in Sheriff Court cases, the complainer was usually first contacted by a VIA officer who is already known to the complainer and a precognition is then scheduled. This afforded the opportunity to schedule the precognition at a time to suit the complainer, and the opportunity for a support worker to be in attendance if desired.

249. Precognitions of complainers about section 275 applications were carried out by a range of staff working on Sheriff Court cases. This included case preparers, procurator fiscal deputes (including those who prosecute the case at trial) and solemn legal managers. We were surprised to hear of cases where VIA staff were emailed a list of questions to ask the complainer regarding section 275 applications and were effectively conducting a precognition themselves. This is not appropriate as VIA staff lack the requisite training to do so. Generally, we found from our interviews and case review a good level of communication between VIA and case preparers, deputes and legal managers in relation to engaging the complainer about section 275 applications. This demonstrated a coordinated approach to organising and carrying out section 275 precognitions.

[85] An interlocutor is any decision of the court short of final judgment.

Appendix 1 – High Court case review findings

250. To support our inspection, we reviewed a sample of cases in which section 275 applications had been made. The background to our case review, its purpose and the headline findings, as well as caveats regarding the data, are set out at paragraphs 20-22 and Chapter 2. Our more detailed findings are presented here.

251. Our review of High Court cases was split into two phases:
- Phase 1 – we reviewed a statistically significant, random sample of 123 High Court sexual crime cases in which section 275 applications had been made[86]
- Phase 2 – we carried out a more in-depth review of 15 cases that had already been reviewed at Phase 1 to assess how they had been managed by COPFS, including how COPFS had engaged with complainers regarding the applications. We purposively sampled cases for review at Phase 2 taking into account a range of information gathered about each case at Phase 1.[87]

Phase 1 – overview

252. We examined 123 High Court cases in Phase 1 of our case review. These cases featured 238 applications, meaning there were almost two applications per case. Fifty five (45%) cases featured one application and 68 (55%) cases featured more than one application. The number of applications per case ranged from one to six.

253. While we were able to identify the total number of applications in each case, we were not able to review every application due to inadequate record keeping by COPFS. While COPFS staff were able to trace the majority of the applications we requested, they were not able to trace five applications across four cases within the time available to complete our Phase 1 review. Further information on the applications we reviewed, including who made them and their content, is available from paragraph 293.

254. Across the 123 cases, 268 complainers featured on the indictments (ranging from one to 15). However, section 275 applications were not made in respect of every complainer. The applications that we reviewed related to 173 complainers and one witness who was not a complainer. More information about the complainers is available from paragraph 267 and the witness from paragraph 284.

255. Of the 123 cases:
- 119 (97%) cases featured one accused on the indictment
- four (3%) cases featured two accused on the indictment. In three of these four cases, applications were made in connection with both the accused. However, in one case where there were two accused, an application was only made in connection with one of the accused.

256. In total, 127 accused featured in cases where section 275 applications had been made, but applications were only made in connection with 126 of those accused. Further information about the accused is available from paragraph 286.

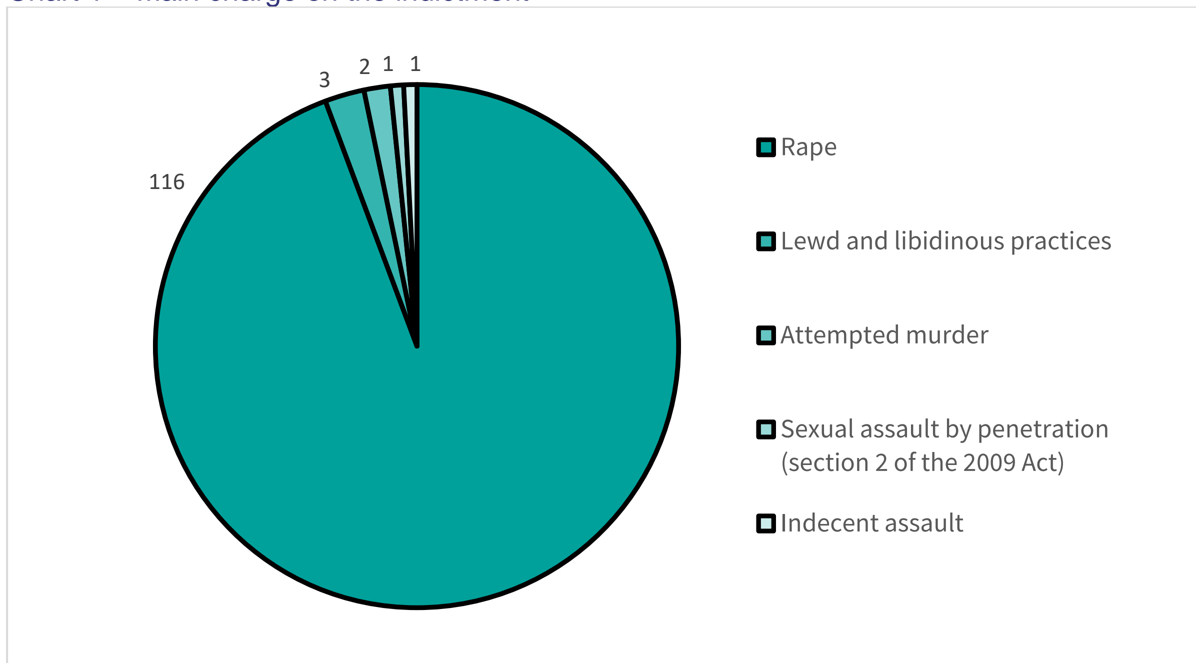
[86] The results of our Phase 1 case review are statistically significant with a confidence interval of 95%±10%.
[87] For example, in Phase 2, we only reviewed cases where the outcome of the section 275 applications were known, and we sought a balance of cases with particular features identified at Phase 1 such as cases where there had been single and multiple applications, where applications had been made by the Crown and defence or both, etc.

257. The 123 cases featured 584 charges on the indictments. The number of charges on each indictment ranged from one to 25. Of the 123 cases:

- 33 (27%) cases featured a single charge on the indictment
- 90 (73%) cases featured multiple charges on the indictment.

258. In each of the 123 cases, we noted the main charge on the indictment (see Chart 1). We deemed the main charge to be the one that would result in the most severe penalty. All of the indictments included a sexual offence, even if the main charge appeared non-sexual (such as attempted murder). In 116 (94%) cases, the main charge on the indictment was rape. This included statutory offences under sections 1 (rape) and 18 (rape of a young child under the age of 13) of the Sexual Offences (Scotland) Act 2009 and, in relation to crimes committed prior to 1 December 2010,[88] the common law crimes of rape and attempted rape. In four of the seven remaining cases, the charges of lewd and libidinous practices and indecent assault related to historic incidents but, had the alleged offences occurred today, they would also have been prosecuted as rape under the 2009 Act.

Chart 1 – Main charge on the indictment



259. For Phase 1 of our case review, we selected cases in which section 275 applications had been made during our sample period (between 1 January and 30 June 2021). The majority of the cases had been reported to COPFS in 2019 and 2020, as we would have expected, but one case was reported more recently (in 2021), while several were reported before 2019, as shown in Table 4. We were surprised that section 275 applications had been made in 2021 for cases reported as long ago as 2016 and 2017, however these cases tended to have complex procedural histories, such as complainers requesting a review of initial decisions to take no proceedings or lengthy appeals processes. More recently, the Covid-19 pandemic also delayed the progress of these cases.

[88] The Sexual Offences (Scotland) Act 2009 (the 2009 Act) came into force on 1 December 2010.

Table 4 – Cases in Phase 1, by year of report

Year of report	Number of cases reviewed in Phase 1
2016	2
2017	2
2018	9
2019	72
2020	37
2021	1

260. Our Phase 1 review was carried out in late 2021. We considered the progress of the cases for the purposes of Phase 1 until 30 November 2021. In 86 (70%) cases, proceedings were live and had not yet concluded at that date. The remaining 37 cases (30%) had concluded and their outcome in relation to the main sexual charge on the indictment is set out in Table 5.

Table 5 – Outcome for main sexual charge in concluded cases[89]

Outcome	Number of cases
Found guilty	15
Acquitted – found not guilty	6
Acquitted – found not proven	5
No further proceedings	7
Pled guilty	2
Deserted simpliciter[90]	1
Examination of facts[91]	1

261. Table 5 shows that in 15 cases, the accused was found guilty in relation to the main sexual charge on the indictment. However, in some of these cases there was a different outcome for other charges or other complainers on the indictment, including those charges or complainers in respect of which the section 275 application had been made. For example:

- in one case, the accused was charged with several sexual offences against two complainers. He was found guilty in respect of the rape of one complainer, but the charges in respect of the complainer about whom the section 275 application had been made were withdrawn
- in another case, section 275 applications were made in respect of three complainers. The accused was found guilty of the charges relating to two complainers (including a rape) but a charge of coercing a person into being present during a sexual activity in respect of the third complainer was found not proven.

262. Table 5 also shows that in 11 cases, the accused was acquitted of the main sexual charge on the indictment. This includes cases where there was an acquittal on all charges but also cases where the accused was acquitted of the main sexual charge but found guilty of other offences.

[89] The conviction data in Table 5 should not be compared with the conviction rates in the National Statistics produced by the Scottish Government in its Criminal Proceedings in Scotland series because of different methods used in compiling the data.
[90] A case which is *deserted simpliciter* is to bring a prosecution for a crime or offence on indictment or summary complaint to an end without the facts being determined and means that the case is at an end. This prevents the prosecution re-raising the case.
[91] Where an accused is unfit to stand trial, an examination of facts takes place instead. In this case, the facts were established.

263. In these, and in all our cases, it is not possible to say what role the section 275 application played in the final outcome.

264. In the seven cases where no further proceedings were taken, this was for a range of reasons including that the accused had died (three cases), the complainer had disengaged from the prosecution process (two cases), the complainer had left the country (one case) and there was no longer any realistic prospect of conviction (one case).

265. In the two cases where the accused pled guilty, in one case the accused pled guilty prior to the trial starting and, in the other case, the accused pled guilty after the trial had started and the evidence from the complainer had been led.

266. The 86 cases that were ongoing at 30 November 2021 had progressed to various stages:

- in 14 (16%) cases, a preliminary hearing or continued preliminary hearing had been fixed
- in 69 (80%) cases, a trial or Dedicated Floating Trial date had been fixed
- in two (2%) cases, an Evidence by Commissioner hearing had been fixed
- in one (1%) case, a warrant for the arrest of the accused was outstanding.

