This memorandum relates to the Sexual Offences (Procedure and Evidence) (Scotland) Bill (SP Bill 31) as introduced in the Scottish Parliament on 28 June 2001

SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This memorandum relates to the Sexual Offences (Procedure and Evidence) (Scotland) Bill introduced in the Scottish Parliament on 28 June 2001. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 31–EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill has two major policy objectives. The first of these is to prevent the accused in rape and other sexual offence cases from personally cross-examining the complainer. This is to be done by requiring him or her to be legally represented throughout his or her trial. The second is to strengthen the existing provisions restricting the extent to which evidence can be led regarding the sexual history and character of the complainer.

PROHIBITION OF PERSONAL CROSS-EXAMINATION

Current law

3. At present, the accused has the right to defend him or herself in person if he or she wishes. This applies to all types of case and includes the right to personally cross-examine the complainer. The court has a right and indeed a duty to intervene when questioning is designed to elicit inadmissible evidence or is clearly abusive. There is also a power to remove an accused from the court room, and appoint a legal representative for him or her, in the event of misconduct preventing a proper trial from taking place in his or her presence. However, this is a fairly extreme test. In controlling questioning, there may be a fine boundary between what is acceptable and what is not, with the accused tending to receive the benefit of any doubt. There may also be distress caused to the complainer by the fact of abusive questioning, even if he or she is not required to answer.

Aims

4. The aim of the new provisions is to prevent the complainer from being humiliated, embarrassed, intimidated or otherwise inhibited in giving evidence as a result of abuse by the accused of his or her right to cross-examine, or as a result of having to submit to questioning by the accused personally about highly intimate or degrading matters, whether or not that questioning is abusive. It is recognised that the very fact of being required to carry on a conversation about these matters which is both with and controlled by the accused in a public place may be traumatic for the complainer.

5. The Executive regards the need for protection of complainers from questioning by the accused personally as an issue of principle. It is recognised that the number of sexual offence cases to date where the accused has personally cross-examined the complainer has been very small. However, the effect of these cases in creating apprehension amongst victims of sexual offences may well have been greater than their number would suggest. Leaving protection of a complainer to the discretion of the courts, even if greater discretion was conferred, would lead to uncertainty as to the degree of protection he or she would receive. As a matter of principle, the Executive believes that a victim of a sexual offence should not have to fear the sort of personal confrontation with the accused which is involved in personal cross-examination.

Mechanisms

6. The accused is to be warned orally on arrest by the police that, should his or her case go to trial, he or she will require to be legally represented and that it would be in his or her best interests to appoint a solicitor, failing which the court will do so. Written notice of the requirement to be represented will be supplied with the indictment, complaint or citation when that is given to the accused. In addition, a further oral reminder will be given at the stage of judicial examination before a sheriff, or on the first calling of the case under summary procedure, where those are applicable. Other existing pre-trial hearings will be used (and new mandatory hearings are also provided for) to establish whether the accused is represented. Where this proves not to be the case, the court will have the power to appoint a solicitor to represent him or her. Alternatively, one adjournment for a maximum of 48 hours may be allowed, to provide the accused with a final opportunity of securing a solicitor of his or her choice. Where an accused dismisses his or her own solicitor or that solicitor withdraws from acting, and the appropriate pre-trial hearing has either been held or dispensed with on the basis that the accused is represented, the solicitor will be required to notify the court. The court will then have power to appoint a replacement, if necessary after adjournment of up to 48 hours to allow the accused a chance to do so.

7. Provision is likely to be made in subordinate legislation under the Legal Aid (Scotland) Act 1986 for something similar to the duty solicitor scheme as a means of identifying solicitors willing and able to act for unrepresented accused in this situation. Such a solicitor could then instruct counsel in the normal way. No new powers in primary legislation are thought to be required.

