Criminal Justice Committee

5th Meeting, 2024 (Session 6), Wednesday 31 January 2024

Victims, Witnesses, and Justice Reform (Scotland) Bill

Note by the clerk

Background

1. The Committee is taking evidence on the Victims, Witnesses, and Justice Reform (Scotland) Bill at Stage 1 of the Parliament's legislative process.

2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. The Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.

3. In general, the Committee is adopting a phased approach to its consideration of the Bill, to divide the Bill into more manageable segments for the purposes of Stage 1.

Today's evidence on the Bill

4. At today's meeting, the Committee will take evidence from three panels of witnesses.

5. The first panel will focus on Parts 1 to 4 of the Bill. The second and third panels will focus mainly on Parts 5 and 6 of the Bill.

Parts 1 to 4 of the Bill

Panel 1

- **The Right Honourable Dorothy Bain KC**, Lord Advocate

  The Lord Advocate is attending in relation to Parts 1-4 of the Bill

6. The following submission has been provided to the Committee for Panel 1 and is reproduced at the Annex—

    - Crown Office and Procurator Fiscal Service (covering Parts 1-4 of the Bill)

Part 1

Establishment of a Victims and Witnesses Commissioner for Scotland

Establishes an independent Commissioner for Scotland who is independent from the Scottish Government, and accountable to the Scottish Parliament.

Commissioner's functions and powers:

- Promote and support the rights and interests of victims and witnesses
- Must take steps to raise awareness and promote the interests of victims and witnesses
- Must monitoring compliance with the Standards of Service and the Victims' Code for Scotland
- Must promote best practice and a trauma-informed approach by criminal justice agencies and those who provide support services to victims
- Investigate whether criminal justice agencies have had regard to the interests of victims and witnesses in carrying out their functions, but not intervene in individual cases

Part 2

Trauma-informed practice

Creates a new legal requirement for criminal justice agencies to have regard to trauma-informed practice. The Victims and Witnesses (Scotland) Act 2014 already sets out range of general principles to which criminal justice agencies must have regard to. Part 2 adds trauma-informed approach to that list in the 2014 Act.

- Creates a requirement for justice agencies to have regard to trauma-informed practice, and for Standards of Service they produce to cover trauma-informed practice
- Empowers the courts to set rules and procedures on trauma-informed practice in relation to both criminal and civil business.
- A requirement for the judiciary to take trauma-informed practice into account when scheduling both criminal and civil court business.

Part 3

Special measures in civil cases

Special measures are practical steps a court can take to help vulnerable litigants and witnesses to be in a courtroom setting with as little fear and distress as possible.

Currently under the law, no adult in a civil case is automatically treated as vulnerable or entitled to special measures. Special measures are also only available where evidence is being taken and witnesses are being cross-examined on it.

Part 3 of the Bill broadly split into the following areas:

- It would extend a new approach to special measures found in the Children (Scotland) Act 2020 for certain family cases to civil cases more generally.
- It would treat certain categories of witness as automatically vulnerable and would also allow special measures to help litigants in hearings where evidence is not being taken.
- It would allow a court to prohibit a litigant from personally conducting their own case and cross-examining witnesses in civil cases.

Part 4

Criminal juries and verdicts

Contains measures reforming criminal trials.

- Removes 'Not Proven' as a verdict in all criminal trials, leaving verdicts of 'Guilty' and 'Not Guilty'.
- Changes the size of a jury in a criminal trial from 15 to 12 members.
- Changes the majority of jurors required for conviction from being a simple majority (where there is a full complement of jurors) to a two-thirds majority.

Parts 5 to 6 of the Bill

Panel 2

- **The Right Honourable Lord Matthews,** Senator of the College of Justice
- **Sheriff Andrew Cubie,** Sheriff of Glasgow & Strathkelvin, Appeal Sheriff and Temporary High Court Judge

Lord Matthews and Sheriff Cubie are attending principally in relation to Parts 5 and 6 of the Bill.

Panel 3

- **Dr Andrew Tickell**, Lecturer in Law, Department of Economics and Law, Glasgow Caledonian University
- **Seonaid Stevenson-McCabe**, Lecturer in Law, Department of Economics and Law, Glasgow Caledonian University.

Dr Tickell and Ms Stevenson-McCabe are attending in relation to the provisions in Part 6 of the Bill on anonymity for complainers.

Part 5

Sexual Offences Court

Establishes a new specialist court to deal with serious sexual offences

Establishes a Sexual Offences Court with the power to deal with serious sexual offence cases, including non-sexual offences forming part of such cases

Provides that judges for the new court would be drawn from existing High Court judges and sheriffs with relevant skills, experience and training.

Sets out a range of training requirements and procedures (e.g. on the use of pre-recorded evidence) aimed at embedding a trauma-informed approach.

Part 6

Sexual Offences Cases: further reform

Introduced new provisions, as well as amending existing legislation, to make further reform to sexual offence cases

Provides automatic life-long protection for the anonymity of victims of sexual offences.

Gives complainers in sexual offence cases a right to independent legal representation when an application is made to introduce evidence about the complainer's sexual history or character

Gives power to the Scottish Ministers to establish, by secondary legislation, a pilot scheme for rape trials without a jury.

7. The following submissions have been provided to the Committee for Panels 2 and 3 and are reproduced at the Annex—

- The Senators of the College of Justice
- Sheriffs & Summary Sheriffs' Association
- Sheriffs Principal
- Dr Andrew Tickell and Seonaid Stevenson-McCabe

Further reading

8. A SPICe briefing on the Bill can be found online.

9. The responses to the Committee's call for views on the Bill can be found online.

10. A SPICe analysis of the call for views, covering Parts 5 and 6, was circulated with the committee papers for the meeting on 10 January.

Previous evidence sessions

11. At previous meetings the Committee has taken evidence from a range of witnesses on the Bill.

12. The Official Reports of these meetings can be found online.

Clerks to the Committee
January 2024

ANNEX

Parts 1 to 4 of the Bill

Extract from Submission from Crown Office and Procurator Service

Part 1 – Victims and Witness Commissioner for Scotland

4. COPFS notes the provisions surrounding the creation of a Victims and Witnesses Commissioner and recognise the importance of a single body who can promote and support the rights and interests of victims and witnesses in relation to both criminal justice agencies and third sector organisations providing victim support services.

5. COPFS have concerns over the proposed provisions set out in sections 16 and 17 of the Bill and the proposed statutory powers of the Commissioner in relation to the content of the annual report and the power to require a reasoned response from the Lord Advocate to matters within an annual report and the resultant statutory duty on the Lord Advocate to provide such a response.

6. The provisions to provide the Commissioner with powers to issue recommendations to the Lord Advocate may unintentionally impact on the Lord Advocate's retained functions as head of the systems of criminal prosecution and investigation of deaths in Scotland, including functions in relation to the training of prosecutors, the content of the standards of service that are set by the Lord Advocate and prosecution policy.

7. COPFS understand that the intention of the Bill is not to legislate for the provision of statutory powers or duties that interfere with the independence of the Lord Advocate as that would be contrary to Section 48(5) of the Scotland Act 1998. The Policy Memorandum for the Bill recognises in Part 5 in relation to the training required to appear in the proposed specialist sexual offence court that:

> "The Bill does not make any provision regarding rights of audience for prosecutors as their appointment is a decision for the Lord Advocate, acting independently of any other person, as provided for under section 48(5) of the Scotland Act 1998"[1] and that "restrictions on the Scottish Parliament's ability to pass legislation which impacts on the Lord Advocate's discretion to appoint individuals to prosecute cases means the Bill cannot require that prosecutors must also have completed trauma informed training before appearing in the court."[2]

8. This position is reflected in the distinction drawn between sections 47 and 48 of the Bill in relation to the statutory requirement of training to acquire rights of audience for solicitors and advocates and section 49 of the Bill which does not impose a similar requirement on prosecutors.

9. COPFS are concerned that the provisions as currently drafted may be misinterpreted as providing the Commissioner with a statutory power to issue recommendations to the

[1] Policy Memorandum paragraph 321
[2] Policy Memorandum para 323

Lord Advocate in relation to the matters within their annual report and as well as the areas identified at section 16 (3) of the Bill.

10. Additionally, the provisions in Section 17 of the Bill requiring a person identified in the annual report of the Commissioner to provide a response to the matters when directed to do so by the Commissioner may also be wrongly interpreted as placing a statutory duty on the Lord Advocate to respond to any recommendations made by the Commissioner and to have to explain and justify prosecution policy and decision making to the Commissioner when required by the Commissioner to do so and which could arguably make the Lord Advocate answerable to and directable by the Commissioner.

11. To avoid any potential misunderstanding that the provisions provide the Commissioner with statutory powers in areas that are protected by the Lord Advocate's independence as head of the systems of criminal prosecution and investigation of deaths in Scotland COPFS submit that it is necessary and appropriate for the Bill to be amended to confirm explicitly that the powers of the Commissioner within section 16 and 17 do not apply in relation to the Lord Advocate.

Part 2 – Trauma Informed Practice

12. COPFS note the observations in Lady Dorrian's review that "The adoption of trauma-informed practices is a central way in which the experience of complainers can be improved." Consequently, COPFS recognise that it is essential that prosecutors and staff who perform different roles within the Crown Office and Procurator Fiscal Service, such as those who work in the Victims Information and Advice service (known as VIA), understand the impact of trauma, recognise the needs of victims and the risk of re-traumatisation, and identify ways in which we can minimise that risk, wherever possible, when carrying out our professional responsibilities.

13. Prosecutors recognise that in order to properly respond to the impact of trauma and to enable complainers affected by trauma to participate in the criminal justice process effectively and give their best quality evidence it is essential that there is effective engagement with them. Effective engagement includes providing an opportunity to meet with prosecutors and COPFS staff before they attend to give evidence, and to ask questions about the criminal justice system and learn more about how special measures operate in practice. This is required to provide complainers with an effective choice in the selection of the special measures that would help them to give evidence.

14. In cognisance of the importance of a trauma aware justice system COPFS already incorporates aspects of trauma-informed practice into our processes and practices in areas such as, the Summary Case Management Pilot, our Victim Strategies in solemn cases and the work of our VIA service with vulnerable witnesses. Our experienced prosecutors and support staff manage and prosecute serious and sensitive cases every day in courts across Scotland. COPFS, through the experience of these highly experienced and specialist prosecutors and staff, is aware that in order to engage effectively with complainers, support and guide them through the prosecution process and achieve the aim of giving best evidence requires comprehensive support in advance of trial and significant support at the time of giving evidence.

15. In advance of decisions being made as to how a witness should provide evidence there should be sufficient time for a court visit and meaningful discussions between the witness and prosecutor about special measures. We understand the processes and practices that could be utilised in the investigation and prosecution of offending and the investigation of deaths to reflect trauma informed practices and the current restrictions that our resources place on our ability to support complainers and witnesses in the way that they should be.

16. The Lord Advocate has committed to implementing the recently published "Trauma Informed Justice: A Knowledge and Skills Framework for Working with Victims and Witnesses" and to ensuring that Scotland has an effective and functioning justice system based on fairness and respect for human rights, which is compassionate, and trauma informed.