The complainers

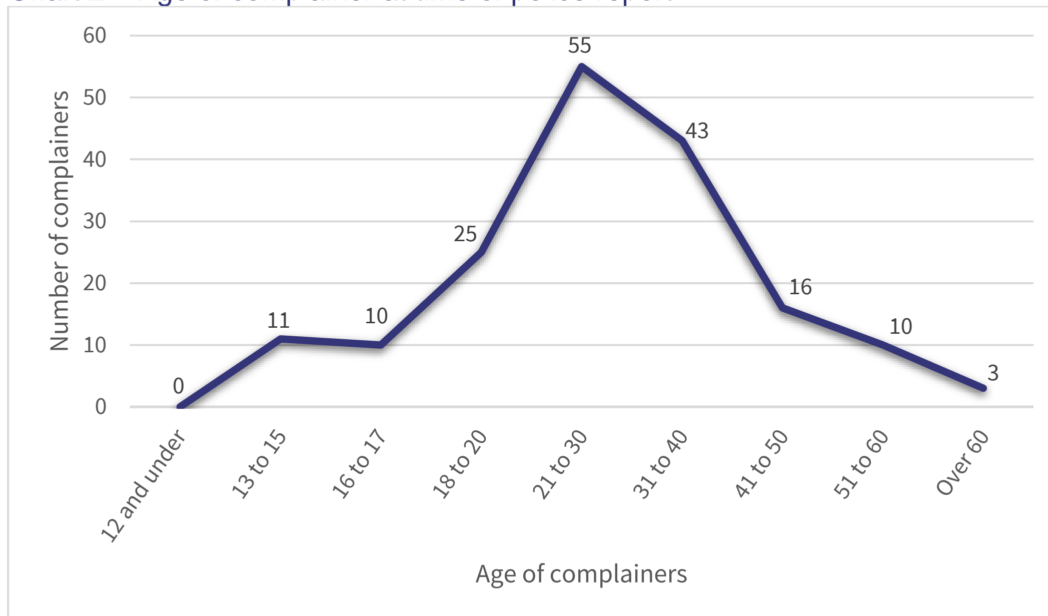
267. The applications that we examined in Phase 1 of our case review related to 173 complainers and one witness. The witness is considered at paragraph 284.

268. Of the 173 complainers who were the subject of a section 275 application, 163 (94%) were female and 10 (6%) were male.

269. The age of the complainers at the time the police report was submitted to COPFS ranged from 13 to 77 (see Chart 2). Twenty one (12%) complainers were children aged under 18, and a further 25 (14%) complainers were under the age of 21. Three (2%) complainers were over 60 at the time of the police report.[92]

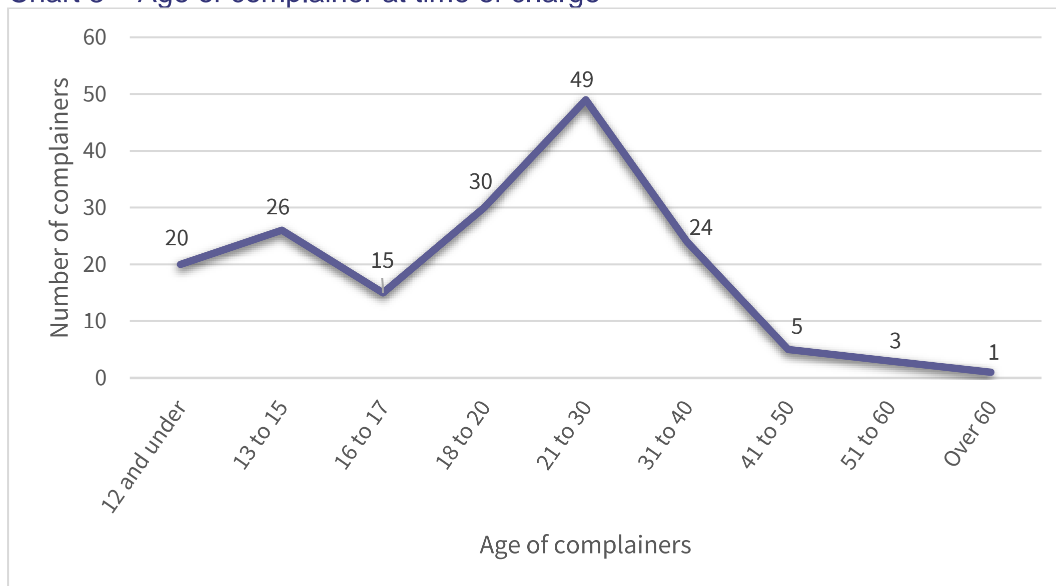
[92] The Crown's Older Person Policy considers complainers aged 60 and above to be 'older persons' so that they can be referred to VIA to ensure that they can access the necessary support and information.

Chart 2 – Age of complainer at time of police report[93]



270. Many sexual offences are not reported to the police until some time after they occur, while some offending has taken place over a considerable period of time (spanning years, or even decades) before being reported to the police.[94] Chart 3 shows the age of the complainer at the time of the main charge to which the section 275 application related or, where the offending spanned several years, the age of the complainer when the offences began.

Chart 3 – Age of complainer at time of charge



271. The age of the complainer at the time of the offence to which the section 275 application related ranged from two to 77 years. In total, 61 (35%) complainers were children aged under 18 at the time of the offence or when the offending began.

[93] The age groupings for those under 18 are those used by the Sexual Offences (Scotland) Act 2009 (that is, offences against those under 13, those aged 13 to 15, and those aged 16 and 17).
[94] Data from Police Scotland suggest that just over a quarter (26%) of sexual crime in 2020-21 was recorded at least one year after it occurred. This provides an indication of the scale of historic reporting.

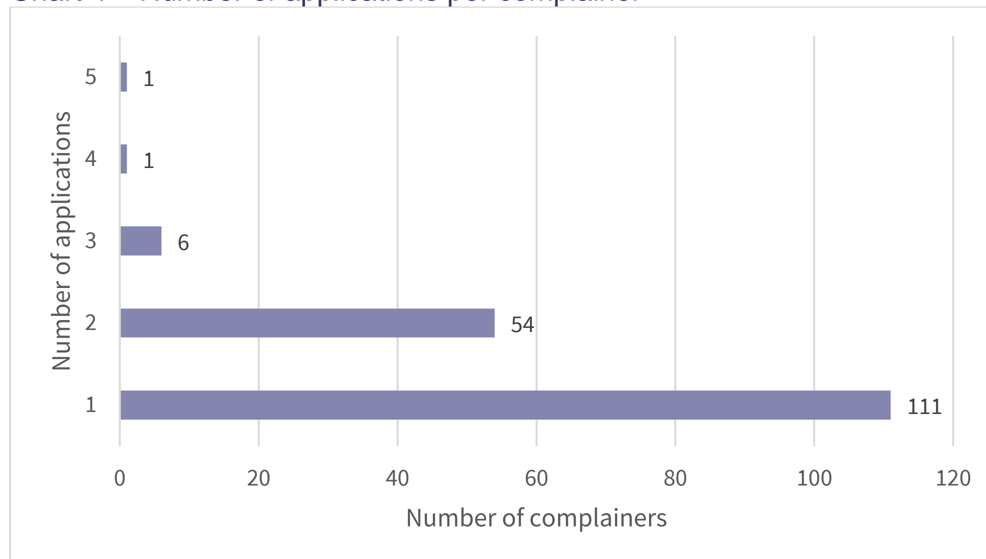
272. Of the 173 complainers:

- 80 (46%) were the same age at the time of police report as they were at the time of the offence
- 16 (9%) were no more than one year older at the time of the police report as they were at the time of the offence
- 77 (45%) were more than one year older at the time of the report than at the time of the offence or the start of the offences. In one case, the offences occurred between 1964 and 1967 but were not reported until 2019, and in another case, the offence was reported in 2019, two years after it occurred.

273. In some of the cases we reviewed, multiple section 275 applications were made in respect of the same complainer. This was because both the Crown and defence made applications about the complainer, because applications about the complainer were made on behalf of more than one accused, or the Crown or the same defence counsel made more than one application about the same complainer.

274. Chart 4 shows that the number of applications per complainer ranged from one to five, and that 62 (36%) complainers were the subject of more than one application.

Chart 4 – Number of applications per complainer



275. While most applications related to an individual complainer, we found 11 applications which each sought to elicit evidence relating to multiple complainers, hence the number of applications in Chart 4 adding up to more than the number of applications that we reviewed.

Vulnerable complainers

276. Complainers in sexual offence cases are all deemed to be vulnerable under section 271 of the 1995 Act. Complainers may also have other vulnerabilities or specific needs, in addition to being deemed vulnerable. These vulnerabilities and needs, depending on their nature, may require a tailored response from COPFS so that steps can be taken to ensure any communication with or support to the complainer is appropriate. In our case review, we sought to identify any actual or potential vulnerabilities, and their nature and extent, based on the information recorded in the case files.

277. Thirty two (18%) of the 173 complainers were deemed vulnerable due to being a complainer in a sexual offence case but no additional vulnerabilities were identified in the documents we reviewed. In relation to the remaining 141 (82%) complainers:
- 78 complainers had one additional vulnerability
- 50 complainers had two additional vulnerabilities
- 11 complainers had three additional vulnerabilities
- two complainers had four additional vulnerabilities.

278. Some of the complainers were vulnerable due to their age – 21 (12%) complainers were under 18 at the time of the police report to COPFS. A further 40 (23%) complainers were under 18 at the time of the offence. Three (2%) complainers were over 60 at the time of the police report.

279. Some complainers were vulnerable or potentially vulnerable due to their living or family circumstances. For example, three (2%) of the complainers were looked after children, four (2%) lived in supported accommodation, two (1%) were homeless and three (2%) were described as having a 'chaotic lifestyle'. Thirty two (18%) complainers were also the victims of domestic abuse.