8. Following the views expressed by the legal profession in the consultation exercise (see paragraphs 38 to 47 below), there will be no statutory code of conduct for court-appointed lawyers. The Law Society of Scotland and Faculty of Advocates will be invited to amend existing non-statutory codes as they think necessary. However, there will be basic provision concerning the role of a court-appointed solicitor. Such a solicitor should seek the instructions of the accused. If instructions are obtained which such a solicitor is able to follow (applying normal rules of professional conduct), then they ought to be followed. To the extent that such instructions are not obtainable, the duty of a court-appointed solicitor will simply be to act in the interests of the accused to the best of his or her ability given the material available.

9. Given that the purpose of appointing a solicitor to the accused is to ensure that he or she is represented throughout the trial, the accused will have no power to dismiss a court-appointed solicitor, or to require him or her to dismiss counsel. If the accused had the latter power, this might place the solicitor in a position where counsel was removed without any suitable alternative being readily available.

10. Otherwise, the Bill draws no distinction between a court-appointed solicitor and any other solicitor acting for an accused in a sexual offence case purely by virtue of the fact of court appointment.

11. The Bill provides that, where a solicitor is appointed by the court, there will be automatic entitlement to legal aid.

12. To reflect the fact that the accused will no longer be able to cross-examine the complainer, the standard bail conditions will be amended to put an accused who personally approaches the complainer with a view to taking a precognition or other statement in breach of his or her bail. The normal penalties for failure to submit to precognition before a sheriff will not apply where such precognition would be of the complainer by the accused personally in a sexual offence case, and the complainer will not be obliged to submit to any such precognition.

Scope

13. It is intended that the ban on personal cross-examination will extend to all cases under the new section 288C(2) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") (inserted by section 1 of the Bill). This duplicates the list in the current section 274(2) (see paragraph 15 below).

14. This is a reasonably comprehensive list. However, it might fail to cover some cases with a sexual element, e.g. "stalking", which might be charged as a breach of the peace. It is also difficult to predict in advance all types of charge which might have a sexual element. The Bill confers upon the Scottish Ministers power to vary the list as necessary to keep up with developments, such as changes in the common law definitions of offences. The Bill also contains provisions allowing the court to declare that the prohibition should apply in a

particular case not covered by the list, either on the application of the prosecution or of its own motion. This is to be done where the court is satisfied that there is a sufficiently significant sexual element to the alleged offence.

SEXUAL HISTORY AND CHARACTER EVIDENCE

Current law

15. This is contained in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, which read as follows:

> "**274 Restrictions on evidence relating to sexual offences**
>
> (1) In any trial of a person on any charge to which this section applies, subject to section 275 of this Act, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—
>
> (a) is not of good character in relation to sexual matters;
>
> (b) is a prostitute or an associate of prostitutes; or
>
> (c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge.
>
> (2) This section applies to a charge of committing or attempting to commit any of the following offences, that is to say—
>
> (a) rape;
>
> (b) sodomy;
>
> (c) clandestine injury to women;
>
> (d) assault with intent to rape;
>
> (e) indecent assault;
>
> (f) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);
>
> (g) an offence under section 106(1)(a) or 107 of the Mental Health (Scotland) Act 1984 (unlawful sexual intercourse with mentally handicapped female or with patient); or
>
> (h) an offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995—
>
> (i) sections 1 to 3 (incest and related offences);
>
> (ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);
>
> (iii) section 6 (indecent behaviour toward girl between 12 and 16);
>
> (iv) section 7(2) and (3) (procuring by threats etc);

(v) section 8 (abduction and unlawful detention);

(vi) section 13(5) (homosexual offences).

(3) In this section "complainer" means the person against whom the offence referred to in subsection (2) above is alleged to have been committed.

(4) This section does not apply to questioning, or evidence being adduced, by the Crown.