17. It is important, though, to acknowledge the context of the adversarial justice system in Scotland and that prosecutors act in the public interest and do not represent individual complainers or witnesses. This means that although prosecutors will take account of a range of factors, including a complainer's views when reaching a decision in a case, their views will not necessarily determine the decision that prosecutors take.

18. Additionally, it has to be recognised that the rules of evidence and procedure of the Scottish legal system, which properly and correctly enshrine the right of an accused person to a fair trial, place the responsibility for proving criminal charges beyond a reasonable doubt on the prosecutor. Proving a case requires the prosecutor to lead evidence from witnesses, and an accused person is entitled to cross-examine those witnesses, during the trial. Inevitably, that will involve asking the witness to recall and speak about events, which may have been very traumatic for them. There are further challenges in ensuring that a complainer feels able to remain engaged in the system are exacerbated, when there is delay in reaching a conclusion in a case or uncertainly as to when a case will call for trial, such as exists in a system of floating trials.

19. These challenges do not prohibit the criminal justice sector recognising the impact of trauma on individuals and seeking to operate in a manner that seeks to avoid traumatisation.

20. In order for these further changes to be delivered effectively, however, there will be considerable resource and practical challenges associated with the implementation of trauma informed practices. Consequently, the ability to ensure a properly trauma informed justice response will require investment and resources. The resource required by COPFS would exceed current resource provision.

Part 4 - Abolition of Not Proven and Change to Jury Size

21. COPFS operates within the structure of the criminal justice system that is created and determined by the legislature and any decisions as to changes to the size and majority requirements of a jury, and the verdicts that are available to the jury, are matters for the Scottish Parliament and are not matters on which COPFS intends to provide submissions.

22. COPFS consider it appropriate, however, to provide information to the Committee on the potential consequences of the proposed changes, and linked ancillary provisions, for the operation of the criminal justice system.

23. Within the Policy Memorandum of the Bill, it is suggested that key research supports a view that jurors may be more likely to convict in a two-verdict system. Consequently, a number of the provisions in Part 4 of the Bill are predicated on the assumption that the removal of the not proven verdict would increase the number of convictions returned by juries.

24. It is submitted that closer analysis of studies referenced in support of this position demonstrates that the studies do not evidence an increase in convictions by juries where there are two verdicts available as opposed to three.

25. The Scottish jury research undertaken in 2019 observes in its report that "**juries asked to choose between three verdicts were no more or less likely to return a guilty verdict than those with two verdicts available**." Further, in the study where juries had only 2 verdicts available to them, they returned conviction in 3 out of 32 "trials". Where juries had 3 verdicts available to them, they returned convictions in 4 out of 32 "trials".

26. The second research referenced in the policy memorandum was the study "**A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making**." In this study 142 individuals were split into 28 "juries" of between 4 – 8 individuals. 14 juries were provided with the option of returning 2 verdicts and 14 were provided with the option of 3 verdicts.

27. The study indicated that 79% of the "juries" returned a not guilty verdict where 2 verdicts were available whilst only 71% of "juries" returned an acquittal verdict where 3 verdicts were available. This demonstrates that there was a 21% conviction rate in the study where 2 verdicts were available to the jury and a 29% conviction rate where there were 3 verdicts open to the jury.

28. Finally, the third study referred to in the policy memorandum "**Proven and not proven: A potential alternative to the current Scottish verdict system**." Divided participants into 3 groups and each group was given the option of returning a verdict if (i) "Guilty", "Not Guilty" or "Not Proven"; (ii) "Guilty" or "Not Guilty"; or (iii) "Proven" or "Not Proven".

29. The study indicates that that there was a 28% conviction rate where there were 3 verdicts available compared to a 46% conviction rate where there were two verdicts of "Guilty or "Not Guilty". However, where there were 2 verdicts of "Proven" or "Not Proven" the conviction rate was 20%. Additionally, this study was conducted online with "jurors" participating individually with no interaction between individuals and so was an analysis of individual juror's verdicts and not the collective verdict of a jury of 15 persons following discussion. The study recognises that the limitations of how the study was conducted decreases the generalisability of the results.

30. It is also submitted that caution should be exercised in extrapolating the results of the mock jury research to real juries. The Scottish Jury research report recognises that the study saw a not proven acquittal rate of 92% in the juries that were part of the study

whilst in actual jury trials in the year 2017-2018 the acquittal rate by not proven was only 17%. Similarly, the not proven acquittal rates in the other two studies were between 42% - 64%. This discrepancy in the accuracy of the research in relation to not proven acquittal rates should be recognised when assessing their value in application.

31. The experience of prosecutors suggest that it is unclear why the removal of the “not proven” verdict would result in an increase in the number of jurors voting to convict an accused person. For a juror to return a verdict of “not proven”, it is assessed that the juror is likely to have determined that the Crown did not prove the charge “beyond reasonable doubt”.

32. The Judicial Institute for Scotland publishes the Scottish Jury Manual which provides guidance for the justiciary on the conduct of jury trials and suggested directions for jurors. At page 116.1/118 in relation to directions on verdicts the Manual indicates that an appropriate direction to jurors is that “if you’re satisfied beyond reasonable doubt that he’s guilty, **your duty is to convict him**.” (emphasis added). It is not clear, therefore, why a juror, who did not find that the Crown had proved a charge beyond reasonable doubt and who would otherwise have returned a verdict of “not proven”, would, on the basis of the same evidence, return a verdict of guilty in the absence of the not proven verdict.

33. Every juror will consider the evidence in a unique way that is personal to them as they fulfil their role, assess the evidence and determine whether the standard of proof has been met. It is unclear why a juror properly discharging their oath and properly directed would return a guilty verdict when provided with only 2 verdicts, when they would have acquitted where three verdicts were available.

34. In addition to the proposals to remove the not proven verdict the provisions in the Bill seek to reduce the size of a jury from 15 to 12 members to facilitate the effective participation of jurors and maximises the opportunity for meaningful and robust deliberations. It is also intended to reduce the impact of jury service on society by requiring fewer people to miss work or other commitments due to serving on a jury.

35. The provisions also increase the majority required for a conviction to a two thirds majority as opposed to a simple majority. This is to “**safeguard the delivery of justice through maintaining fairness and the balance of safeguards in the system” and will “help maintain confidence in the jury system and the decisions being made and bring Scotland closer to other jurisdictions with common law traditions…”**[1]

36. At present a majority of 8 is required for a conviction. Where the jury comprises 15 members, this equates to 53% of the jury voting in favour of a guilty verdict before the accused is found guilty. If the jury size was to be reduced to 14 members, 57% of the jury would require to find the accused guilty and this would rise to 62%, where the jury was reduced to 13 members.

37. The current proposals are that the two-thirds majority required to return a guilty verdict in a case would be 8 out of a jury of 12. This is the equivalent of 67% of the members of the jury.

38. Where jurors have been excused, the majority required for a guilty verdict remains at 8 for a 11-person jury (73%) and decreases to 7 for a jury of 10 or 9 persons (70% or 78% respectively).

39. Where the jury does not reach the required majority to return a guilty verdict a not guilty verdict will be recorded, and the accused will be acquitted. This is different to the common law systems, such as England and Wales, where there is potential for a retrial in such circumstances.

40. It is observed that, when considered alongside the position that jurors who would previously have acquitted the accused through a finding of “not proven” are unlikely to change their verdict to one of guilty if the not proven verdict is removed, the requirement to prove the case beyond a reasonable doubt so as to satisfy a higher proportion of the jury that they would be entitled to find the accused guilty, will place an increased burden on the Crown in prosecuting in the public interest.

41. While it is not possible to predict the outcome in any trial, the proposed changes to the jury system may result in an increase in the number of acquittals in cases which would previously have resulted in conviction. This will impact on complainers, the public interest and the proper operation of the criminal justice system.

42. Furthermore, unlike other common law jurisdictions which operate a system of juries of 12 jurors, with 2 verdicts open to them, such as in England and Wales, the provisions do not allow for an application by the Crown for authority to raise a further prosecution where the majority of jurors have returned a guilty verdict but the required majority of 8 has not been reached in juries of 12 or 11 jurors, or the majority of 7 in juries of 10 or 9 jurors (which would be a verdict of 7-5, 7-4, 6-4 or 6-3 respectively).

43. This creates a scenario where, should a jury of 12 reach a verdict where seven jurors return a guilty verdict and 5 jurors return a not guilty verdict, the accused would be acquitted notwithstanding that 58% of the jury had returned a guilty verdict, which as identified above, is a greater majority than currently required for a conviction.

44. In such a scenario it is suggested that there is merit in the court having the authority to consider and grant a Crown application for a retrial. This could be structured so that a court, following the returning of a verdict where the majority of a jury returned a verdict of guilty but where the statutory majority was not reached, would consider if it was in the interests of justice not to acquit the accused of the charge but grant an application of the Crown to permit the accused to be retried.

45. It is noted that one of the arguments against the creation of a provision for retrial is that it risks additional trauma for the complainer in having to give evidence more than once. However, this should be balanced against the trauma experienced by a complainer following an acquittal, particularly where the majority of the jury would have found the accused guilty. Further, it is submitted that the proposed increased use of pre-recorded evidence may remove or reduce the requirement for a complainer to have to give evidence at a second trial.

Parts 5 to 6 of the Bill

Extract from Submission from Supreme Courts of Scotland - Senators of the College of Justice

Executive Summary

The Victims, Witnesses and Justice Reform (Scotland) Bill contains proposals for significant reform of the criminal justice system in Scotland. A number of the proposed changes focus on the experience of victims and witnesses in the criminal justice system. However there are also provisions which are more wide ranging.

A number of the provisions have been considered by the judiciary in the previous consultation responses:

- Scottish Government Consultation Paper – *Improving victims' experiences of the justice system*.

- The Scottish Government Consultation Paper: The Not Proven Verdict and Related Reforms

These responses are linked below and referred to for their terms.

In general, the judiciary welcomes the reforms which aim to make giving evidence a less traumatic experience for witnesses. Likewise there is support for incorporating in legislation provisions relating to anonymity of victims.

The majority of senators are also in favour of abolishing the not proven verdict and moving to a two verdict system. However they do not agree with the suggestion that the jury size should be reduced from 15 to 12.

Whilst the benefits of a sexual offences court and independent legal representation for complainers are recognised, there are concerns regarding some of the operational aspects of these reforms. In particular, the senators do not agree that a sexual offences court should have jurisdiction to try cases of murder or have a power to impose an Order for Lifelong Restriction.

As noted in the response submitted for the Consultation Paper- Improving victim's experiences of the justice system senators are divided in their views relating to powers for the Scottish Ministers to develop a pilot scheme for judge only sexual offence trials. As such two sets of answers are provided.

Preamble

Many of the questions in this consultation have already been considered by us in our responses to the consultations on *The Not Proven Verdict and Related Reforms* and *Improving Victims' Experiences of the Justice System*. Rather than repeat what we said then we attach the relevant parts as hyperlinks in the Appendices.

2. What are your views on Part 2 of the Bill which deals with trauma informed practice in criminal and civil courts?

We welcome the proposals in clause 24 which are consistent with, and an appropriate development of, existing common law principles and the provisions of the 2014 Act on how witnesses ought to be treated.

We consider that, by specifically empowering the making of provisions by Act of Adjournal, clause 25 is a flexible and effective way of developing rules for ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice.