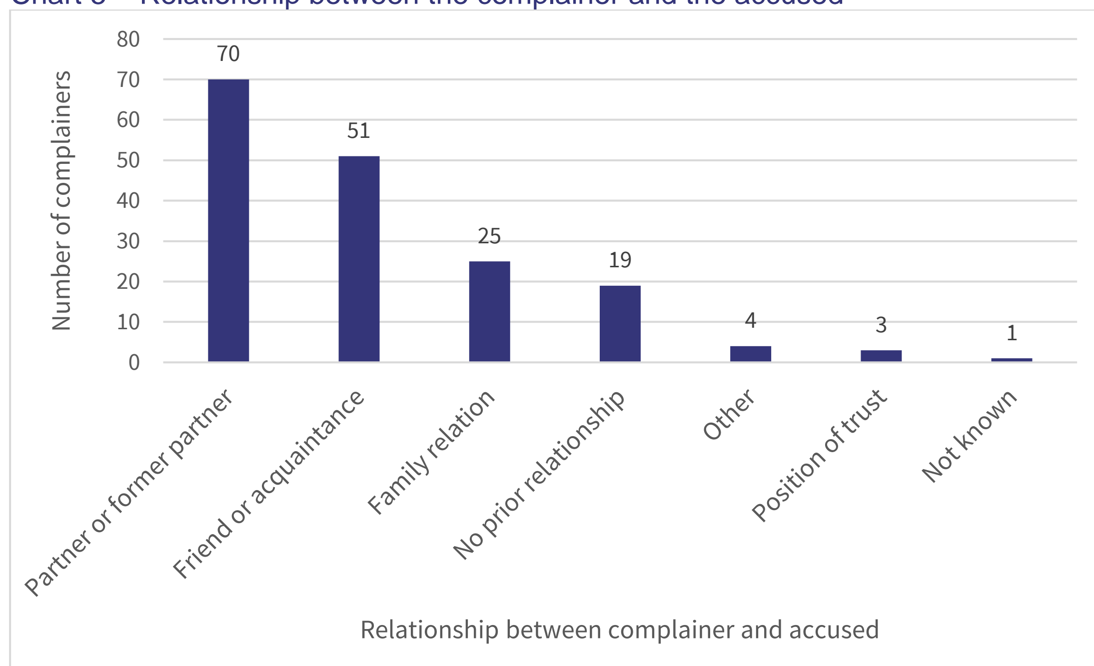
280. Neither COPFS nor the police routinely record whether a complainer has a disability. However, this information is sometimes included in the case documentation. Ten (6%) complainers were described as having a disability. A further four (2%) were described as having learning difficulties and two (1%) had a neurodevelopmental condition. Sixty (35%) complainers were described as having mental health issues, and 25 (14%) misused alcohol and/or drugs.

281. Five (3%) complainers required an interpreter.

Complainer's relationship with the accused

282. The existence and nature of the complainer's relationship with the accused often features in section 275 applications. Chart 5 shows the nature of the relationship between the 173 complainers and the accused. The majority (86%) of accused were known to the complainer prior to the alleged offence.

Chart 5 – Relationship between the complainer and the accused



283. The category of 'No prior relationship' includes those complainers and accused who were strangers to one another prior to the alleged offence, as well as those complainers who had first met and spent time with the accused on the same day as the alleged offence.

The witness

284. One section 275 application was made by the Crown in respect of a witness who was not the complainer. The witness had originally been listed as a complainer in the police report to COPFS, but was not included on the indictment for appropriate reasons. A decision was taken to include the witness on docket evidence.

285. The making of a section 275 application in respect of a witness who was not a complainer was unexpected given that sections 274 and 275 only apply to complainers. The witness appeared on a docket, but COPFS policy notes that section 275 applications are neither required nor permitted in respect of witnesses who feature in a docket but not the charge.[95] It appears that the application was erroneously made but nevertheless was granted by the court.

The accused

286. As noted at paragraphs 255-256, in our sample of 123 cases, section 275 applications were made in connection with 126 accused. All the accused were male.

287. From the information available on the indictment, 29 (24%) cases were indicted while the accused was remanded in custody and 94 (76%) cases were indicted while the accused was on bail.[96]

288. The age of the accused at the time they were reported to COPFS ranged from 16 to 72:

- four (3%) accused were aged under 18 (one was aged 16, and three were 17)
- 15 (12%) accused were aged between 18 and 20
- 41 (33%) were aged between 21 and 30
- 30 (24%) were aged between 31 and 40
- 14 (11%) were aged between 41 and 50
- 15 (12%) were aged between 51 and 60
- six (5%) were aged between 61 and 70
- one (1%) accused was aged over 71 (he was 72).

289. The age of the accused at the time of the offence to which the section 275 application related ranged from eight to 67 years. The accused is often charged with offences that span a period of time (either in respect of the same or different complainers). For that reason, it is not possible to group the accused by their age at the time of offending as has been done for the age at the time of reporting.

290. Of the 126 accused in our sample:

- 77 (61%) accused were reported to COPFS within one year of all of the alleged offence(s)
- 49 (39%) accused were reported for an offence or series of offences that took place more than one year before the report was made.

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[95] OI 2/21.

[96] Data based on the status of the accused at the time of the original indictment (in a number of cases, accused persons who previously had been indicted were subsequently released on bail prior to their trial, while some accused persons who had been on bail were subsequently remanded or re-indicted and remanded).

291. Thirty six (29%) of the 126 accused were charged with offences spanning a period of time, often several years apart. The longest span of alleged offending contained in the indictment was 41 years.

292. Seven (6%) accused were reported as adults for offences that were *all* alleged to have been committed while they were under the age of 18, one of whom was reported 48 years after the most recent alleged offence. A further eight (6%) accused were reported as adults where *some* of the alleged offending took place while they were under 18.

The applications

293. In the 123 cases in our sample, 238 section 275 applications were made – a rate of almost two applications per case. Fifty five (45%) cases featured one application and 68 (55%) cases featured more than one application. The number of applications per case ranged from one to six:

- 55 (45%) cases featured one application
- 40 (33%) cases featured two applications each
- 15 (12%) cases featured three applications each
- eight (7%) cases featured four applications each
- four (3%) cases featured five applications each
- one (1%) case featured six applications.

294. The reason for multiple applications in individual cases varied depending on the circumstances of the case and the approach taken to the applications. Some cases had more than one application because there were applications from both the Crown and defence, or because the case featured more than one accused[97] or more than one complainer and, commonly, separate applications were made in respect of each. However, in some cases with multiple complainers, rather than there being a separate application in respect of each complainer, one application related to several complainers. For example, in six cases, the Crown made a single application referring to more than one complainer,[98] while in five cases, the defence made a single application referring to more than one complainer.[99]

295. There were also cases in which multiple applications were made in respect of the same complainer. This was done by both the Crown and defence. In 11 of the 97 (11%) cases in which the defence made applications, the defence made more than one application about the same complainer. In four of the 80 (5%) cases in which the Crown made applications, the Crown made two applications about the same complainer. For example:

- in one case with one accused, the defence made four applications all relating to the same complainer
- in one case with two accused, defence counsel for each of the accused made applications about the same complainer
- in one case with one accused, the Crown made two applications about the same complainer.

296. It is not clear from our Phase 1 review why multiple applications about the same complainer were made by the same party. However, the making of multiple

[97] For example, in one case, there were two accused who each made applications regarding the same complainer.

[98] In five of those cases, the Crown application related to two complainers, while in one case, the application related to three complainers.

[99] In four of those cases, the defence application related to two complainers while in one case, the application related to three complainers.

applications, particularly if made at different times, has implications for how often the complainer will be contacted by the Crown with intimation of the application and seeking the complainer's views on its content.

297. Although there were 238 applications in our sample, five applications had not been imported to the electronic case file and were not traced within the time available for our Phase 1 review. The analysis below is therefore based on 233 applications.

Who made the applications?

298. Of the 123 cases we reviewed:

- in 80 (65%) cases, applications were made by the Crown
- in 97 (79%) cases, applications were made by the defence.

299. In 54 (44%) cases, applications were made by both the Crown and the defence. In the remaining 69 (56%) cases, applications were made by either the Crown or the defence.

300. Of the 233 applications we reviewed:

- 89 (38%) were made by the Crown
- 144 (62%) were made by the defence.

301. A key feature of the Crown's applications is that almost a third of them related to docket evidence (see paragraph 340).

Main charge to which the applications relate

302. At paragraph 258, we noted the main charge on the indictment in the 123 cases we reviewed. We also recorded the main charge to which the section 275 application related which was often, but not always, the same. In 203 of the 233 (87%) applications, the main charge to which the section 275 application related was rape. This included alleged contraventions of sections 1 and 18 of the Sexual Offences (Scotland) Act 2009, as well as the common law offence of rape or historic offences that would now be prosecuted as rape (see Table 6).

Table 6 – Main charge to which section 275 applications relate

Main charge	Number of applications
Rape[100]	203
Sexual assault (section 3, 2009 Act)	6
Indecent assault	5
Lewd and libidinous practices	4
Voyeurism (section 9, 2009 Act)	4
Attempted murder	3
Intercourse with an older child (section 28, 2009 Act)	3
Sexual assault by penetration (section 2, 2009 Act)	2
Stalking (section 39, Criminal Justice and Licensing (Scotland) Act 2010)	1
Sexual assault on a young child by penetration (section 19, 2009 Act)	1
Assault	1

[100] Includes offences under sections 1 (rape) and 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009, section 5 of the Sexual Offences (Scotland) Act 1976 and section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 (now considered rape) and the common law crime of rape.

Outcome of the applications

303. Table 7 shows the outcome of the section 275 applications we reviewed. Of the 218 applications where the outcome was known:

- 170 (78%) were granted in full or in part
- 33 (15%) were refused
- 15 (7%) were withdrawn.

Table 7 – Outcome of section 275 applications

Applicant	Granted in full or in part	Refused	Withdrawn	Not known or outstanding	Total
Crown	67	5	7	10	89
Defence	103	28	8	5	144
Total	170	33	15	15	233

Outcome of Crown applications

304. Of the 89 section 275 applications made by the Crown, six had not yet been considered by the court at the time of our review and the outcome of four had not been recorded in the case files. Of the remaining 79 applications by the Crown:

- 64 (81%) were granted in full
- three (4%) were granted in part
- five (6%) were refused
- seven (9%) were withdrawn.

305. In total, 85% of the Crown's applications were granted in full or in part. It is worth noting that 100% of the docket applications made by the Crown (where the outcome is known) were granted. Excluding the docket applications, 79% of the Crown's applications were granted in full or in part.

306. Five of the Crown's section 275 applications were refused by the court. Three of the applications were refused because they were deemed unnecessary,[101] one was deemed irrelevant and one was refused because it was late.

307. Seven of the Crown's section 275 applications were withdrawn. Three appeared to have been withdrawn because they were not considered relevant; three were considered unnecessary due to developments in case law; and one appeared to have been withdrawn because it covered the same material as an application made by the defence (see paragraphs 134-135).

Outcome of defence applications

308. Of the 144 applications made by the defence, the outcome of five was not yet known, either because the application had not yet been considered by the court or because the outcome was not recorded in the case records we reviewed. Of the remaining 139 applications by the defence:

- 103 (74%) were granted in full or in part
- 28 (20%) were refused
- eight (6%) were withdrawn.