275 Exceptions to restrictions under section 274

(1) Notwithstanding section 274 of this Act, in any trial of an accused on any charge to which that section applies, where the court is satisfied on an application by the accused—

(a) that the questioning or evidence referred to in subsection (1) of that section is designed to explain or rebut evidence adduced, or to be adduced, otherwise than by or on behalf of the accused;

(b) that the questioning or evidence referred to in paragraph (c) of that subsection—

(i) is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming part of the subject matter of the charge; or

(ii) is relevant to the defence of incrimination; or

(c) that it would be contrary to the interests of justice to exclude the questioning or evidence referred to in that subsection,

the court shall allow the questioning or, as the case may be, admit the evidence.

(2) Where questioning or evidence is or has been allowed or admitted under this section, the court may at any time limit as it thinks fit the extent of the questioning or evidence.

(3) Any application under this section shall be made in the course of a trial but in the absence of the jury, the complainer, any person cited as a witness and the public."

16. Under the current law, applications are made orally and may be made at any time during the trial. They are disposed of after hearing argument. While the court (at least in jury trials) will require to give reasons for its decision which are entered in the record of proceedings, there is no guidance as to what these should contain.

Evaluation of the current law

17. The Executive believes that there are a number of deficiencies in these provisions. They are sufficiently elastic not to strongly discourage the use of this type of evidence. Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak

when compared with its prejudicial effect. This may include invasion of the complainer's privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer. The current provisions rely heavily on individual judges to achieve a proper focus on these matters, without providing clear guidance.

18. Other deficiencies which the Executive believes to exist in the current law are as follows—

- The present provisions contain no express requirement that evidence or questioning must be relevant before it is admitted. Although as a matter of law irrelevant evidence is not admissible, the existence of statutory tests of admissibility which do not include relevance has sometimes led to a focus on the statutory wording at the expense of relevance.

- Any potentially prejudicial effect caused by diverting a jury's attention from the issues it requires to determine in arriving at its verdict does not expressly require to be weighed. Where evidence falls within one of the excepted categories, the court is bound to admit it, regardless of this.

- There is no guidance on how the general "interests of justice" exception is to be interpreted.

- The complainer's privacy and dignity are not given any particular status.

- Applications to admit evidence or questioning do not require to be in writing and no guidance is given on the content of a decision on admissibility.

19. The Bill attempts to address these matters by substituting new sections for the current sections 274 and 275 of the 1995 Act.

Aims

20. The reforms contained in this Bill are designed to prevent the use of irrelevant evidence, and discourage the use of evidence of limited relevance where the primary purpose of such use is to undermine the credibility of the complainer, or divert attention from the issues a jury requires to determine. The intention is to provide a greater degree of focus, requiring the courts to take time to consider in detail whether and how evidence is truly relevant and the extent to which it may divert attention onto issues which are not relevant. A relatively broad degree of judicial discretion remains, but decisions ought clearly to address these matters and should also enable a prompt stop to be put to any evidence or questioning which exceeds the stated limits of admissibility. The Bill also attempts to ensure that both the complainer and the defence are clear at as early a stage as possible what the nature of the defence is, and what this may involve for the complainer.

Admissibility of evidence

21. The Bill renders inadmissible any evidence or questioning falling within any of paragraphs (a) to (d) of the new section 274(1). The intention is that (d) will cover use of medical evidence about the complainer which does not relate directly to the alleged sexual offence

22. However, the Bill also provides that such evidence or questioning may be admitted or allowed in the circumstances specified in the new section 275(1). The court is directed to consider, as part of the proper administration of justice test in section 275(1)(c), protection of the dignity and privacy of the complainer and the need to prevent a jury's attention becoming diverted from the issues which require to be determined in arriving at a verdict.

Applications to introduce evidence

23. The Bill will require applications to introduce evidence which is subject to the general prohibition to be made in writing. Applications will normally need to be made and dealt with before the jury takes the oath (if applicable) or the first witness is sworn, unless cause can be shown for lateness. Such applications will require to specify the items of evidence sought to be introduced, or the line of questioning to be pursued, together with the issues to which the evidence or questioning is said to be relevant, how it is relevant and what the proposed use of the evidence will be. The court will be able to determine issues of admissibility using any method open to it at common law. This includes "trial within a trial", which involves hearing the evidence (or allowing the proposed questioning to take place) in the absence of any jury. The sheriff or judge then rules on the application. If there has been a "trial within a trial" then, where there is a jury, any permitted evidence or questioning will require to be repeated in their presence.