We consider that by specifically empowering the making of provisions by Act of Sederunt, clause 26 is a flexible and effective way of developing rules for ensuring that civil proceedings are conducted in a way that accords with trauma-informed practice.

On one view, clause 27 does no harm because it requires no more than that regard is had by the Lord President to the desirability of complying with trauma-informed practice in making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts. On the other hand it may risk misleading witnesses as to what is achievable in practice because it is never possible to guarantee with certainty that a trial in the High Court will start on a fixed date no matter how much effort and resource is put into ensuring that it does. Efforts directed to ensuring that particular trials start on a fixed date may have a significantly adverse impact on the efficient disposal of business generally which of itself will have adverse implications for achieving trauma-informed practice in other cases by increasing delay and uncertainty. These considerations appear to be recognised in the Policy Memorandum.

Other than clause 28(3) which relates to the exercise of powers by the Lord President, the sheriffs principal may be better placed to respond. Our impression generally is that our observations on clause 27 could also be made concerning clauses 28 and 29. It seems particularly doubtful what real utility the provision could have concerning the Sheriff Appeal Court where the attendance of witnesses will be extremely rare.

4. What are your views on the proposal in Part 4 of the Bill to abolish the not proven verdict and move to either a guilty or not guilty verdict?

We refer to our previous response to the Scottish Government Consultation Paper: The Not Proven Verdict and Related Reforms, the relevant parts of which are appended hereto. We indicated then that a majority of Senators were in favour of the proposal, for the reasons set out in our response. That remains the position.

5. What are your views on the changes in Part 4 of the Bill to the size of criminal juries and the majority required for conviction?

We note that the Bill as introduced seeks to reduce the size of the jury from 15 to 12 jurors with consequential amendments to the minimum number of jurors after discharge to constitute a jury to 9. There are consequential amendments to the majority required for a guilty verdict, namely 8 in the case of a jury consisting of 11 or 12 jurors and 7 in the case of a jury consisting of 9 or 10 jurors.

We refer to our previous response to the Scottish Government Consultation Paper: *The Not Proven Verdict and Related Reforms*, the relevant parts of which are attached as an appendix. For the reasons set out therein, and which are amplified here, we do not agree with the proposals in the Bill.

One of the benefits of a jury comprising 15 persons is that a vote does not carry too great a weight. Decreasing the jury size to 12 will increase the weight of a vote and this may increase if the jury has to reduce in size due to illness. Scotland's system differs from the system in England where a jury is permitted to fail to reach a verdict. In that event the jury will be discharged and a new trial could be ordered on application. In Scotland a jury must reach a verdict. If the jury fails to reach a guilty verdict then the accused will be acquitted. Any jury comprising a cross section of the public chosen at random could have jurors who ignore the evidence and take an unreasonable position, whatever that may be. A jury of 15 persons is much better positioned to deal with such a situation and ensure that the weight of that juror's vote is not disproportionate to the overall view of the jury. The evidential basis for the change is not robust and does not appear to be based on principle. Leaving the jury at 15, with a requirement for a conviction of at least 10 in favour of such a verdict, as we suggested in our earlier response, would allow the jury number to go to 12, as is already the law. It would avoid the need for what look like artificial and random provisions, namely those set out in the proposed section 99A(4) of the 1995 Act, following on from the proposed new section 90.

We presume that an increase in the majority required for a conviction is intended to counterbalance the abolition of the not proven verdict. If that is the rationale, then the balancing exercise may be based on a false premise. Given the standard direction that a jury can only convict where the Crown has proved its case beyond reasonable doubt, and where there is the requisite majority for guilty, votes for not proven would not logically transfer in whole or in part to guilty.

6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?

We have already submitted a response to the consultation paper *Improving Victim's Experience of the Justice System*. In that response we agreed that a specialist court should be created to deal with sexual offences including rape and attempted rape.

A copy of the relevant parts of our response is appended hereto for reference.

Putting matters shortly, we made the following point

1. We said that we did not agree with arguments that this would lead to a downgrading of sexual offences but would allow them to be treated in a court with specially trained personnel. While the High Court could continue to deal with them, with particular judges allocated for a period of time, this would be a cosmetic change and unlikely to produce any lasting benefits.

2. We agreed that it should be a court separate from the High Court and Sheriff Court.

3. We agreed that it should sit in the venues which were currently available.

4. We agreed that it should have jurisdiction to hear non-sexual charges which appeared on the same indictment as sexual ones. The question to which we responded suggested the example of assault but we also suggested such crimes as statutory breaches of the peace, stalking, unlawful communications, drugs offences and breaches of section 1 of the Domestic Abuse (Scotland) Act 2018. We made it plain that in our view charges of murder and attempted murder would have to be tried in the High Court as well as cases where an Order for Lifelong Restriction might be anticipated.

5. We agreed with Lady Dorrian's review that the court should have a maximum sentencing power of imprisonment for ten years with the ability to remit to the High Court if a longer sentence was to be imposed. We were not in favour of a system where two courts with equal jurisdiction sat in parallel.

6. We agreed that the court should be presided over by High Court judges and sheriffs, with the Lord Justice General deciding what training would be required.

7. We agreed that the requirements on legal practitioners should match those in the High Court and that legislation should require them to be specially trained and trauma informed, pointing out that the content of any training and the standards to be reached should be a matter for the Lord Justice General.

While we are pleased to see that it is intended to create such a court, we are disappointed at a number of the specific clauses in the Bill and we comment on these as follows.

Clauses 39 and 62

These clauses envisage that the court will have jurisdiction to try the sexual offences listed in schedule 3. We have no particular problem with this except that the question whether an offence is one which contains a substantial sexual element may cause difficulty. There have been a number of cases where that has been the subject of argument and it might be thought better that the jurisdiction of the court should be determined by bright lines. We say no more about that.

The only offences which may not be tried in the court are treason and breach of duty by magistrates. None of us can remember when the last trial for either of these offences took place. That being so, the proposed jurisdiction of the new court, with its unlimited sentencing powers will be in large measure exactly the same as that of the High Court, given the preponderance of sexual offences which make up that court's daily workload. The Policy Memorandum says at para 280 that there are known cases in which sexual abuse perpetrated by an accused is alleged to have escalated over time, against multiple complainers, ultimately leading to a murder and that given the experience of the surviving complainers and the nature of their evidence the policy objective is to afford them the benefits of the case being prosecuted in the Sexual Offences Court. While this is undoubtedly true, there are not many such cases and the anecdotal nature of para 280 gives no confidence that this major constitutional change has been thought through properly. The appropriate place for charges of murder and attempted murder is the High Court. Murder is the most serious charge in the criminal canon. It is that charge which should determine the forum. The suggested change ignores the fact that in the very few cases where sexual offences are alleged against a surviving complainer, it is likely that the

case will be tried before a judge who is also a judge of the sexual offences court and that most if not all of the benefits of that court will be able to be afforded to such a complainer.

We remain firmly of the view that life imprisonment and OLRs should be the exclusive province of the High Court.

Clauses 40 and 41

Some disquiet has been expressed with clauses 40 and 41 of the Bill.

The criticisms are as follows:

It is proposed in clauses 40 and 41 of the Bill that the Lord Justice General will have power to remove a judge (including the president and vice president) from their office, though no from the office which that judge held prior to appointment to the sexual offences court. As the Bill is currently drafted, the Lord Justice General may exercise this power for any or no reason and with no prior procedure other than consultation in the case of a judge. These provisions, which are in contrast to the procedure for removal of a judge in the Scotland Act may constitute interference with a judge's security of tenure. ECHR article 6 requires an accused person to be tried by an independent and impartial tribunal established by law. In the case of Starrs v Ruxton 1999 SCCR 1052 it was held that security of tenure was essential for juridical independence.

Lord Reed stated

> 'according to the principles of the rule of law in democratic states which is the common heritage of the European countries, the irremovability of judges during their term of office …is a necessary corollary of the independence from the Administration and is thus included in the guarantees of Article 6(1) of the Convention.'

While clause 40 does not affect the security of tenure of a judge in the appointment prior to the appointment to the sexual offences court, a member of the sexual offences court has no security of tenure in that court. That lack of tenure could be sufficient to render the court neither independent nor impartial.

The contrary argument may be expressed thus. Since all judges of the court would be senators, sheriff principals, sheriffs and temporary judges, removal from the court would not deprive a judge of judicial tenure and all that goes with it. We note also that the Lord Advocate has no role in the appointment or removal of a sexual offences court judge and it was that involvement which was objectionable in Starrs v Ruxton. The appearance of dependence on the executive was also problematic. The position of a judge of the sexual offences court is more analogous to that of a Temporary Judge who is appointed by the Scottish Government on the Recommendation of the Lord President. It is not objectionable that a temporary judge is appointed by the executive; Kearney v HM Advocate 2006 SC (PC) 1 in which the leading opinions were given by Lord Bingham and Lord Hope. In Starrs, judicial involvement in the appointment of temporary sheriffs was considered a safeguard of judicial independence.

On the face of it, appointment by the Lord Justice General brings even more independence and impartiality than appointment by the executive. On one view

appointment and removal of a judge might be akin to the manner in which the Lord President appoints or removes a designated commercial judge or family judge and the Lord Justice General appoints or removes a designated preliminary hearing judge.

Nevertheless, given the criticisms made of clauses 40 and 41 of the Bill and the status of the proposed court, the Scottish Government may wish to consider whether it would be preferable for Sexual Offence Court judge appointment to involve some level of tenure and for removal to require more formality, in order to reduce the prospect of litigation.

The Judiciary and Courts (Scotland) Act 2008 as amended offers one model in sections 20B, 20C, 20D, 35 and 39.

Lest the matter be the subject of litigation in the future, we offer no opinion on the matter. We offer these observations for such assistance as they may provide.

We have no comment to make on the remaining clauses of Part 5, which seem necessary for the proper functioning of the Court.

7. What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?

We consider that the provisions introduced by clause 63 appear to be appropriate in their terms.

We observe that the legislative purpose behind the exception in section 106E might be augmented by the inclusion in subsection 3 of the common law crimes of false accusation (see Gordon : The Criminal Law of Scotland Vol 2 (4 th Ed at para 55.36) and wasting the time of the police/misleading the police (para 55.38 and the cases cited there). It is within our experience that in the exceptionally rare cases of those who have made false reports of a sexual offence, they have sometimes been prosecuted for these common law crimes.

8. What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?

Whilst we see the benefit of independent legal representation for complainers regarding the making of section 275 applications, we consider that the procedures created in new subsections 4(B) – 4(D) in section 275 of the 1995 Act by clause 64 of the Bill will prove timeconsuming and cumbersome. They will create a considerable amount of extra work for the judiciary and support staff, and no doubt for prosecutors and defence lawyers, which will be time-consuming and resource intensive. There is considerable potential for delay and churn of pre-trial hearings unless there are sufficient additional personnel and resources to support this new procedure. Such resource is difficult to envisage given the volume of business and the extent of the recovery programme.

In what circumstances would the court refuse to make the proposed evidence available?