309. Of the 28 defence applications that were refused by the court, the case records suggested that 10 were deemed collateral and irrelevant; eight were deemed unnecessary (sometimes on the basis that they were in the same terms as the Crown's application); and one was refused as the defence being put forward had no

[101] Applications were deemed unnecessary because they were not struck at by section 274.

basis in law. We were not able to ascertain from the case records the reasons for refusing the remaining nine applications.

310. Eight defence applications were withdrawn. It was not clear from the case records why four of the applications were withdrawn. Three (all in the same case) appeared to have been withdrawn after the Crown indicated that it would lay the accused's previous convictions before the court. One application was withdrawn after the complainer died.

311. Our case review suggests that Crown applications are more likely to be granted in full or in part (85%) than those made by the defence (74%), while defence applications are more likely to be refused (20%) than those made by the Crown (6%).

312. It is worth noting however, that even where applications were granted in full by the court, they had sometimes been previously amended by the Crown or the defence, often following discussions between the parties. In some cases, parts of an application were withdrawn. Additionally, in some cases, notwithstanding the court granting the application in full, the judge made certain remarks to reinforce that the questioning of the complainer at trial had to be conducted sensitively and within the spirit of the legislation. For example:

- in one case, the judge said that the defence was not to stray into humiliating the complainer and was not to use excessive repetition to make points
- in one case where the application was granted in full, the judge said that a particular paragraph of the application had to be dealt with sensitively and politely
- in one case, applications were granted after revised applications were submitted by both the Crown and defence and the judge reminded them that all of the matters contained in the applications should be put to the complainer in the least detail required and with no attempt at embarrassing, humiliating or seeking judgement about the complainer's actions.

Opposing party's attitude towards applications

313. During our review, we sought to identify the opposing party's attitude towards section 275 applications. Table 8 shows the Crown's attitude towards defence applications, and the defence attitude towards Crown applications. The opposing party's position on 54 applications was either not known or the application had not yet been considered. Of the remaining 179 applications:

- 119 (66%) were unopposed
- 60 (34%) were opposed in full or in part.

Table 8 – Opposing party's attitude towards applications

Applicant	Opposed in full or in part	Unopposed	Not known or outstanding	Total
Defence attitude to Crown applications	4	57	28	89
Crown attitude to defence applications	56	62	26	144
Total	60	119	54	233

314. The defence's attitude towards Crown applications was not known or not yet known in relation to 28 applications.[102] Of the remaining 61 applications by the Crown:
- 57 (93%) were unopposed by the defence
- four (7%) were fully or partly opposed.

315. In respect of the 57 Crown applications that were unopposed by the defence, 53 were granted in full or in part. Four unopposed Crown applications were refused by the court.

316. In respect of the four applications that were fully or partly opposed by the defence, three were granted in full and one was granted in part. In only one case was the reason for the defence's opposition to the application noted in the case records – the defence opposed the application because it was late (the application was nevertheless granted). Three of the four applications opposed by the defence were docket applications.

317. The Crown's attitude towards defence applications was not known or not yet known in relation to 26 applications. Of the remaining 118 applications by the defence:
- 62 (53%) were unopposed
- 56 (47%) were opposed in full or in part.

318. Of the 62 defence applications that were not opposed by the Crown, 54 were granted in full by the court, six were granted in part, one was refused and one had not yet been considered. The application which was not opposed by the Crown but which was refused by the court was refused on the basis that the evidence sought to be elicited did not engage section 274. In the same case, the Crown opposed a second application made by the defence.

319. In relation to the 56 defence applications that were opposed by the Crown, 32 were fully opposed. Of these fully opposed applications, 23 were refused by the court, eight were granted in part and one was granted in full. Twenty four applications were partly opposed by the Crown. Of these partly opposed applications, 20 were granted in part by the court and four were granted in full.

320. As noted above, 28 defence applications were refused by the court. We were not able to ascertain the Crown's attitude towards four of those applications. Of the remaining 24 refused defence applications, the Crown opposed 23 (96%) and did not oppose one (4%).

321. Our case review suggests that the Crown is more likely to oppose applications than the defence (47% compared to 7%). It also suggests:
- the Crown opposes more defence applications than are refused by the court
- the Crown's lack of opposition to defence applications is generally supported by the court. This could suggest that the Crown's lack of opposition is generally appropriate, or it could suggest that the Crown's stance influences the court's decision
- the nuanced approach by the Crown to applications made in the same case suggests that the Crown is considering the merits of each application.

[102] We were not able to ascertain the defence's attitude in relation to 23 applications from the case records to which we had access; four applications had not yet been considered by the court and the defence's attitude was therefore not yet known; and the Crown withdrew one application before the defence's attitude was known.

Content of the applications

322. In Phase 1 of our case review, we considered the content of the 233 applications we examined. We identified 10 categories of evidence that applications may seek to admit or elicit at trial.[103] These were:
   a) the complainer's past sexual history with the accused
   b) the complainer's past non-sexual history with the accused
   c) the complainer's behaviour with the accused at or around the time of the alleged offence (whether sexual or non-sexual)
   d) the complainer's sexual behaviour with, or in the presence of, a third party at or around the time of the alleged offence
   e) the complainer's relationship status
   f) the sexual history of the complainer other than with the accused
   g) the sexual character of the complainer
   h) the general character of the complainer
   i) the behaviour of the complainer after the alleged offence, not involving the accused
   j) the behaviour of the complainer after the alleged offence involving the accused.

323. Some applications covered only one category of evidence, while others were more complex and sought to admit or elicit evidence from a range of categories (see Table 9). No application covered evidence from all 10 categories. The length and complexity of the application has implications for the Crown when assessing its response to those made by the defence and when consulting complainers on their content.

Table 9 – Categories of evidence covered by section 275 applications

Categories of evidence	Number of applications
1	127
2	55
3	29
4	13
5	4
6	3
7	1
8	0
9	1
10	0

324. Table 9 shows that:
   - 127 (55%) applications sought to admit or elicit evidence from one category
   - 106 (45%) applications sought to admit or elicit evidence from more than one category.

325. Of the 127 applications relating to one category of evidence, 66 (52%) were made by the Crown and 61 (48%) by the defence. Of the 106 applications relating to more than one category of evidence, 23 (22%) were made by the Crown, and 83 (78%) were made by the defence.

[103] These categories were based on those used in M Burman, L Jamieson, J Nicholson & O Brooks, Impact of aspects of the law of evidence in sexual offence trials: an evaluation study (2007). In that study, nine categories of evidence were used. We have split the ninth category used in that study (the behaviour of the complainer after the alleged offence) into two – behaviour after the alleged offence not involving the accused, and involving the accused.

326. The Crown was more likely to make targeted applications relating to only one category of evidence (74% of its 89 applications) than to make more complex applications relating to multiple categories of evidence (26% of its applications).[104]

327. The defence was more likely to make an application relating to multiple categories than a single category – 58% of the 144 defence applications related to more than one category (compared to 26% of the Crown's applications). The most complex applications were also made by the defence – all the applications relating to five or more categories of evidence were made by the defence.

328. The category of evidence most frequently sought is shown in Table 10. Across the 233 applications, 451 'requests'[105] were made for evidence within the 10 categories.

Table 10 – Frequency of evidence sought to be admitted or elicited

Category of evidence	Number of requests	Proportion of total requests
a) Past sexual history with accused	72	16%
b) Past non-sexual history with accused	17	4%
c) Behaviour with accused at or around time of alleged offence	138	31%
d) Sexual behaviour with third party at or around time of alleged offence	9	2%
e) Complainer's relationship status	35	8%
f) Sexual history of complainer (other than with accused)	14	3%
g) Sexual character of complainer	15	3%
h) General character	79	18%
i) Behaviour of complainer after the alleged offence, not involving accused	31	7%
j) Behaviour of complainer after the alleged offence involving the accused	41	9%

329. Table 10 shows that the category of evidence sought to be admitted or elicited the most often is that relating to the complainer's behaviour with the accused at or around the time of the alleged offence, which makes up almost a third of all requests in section 275 applications. Examples of such evidence include consensual kissing and hugging immediately prior to the alleged offence. The reason this category of evidence is sought most often is likely because this evidence, whether elicited by the Crown or the defence, may be seen as having a bearing on whether the complainer consented to the sexual activity and the accused's reasonable belief in that consent, issues which are often the crux of a sexual offence case.

330. Evidence regarding the character of the complainer (whether about their sexual or general character) was sought in 21% of applications. Evidence about the complainers' general character related to, for example, their mental ill-health, their use of alcohol or drugs, and their dishonesty.

331. Evidence regarding the complainer's past sexual history with the accused also commonly featured in section 275 applications (16% of all requests related to this category). Docket applications accounted for a significant proportion of these

[104] A factor contributing to the Crown's high rate of targeted applications is that all of its applications relating to dockets, of which there were 28, sought to elicit or admit evidence from only one category of evidence.
[105] We broke down the applications into requests for evidence from each category, and where the category related to more than one complainer, a request was counted for each complainer.

requests – of the 72 requests made to admit or elicit evidence regarding the complainer's past sexual history with the accused, 27 (38%) were made in docket applications.

332. Table 11 shows the frequency of the categories of evidence sought in section 275 applications, broken down by the Crown and the defence. The Crown made 130 requests for evidence (a rate of 1.5 per application) and the defence made 321 requests for evidence (a rate of 2.2 per application).

Table 11 – Frequency of evidence sought to be admitted or elicited, by Crown and defence

Category of evidence	Number of Crown requests	Proportion of Crown requests	Number of defence requests	Proportion of defence requests
a) Past sexual history with accused	45	35%	27	8%
b) Past non-sexual history with accused	2	2%	15	5%
c) Behaviour with accused at or around time of alleged offence	45	35%	93	29%
d) Sexual behaviour with third party at or around time of alleged offence	1	1%	8	2%
e) Complainer's relationship status	9	7%	26	8%
f) Sexual history of complainer (other than with accused)	5	4%	9	3%
g) Sexual character of complainer	3	2%	12	4%
h) General character	19	15%	60	19%
i) Behaviour of complainer after the alleged offence, not involving accused	1	1%	30	9%
j) Behaviour of complainer after the alleged offence involving the accused	0	0%	41	13%

333. The most common categories of evidence sought to be elicited by the Crown were those relating to the complainer's past sexual history with the accused and the complainer's behaviour with the accused at or around the time of the alleged offence (each of which represented 35% of all Crown requests). This latter category of evidence was also the one most often sought to be elicited by the defence (29% of all defence requests).