24. The Consultation Document issued prior to publication of the Bill (see paragraphs 38-47 below) suggested inclusion of statutory provision for "trial within a trial". However, on reflection the Executive feels this is not required, as it is a method which a judge could use at common law if it was thought appropriate in any particular case. Distress might well be caused to complainers by having to give evidence twice. It is also possible that the first occasion, outwith the presence of the jury, might be used by the defence as an opportunity to test the complainer's reactions to questioning in the hope of later exploiting any vulnerability revealed, or to ask purely "fishing" questions. For these reasons, the Executive does not wish to encourage unnecessary use of the procedure.

25. In issuing its decision, the court will require to state what items of evidence or lines of questioning (if any) are being allowed, why they are considered to be admissible, the issues to which they are expected to be relevant, any issues to which they are thought not to be relevant and any uses which ought not to be made of them together with any general directions the court thinks appropriate, e.g. to protect the complainer from further questioning straying beyond the boundaries.

Scope of the provisions on evidence of character and sexual history

26. This is to be identical to that for the cross-examination provisions.

Ancillary matters

27. The restrictions on introduction of sexual history and character evidence will equally extend to the Crown, which will have to apply in the same way as the defence to bring in such material.

28. Consent and belief in consent will become defences of which the accused requires to give prior notice, in much the same way as certain other defences known as special defences i.e. insanity, alibi, self -defence and incrimination, which currently require to be intimated in advance of the trial.

ALTERNATIVE APPROACHES

Prohibition of cross-examination

29. The Executive considered use of screens or CCTV as an alternative to the ban on self-representation. However, cross-examination by these methods would still involve questioning controlled by the accused, concerning highly personal and potentially degrading matters. While they would create a physical barrier or some physical distance between accused and complainer, these methods would not tackle the basic issue of personal confrontation between the two of them. The Executive considers that the complainer should be able to give evidence in the normal way, without the avoidable fear or discomfort arising from such confrontation.

30. There was also a suggested procedure whereby the court would appoint a lawyer (an "amicus curiae") to represent the complainer during cross-examination by an unrepresented accused. This might lead to more vigorous and earlier objection to any questioning or evidence of doubtful relevance. It would still not address the question of whether the complainer should be personally cross-examined by the accused at all. The Executive takes the view that he or she should not, for the reasons outlined above.

31. Consideration was given to requiring the accused to be represented for the cross-examination of the complainer only, as this would be less restrictive of his or her rights. It is also the solution which has been adopted in England and Wales. However, it was felt that there were peculiarities of Scottish criminal procedure which made this a difficult option in practice. Disclosure of statements and evidence prior to trial is much more far-reaching in England and Wales than in Scotland, where there is great reliance on oral advocacy. There would be a real danger that a court-appointed lawyer who was drafted in for the cross-examination alone would not have an adequate picture of the case as a whole. Also, this solution would mark the complainer off from other witnesses, which might heighten his or her

self-consciousness and give him or her special status in the eyes of the jury, which would not be beneficial to the accused. The trial might well not look normal to a jury, which might be surprised by the changes in representation. The lawyer might be prevented from representing the accused effectively because of failure on the part of the accused to question witnesses appropriately, either before or after the cross-examination of the complainer.

32. The Executive also gave some thought to allowing the judge to ban personal cross-examination in any individual case, rather than doing so across the board. This might be thought to be better directed at accused persons who might abuse the right to cross-examine. However, suspicion of this would be unlikely to arise in advance, before the accused had begun at least some questioning. To that extent, the complainer would not be fully protected. An adjournment at that stage would cause delay. Furthermore, this method would not deal with the feelings of a complainer about being personally questioned by the accused at all, whether or not his or her way of doing so was unreasonable.