If the court did so the complainer's lawyer would be unable properly to vindicate her rights undermining the purpose of representation. The court has already required that a complainer should be told of the content of a section 275 application (RR v HM Advocate 2021 JC 167) and it long ago determined that there was no unfairness in a complainer

being made aware of the content of a section 275 application; Moir v HM Advocate 2005 1 JC 102 at paras 51 and 52.

In August 2022, in responding to the consultation Improving victims' experiences of the justice system, question 48 we observed the following:

> "…The court has determined that the complainer should be told about any application made under section 275 of the Act – *RR v HM Advocate* 2021 JC 167. The complainer may have personal and otherwise unknown information which assists the court in deciding if the proper administration of justice test in section 275 is met. Advance notice of a line to be taken may assist a complainer in preparing to give evidence, because without notice, the complainer may have forgotten matters about which they could give evidence if prepared. **Complainers should be entitled to know what the evidence in the case is**. They can listen to witnesses called after they have given evidence, though not all will feel able to do that**. They should have advance notice of matters likely to be raised with them**. It is also likely to be of advantage to the court to receive submissions from the complainer's perspective on the grant or otherwise of any application made under section 275 of the Act."
>
> [Emphasis added]

It would be useful to reconsider if this procedure is necessary or desirable.

If some scope for adjudication by the court may potentially be occasionally required, it may be more appropriate and proportionate if the scheme required the Crown to intimate to the defence the evidence it proposed to provide to the complainer's solicitor with the onus then being on the defence to state a reasoned objection if so advised.

We observe that the terms of the new subsections (B) to (D) do not relate to some further evidence beyond that "referred to in, or relevant to, the application" as the policy memorandum suggests at paras 516 to 518. The wording of the subsections means that an application must be made to the court before any evidence is sent to the complainer's solicitor.

Section 275ZA (4)

Unless the Crown adopts a practice of giving advance notice of the terms of the indictment to the accused and or his solicitor, the requirement to make a section 275 application 21 days before the preliminary hearing/first diet, however desirable it may be, will result in delay and churn. Late applications are frequently encountered under a provision which allows the application to be made some 14 days later. It is most unlikely that a section 275 application which would require the detailed instructions of the accused would be prepared and lodged within 8 days of the service of the indictment.

Late applications at trial (or commission)

As the provisions are drafted, there appears to be no discretion to the court not to have intimation made by the prosecutor and to hear from a complainer's solicitor following the cumbersome procedures. We consider that this will cause considerable difficulty and delay which will be disadvantageous to a complainer giving evidence at trial (or on commission)

potentially having to wait for days in the midst of giving evidence or longer in a commission in which it may not be possible to recommence within a day or two without discharging some other commission hearing/s. Our experience suggests that such a delay will cause an extraordinary and unacceptable level of distress to the complainer for what may be of no real advantage. It would be the very antithesis of a trauma informed approach.

We adhere to our previous response to question 51 in the earlier consultation:

> "If the court was prepared to consider such an application and then had no option but to adjourn the proceedings to allow the complainer an opportunity to obtain independent legal representation, regardless of the apparent merit or weakness of the application, the consequence may well be a disproportionate level of delay, disruption and distress. We therefore suggest that the trial judge should be entitled to exercise a discretion as to whether to allow independent representation in relation to any applications made after the commencement of the trial."

> **9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?**

There are different views amongst our number with some judges supportive of this proposal and others not for reasons we have already set out in August 2022 in responding to the consultation *Improving victims' experiences of the justice system*. We adopt those views (and attach a copy as an appendix). We will identify a practical question which will need to be considered.

THE VIEWS OF THOSE WHO SUPPORT THE PROPOSAL

Those who consider that there is a serious problem with what happens in jury trials for rape identified three reasons in particular for their concern.

> "The first is that the available data has consistently highlighted a significant disparity in the conviction rate for such offences as opposed to others. The second is that the available research findings demonstrate the continued presence of rape myths in the minds of jurors which, when present, are incompatible with the duty to assess the evidence dispassionately and return a verdict which reflects justice in the case. The third is that their own experience of involvement in such cases has led them to see that prosecutions regularly fail despite the presence of apparently credible and reliable evidence and thus to conclude that a process is at work in such cases which is not replicated in other types of prosecutions and which is not conducive to justice."

We are aware that there has been criticism of the research carried out in Scotland and England respectively using mock juries and a questionnaire for real jurors to complete after trials. The findings of the Scottish mock jury research are endorsed by research from New Zealand conducted with real jurors hearing real trials for sexual offences. ""*I Think She's Learnt Her Lesson: Juror Use of Cultural Misconceptions in Sexual Violence Trials*," Tinsley et al; https://ojs.victoria.ac.nz/vuwlr/article/view/7128/6792; Vol. 52 No. 2 (2021): Victoria University of Wellington Law Review. The import of the paper was summarised by Professor Fiona Leverick in a letter to Scottish Legal News published on 5 May 2023, https://www.scottishlegal.com/articles/letter-myth-of-no-myths-is-a-myth. She explained that:

> "The jurors they interviewed often drew on 'real rape' stereotypes, including the extent of a complainant's physical resistance, in determining credibility, and placed undue weight on delayed reporting, **despite having been directed otherwise**. Complainants who did not display an appropriate degree of emotion when giving evidence were judged not to be credible and defendants who had been intoxicated at the time of the events in question were judged leniently as having made 'drunken mistakes'. By contrast, jurors endorsed victim blaming attitudes relating to the complainant's clothing, flirtatious behaviour, lifestyle, intoxication and prior sexual history."
>
> [Emphasis added.]

Whilst it may be suggested that the situation could be improved in Scotland by greater use of directions in writing and otherwise, to counter rape myths, the New Zealand research does not offer grounds for optimism of the effectiveness of such directions. The use of specimen rape-myth directions being developed by the Jury Manual Committee in certain trials involving a single complainer in 2023 did not prevent acquittals which appeared to the trial judge to be conspicuously generous on the evidence adduced.

On a practical level we would suggest that consideration is given to adding a provision matching clause 39(1) to (3) of the Bill in order that evidential charges can be tried and disposed of alongside the qualifying sexual offence(s).

We are aware of the suggestion that a pilot of single judge trial courts could deprive such courts of status as independent tribunals and offer some observations in response.

It is not necessary under article 6 of the Convention for there to be a jury in order for a court to be independent and impartial or for a trial to be fair. The majority of criminal prosecutions in Scotland are tried by an independent and impartial tribunal in the form of a sheriff sitting alone. The judges presiding over pilot courts would be independent and impartial Lords Commissioners of Justiciary, Temporary Judges and possibly sheriffs. All are bound by their judicial oath which includes doing "right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."

We note that the Government considered the recommendations of Lady Dorrian's Review Improving the Management of Sexual Offence Cases. Recommendation 5 was in these terms:

> "Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply and such other important matters should form part of that further consideration."

There was no suggestion that any proportion of convictions is expected or desirable, although it was noted in the course of the Review that the rate of conviction for rape is conspicuously lower than for other crimes prosecuted in the High Court. This recommendation is quoted at para 564 of the Policy Memorandum.

The policy objectives are set out at paras 567 and 568 of the Policy Memorandum:

> "567. The policy objective is to gather evidence to enable an analysis, properly informed by empirical research, to be undertaken of some of the difficulties encountered in Scotland in the prosecution of cases involving rape, and in particular to allow an assessment of the system by which verdicts are reached.
>
> 568. It is estimated by some practitioners that trials without juries may take around half the time and that the issues in dispute will be more focussed providing a greater opportunity for complainers to give their best evidence and therefore better serving the interests of justice and minimising re-traumatisation. Evidence from other jurisdictions also demonstrates that the use of written reasons for verdicts can contribute directly to improving the experience of complainers by increasing transparency and clarity around how decisions on verdicts are reached in these cases. The pilot will therefore provide important insights into whether single judge trials can improve complainers' experiences of the court process and increase efficiency."

The policy objectives appear to relate to process and not verdict. Accordingly we are unconvinced that pilot trial courts would lack the qualities of an independent tribunal.

The Scottish Government is concerned that there may be systematic problems with the treatment of sexual offences which has been considered a legitimate concern by the High Court of Justiciary. In Moir v HM Advocate 2005 1 JC 102 the court accepted that it was a legitimate policy objective to address undeserved acquittals arising from prejudice against complainers and appears to have considered a high acquittal rate as being important; see paras 7 and 11 of the opinion of the court delivered by the Lord Justice Clerk (Gill).

In *Judge v United Kingdom* 2011 SCCR 241, at para 28, the European Court of Human Rights accepted that the Scottish Parliament:

> "…was [also] entitled to find that a number of myths had arisen in relation to the sexual history and character of a complainer in sexual offences and to conclude that these myths had unduly affected the dignity and privacy of complainers when they gave evidence at trial. Having reached these conclusions, it was well within the purview of the Parliament to take action to protect the rights of complainers and, in doing so, to prohibit in broad terms the introduction of bad character evidence of complainers, whether in relation to their sexual history or otherwise."

The Scottish Government is still concerned about the prevalence and effect of rape myths and has a growing evidential basis for its concern. It is a legitimate concern as is the extent of sexual and domestic violence against women in Scotland.

Such concerns do not undermine the independence and impartiality of Scottish judges currently hearing summary trials for both sexual offences and domestic abuse. We are not convinced that they can undermine the independence and impartiality of Scottish judges deciding more serious sexual offences.

We are unconvinced that there is any basis to conclude that pilot trial judges would be under pressure to return convictions. We are unconvinced that there is any basis to conclude that judges would fail to fulfil their judicial oath.

It is not immediately obvious to us that there is anything inherent about a time-limited pilot which deprives a court of its independence and impartiality. Why would it any more deprive

a court of its independence and impartiality than the trial introduction of drugs courts and domestic abuse courts in some but not all sheriffdoms?

THE VIEWS OF THOSE WHO DO NOT SUPPORT THE PROPOSAL

A number of judges strongly disagree with the proposal that a pilot study of single judge courts for rape offences should be set up. A copy of the response of those judges to the relevant part of the consultation on Improving Victim's Experience of the Justice System is appended for reference

There are objections in principle to courts comprising only a judge. Separately, there is concern that a pilot scheme such as that envisaged by the Bill may not be compatible with article 6 (1) ECHR.

We are of the opinion that no good reason has been identified for removing trial by jury in respect of charges of rape and attempted rape. It is stated in the policy memorandum (paragraph 13) that the rate of conviction in rape and attempted rape cases are significantly lower than that in other cases. It is claimed that there is a body of evidence that suggests that rape myths may influence juror decisions in rape cases (paragraph 20). This view is reiterated at paragraph 543 which states that 'the significant and enduring nature of the disparity indicates that there are systemic problems with the treatment of these cases in Scotland.' The research on which this view is based is dependent on mock juries (paragraph 549).

We give directions to the jury as provided for in section 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995. The directions are revised from time to time and published in the jury manual. Recent revisals provide for directions (among other things) on the fact that there is no such thing as a typical crime of rape, nor a typical rapist, not a typical person that is raped. Juries are told that rapes can take place in almost any circumstances, and that there is no typical response from a person who is attacked. Juries are told that there may be good reason for a complainer's delay in telling another person about an offence, or in reporting it to an investigating agency. We give directions that if evidence is given, or a suggestion in a question is made that sexual activity took place without physical resistance, there can be good reasons why a complainer might not physically resist. We tell juries that the Crown does not need to prove that a complainer communicated her lack of consent to the accused person for by example shouting or calling for help. Further, if there is evidence that sexual activity took place without the accused person using physical force to overcome the will of the complainer, there may be good reasons why the perpetrator of the offence did not need to use physical force to overcome the will of the complainer. In all of these directions we state that absence of report, absence of physical resistance and absence of physical force does not necessarily indicate that the allegation is false.

