

Faculty of Advocates submission of 19 April 2023

PE1994/C Review the trial process for sexual offence cases

Since petitions usually concern matters of policy, we do not generally take a position on them. On this occasion, however, we consider that there is reason for us to respond, as we will explain.

The petitioner is "Calling on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and handling of witness evidence in sexual offences cases". I have read the Scottish Government response to the petition and the SPICE briefing. I note the various initiatives referred to in those documents. For our part, we made reference to this specific issue in our response to the consultation in 2022 by the Scottish Law Commission. The Commission was consulting on what should be in its eleventh programme of law reform. In the Faculty response, prepared in August 2022, we highlighted the practical operation of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 as a potential project for the Commission. We enclose a copy of that response.

We hope this is of assistance to the committee in its consideration of the petition.

FACULTY OF ADVOCATES RESPONSE TO PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM (ABRIDGED)

1. Do you have any suitable law reform projects to suggest?

Criminal Procedure (Scotland) Act 1995 (ss 274-275)

2. If suggesting a new project:-

(a) Please provide us with information about the issues with the law that you have identified:

Section 274 of the 1995 Act imposes a general prohibition on the leading of character evidence and evidence relating to prior sexual activity in relation to sexual offences. Section 275 provides a limited exception to this prohibition. The experience of practitioners in sexual offence cases is that the interpretation of s. 275 has narrowed in recent years. The SLC is invited to consider whether the current approach to ss. 274 and 275 strikes an adequate balance between the rights of complainers and the rights of the accused to lead evidence which may be of relevance to the issues at trial.

(b) Please provide us with information about the impact this is having in practice:

A number of issues arise in relation to the present approach to the law. Firstly, there is a sense that the scope of the exception in s. 275 is unpredictable and subject to repeated judicial consideration. Appeals in relation to s. 275 applications form a substantial part of the Appeal Court's business. This leads to practitioners having difficulty in advising clients and formulating trial strategies when it is difficult to predict what evidence will and will not be admitted. Further, the present approach arguably excludes too much evidence from a jury's consideration. Relevant context may be excluded from the jury.

(c) Please provide us with information about the potential benefits of law reform:

The law in relation to these provisions has developed incrementally in the context of specific factual circumstances in specific cases. The Faculty considers that it would be beneficial for the SLC to analyse the issues from first principles and consider whether any reformulation of the statutory tests is necessary in order to: (i) promote certainty, and (ii) strike the correct balance between the rights of complainers and the rights of the accused.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Potentially, depending on the outcome of any review of the existing law.