334. Notably, the Crown was far more likely than the defence to seek to admit or elicit evidence relating to the complainer's past sexual history with the accused. Docket applications accounted for 58% of the Crown's requests to admit or elicit evidence in this category. A previous study of section 275 applications published in 2007[106] (prior to applications being made in respect of dockets) had suggested that this evidence was sought by the Crown to provide the jury with context and to help them make sense of the events surrounding the alleged offence. Some of the applications we reviewed suggested the Crown may still be taking this approach in some cases, albeit there is case law suggesting that providing such context or a narrative may not be required.[107]

335. The defence was far more likely to make applications relating to the complainer's behaviour after the alleged offence (whether the behaviour involved or did not involve the accused) – these categories represented 20% of all defence requests, but only 1% of Crown requests. Examples of behaviour falling into these categories include

[106] Burman *et al* (2007), from para 4.47

[107] *HMA v JW* 2020 SCCR 174 (paras 32-34); *SJ v HMA* [2020] HCJAC 18.

showing no signs of distress and maintaining contact with the accused. Maintaining contact with the accused ranged from maintaining contact via social media to continuing a sexual relationship with the accused. It also included remaining friends, continuing to work with the accused and the complainer allowing contact between her children and the accused.

336. We noted the outcome of each request to admit or elicit evidence. As noted above, the outcome of some section 275 applications was not known, either because the application had not yet been considered by the court or the outcome was not recorded in the case records to which we had access. In the remaining applications where the outcome was known and excluding those where the application was withdrawn, we recorded the outcome for each individual request to admit or elicit evidence relating to a particular category. The outcome of 382 of the 451 requests is known and is shown at Table 12. In total, 69% of requests were granted or granted in part, and 31% of requests were refused.

337. When the requests shown in Table 12 are broken down by the Crown and the defence, we found that Crown requests were more likely be granted in full or in part, while defence requests were more likely to be refused. Of the 130 requests made by the Crown, the outcome was recorded as granted, granted in part or refused in 100:

- 90 (90%) were granted or granted in part
- 10 (10%) were refused.

Table 12 – Outcome of requests to admit or elicit evidence

Category of evidence	Number of known results	Number of requests granted/ granted in part	Proportion of requests granted/ granted in part	Number of requests refused	Proportion of requests refused
a) Past sexual history with accused	55	37	67%	18	33%
b) Past non-sexual history with accused	16	7	44%	9	56%
c) Behaviour with accused at or around time of alleged offence	126	116	92%	10	8%
d) Sexual behaviour with third party at or around time of alleged offence	8	6	75%	2	25%
e) Complainer's relationship status	26	14	54%	12	46%
f) Sexual history of complainer (other than with accused)	11	4	36%	7	64%
g) Sexual character of complainer	13	7	54%	6	46%
h) General character	67	39	58%	28	42%
i) Behaviour of complainer after the alleged offence, not involving accused	28	15	54%	13	46%
j) Behaviour of complainer after the alleged offence involving the accused	32	20	63%	12	38%
Total	382	265	69%	117	31%

338. Of the 321 requests made by the defence, the outcome of 282 is known. For the remaining 39 requests, the outcome was either unknown, the request was outstanding or the request had been withdrawn.

- 175 (62% of the known results) were granted or granted in part
- 107 (38%) were refused.

339. Table 12 shows that the category of evidence most likely to be refused related to the sexual history of the complainer with someone other than the accused, followed by the complainer's past, non-sexual history with the accused. The category of evidence most likely to be allowed or allowed in part related to the complainer's behaviour with the accused at or around the time of the alleged offence, followed by the complainer's sexual behaviour with a third party at or around the time of the alleged offence (although the number of requests relating to this latter category is small and should therefore be treated with caution).

Docket applications

340. Of the 233 applications that we reviewed, 30 (13%) were docket applications. Twenty eight (93%) of the docket applications were made by the Crown and two (7%) by the defence. Docket applications made up 31% of the Crown's section 275 applications, and 1% of applications made by the defence.

341. All of the Crown's docket applications sought to admit or elicit evidence relating to a single category:

- 26 (93%) sought to elicit evidence relating to the complainer's past sexual history with the accused
- two (7%) sought to elicit evidence relating to the complainer's behaviour with the accused at or around the time of the incident.

342. The outcome of 21 of the Crown's 28 docket applications is known – all were granted in full. The outcome of the remaining applications was not known, either because it had not yet been decided by the court or had not been recorded in the case records we reviewed.

343. We were only able to ascertain the defence's attitude towards 15 of the Crown's docket applications. Twelve of the docket applications were not opposed by the defence. Three docket applications were fully or partly opposed (one of which was opposed on the basis that it was late, rather than on its merits), but all were granted by the court.

344. Of the two docket applications made by the defence, one sought to elicit evidence relating to the complainer's past sexual history with the accused. It was allowed in part. The second defence docket application related to five categories of evidence, some of which were allowed and some were allowed in part. One of those cases was fully opposed by the Crown and granted in part by the judge, and in the other case the attitude of the Crown is not recorded on the court minutes.

Reviews and appeals

Reviews

345. In 26 of the 123 (21%) cases we reviewed for Phase 1, we found evidence that the Crown had either lodged a new application, withdrawn an application, or asked the court to review previously granted applications in light of changes to case law or policy.

346. In 20 of these cases, the new, withdrawn or reviewed Crown applications were docket applications. In some cases, the Crown's change in approach appeared to be connected to a new operational instruction regarding docket applications which came into effect on 30 March 2021.

347. In the remaining six cases, the Crown reviewed its own applications or asked the court to review those made by the defence in light of the developing case law. This resulted in some applications being withdrawn, some new applications being made, and some previously granted applications being refused. For example, in one case, the Crown asked the court to reconsider three Crown and three unopposed defence applications that had previously been granted. Prior to trial, the Crown brought the court's attention to pending appeal cases (including *RR* and *CH*) which would have an impact on the six applications. This led to the Crown withdrawing its three applications and the defence resubmitting three applications. The Crown changed its position on all three defence applications from unopposed to opposed. When reconsidering the applications, the court affirmed the Crown's decision to withdraw its applications and refused two defence applications in full and allowed one only in part. Thus, six previously granted applications were reduced to one application that was granted in part, significantly narrowing the scope of the evidence to be admitted or elicited at trial.

Appeals

348. Of the 123 cases we reviewed at Phase 1, leave to appeal the decision of the preliminary hearing judge regarding the section 275 application was sought in eight (7%) cases. In seven cases, leave to appeal was sought by the defence, and in one case, leave to appeal was sought by both the Crown and the defence. No cases featured a Crown appeal in respect of a Crown application.

349. Of the eight cases where leave to appeal was sought, it was refused in three:
- in one case, the defence was refused leave to appeal a decision to grant late applications made by the Crown
- in one case, the defence was refused leave to appeal a decision to grant a defence application only in part
- in the case where leave to appeal was sought by both the Crown and defence regarding a defence application, leave to appeal was refused.

350. In five of the eight cases where leave to appeal was sought, it was allowed. In all five cases, leave to appeal was sought by the defence in relation to a decision about its own section 275 application. In one case, the appeal was ongoing at the time of our review and in another we were not able to ascertain the outcome of the appeal from the case records. In the remaining three cases, the Appeal Court upheld the decision of the preliminary hearing judge to refuse an application entirely or to limit the scope of questioning and all defence appeals were refused.

Phase 2 – overview

351. In Phase 2 of our case review, we carried out a more in-depth review of 15 cases that we had already reviewed at Phase 1. We assessed how the Crown had managed the section 275 applications in those cases, including how it had engaged with complainers about the applications.

352. We reviewed 15 cases featuring 37 applications and 26 complainers.

353. The number of applications per case ranged from one to six:

- in four cases, there was one application
- in five cases, there were two applications
- in four cases, there were three applications
- in one case, there were five applications
- in one case, there were six applications.

354. Of the 37 applications:

- 12 were made by the Crown.
- 25 were made by the defence.

355. Of the 12 Crown applications:

- seven were drafted by a case preparer (three of whom were legally qualified and four of whom were not legally qualified)
- three were drafted by an advocate depute
- we could not establish who had drafted two applications from the case records.

356. All of the applications drafted by a case preparer were checked by a more senior colleague. In some cases, there was evidence that an advocate depute checked and amended the applications, whereas others were reviewed by solemn legal managers and indicters.

357. We assessed the extent to which the section 275 applications complied with the common law rules of evidence and the 1995 Act. This was not to substitute our assessment for that of the courts, but to help gauge the quality of the Crown's applications and whether it was appropriately responding to defence applications.

Compliance with section 275(3)

358. We considered the extent to which the Crown's applications complied with section 275(3) of the 1995 Act (see paragraph 7).

- all 12 of the Crown's applications set out the evidence to be admitted or elicited
- all 12 set out the nature of the questioning proposed
- 11 of the 12 Crown applications set out the issues at trial to which the evidence was considered relevant but one did not
- all 12 set out the reasons why the evidence was considered to be relevant to those issues
- all 12 set out the inferences which it proposed to submit to the court should be drawn from the evidence.

359. Overall, 11 of the 12 Crown applications fully complied with the statutory requirements set out in section 275(3). In contrast, of the 25 defence applications

- one did not fully set out the evidence to be admitted or elicited
- six did not set out the nature of the questioning proposed, and one only did so in part
- four did not set out the issues at trial to which the evidence was considered relevant, and one only did so in part
- one did not set out the reasons why the evidence was considered to be relevant to those issues
- two did not set out the inferences which it proposed to submit to the court should be drawn from the evidence.

Admissibility at common law

360. In *CH v HMA*, the Appeal Court noted that, 'The touchstone for consideration of an application under section 275 is that the evidence sought to be elicited is admissible at common law.'[108]

361. We therefore considered the extent to which the applications that we reviewed sought to lead evidence that was admissible as relevant at common law. Of the 37 applications, we considered:
- 16 sought to lead evidence that was admissible at common law
- 12 sought to lead evidence that was admissible in part
- nine sought to lead evidence that was inadmissible.

362. Of the 12 Crown applications, we considered:
- the evidence in 10 applications to have been admissible at common law
- the evidence in one to have been partly admissible
- the evidence in one to have been inadmissible. This application, concerning the complainer's use of cannabis, did not sufficiently explain why the evidence the Crown sought to admit was relevant. This application was ultimately withdrawn at the fourth preliminary hearing in the case.