Further, juries are told that there is no typical response from a person when they are asked to give evidence about a rape. We explain that when someone who has suffered a traumatic event is asked to recount it later it is to be expected that there may be a lack of coherence, gaps in their memory and that their memories may change over time. We explain that people who have been abused in a domestic setting may struggle to extricate themselves from it for a whole range of reasons. When giving evidence about such abuse, or about any other sexual assault including rape, a person may be visibly emotional or may show no emotion. We tell juries that the presence or absence of emotion or distress

when giving evidence is not a good indication of whether the person is telling the truth or not.

We conduct criminal trials on the basis that juries accept the directions they are given. We put parts of the directions in writing. We are aware that the object of directions is to instruct the jury on the law and we make the directions as clear as possible. The directions referred to above are given in rape cases in order to make sure that rape myths do not affect juries. We are not persuaded that juries pay heed to directions in other trials but not in rape trials.

We do not accept that it can be confidently asserted that the acceptance by juries of rape myths is the reason why convictions in these cases are lower than in other crimes. Rather we are of the view that the nature of the charges and the evidence led is such that a jury, or a judge sitting alone, may find it difficult to conclude that there is no reasonable doubt about what occurred and more fundamentally whether a crime was committed. That being so, it is unsurprising that the conviction rate in such cases is lower than in cases such as speeding in which proof is provided by scientific evidence.

In many rape cases the evidence is about sexual relations between adults. The most common defence is that there was consent. There is usually forensic evidence showing that penetration took place, and that is usually agreed before trial. The question before the jury is whether the Crown can prove that penetration took place without consent. In the policy memorandum at paragraph 580 it is stated that '[s]exual offences commonly involve assessments of an accused's reasonable belief that there was consent.' That is not correct. The question of reasonable belief very rarely features in a trial. The defence is not that the accused reasonably thought there was consent, but that there in fact was consent. This is raised with defence counsel at the preliminary hearing. Counsel are asked to explain the defence. It is very rare for the court to be satisfied that there is a real possibility of a direction on reasonable belief being required. Judges routinely direct at trial that no question of reasonable belief arises. Therefore at trial there is evidence put before the jury from the complainer that there was no consent. The defence lead evidence from the accused or from other sources, such as facts and circumstances surrounding the event, that there was consent. Thus the jury are asked to decide if the evidence leaves them in no reasonable doubt that penetration happened without consent. The jury are faced with differing accounts of what happened in intimate matters.

Care is taken in rape cases that irrelevant evidence is not led. The rape shield provision currently in force (sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995) prevent evidence of past sexual history and other irrelevant or collateral matters being led. The Sexual Offences (Scotland) Act 2009 is clear that everyone is entitled to sexual autonomy and that consent to the particular sexual act at the particular time alleged in the indictment is required. Counsel who wish to ask questions which may be irrelevant have to make a request in writing to do so at a preliminary hearing. These requests are the subject of debate by Crown and defence before a judge. Many applications are refused as they raise matters which are irrelevant. In recent years requests to lead evidence that the complainer consented to the same act as is alleged in the indictment in the past, or after the date of indictment, will be refused unless it can be shown that the evidence is relevant. An example is that if the defence maintain that sexual relations took place in the hours before the allegation, then that will be allowed to explain forensic evidence. But in the more commonly encountered case, the act of penetration at the time alleged is admitted

and is proved by forensic evidence and so evidence of any other sexual encounter will be inadmissible.

At trial the situation very often is that the complainer and the accused are known to each other; they have had consenting relations before the allegations, and sometimes after that time; the forensic evidence proves that penetration took place and that is agreed in advance; the complainer's position is that penetration was without consent; the accused's position is that consent was given at the time to the act which took place. The jury are made aware that the complainer and accused know each other. If they were partners, they are made aware of that. Sexual relations between them other than on the occasion alleged are not part of the evidence. Previous sexual history with other partners is not part of the evidence. Thus the jury is faced with making a decision as to whether they find the complainer credible and reliable, in light of all of the circumstances before them, when the complainer says that there was no consent. Given that the accused is asserting that there was consent, it is not surprising that on some occasions the jury finds that there is reasonable doubt about what happened. That is inevitable.

We refer to our earlier reply, where we stated that in making the decisions we have outlined above, a jury brings its collective experience to the task. The nature of the evidence means that knowledge of current mores and personal behaviour norms is relevant. Judges are accustomed to putting their personal views aside and deciding cases impartially, but one decision maker as opposed to 15 (or 12) does increase the risk of decision making being less balanced. The majority of judges are in late middle age, male, from a white Scottish ethnic background and are educated to university level. Many would argue that a number of people from differing backgrounds and ages combining to reach a decision is preferable to one person deciding alone. A single decision maker from a background often very different from that of the accused person and the complainer and other witnesses is no better qualified to determine issues of fact than a jury drawn from a wide cross section of modern Scottish society. It is acknowledged that judges have the advantage of training in the existence of rape myths while juries, before they are directed, may not. Both judges and properly directed juries can be expected to ignore rape myths.

In summary, the body of judges who favour retaining trial by jury consider first that the disparity in conviction rates does not in and of itself justify departing from the principle of trial by jury for such offences; and secondly that the move away from jury trials is not justified in the absence of evidence as to whether or not the concerns identified in the Lord Justice Clerk's review have been addressed by the provision of detailed written and oral directions.

Clause 65 provides that Scottish Minsters may, by regulations, provide that trials for rape or attempted rape are for a specified period conducted by a court sitting without a jury. This is referred to as the pilot scheme. Clause 66 provides that Scottish Ministers must review the operation of trials under the scheme and publish a report on them. This is an innovation as the work of the courts has never been subject to the review of the government. The Bill does not set out the criteria for success or failure of the pilot scheme. In the policy memorandum paragraph 563 states that trials by a judge alone could mitigate the impact of rape myths and preconceptions. It is also stated in that paragraph that single judge trial could deliver wider benefits such as improvements in complainer experience and increased efficiency in case management.. Paragraph 565 states that the pilot will provide 'an important opportunity to critically assess matters and gather evidence to inform the debate.' One possible reasonable inference is that the review will examine the number

of convictions and will attempt to decide if more convictions are obtained in a judge only trial than in a jury trial.

Whilst as Senators we would not express a concluded view on the validity or otherwise of these points, we are aware of arguments to the following effect. The pilot scheme amounts to a court set up by the government with a limited life span, and subject to examination and review by the government. That may not be an independent tribunal. It may not comply with the requirements of ECHR article 6. It may not be within the legislative competence of the Scottish Parliament under section 29(2) of The Scotland Act 1998. Further, the combination of such a court with judges who have no security of tenure in that court may not satisfy the requirements of a fair trial.

APPENDIX 1 The Scottish Government Consultation Paper: "The Not Proven Verdict and Related Reforms" - Response of the Senators of the College of Justice

APPENDIX 2 The Scottish Government Consultation Paper: "Improving victims' experiences of the justice system." - Response of the Senators of the College of Justice

Extract from Sheriffs & Summary Sheriffs' Association

6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?

Part 5 – Sexual Offences Court

The creation of a national sexual offences court would be a policy decision, significantly re-shaping the court system in Scotland. There has not previously been a criminal court whose jurisdiction is directed to one class of crime alone. The Association makes no comment about that policy choice as such. We do however have observations about a number of important practical issues which are likely to arise should this be pursued.

Section 40: Appointment of Judges

The necessity for approved training is a novel inclusion when the Lord President is solely responsible otherwise for training of judicial office holders. However the Association notes that the Judicial Institute work at the hand of the Lord Justice General and trauma-informed practice already plays a significant part of their curriculum.
The question of the length of time of appointment and the interaction with "mainstream" judicial work is worthy of comment. We consider that there are a number of issues which arise in relation to the appointment of sheriffs to serve in the proposed new court which are distinct from the position of High Court judges.

1. Section 40(10) allows for sheriffs and for temporary judges to serve in the proposed new court. It is currently not clear whether sheriffs will be appointed, or invited to apply for appointment, to the court. It is also far from clear whether in practice the sheriffs appointed to the court will be those who already hold appointments as Temporary Judges. These are important practical matters and should be the subject of express provision.
The Association considers that, as regards sheriffs, appointment to the court should be following a selection process where expressions of interest to serve are sought from the whole sheriff cohort. That is consistent with current practice when temporary judges are being selected.

2. Whilst experience and regular practice in the court is essential, the risk of vicarious trauma is high when a judicial office holder has to hear sensitive and often harrowing evidence, and deal with significant vulnerabilities every day. The chance to "take a breather" should be considered by those operating the court, perhaps following the model of Temporary Judges with set periods in the court. The "ideal time" would require to be monitored to ensure the balance between consistency and possible vicarious trauma was met. Guidance, for example from psychologists could be sought and built into an operating framework.

3. Following on from the previous point, the Association considers it essential that there is a clear statement of the amount of time judicial office-holders will be expected to serve on the court. Is an appointment for 3 years, or 5 years, or longer? Is the expectation that appointment will be for a continuous period, or as the business of the court requires? For sheriffs, and for sheriffdom business mangers, these are important considerations. We have alluded to vicarious trauma, and would suggest that the expectation should be sitting

for no more than a specified period before a return to other duties across the period of appointment to the court.

4. Given the likely volume of business in the new court, and the fact that, on the face of it, more of its case load is likely to come from the High Court the we consider that there are potentially significant questions about the workload of those sheriffs who are sitting in the sheriff courts. While some cases which would now be tried by sheriff and jury will likely go to the new court, those are likely to be a significantly smaller proportion of sheriff court trials. That implies that the business of the sheriff court is likely to remain closer to current levels with potentially fewer sheriffs available to deal with it.

5. The question of removal from office in terms of section 40(7) requires to be clarified. There is currently no test or set of circumstances in the Bill which would manage this process. We consider that is highly anomalous. The Committee will be aware that the public debate around the Bill includes questions about the terms of judicial appointment to the court. We consider that some of those concerns may be well-founded as the Bill currently stands. In particular:

> (a) It is not clear whether appointment is for a fixed period, nor whether it is renewable, and, if so, on what terms.
>
> (b) No appeal process or even opportunity to make representations appears to be considered, simply consultation with the Vice President.
>
> (c) The question is what forms the basis for even considering suspension? Is it to be similar to the current discipline rules that may lead to sanction at present, or is a lesser or different test envisaged. Is this a form of performance management and if so what is the criteria. It may be mentioned later that the only likely success criteria of a juryless trial might be increased conviction rate. If that is so, is a sheriff to face suspension for too many acquittals? Or too many appeals? This is a novel and concerning precedent to move away from the agreed and settled code of conduct and disciplinary procedures. The Bill certainly envisages a different test as a sheriff may be suspended form the new court but still able to continue in their “usual” duties, which would suggest a test falling far short of the current rules is in mind but not defined.