33. Finally, the possibility of requiring questions to be put via the judge was canvassed. However, it was felt that this would threaten judicial impartiality.

34. On the procedural issues, the Executive is not aware of any concrete alternative proposals for achieving the desired policy.

Sexual history and character evidence

35. Consideration was given to following the approach taken in England and Wales by, the Youth Justice and Criminal Evidence Act 1999. This describes more narrowly which categories of evidence are and are not admissible. For example, there is a provision stating that sexual history evidence is not admissible to show consent at all unless the relevant behaviour took place at or about the same time as the events forming the subject matter of the charge, or unless it is so similar to sexual behaviour of the complainer forming part of the events charged or occurring at about the same time that the similarity is more than coincidental. There is also an exception for testimony explaining or rebutting prosecution evidence. However, there were concerns that it may be too hard to predict in advance what type of evidence may be relevant to an individual case. These fears have been borne out by a recent decision of the House of Lords (Regina v A [2001] UKHL 25) which held that the "similar behaviour" exception needed to be interpreted in a way which did not reflect its literal meaning, greatly expanding its scope, to ensure compatibility with the Human Rights Act. The "weighing exercise" incorporated in this Bill was seen to provide a valuable safeguard in this respect, and to combine judicial discretion with a greater degree of focus than at present. The approach in the Bill is more akin to that of the Canadian Criminal Code, which was referred to without disapproval in the House of Lords decision.

36. Restricting the Bill's provisions to evidence of *sexual* history or *sexual* character only was a possibility. However, concern was expressed that many subtle character attacks on a complainer, which might have sexual connotations, were not overtly sexual. The Executive

believes there is a need to protect complainers from such attacks where their relevance to the issues cannot be clearly demonstrated.

37. Consideration was given to retaining the Crown exemption, on the basis that prosecutors could be relied upon not to use specious evidence which may not have strong relevance and might distress a complainer. However, large numbers of those who took part in our consultation exercise wished to see greater Crown accountability achieved by abolition of the exemption. Applying the same rules to both prosecution and defence creates greater "equality of arms" and is likely to look fairer to an outside observer. The Executive does not anticipate that the Crown will in fact want or need to make applications in very many cases in practice, so treating prosecutors in the same way as the defence should not impose too heavy a burden. Ultimately, the Executive believes that what is a decision about admissibility of evidence should be made by the court regardless of which party wishes to lead the evidence. It should not be for a party to decide what evidence is admissible.

38. A significant number of consultees either did not support the Executive's general policy, or felt there was no problem with the existing law. This did not amount to alternative proposals for implementing the policy.

CONSULTATION

39. A Consultation Document, *Redressing the Balance*, was issued on 9 November 2000. The consultation period closed on 31 January 2001. Sixty-seven responses were received. The last of these arrived on 9 March 2001. Responses received after the closing date were still given full consideration.

40. Participants in the consultation exercise included women's groups; rape crisis groups; victim support groups; local authorities; organisations representing lawyers; members of the judiciary; legal academics; miscellaneous groups (including e.g. a trade union, organisations representing police officers and the Church of Scotland Guild); individuals with a professional interest in the issues and members of the public.

Cross-examination

41. The Consultation Document canvassed the following options—

- Option 1: Removing the accused's right to cross-examine the complainer personally, while preserving his or her right to represent him or herself for the rest of the trial.

- Option 2: Giving the judge discretion to require the accused to be represented.

- Option 3: Requiring the accused to be represented throughout the trial.

- Option 4: Requiring questions to be put via the trial judge where the accused was unrepresented.

42. Alternative suggestions involving screens, CCTV and the appointment of an amicus curiae were made by various consultees.

43. Option 3 attracted the support of half of those who responded, and gained substantially more backing than any of the other alternatives. It is reflected in the Bill.