363. Of the Crown applications that we considered admissible at common law, five related to dockets.

364. Of the 25 defence applications, we considered:
- the evidence in six applications to have been admissible as relevant at common law
- the evidence in 11 applications to have been partly admissible
- the evidence in eight to have been inadmissible.

365. Examples of evidence which the defence sought to admit or elicit and which we considered not to be relevant at common law given the circumstances of the case included evidence regarding the complainer's:
- sexuality
- previous convictions for dishonesty
- mental health and substance misuse
- relationship with the accused following the incident
- relationship with another man
- previous sexual history with the accused
- failure to report the incident at an earlier opportunity.

In one case, the accused was charged with rape on various occasions over a lengthy period of time. The defence submitted a section 275 application which sought to lead evidence that the accused had continued to play a role in the complainer's life after that period, including being present at key events and taking care of her children. When consulted on the application, the complainer's position was that she did not want the accused in her life but that, as a member of her extended family, he regularly insinuated himself into it. The application was opposed by the Crown which considered the evidence to be irrelevant. The court refused the application on that basis saying that, if allowed, the evidence would lead to a collateral inquiry.

[108] *CH v HMA* [2020] HCJAC 43 at para 34.

Evidence prohibited by section 274

366. Where the evidence is admissible at common law, consideration must then be given to whether the evidence is struck at (i.e. prohibited) by section 274. Of the 37 applications, we considered that:
    - in 19 applications, the proposed evidence was struck at by section 274(1) (of which, nine were Crown applications and 10 were defence applications)
    - in 15 applications, the proposed evidence was struck at in part (two Crown, 13 defence)
    - in two applications, the proposed evidence was not struck at, rendering the applications unnecessary (both defence applications)
    - in one Crown application, there was divided opinion among our inspectors as to whether the evidence was struck at, illustrating the challenges posed when applying the legislation.

Compliance with section 275(1)(a-c)

367. Where evidence is admissible at common law and struck at by section 274, a section 275 application is required. The court may allow the evidence if it is satisfied as to its specificity, relevance and probative value.

368. Regarding the requirement that the evidence sought to be admitted or elicited must relate to specific matters (section 275(1)(a)), we considered:
    - in 31 applications, the evidence related to specific matters (nine Crown, 22 defence)
    - in five applications, the evidence related to specific matters in part (two Crown, three defence)
    - in one case, the evidence did not relate to a specific matter (a Crown application regarding the complainer's use of cannabis over a long period of time).

369. Regarding the requirement that the evidence sought to be admitted or elicited must be relevant (section 275(1)(b)), our assessment of the applications for the statutory test of relevance was the same as that for the common law test of relevance (see paragraph 361).

370. Regarding the requirement that the evidence sought to be admitted or elicited must have significant probative value (section 275(1)(c)), we considered:
    - in 14 applications, the probative value was significant (eight Crown, six defence)
    - in 15 applications, the probative value was significant in part (three Crown, 12 defence)
    - in eight applications, the probative value was not significant and was not likely to outweigh the risk of prejudice to the proper administration of justice (one Crown, seven defence). All of these eight applications were also not considered to be relevant.

Only one of the 37 applications that we reviewed at Phase 2 sought to admit evidence demonstrating that the complainer was subject to a condition or predisposition (section 275(1)(a)(ii)). This was a defence application that otherwise comprehensively addressed the three cumulative tests within section 275. The defence sought to lead evidence that the complainer had a condition which manifested itself in lying or attention seeking behaviour. The application was refused – no reasons were given, but the application did not appear to fulfil the criteria outlined in *HMA v Selfridge*,[109] including that the medical report did not specify that the complainer's condition, as a matter of fact, resulted in the complainer lying about matters.

[109] *HMA v Selfridge* 2021 SLT 976.

Timing of applications

371. The 1995 Act requires that section 275 applications are made not later than seven clear days before the preliminary hearing in a High Court case. Of the 37 applications:
    - 19 were lodged timeously (three by the Crown and 16 by the defence)
    - 18 were lodged late (nine Crown, nine defence)

372. While we were able to establish if applications were on time or late, it was often difficult to establish from the records available the exact date that the applications were lodged.

373. Five of the Crown's nine late applications related to its change in policy regarding docket applications and the introduction of OI 2/21. This policy change resulted in staff revisiting ongoing cases and making new applications. Of the other four late applications:
    - the reasons two were late are unknown
    - one application was drafted at a very early stage but there appears to have been an administrative error regarding its lodging
    - one application was lodged on time but was subsequently withdrawn and a new application was lodged (late) at a continued preliminary hearing.

374. Of the 18 late applications:
    - six were lodged at the first preliminary hearing (two by the Crown)
    - four were lodged at a second preliminary hearing (two by the Crown)
    - three were lodged at a third preliminary hearing (two docket applications by the Crown)
    - one was lodged at a fifth preliminary hearing (a docket application by the Crown)
    - three were lodged at trial (including a docket application by the Crown)
    - one application was lodged late but was withdrawn prior to the next calling of the case (a docket application by the Crown).

375. Of the nine defence applications that were lodged late, the Crown did not oppose five on the basis of lateness. The attitude of the Crown to the other four application could not be established from the case records. Of the nine Crown applications that were lodged late, the defence only opposed one on the basis of lateness (four were not opposed, the attitude of the defence could not be established in three, and one was withdrawn).

376. Of the 18 late applications, the outcome of one late Crown application was not known. Of the remaining 17, there was a record of the special cause for lateness in only seven. Of the 17 late applications where the outcome is known:
    - nine were granted in full (five Crown, four defence)
    - four were refused (one Crown, three defence)
    - four were withdrawn (two Crown, two defence).

377. The refused Crown application was refused on the basis that it was late (this was the application that was late due to an administrative error). In relation to two of the refused late defence applications, the records do not show if the applications were refused for lateness or on their merits. The third application was refused as irrelevant, rather than for lateness.

Outcome of applications

378. The 37 section 275 applications were decided at various stages in the case:
    - 10 were decided at the first preliminary hearing

- nine at the second preliminary hearing
- five at the third preliminary hearing
- two at the fourth preliminary hearing
- two at the fifth preliminary hearing
- five at the sixth preliminary hearing
- four at the trial.

379. The outcome of one Crown application is unknown. Of the remaining 36 applications:
    - 12 were granted in full (six Crown, six defence)
    - eight were granted in part (all defence applications)
    - nine were refused (two Crown, seven defence)
    - seven were withdrawn (three Crown, four defence).

380. Of the 12 Crown applications, three were withdrawn and the outcome of one is unknown. Of the remaining eight:
    - the reason for granting six was that the probative value of the evidence was significant and relevant to the credibility and reliability of the complainer
    - the reasons for refusing two were that one was late, and one was unnecessary.

381. Of the 25 defence applications, the Crown:
    - opposed seven in full (five of which were refused, and two were granted in part)
    - opposed five in part (one of which was granted, four were granted in part)
    - did not oppose seven (five of which were granted, two were granted in part)
    - the Crown's attitude is not known for six applications (two of which were refused, four were withdrawn by the defence).

382. Generally, where we identified the defence applications as being deficient in some way, it is reassuring that they were opposed or opposed in part by the Crown. In particular, all of those that we considered to be wholly irrelevant at common law or lacking in significant probative value, and where the Crown's attitude towards them was known, were opposed in full by the Crown.

383. Of the 14 defence applications that were granted or granted in part, the reason for allowing the evidence sought in 12 applications was that the evidence was relevant to the credibility and reliability of the complainer. No reason was given regarding one application that was allowed, and the court minute noting the reason was missing from the case records in respect of another application. Where the defence application was refused or partly refused, reasons included the evidence not being relevant and the evidence not being struck at by section 274.

384. Seven applications were withdrawn (three Crown, four defence). Applications were withdrawn at various stages. The reasons four applications were withdrawn are not known (one Crown, three defence) – all four either contained errors or sought to admit irrelevant evidence. Where the reason was known:
    - one Crown application was withdrawn because it was no longer necessary after the docket to which it related was deleted
    - one Crown application was withdrawn after the advocate depute decided the evidence was not struck at by section 274
    - one defence application was withdrawn after the Crown deserted the charge on the indictment to which the application related.

385. In relation to six of the seven withdrawn applications, the complainer had already been told of its existence and precognosced on its contents.

Adjournments and continued preliminary hearings

386. The hearing of four cases featuring 10 applications was adjourned to a further preliminary hearing. In three cases featuring nine applications, the hearing of the applications was adjourned to allow the Crown to obtain the views of the complainers. In one case, the hearing of one application was adjourned pending the recovery of medical documents required for an expert medical report in relation to a section 275 application.

387. More generally, we found all of the 15 cases that we reviewed at Phase 2 contained section 75A minutes which administratively adjourned preliminary hearings to a further date. Eight cases had between one and five adjournments relating to Covid-19, while seven cases had adjournments for other reasons. Around 10% of the section 75A adjournments in the 15 cases featured issues with section 275 applications as a reason for adjourning the diet administratively.

388. Twelve of the 15 cases had continued preliminary hearings, 10 of which included section 275 applications among the reasons for the continuations. In these cases, we found that 45% of the issues resulting in continued preliminary hearings related to section 275 applications.

Recording of reasons

389. Since its third iteration in February 2021, OI 13/20 has required prosecutors to take a careful note of the court's ruling on section 275 applications, including any reasons given and any conditions imposed. Of the 21 applications we reviewed that were heard after this date, there was an appropriate record of the court's ruling in relation to 18. No record was made of the court's ruling in relation to three applications. The need for an adequate record to be made by the prosecutor at the preliminary hearing is important as we found court minutes often lacked useful information on why applications had been refused (bearing in mind a different prosecutor is likely to conduct the trial).

Engagement with the complainer

390. In the 15 cases we reviewed in Phase 2, the 37 applications related to 26 complainers.

391. The number of complainers about whom applications had been made in each case ranged from one to four:
    - in eight cases, there were applications relating to one complainer
    - in four cases, there were applications relating to two complainers
    - in two cases, there were applications relating to three complainers
    - in one case, there were applications relating to four complainers.

392. Generally, applications tended to relate to a single complainer, although sometimes an application related to more than one. Three of the 37 applications we reviewed at Phase 2 related to more than one complainer, all of which were made by the defence. Two applications related to two complainers, and one application related to three complainers.

393. For 13 (50%) of the 26 complainers, there was one application. For 11 (42%) complainers there were two applications and for two (8%) complainers, there were three applications. Where there was more than one application about a complainer, this was because:
    - both the Crown and defence made an application (this happened in respect of eight complainers)

- the Crown made a second application about the same complainer, with the second application relating to a docket (two complainers)
- there were two accused and an application was made by each defence counsel about the same complainer (two complainers)
- the defence made a second application after the first was withdrawn (one complainer) or refused (one complainer).