6. Given that the jurisdiction of the proposed court overlaps with the High Court of Justiciary, it is not clear whether sheriff members will be paid at an enhanced rate, to reflect the additional responsibility involved.

7. We consider that resourcing for the specific training and support needs which will certainly arise beyond the trauma-informed judging already specified should be given a firm basis on the face of the Bill. These are likely to be akin to what is provided for temporary judges.

<u>Section 44 – location of the court</u>

Section 44 of the bill essentially legislates for the Sexual Offences Court to sit anywhere in Scotland. This provision entails a potentially significant impact on the Sheriff Court if sittings of the proposed court are to take place within existing Sheriff Court buildings and court-rooms. The Association would encourage the Committee to seek assurances that

there will be a sufficient allocation of resources, including additional resources if necessary, to accommodate the proposed court and displacement of other business at the local level. It will be appreciated that there are a fixed number of court-rooms, and in busy sheriff court centres in particular, these are already heavily committed.

It is implicit that the preliminary stages of cases to be tried by the proposed court will be managed by that court. By the preliminary stages, we mean the preliminary hearing and any continuation of it, the taking of evidence of complainers and vulnerable witnesses on commission, and the necessary prior ground-rules hearings for such commissions. The premise of a dedicated judicial cohort seems to require that. There are consequential issues about resources, depending on where that preliminary business is to be managed. The existing body of solemn (sheriff and jury) cases in the sheriff court are managed in the course of court days where a wide range types of solemn criminal business calls in the first diet court. There are likely to be consequences for court programming in the sheriff court, if a significant volume of the work of the proposed court is to be managed there alongside other solemn cases. It is possible, for example, in larger court centres that two parallel courts might be required, where only one would currently sit. It is not clear whether work arising from the proposed new court would be entirely removed from smaller sheriff courts, and if that is the intention, there is, arguably, an issue about the local visibility of the administration of justice.

Sections 45 and 46 – transfer of cases

Sections 45 and 46 provide for the transfer of cases from the High Court of Justiciary and the Sheriff Court to the proposed court and vice versa. No explicit test is contained within the bill as presently drafted although it is obviously implicit that the test in section 39 of the Bill will require to be met (namely that the accused must face at least one charge of an offence or attempted offence listed under schedule 3 of the Bill).
The defence are given an opportunity to make representations to the court prior to any transfer taking place. In practice, these hearings can be anticipated to be most contentious when there is a question regarding whether an alleged offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 has a “substantial sexual element.” The way schedule 3 of the bill approaches this at paragraph 16 is to say that an offence of this type can be tried in the new court “where it is apparent from the offence as charged in the indictment that there was a substantial sexual element.”

Sheriffs are used to dealing with this test and there is clearly an authoritative body of case law that gives guidance on how to determine whether an offence contains a “substantial sexual element.” A few issues may however call for comment here.

1. The Bill chooses to reflect the wording in terms of section 288C of the Criminal Procedure (Scotland) Act 1995 rather than paragraph 60 of Schedule 3 of the Sexual Offences Act 2003, i.e. a “substantial” rather than a “significant” sexual element. This is an important distinction, and is more than a matter of semantics. The case of HMA v. S(R) 2022 HCJAC 41 sets out the distinction between the two terms and seems to give the rationale behind the selection of the words “apparent substantial” rather than “significant,” namely, the stage of the proceedings at which the question falls to be considered. A “substantial” sexual element is a “less stringent test.” In that particular case the test of a “substantial sexual element” was said to be met where there had been a “violation” of the complainer’s “bodily autonomy.” A strong factor in the court’s reasoning in that case was the purpose of the legislation in terms of section 288C, namely, the protection of a

complainer from being questioned by the accused. Such a consideration would not feature in an assessment of the meaning of “substantial sexual element” in the context of an application to transfer proceedings to the proposed new court.

2. The requirement for the sexual element being “apparent” from the crime charged would ideally require careful drafting from the Crown that makes it explicit that a “substantial sexual element” is alleged. It may be worth considering that the wording of the Bill as it presently stands would suggest an assessment would have to be made by a Sheriff on the face of any averments in the charge and this would be preferable to any impractical enquiry behind the terms of the allegation. Some consideration could be given as to how to deal with any defence submission that a Crown averment about substantial sexual element cannot be borne out by the disclosed Crown case.

3. Other issues of characterisation arise. For example, paragraph 15 of Schedule 3 allows the new court to deal with an offence under section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (disclosing or threatening to disclose, an intimate photograph or film). This is an offence that would not automatically be deemed to contain a “significant sexual element” for the purposes of para 60 of schedule 3 of the 2003 Act (see Sorrell (Barry) v. Procurator Fiscal, Greenock 2020 SAC (Crim) 2) but could be considered to be a “violation” of the complainer’s “Bodily autonomy” (as in S(R) v. HMA). There are consequences for the operation of the sex offender notification requirements. Paragraph 15 of the bill brings such an offence within the jurisdiction of the new court. The Crown will routinely libel conduct such as that prohibited by section 2 of the Act as part of an omnibus charge libelled under section 1 of the 2018 Act.

It can therefore be seen that the factors engaged in the test for a “substantial sexual element” in terms of section 288C of the 1995 Act and for a “significant sexual element” in terms of para 60 of sch 3 to the 2003 Act do not necessarily sit squarely with the questions engaged in determining a “substantial sexual element” in the context of an application to transfer proceedings to the proposed new court.

5. There is also no “catch all” provision that any offence deemed to contain a “substantial sexual element” could competently be tried before the proposed new court. Further consideration might be given to this. For example, the type of offending behaviour which is presently prosecuted under section 1 of the 2018 Act is often prosecuted as a part of an omnibus charge alleging contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 if the alleged conduct was prior to the 2018 Act coming into force. Such offending may well contain an “apparent substantial sexual element” and some form of wording should perhaps be considered for inclusion in schedule 3 of the Bill.

Section 56 – prohibition on accused conducting own defence

This section prohibits an accused in the Sexual Offences Court from conducting his or her own case, when evidence is to be lead. In that regard it simply rehearses the position that exists at present. The section goes on to give the Court the power to appoint a solicitor. In our experience, it is increasingly difficult for the court to find solicitors willing to take on such appointments. This is a specific instance of the wider problem of the significant pressure on criminal defence solicitors. In order for this provision to be effective in the proposed court, it will be essential that legal aid rules are in place to make this provision workable, including for the instruction of counsel.

The only practical point arising from this section is the difficulty already faced in 'persuading' a solicitor to accept appointment. That is a wider difficulty which is probably best left outwith the scope of a response to this Bill.

Section 57 – Vulnerable witnesses

This section extends the vulnerable witness provisions to the Sexual Offences Court and in that regard is surely not controversial.

Section 58 – Ground Rules Hearings

This section imports the current arrangements for ground rules hearings in relation to evidence on commission to all vulnerable witnesses in the Sexual Offences Court, with the important addition that as well as everything that is currently covered in a ground rules hearing the vulnerable witness ground rules hearing will also determine how the vulnerable witness is to give evidence – essentially the type of special measure that will be used. The Association supports this in principle. There are likely to be practical issues.

1. At present, in Sheriff and Jury level cases, in our experience there are still more vulnerable witnesses who give evidence with the assistance of one of the other special measures than who give evidence on commission. Accordingly, there will be an increase in the number of ground rules hearings and these will need to be factored into the resources provided to the Sexual Offences Court – both in relation to available Court time, space and staff – including Judges.

2. Active judicial management of ground rules hearings is the key to their successful operation. Adequate time will require to be provided for judicial preparation. That has consequences for judicial availability for other business, which can be a significant pressure point in the sheriff court.

3. The current standard of preparation for ground rules hearings in the Sheriff Court, by both Crown and defence, is variable, and we would anticipate a Practice Note about this to be towards the top of the agenda of the senior members of the proposed court, in order that case managing judges have sufficient powers to manage these hearings effectively.

Section 62 - Sentencing power of Sexual Offences Court

In terms of section 62 of the Bill,

"The Sexual Offences Court may impose on a person that it convicts of an offence any sentence which the High Court of Justiciary would be entitled to impose on the person in respect of the offence for which the person has been convicted."

It follows that, for sheriffs sitting in the proposed new court, this is a significant amendment to the sentencing powers of a sheriff. The change is such that sheriffs would be able to impose life sentences, unlimited periods of imprisonment, Orders for Lifelong Restriction and other severe penalties. That is akin to the powers of a Temporary Judge in the High Court. This significantly increases the burden of responsibility on a sheriff. Such a change would need to be fully supported by judicial training, including mentoring by High Court

judges on the issues which arise particularly in relation to higher end sentences in the High Court.

7. What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?

We have no comment to make on this part

8. What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?

Section 64 – Independent legal representation for complainers

The SSA has no comment as a matter of policy.

There are however a number of important practical matters which are likely to arise; some, at least, of which may require to be the subject of legislation.

1. It is likely that hearings in relation to applications under section 275 of the Criminal Procedure (Scotland) Act 1995 (application to lead evidence of sexual nature regarding the complainer), will require significantly more preparation, management and court time, as well, potentially, additional time for the judge to write a note of his or her decision. At present such a note would only generally be required in the event of an appeal.

2. As the Bill stands, it is not clear what status the submission on behalf of a complainer is to have. Is it simply information about the complainer's view on the application? What weight will the court have to attach to a complainer's submission?

3. It is foreseeable that there could be a difference between the accused, the Crown and the complainer about factual assertions made in an application. How would these be resolved? If the facts asserted would make a line of examination relevant and admissible in terms of section 275 would the court need to decide of the veracity of the facts? If so how? Would evidence be led? If so when and how? It goes without saying that if it were necessary for the court to have a preliminary evidential hearing, that is likely to delay the actual trial.

4. In terms of section 275B of the Criminal Procedure (Scotland) Act 1995, an application to lead such evidence must be made 7 days prior to a preliminary hearing in the High Court, or in any other case 14 days prior to trial (which is intended to cover solemn and summary proceedings in the sheriff court). An application may be made later than that on special cause shown, up to and including at the trial. That might be, for example, because of evidence which for good reason, has come to light very late in the day. Such cases are relatively infrequent, but do occur. There are likely to be logistical and practical challenges in giving effect to the complainer's right to make representations. Obtaining legal representation at short notice may be challenging, and it seems inevitable that the trial will be delayed, at least for a number of days, while the application is dealt with.

5. At present the accused will normally only be able to appeal the court's decision on an application under section 275 after trial and conviction. It is not clear as the Bill stands whether the complainer would have any right to appeal against such decision, and, if so, at what stage in proceedings. Nor is it clear as the Bill stands what would be the position if

the Crown did not support any appeal by the complainer. It goes without saying that an appeal against the court's decision pre-trial would delay the actual trial.

9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?

Judge-only trial pilot

Section 65 makes provision about a pilot scheme for judge-only rape trials, and section 66 makes provision about reporting on that pilot by Scottish Ministers. The Committee will be aware of significant controversy about various aspects of this part of the Bill. We do not seek to engage with all of the points which have been raised about the pilot, but we would make the following points.

First, we consider that the criteria by which such a pilot is to proceed and by which success, or not, is to be measured, should be clearly articulated in advance and publicly. If not on the face of the Bill, a Ministerial statement ought to be made. The implicit premise of judge-only rape trials is that juries are failing to convict in cases where they "ought" to do so, and that judges will get such cases "right". In other words the yardstick for success is an increased conviction rate.