44. *Redressing the Balance* also asked for views on the extent of the ban on cross-examination. The Document proposed that the list of sexual offences currently contained in section 274 of the Criminal Procedure (Scotland) Act 1995 could act as an acceptable starting point. The vast majority of consultees agreed with this view. Section 274 contains a fairly comprehensive list of sexual offences. Various suggestions were made for expanding the list. Some of these (such as any case involving a child witness, domestic violence, "hate crimes" and cases where there was a "power relationship" between accused and witness) seemed to fall more naturally within the forthcoming review of the law relating to vulnerable witnesses. However, the Executive has accepted that there should be "sweeping up" provision ensuring that any offence with a substantial sexual element can be covered, should the court so order.

45. The Bill's procedural mechanisms for ensuring that the accused is represented were largely included as policy proposals in the Consultation Document. These attracted little comment.

46. The Document floated the idea of a statutory code of conduct for court-appointed lawyers. The majority of respondents from the legal profession felt this was unnecessary. Any new rules needed could be formulated by the profession on a self-regulatory basis. Consultees were also asked for their opinion on the approach taken in England and Wales by the Youth Justice and Criminal Evidence Act, whereby a court-appointed solicitor has no duty at all towards the accused. Again, most respondents from the legal profession felt this was excessive and unnecessary.

47. The proposed alteration of the bail conditions attracted few comments, although some respondents did feel that the change might simply "put ideas into the heads of" certain accused persons.

Sexual history and character evidence

48. *Redressing the Balance* invited views on a "weighing" approach to admissibility of evidence, along the lines of the Canadian Criminal Code and very broadly reflecting what is now contained in the Bill. This was supported by a majority of consultees. The Bill's approach to character evidence which is not explicitly sexual is based on the Consultation Document. Again, a majority of consultees backed this. The proposals on written applications and fully reasoned decisions attracted little controversy. The "trial within a trial"

and abolition of the Crown exemption did divide respondents, but a substantial majority were in favour of abolition of the Crown exemption. Concerns about "trial within a trial" have been responded to by making no express references to it in the Bill, although the judiciary will retain a discretion to use any competent method of deciding on admissibility. There was substantial support for requiring prior notice to be given of consent or belief in consent as a defence.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

49. Men as well as women can be and are victims of sexual offences, women as well as men can be perpetrators of such offences and children of both sexes may be abused. Nonetheless most trials for sexual offences involve a female complainer and a male accused. Therefore, the provisions contained in this Bill will in practice benefit women more than men. In so far as the Bill restricts the rights of some accused persons, it will affect men to a greater extent than women, since the majority of accused are male. However, this is believed to be entirely legitimate and the provisions themselves do not specifically single out any particular group. The Executive believes that the effect of sexual offences can be exacerbated when victims are afraid to report crimes against them because of the trauma involved in a courtroom ordeal. The overriding objective of the Bill is to minimise this by ensuring that the complainer need not fear questioning from the accused personally and that the complainer's private life will not be explored to a greater extent than is strictly necessary. It is hoped that this will provide reassurance to victims and thus encourage the reporting of crimes against them, leading to greater deterrence.

Human rights

50. The Bill removes the right of the accused to conduct his or her defence personally in sexual offence cases and places some restrictions on the extent to which he or she can lead certain types of evidence in those cases. The Executive does not consider that these changes infringe the accused's right to a fair trial. The underlying purpose of the new provisions is to give greater protection to the right of witnesses to respect for their private and family lives. The Bill seeks to achieve a reasonable balance between the rights of the accused and the rights of witnesses.

Other matters

51. The Executive considers that the Bill has no disproportionate effect on island communities as compared with other communities.

52. There should be no impact on local government, other than perhaps a very minor increase in expenditure to cover extra hearings in the District Courts. However, statistical

evidence suggests that there are only a very small number of prosecutions for sexual offences in these courts. There should be no impact on sustainable development.

53. There are no other matters which Ministers believe require inclusion.

This memorandum relates to the Sexual Offences (Procedure and Evidence) (Scotland) Bill (SP Bill 31) as introduced in the Scottish Parliament on 28 June 2001

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