394. For the two complainers who were the subject of three applications, each had two applications made by the Crown and one application by the defence.

395. The Crown has a duty to engage complainers about each application. While there were 26 complainers who required to be contacted, 11 required to be contacted about two applications, and two required to be contacted about three applications. This meant that there were 41 occasions on which a complainer could be contacted about a section 275 application.[110]

396. In our review, we sought to assess whether complainers were contacted about each application, and the extent to which the requirements in OI 13/20 were fulfilled during that contact. Where there are multiple applications about the same complainer, the complainer would ideally be contacted once to discuss all of the applications. However, this rarely happens in practice as applications are lodged at different times and the Crown generally makes contact with the complainer shortly after each application is lodged. As a result, we assessed each of the 41 occasions the complainers were contacted.

397. It is worth noting that where a complainer was contacted on more than one occasion:
- some of the requirements of OI 13/20 may have been fulfilled on one occasion but not another
- because the same complainer could be contacted at different times about an application, different versions of OI 13/20 (with different requirements) may have been in place on each occasion on which they were contacted.

Relevant law and policy

398. The relevant law and policy that applied on each of the 41 occasions on which complainers were contacted varied. The key dates are:
- 7 October 2020 – the court's judgment in *RR*, noting that the Crown is under a duty to ascertain the complainer's position in relation to a section 275 application and present that position to the court
- 15 October 2020 – as a result of *RR*, the form of written record which the Crown and defence must complete regarding their state of preparation was amended to include section 5A. Where there has been a section 275 application, section 5A requires the Crown to indicate whether the complainer has been told of the application, been invited to comment on the accuracy of any allegations within it, and been asked to state any objections to the granting of the application. The new form came into effect immediately
- 12 November 2020 – the Crown issued an updated OI 13/20 to all legal staff and case preparers, reflecting the requirements of *RR* and the new form of written record. OI 13/20 also set out additional requirements that it expected staff to fulfil, such as advising the complainer of the outcome of the

[110] Viewed another way, there were 37 applications, but two applications related to two complainers and one application related to three complainers – totalling 41 occasions on which a complainer required to be contacted about an application.

application. OI 13/20 was further amended on 2 February 2021 and 3 August 2021.[111]

399. As noted at paragraph 395, there were 41 occasions on which a complainer could be contacted about an application. However, on five occasions, the application was lodged and heard prior to *RR*, meaning that the duty imposed on the Crown by the court had not yet come into effect. At this time, Crown policy was that complainers should be advised of applications as a 'general rule' and the question of whether they should be precognosced about the application's contents should be addressed on a case-by-case basis. We have not therefore assessed the Crown's engagement with the complainer on these occasions as no duty of engagement yet existed (although we noted that no precognition was instructed on any of the five occasions).

400. On a further one occasion, the application was lodged after 15 October 2020 but before 12 November 2020 when the Crown provided guidance to staff on how the duty of engagement should be fulfilled. On this occasion, the complainer was advised of the section 275 application and precognosced on its content, and her views were made known to the court.

401. In respect of one further occasion when a complainer should have been contacted about a section 275 application, the complainer had sadly died prior to the case being reported to the Crown.

402. We therefore sought to assess the Crown's engagement with the complainer on the remaining 34 occasions.

Advising the complainer that a section 275 application has been lodged

403. There were 34 occasions on which the complainer should have been told that a section 275 application had been made. On 29 (85%) of these, the complainer was advised of the application or attempts were made to advise the complainer. On two of the 29 occasions, relating to two applications about the same complainer, the Crown sought to advise the complainer but she declined all contact. Of the remaining five occasions:

- on two occasions, a decision was made not to advise the complainer about a docket application because its content had been the subject of an earlier discussion with the complainer and the complainer's views were already known
- on two occasions, the complainer was not advised of a section 275 application relating to a docket
- on one occasion, the complainer was not engaged about a revised defence application which was an expansion of the original application about which she had already been advised.[112]

404. On the 27 occasions on which the Crown successfully made contact with the complainer to advise them of the application, all contact was made by telephone by the case preparer.

[111] Changes included: on 2 February 2021, OI 13/20 was updated to remind staff to keep a record of attempts to engage the complainer, and to remind prosecutors to make a careful note of the court's ruling on a section 275 application, including reasons given or conditions imposed; and on 3 August 2021, OI 13/20 was updated with a new requirement that complainers be told the likely outcome of applications.

[112] For further commentary on these cases, see para 156.

Precognition of the complainer

405. The Crown is required to precognosce complainers to ascertain their views on the section 275 application, including whether they have any objections to it being granted. On 28 (82%) of the 34 occasions on which complainers should have been precognosced, there was an instruction to precognosce the complainer:
    - on 26 occasions, the instruction was given by an advocate depute
    - on one occasion, the instruction was given by a senior depute
    - on one occasion, there was no record of who gave the instruction.

406. There was no instruction to precognosce the complainer in the remaining six occasions and no precognition took place. On three of these six occasions, it appeared from the records as though a conscious decision was taken not to instruct a precognition because it was thought the complainer's views were already known. On the other three occasions, there was no evidence that precognoscing the complainer had been considered.

407. On five of the 28 occasions where there was an instruction to precognosce the complainer, the complainers were children (aged between 13 and 15) and the instructions were given by Crown Counsel, in accordance with OI 13/20.

408. OI 13/20 states that complainers should be invited to a meeting at which the precognition will take place. If the complainer does not wish to meet or if there is insufficient time to arrange a meeting, the precognition may take place by telephone or by video call.

409. Of the 28 occasions where a precognition of the complainer was instructed, the precognition took place in 26 (93%). On the remaining two occasions, involving the same complainer aged 13, the complainer refused to engage despite efforts made by the case preparer, VIA, her father and other professionals providing support to the complainer.

410. Of the 26 occasions where a precognition took place, all were carried out by the case preparer, five of whom were legally qualified and 21 of whom were not (but whose role is to conduct such work).

411. Of the 26 occasions where a precognition took place:
    - 22 (85%) took place at the same time the complainer was advised that a section 275 application had been made
    - four (15%) precognitions were arranged in advance.

412. Of the 26 occasions where a precognition took place:
    - 25 (96%) took place via telephone. On one of these occasions, a precognition by video call had been arranged, but took place by telephone following a technical difficulty
    - one (4%) took place in person.

413. In 15 (58%) of the 26 occasions where a precognition took place, we found no evidence to suggest the complainer had been given a choice as to which format it could take (i.e. by telephone, video call or in person).

414. OI 13/20 states that complainers may be accompanied to the meeting about the section 275 application by an advocacy or support worker or another person if they wish. A supporter was in attendance at only two (8%) of the 26 occasions

on which a precognition took place. Both occasions were in respect of the same complainer. The complainer was a child who lived in a care home – the case preparer made contact with the child via a support worker who then attended the meeting.

Timing of the applications

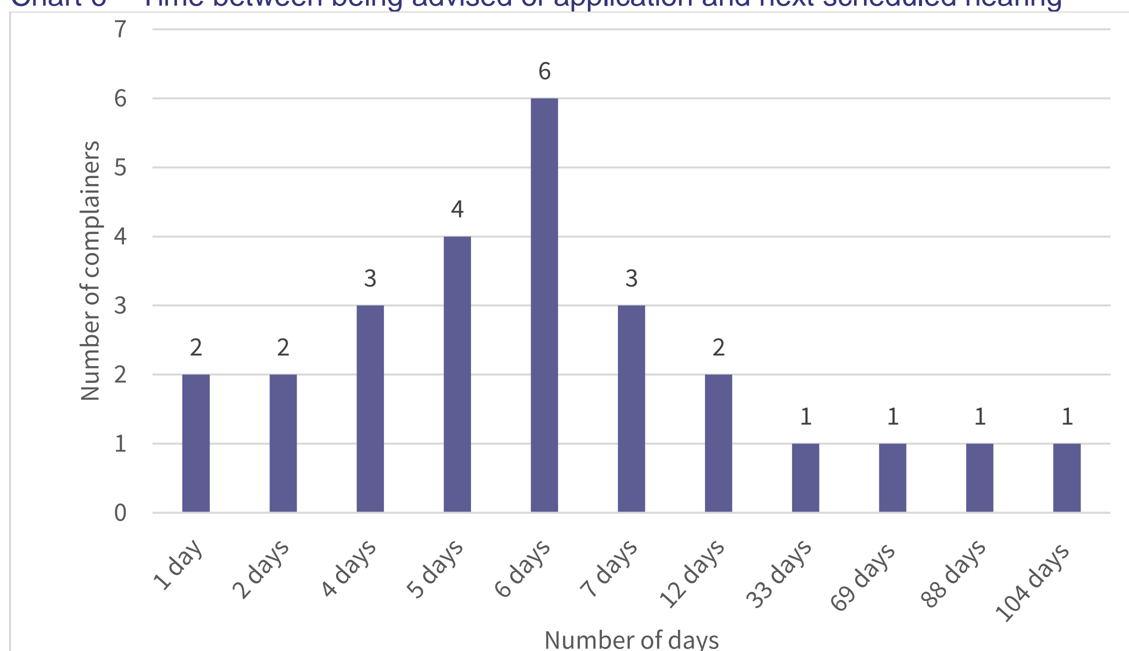
415. In High Court proceedings, the 1995 Act states that section 275 applications shall be made no later than seven clear days before the preliminary hearing. Late applications will only be considered on special cause shown.

416. In our case review, we sought to identify when applications were lodged with a view to understanding how much time the Crown has to engage with the complainer. On seven of the 26 occasions on which precognition took place, we were not able to identify the date of lodging from the case records. Of the remaining 19 occasions:

- on 13 occasions, the application was lodged prior to the first preliminary hearing (of which, five were lodged seven days or fewer before the hearing)
- on six occasions, the application was lodged at a later hearing.

417. We also considered the time between the complainer being advised of the application and the next scheduled hearing for all 26 occasions where a precognition took place (see Chart 6).

Chart 6 – Time between being advised of application and next scheduled hearing



418. Chart 6 shows that on 20 of the 26 occasions on which a complainer was precognosced, there were seven days or fewer between the complainer being advised of the application and the next scheduled hearing. This meant there was little time to arrange a precognition or for the complainer to consider the application and form a view.[113]

[113] On the two occasions in Chart 6 on which the complainer was advised of the application 12 days before the next scheduled hearing, the hearing was the preliminary hearing. For the four occasions on which the complainers were advised further in advance, the first preliminary hearing had already taken place.