Secondly, we are aware of discussion about a number of academic studies. We consider it is essential there is further research in this area.

Thirdly, we have significant concerns about judicial welfare in the context of such a pilot. There is, rightly, public interest in the modalities of prosecution of sexual offences. However, as has been evident since the publication of the Bill, the form and content of the debate is noisy and frequently personalised. There is a very real risk that judges will in effect be on trial: if the political yardstick for success is an increased conviction rate, it is inevitable that individual judicial decisions will be the subject of significantly greater public comment. With the exception of the so-called 'Diplock' courts in Northern Ireland during the Troubles, we are unaware of any jurisdiction in which decisions on conviction are taken by a single judge in trials for serious crime. Judges who are perceived to have an unduly high acquittal rate (whatever that means) will be criticised. Given experience following existing sentencing decisions, judges are likely to be the subject of personal abuse on social media and elsewhere. Judges are not in a position to answer back, and it is imperative that practical support is available from the Judicial Office. It is also imperative that Ministers appreciate that their obligations under section 1 of the Judiciary and Courts (Scotland) Act 2008 to uphold the continued independence of the judiciary extend to avoiding lending support to ill-informed criticism of individual judges as well as of the judiciary generally.

Fourthly, section 65(5) of the Bill envisages that the judge "must, when giving the verdict or as soon as reasonably practicable after doing so, give written reasons for the verdict". Judges are of course experienced in giving written reasons for decisions. The length and degree of detail vary depending on the decision. What is not spelled out in the Bill is the detail which is to be expected, and that will have an impact on how long it will take to produce a properly-reasoned written decision. We consider that there are important training and mentoring requirements here, which will require to be adequately resourced.

Extract from Sheriffs Principal Association
The Sheriffs Principal of the six sheriffdoms in Scotland

2. What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts?

(1) A prohibition against persons representing themselves in criminal or civil proceedings must proceed upon an assumption that representation by a solicitor or advocate is available. As was found recently under existing legislation with the same requirement during industrial action taken by solicitors, there is no means by which a trial can proceed in the face of no solicitor being willing to appear. It would be wrong to provide that a court can instruct a solicitor to appear, being a breach of the fundamental principle of the independence of the legal profession. Without that, the court is powerless. It is a matter for Parliament to resolve this conundrum, but there is no obvious solution.

(2) It is acknowledged in any discussion on trauma-informed practices that they should apply equally to the accused – a point which is perhaps unnecessary in the context of the specific provisions and underlying purpose of the Bill, but one which should and more than likely will be in the mind of judges and sheriffs when exercising their discretion.

6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?

(1) We have no views to express on the underlying policy. We do however have concerns about the implications for resources. Before the provisions are brought into force, there should be a detailed analysis of the effect of the new court on the deployment of sheriffs and the use of sheriff courts. We do not consider that this analysis has been covered appropriately in the Financial Memorandum. The use of temporary judges appointed from the shrieval cohort has already had an effect on the efficient management of sheriff courts and their programmes. Inevitably, appointment of sheriffs as temporary judges is of the more senior members of a sheriff court. That is particularly so in the context of the present post Covid recovery programme for High Court business. We have no objection to that in principle and take the same view on the deployment of sheriffs in the new court. Nevertheless, the practical effect of the absence of such senior members of the shrieval cohort should be recognised. More significantly, it is likely that the overall workload of sheriffs, whether in the local court or in the new court, will substantially increase. An assessment requires to be made of the likely need for the appointment of additional sheriffs to cover the additional workload.

(2) We support the proposal that the judges of the new court be appointed by the Lord Justice General. In our experience, the existing arrangements for the appointment of temporary judges on the same basis works well in practice. Any other procedure would be unnecessarily bureaucratic and would necessarily involve the Judicial Appointments Board for Scotland which is already overstretched in its workload. Even if additional resources were made available, it would involve the appointment of not just additional lay Board members but also additional senators, sheriffs principal and sheriffs, all of which would be very difficult, if not impractical,

given the present business pressures on each cohort. It would also cause considerable delay in the establishment of the new court and would be likely to cause unnecessary difficulties for the efficient running of the new court's programme from year to year. The elevation of a sheriff to the role of temporary judge or as a judge in the new court should be seen as a career progression. The current provisions for the well-being, training and, albeit rarely, the disciplining of sheriffs are well understood and work well, under the supervision of the senior judges and the sheriffs principal.

(3) We do not see the necessity for section 44(7). This would be a constitutional innovation. The section already provides for consultation with the Lord Advocate before the President of the new court fixes the number of sittings. That reflects long established practice in all courts. The President can fix only the number of sittings which resources allow, albeit after consideration of the business needs of the prosecutor who remains as master of the instance.

7. Anonymity for victims

As this is a matter of policy, we have no views to express.

8. Independent legal representation for complainers

We have no views to express on the policy. However, we have had the opportunity to read in draft the response by the Sheriffs Association. We agree with and support their observations.

9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?

While we do not have views on the overall principle of the proposal, we do express concerns about how the pilot will operate in practice given that the trials will be real, rather than mock ones, and how it will be made possible to assess the success or failure of the pilot. In saying that, we recognise that these matters will be further discussed and consulted upon before Scottish Ministers promulgate regulations.

Extract from Dr Andrew Tickell and Seonaid Stevenson-McCabe

Introduction

1. This submission focuses exclusively on the proposals in **Part 6 of the Bill** to introduce automatic **anonymity for complainers in sexual and other qualifying offences**.

2. It is often assumed that victims of sexual crime already have an automatic right to lifelong anonymity in Scotland and that reporting restrictions backed up by criminal sanctions are already available to courts, police and prosecutors here.[3] This is currently the legal position in the rest of the UK for most sexual crime – and has been the case since 1976.[4]

3. However, **there is currently no corresponding legal right to anonymity for complainers in Scotland**.[5] While the 1992 Act does apply in Scotland – its effect is only to prohibit Scottish publishers from disclosing information likely to identify a complainant in a sexual prosecution in England and Wales. Scottish prosecutions are not covered, meaning that it is lawful for publishers to identify complainers in these cases – with or without their consent – unless the courts make special orders restricting publicity under the Contempt of Court Act.[6]

4. Considering the substantial and increasing volume of sexual offences (a) being reported to Police Scotland and (b) prosecuted at both Sheriff and High Court level – official data shows these contempt powers are seldom used, leaving the overwhelming majority of Scottish complainers unprotected.

5. Our experience suggests this legal background is not widely understood. The Scottish media routinely refers to victims of sexual offences "waiving their right to anonymity" – contributing to the impression that adequate legal regulation is already in place. The starker reality is that victims of sexual crime currently have no legal "right to anonymity" to waive under Scots Law, and must rely on press ethics, decency or restraint on social media – and seldom-made contempt orders – to prevent their identities spilling into the public domain. Section 63 of this Bill finally addresses this gap in the law.

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[3] 1 There are different ways of describing the people who will benefit from reporting restrictions under the Bill. The Bill is framed in terms of "victims" – though its provisions will apply to cases where there is no prosecution, or indeed where the accused is acquitted of committing an offence against them. Scots lawyers generally describe people who testify about their experiences of crime as "complainers." Sexual violence advocacy and support services often use the language of "survivors" to describe their service users. For the avoidance of doubt, these terms will be used interchangeably in this submission to refer to anyone who says they have been the victim of a sexual or other qualifying crime. In a similar way, references to "sexual crime" in this submission should be taken to include other qualifying offences included in the Bill.

[4] Originally set out in the Sexual Offences (Amendment) Act 1976 – now the Sexual Offences (Amendment) Act 1992

[5] In terms of the mainstream media, protecting the identities of victims of sexual offending is written into the OFCOM code and the Editors' Code. However, the evidence suggests that this ethical principle is not always upheld. The Independent Press Standards Organisation found that articles published by the *Greenock Telegraph* (2023) and Daily Record (2015) identified sexual offence complainers

[6] 1981 Act, section 11.

About us

6. We launched the Campaign for Complainer Anonymity at Glasgow Caledonian University in September 2020. Working with our law students, the project aims to research **international best practice** on reporting restrictions for complainers in sexual cases, **public attitudes** to complainer anonymity in Scotland, and **raise awareness** of the need for reform.

7. Our research examines how Scots law compares with **twenty other common law jurisdictions** – including the rest of the United Kingdom,[7] Ireland, India, Singapore, Hong Kong, Canada, America, New Zealand, and Australia.[8] Our studies show that in failing to provide clear legal rules restricting publicity in these cases, Scotland is out of step not only with the rest of the UK – but also with the overwhelming majority of comparator common law jurisdictions. This supports the case for reform.

8. Our comparisons with Australia have generated particularly important insights, as a number of Australian states – including Tasmania, Victoria and Northern Territory – have recently updated their anonymity laws in the wake of the international #MeToo campaign and the domestic #LetHerSpeak movement[9] – confronting the challenges of regulating publishing in the social media age while facilitating the autonomy of victims of sexual crimes to share their stories if they choose to do so.

9. In addition to highlighting creative ways to reform Scots law in this area, the experience in these jurisdictions highlights the potential problems caused by well-intentioned reforms which have not been adequately stress-tested against reality – including extending anonymity beyond a complainer's natural life, legislating in a way which pretends social media does not exist, and introducing provisions allowing complainers to "tailor" consent to be identified by particular publishers – but not others.

10. We were able to share these findings with the Scottish Government at an early stage in the policy development of this aspect of the Bill. In our judgement, the Bill's provisions on complainer anonymity reflect the best lessons learned from this international practice – upholding the autonomy and privacy of complainers while ensuring that the updated legal framework will not result in the imposition of unnecessary legal, social and economic costs on them to secure or waive their anonymity, or create unreasonable legal expectations of social media users sharing associated media in a legitimate way. In this submission, we aim to give the Committee a practical overview of the advantages of different elements of the Bill which may not be obvious from reading its legislative language abstractly.

11. The second main empirical strand of our work explores **public attitudes** towards complainer anonymity.[10] Working with the Diffley Partnership, we commissioned a nationwide opinion poll in September 2021 on different aspects of complainer anonymity.

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[7] A Tickell (2020) "Why don't sexual offence complainers have a right to anonymity in Scotland?" Edinburgh Law Review 24(3) 427 – 434. An open access versions of this paper is available here: https://researchonline.gcu.ac.uk/en/publications/why-dont-sexual-offence-complainers-have-a-right-to-anonymity-in-

[8] A Tickell (2022) "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak" *Edinburgh Law Review* 26(3) 355 – 389, accessible here: https://researchonline.gcu.ac.uk/en/publications/how-should-complainer-anonymity-for-sexual-offences-be-introduced

[9] For the background to this, see generally: https://www.letusspeak.com.au/

[10] 8 A Tickell and S Stevenson-McCabe (2023) "Interpreting sexual offence verdicts: public attitudes to complainer anonymity and the "not proven" debate" Edinburgh Law Review 27(1) 95 – 104, accessible here: https://researchonline.gcu.ac.uk/en/publications/interpreting-sexual-offence-verdicts-public-attitudes-to-complain.