During the precognition meeting

419. OI 13/20 states that the law and practice around section 275 applications should be explained to the complainer during the precognition meeting. This was done on all 19 occasions where it was relevant.[114] However, some case preparers found it difficult to summarise the law accurately, suggesting that a written summary could be made available for all case preparers to use. This could also be shared with complainers.

420. OI 13/20 notes that it will not generally be necessary to show the complainer a copy of the application, but that complainers should be advised of its 'full content'. All of the complainers who were precognosced were advised of the evidence sought to be admitted or elicited in the application, but not necessarily the full contents of the applications (such as the reasons why the evidence is relevant or the inferences to be drawn from the evidence). None of the complainers were shown a copy of the application. A note of the complainer's views towards the application was made by the case preparer on all occasions except one, where the case preparer failed to do so.

421. OI 13/20 states that complainers should be advised that their position on the facts alleged in the application and attitude towards the application will be made known to the court. Of the 19 occasions where this was relevant:
    - on 15 occasions, the complainer was advised their views would be shared with the court
    - on four occasions, the complainer was not so advised. In relation to three occasions, the case preparer was not aware this was a requirement, and in relation to the fourth occasion, the case preparer chose not to tell the complainer their views would be shared with the court. The case preparer felt doing so may cause the complainer to disengage.

422. OI 13/20 states that where time permits and if the complainer wishes it, the complainer should be written to post-precognition with a note of what the complainer said and what will be done with the information. Of the 19 occasions where this was relevant:
    - on 17 occasions, no written summary of the meeting was provided to the complainer
    - on two occasions, a written summary was provided and the complainer was advised to get in touch with the case preparer if they disagreed with anything.[115]

423. In August 2021, OI 13/20 was updated to say that complainers should be advised of the likely outcome of the section 275 application during the precognition meeting. This new instruction only applied to three of the occasions that we reviewed. On none of these occasions was the complainer advised of the likely outcome.

Complainers' views on section 275 applications

424. The judgment in *RR* requires that the Crown ask the complainer to state whether they have any objections to the granting of a section 275 applications. OI 13/20 reiterates this requirement. Of the 26 occasions where a precognition took place:
    - on 11 (42%) occasions, the complainer was not opposed to the granting of the application

[114] It was not relevant in seven of the 26 occasions when a precognition took place due to the timing of the precognition and the requirements in place at the time.
[115] See from para 198 for further commentary on this aspect of OI 13/20.

- on six (23%), the complainer was fully opposed to the granting of the application, and disputed the evidence the application sought to admit or elicit
- on eight (31%), the complainer was partly opposed to the granting of the application
- on one (4%), the complainer had no firm view as to whether she opposed the application.

425. Whether or not the complainers opposed the granting of the applications, many expressed their shock, hurt, anger, anxiety and confusion in response to being told of the applications. However, complainers also frequently understood why the application to admit or elicit the evidence was being made.

426. We considered whether the attitudes of the complainer and Crown towards an application were aligned. Of the 26 occasions, we found that:
- on 13 (50%) occasions, there was no suggestion that the views of the complainer and the Crown differed (these occasions related to three Crown and 10 defence applications)
- on nine (35%) occasions, there was evidence of differing views between the complainer and the Crown (these related to two Crown applications and seven defence applications)
- on four (12%) occasions, we were unable to establish the views of the Crown. All concerned defence applications. The views of the Crown had not been made known to the complainer at the precognition meeting and, on three occasions, the applications were withdrawn before the Crown had to articulate its position at the preliminary hearing. On the fourth occasion, the application was heard at trial and no record was available at the time of our review of the Crown's attitude towards the application.

427. Where the views of the complainer and the Crown differed, this was for various reasons such as:
- the defence application was opposed by the complainer but not the Crown
- the Crown application was opposed by the complainer
- the defence applications were opposed in part by the complainer and in different or in fewer parts by the Crown.

Advising complainer of outcome

428. OI 13/20 states that complainers must be advised of the outcome of section 275 applications. Of the 26 occasions where the complainer was precognosced:
- on 12 (46%) occasions, the complainer was advised of the outcome
- on 14 (54%) occasions, the complainer was not advised of the outcome.

Appeals

429. Leave to appeal was granted in relation to two defence applications. In relation to one, there appears to have been no communication with the complainer despite there being an instruction to make contact with her. In relation to the second, the case preparer was not even aware of the appeal and therefore had not been in contact with the complainer about it.

Overall assessment of communication with the complainer

430. We sought to make an overall assessment of how well the Crown engaged with complainers regarding section 275 applications. Where a complainer was the subject of more than one application and was contacted by the Crown on multiple occasions, we have based our assessment on all of the occasions on

which they were contacted. Our assessment took account of the relevant law and policy at the time the section 275 applications were dealt with, including the requirements of *RR* and the relevant Crown policy. We assessed the engagement as either good, reasonable or unsatisfactory:

- good – the requirements of *RR* were fulfilled and the relevant policy was followed in full
- reasonable – the requirements of *RR* were fulfilled and the relevant policy was mostly followed but there was scope for further improvement
- unsatisfactory – either the requirements of *RR* were not fulfilled or key elements of the relevant policy were not followed.

431. We assessed the engagement with 21 of the 26 complainers. One complainer had died, and applications in respect of the remaining four complainers were dealt with prior to *RR* and therefore the new requirements were not applicable.

432. We assessed the engagement regarding section 275 applications to have been good for nine (43%) of the 21 complainers. With the exception of one complainer who refused to engage despite concerted efforts by COPFS, these complainers were informed of the applications, precognosced on their contents and were advised of the outcome. The way in which the engagement was carried out tended to be complainer-led and, in some cases, additional support was offered or arranged.

433. We assessed engagement as being reasonable for eight (38%) complainers. A key issue for these complainers was that most were not informed of the outcome of the application. One complainer was not advised of an appeal regarding a section 275 application in her case, albeit the engagement was otherwise good.

434. We considered the engagement to have been unsatisfactory in respect of four (19%) complainers. This was generally because the complainer had not been told of the application or precognosced on its contents. For one 16-year-old complainer, we assessed the engagement as unsatisfactory as it did not appear that any consideration had been given to her age when advising her of an application relating to sensitive matters, she was not advised of the outcome, nor was she advised of a second application which was an amended version of the first.

Appendix 2 – Key terms

1995 Act: Criminal Procedure (Scotland) Act 1995

2009 Act: Sexual Offences (Scotland) Act 2009

Accused: person charged with committing a crime.

Advocate Depute: Advocate Deputes are prosecutors appointed by the Lord Advocate. Advocate Deputes prosecute all cases in the High Court and present appeals in the appeal court.

Case preparer: members of COPFS staff who interview witnesses and prepare cases for court in solemn proceedings.

Charge: the crime that the accused person is suspected of having committed.

Complainer: the person who made the allegation.

Crown Counsel: collective term for the Law Officers (Lord Advocate and Solicitor General) and Advocate Deputes.

Crown Counsel's instructions: instructions by Crown Counsel to prosecutors.

Crown Office and Procurator Fiscal Service (COPFS): the independent public prosecution service in Scotland. It is responsible for the investigation and prosecution of crime, the investigation of sudden, unexplained or suspicious deaths, and the investigation of criminal allegations against the police. Also referred to in this report as 'the Crown'.

Dedicated floating trial: unlike summary trials, which are always fixed for a specific day, solemn jury trials in the High Court and Sheriff Court are often fixed as 'floating' trials, in the sense that they might start at some point within a range of days, in a particular court.

Docket: under section 288BA of the 1995 Act, a docket can be added to an indictment or complaint to give notice of an intention to lead evidence of a crime not libelled.

Evidence by Commissioner hearing: a hearing where a witness can give evidence at a different time or place than the actual trial. The witness is asked questions in the usual way but the evidence is recorded and will be played during the trial and will normally be regarded as the evidence of the witness.

First diet: a court hearing to establish the state of preparation of the prosecutor and defence for trial.

Indictment: court document that sets out the charges the accused faces at trial in solemn proceedings.

Investigative agreement: sets out a strategy for the investigation and preparation of a case. It sets out key matters relevant to the prosecution, including the charges to be investigated, how these will be proved, the parameters of the investigation and how the evidence will be presented.

Knowledge Bank: COPFS information database containing legal and non-legal guidance.

Law Officers: the Lord Advocate and the Solicitor General.

Lord Advocate: Ministerial Head of COPFS. She is the senior of the two Law Officers, the other being the Solicitor General.

Marking: decision of action to be taken.

OI 2/19: Operational Instruction 2 of 2019 on the protection of witnesses from unfair or oppressive questioning.

OI 13/20: Operational Instruction 13 of 2020 on protecting witnesses in sexual offences cases – Section 275 of the Criminal Procedure (Scotland) Act 1995.

OI 2/21: Operational Instruction 2 of 2021 on section 275 applications for docket witnesses.

Pathway: the pathway document is an electronic 'living' document designed to record key milestones and the progress of a case in one place.

Petition: formal document served on accused in solemn proceedings. It gives notice of the charges being considered by the Procurator Fiscal.

Precognition: an interview of a witness by COPFS or a defence lawyer to help them find out more about a crime and prepare for a court case.

Preliminary hearing: procedural hearing in all High Court cases. The purpose is to adjudicate on the state of preparation of the defence and the prosecution and to resolve all outstanding issues prior to the trial commencing.

Procurator Fiscal: legally qualified prosecutor who receives reports about crimes from the police and other agencies and makes decisions on what action to take in the public interest and where appropriate prosecutes cases.

SCTS: Scottish Courts and Tribunals Service

SLM: solemn legal manager.

Section 275 application: an application made under section 275 of the Criminal Procedure (Scotland) Act 1995 to lead evidence about a complainer's sexual history or character in a sexual offences trial.

Solemn proceedings: prosecution of serious criminal cases before a judge and a jury in the High Court or Sheriff Court.

Summary proceedings: prosecutions in the Sheriff or Justice of the Peace Court before a judge without a jury.

Trial diet: a court hearing where evidence is led before a judge and jury to determine if a person is guilty of a crime.

VIA: Victim Information and Advice Service (part of COPFS), which offers assistance to some victims and witnesses.

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About HM Inspectorate of Prosecution in Scotland

HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service (COPFS). The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person. COPFS is the sole prosecuting authority in Scotland and is also responsible for investigating sudden deaths and complaints against the police which are of a criminal nature.

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