Our results are based on a survey of 2,115 respondents from across Scotland, weighted to the population by age and gender. Our survey identified a high level of support for the principle of complainer anonymity and a degree of confusion about whether complainers already have a right to anonymity in Scots law.

12. 42% of our respondents believed that “the media can never identify people who say they have been the victim of a sexual offence.” 18% “didn’t know” what reporting restrictions current applied. 73% tended to agree (26%) or strongly agreed (47%) with the proposition that “people who say they have been the victim of a sexual offence should have the right to anonymity for the rest of their lives, preventing them from being identified in the media or on social media.”

Why complainer anonymity matters

13. Complainer anonymity can be understood as a means of protecting the privacy of people who disclose their experiences of sexual victimisation – but also their **autonomy** to decide whether, when and if they wish to disclose their experiences.

14. As Clare McGlynn has argued, reporting restrictions in sexual cases have traditionally been understood as serving “a dual purpose: privacy and the administration of justice.”[11] Temkin argues other factors should also be taken into account in justifying automatic restrictions, including “the unaccountable stigma which attaches to sexual assault victims and does not apply to other victims of crime” and the “salaciousness of the press.”[12] To this, the impact of social media must now be added.

15. Security that complainers cannot lawfully be identified without their consent secures not only an enhanced degree of privacy in connection with sexual allegations – it also de-escalates some of the social consequences of reporting sexual violence, potentially increasing the number of disclosures made to criminal justice authorities about these generally under-reported crimes.

16. However, recent Australian experience has highlighted the importance of adopting reporting restrictions which respect not only the privacy but also the **autonomy** of survivors of sexual violence. The #MeToo campaign has highlighted that making public disclosures can be empowering for survivors, help raise awareness, challenge stereotypes, and collectivise and destigmatise experiences of sexual violence.

17. It is critical that Scots law respects the legitimate autonomy of complainers in these cases and facilitates their decisions to share – or not to share – their experiences, without imposing additional legal or economic costs on going public, or by requiring survivors to undergo potentially disempowering and retraumatising court procedures to receive judicial permission to share what happened to them. Finding the right balance between these competing interests may be particularly challenging in terms of child complainers who wish to disclose their experiences. Our evidence deals first with the Bill’s proposals in terms of adult complainers, before addressing the special rules for child complainers set out in section 106D.

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[11] C McGlynn, “Rape, defendant anonymity and human rights: adopting a 'wider perspective” (2011) Criminal Law Review 3 199 – 215 at 213.
[12] J Temkin, Rape and the Legal Process (2002) at 306.

The Bill's proposals

18. The Bill proposes to introduce complainer anonymity by way of an amendment to the Criminal Justice (Scotland) Act 2016.[13] This takes the form of reporting restrictions which prohibit the **publication of any information "likely to lead" to a person's identification as a victim** of a sexual or other qualifying offence.[14]

19. This provision will prohibit not only the unauthorised naming or picturing of complainers but will extend to what is often described as "jigsaw" identification, criminalising the publication of indirect information about an individual which could allow them to be constructively identified. This approach is consistent not only with the courts' approach to breaches of the Contempt of Court Act,[15] but also international practice, which typically extends to the publication of any information "likely to lead to the identification of the person" involved.[16]

20. The Bill proposes that these reporting restrictions will apply during the complainer's **"lifetime**" and will only automatically cease "on that person's death."[17] We support this approach. First, it is consistent with the general legal principle than an individual's privacy and reputational rights extinguish at the end of their natural life and are not transferable. Our research suggests most comparator jurisdictions with similar reporting restrictions limit their application in this way. This approach gives journalists, court reporters, writers, biographers and historians legal certainty that if they write about a deceased person, they are not at risk of committing a criminal offence under the legislation.

21. While some jurisdictions have introduced legal rules extending reporting restrictions beyond the complainer's natural lifetime, these have proven much more problematic than they might superficially appear. Under Victorian law, for example, if the victim of a sexual offence did not waive their anonymity during their lifetime, it was necessary for anyone wishing to identify them **to apply and gain permission from the court**. Similar rules still apply in New Zealand. These rules mean it was a criminal offence for family members to disclose that it was their daughter, sister or partner who had been killed in the course of a sexually-motivated homicide – unless the family first applied to the court to lift reporting restrictions, paying the associated legal costs out of their own pockets, and waiting until judges had been able to consider the case before going public. Restrictions framed in this way – although notionally aimed at respecting the victim's autonomy – understandably caused considerable upset and prompted demands for legislative reform in Victoria.[18]The approach taken by the Scottish Government avoids this problem, and the secondary trauma well-intentioned but badly thought-out rules have caused elsewhere.

22. The international comparisons suggest a range of different triggering events can be used to ground the **start of this right to anonymity**. Initially, we thought that reporting an allegation to the police met these needs. However, we have now changed our minds. The

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[13] Victims, Witnesses and Justice Reform (Scotland) Bill, section 63.
[14] Section 106C(1).
[15] *Murray v HM Advocate* [2022] HCJAC 14
[16] This is the language, for example, used in Tasmanian law.
[17] Section 63(3).
[18] ABC News, "Government moves to protect families who want to speak about dead sexual assault victims" 3rd August 2021 accessible at: https://www.abc.net.au/news/2021-08-03/laws-to-allow-families-of-deadsexualassault-victims-to-speak/100344416

proposed statutory language clarifies that it will always be unlawful to identify someone as a victim of a sexual or other qualifying offence – unless they consent, another relevant defence applies, or the court has decided to remove reporting restrictions under s.106E.

23. The Scottish Government's approach is characterised by its legal certainty, welcome simplicity and early application. No procedural steps will be required of the complainer to activate the proposed reporting restrictions. No procedural steps will be required of reporters to establish reporting restrictions apply to their publications. This approach has the advantage that no windows of time are artificially created by the law during which identifying a complainer might be lawful – as would be established, for example, if reporting restrictions commenced only after the accused person was indicted, or made their first court appearance. The Scottish Government's approach should also answer anxieties articulated by Rape Crisis Scotland that allegations which may never be reported to the police – or which give rise only to civil rather than criminal proceedings – should also benefit from the law's protection.

24. In terms of **qualifying offences**, the Bill is drafted more broadly than the equivalent restrictions in England and Wales – but this breadth is welcome. McGlynn and Rackley have criticised the failure to introduce anonymity rights for English and Welsh complainants in cases brought under the Criminal Justice and Courts Act 2015, which criminalises "disclosing private sexual photographs and films with intent to cause distress."[19] They persuasively argue the failure to extend anonymity to victims of image-based sexual abuse fails to recognise the significant privacy and dignity implications of these cases. We agree.

25. Against this backdrop, it is very positive to see the equivalent Scottish offence of disclosing intimate images or footage without consent under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 included this Bill – alongside other key sexual offences, and other intimate crimes including female genital mutilation, virginity testing, hymenoplasty and offences under section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015.

Waiving anonymity

26. The Bill makes clear that the proposed reporting restrictions will "not prevent the person to whom the information relates from publishing information which is likely to lead to their own identification as being a victim" of sexual crime or other qualifying offence.[20] This provision means **a complainer cannot face any legal sanctions** for disclosing their own experiences of being a victim of a sexual or other qualifying offence – affording them legal certainty about their freedom to speak, subject only to the potential for their disclosures to identify other complainers.

27. In terms of third-party publishers who share information capable of identifying someone as a victim of a protected offence, the Bill proposes three key **defences**:

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[19] C McGlynn and E Rackley, "Image-based sexual abuse" (2017) Oxford Journal of Legal Studies 37(3) 534 – 561
[20] Section 63(4).

a. Being **unaware** – or not having suspected or had reason to suspect – that your publication included information “likely to lead to the identification of the person as being a victim” of a qualifying offence;[21]

b. Publishing identifying information **with an adult complainer’s written consent**;[22] and

c. A **public domain defence**, on the basis the publisher shared information about a complainer which was already in the public domain, published by another person, and there was **no reason** for the publisher to believe the complainer had not consented to the disclosure.[23]

28. The first two defences are in keeping with the approach to restrictions adopted internationally – and in our view the third clearly improves on existing international models, recognising the fact that social media users are likely to (a) re-publish material produced by victims themselves, and (b) share apparently legitimate third party sources which may include identifying information about the victim of a sexual offence, with little expectation that doing so may constitute a criminal offence, unaware that repetition might be problematic or require due diligence on their part to establish that disclosure of this information was and remains consensual.

29. These provisions provide safe harbour for social media publishers who share information identifying someone in good faith – perhaps by posting a link to an article published by a newspaper or broadcaster, or by sharing a TikTok video of a complainer talking about their experiences. This is extremely important in practice and will avoid incidentally criminalising people innocently sharing relevant information.

30. Framing the relevant defences in this way will avoid the costly mistakes other jurisdictions have made by limiting the scope of lawful publication to publishers who secure an anonymous complainer’s explicit consent for them to publish the relevant information. In reforming reporting restrictions in the wake of the #MeToo campaigns, some legal systems have adopted much more convoluted rules allowing complainers to “tailor” their consent to publish identifying information about them, conditioning this consent on written consent to every particular publication, or placing even more wide-ranging restrictions on what kinds of disclosures are permitted.

31. While a legal requirement for written consent to every publication may appear to empower complainers and give them control over the narrative, experience suggests similar rules in Australia have exposed sexual assault victims to repeated, uninvited and unwelcome intrusions into their lives by media professionals undertaking the legal compliance work necessary to publish followup stories mentioning sometimes already high-profile victims of sexual crime.

32. Instead of maximising complainer autonomy and control over whether they are identified with their story in the media, the practical effect of this kind of rule has been that

[21] Section 106F(5).
[22] Section 106F (3).
[23] 1 Section 106F (4).

reporters end up badgering victims for repeated statements of their consent to re-publish information already in the public domain – even if their identity is already widely known.[24]

33. Under the Scottish Government's proposals, this will not be necessary and should not happen. By incorporating an innovative **public domain** defence into the Bill, these proposals neatly avoid this problem – while ensuring that bad-faith publishers sharing private information without the consent can still face legal consequences for doing so.

Identifying complainers under 18 years of age

34. In terms of complainers under 18 years of age, the Bill proposes (a) that it will not be a criminal offence for them to identify themselves in connection with an qualifying offence.[25] In our view, this approach is extremely positive and is consistent with the aspiration for this legislation to safeguard the autonomy of adults, children and young people, and respect their right to share their experiences in public free of the risk of any criminal sanction for doing so.[26]

35. However, under the current proposals, third party publishers wishing to publish identifying information about people under 18 must first satisfy the sheriff that the child complainer "understands" the nature of the order disapplying reporting restrictions, "appreciates" the effect of make such an order, and "gives consent" to the publication.[27] In addition to this, the proposals give the sheriff the ability to take into account any other "good reason" to refuse to dispense with reporting restrictions.[28]

36. In terms of the other jurisdictions we have examined, most impose some restrictions on the ability of children or third parties to disclose their connection to sexual offending, involving the court as a safeguard against immaturity and media manipulation of potentially vulnerable people. As drafted, the Bill's provisions seem designed to address situations where mainstream media outlets wish to identify a child complainer in connection with a criminal case – perhaps in a newspaper, other publication or broadcast.

37. In practice, however, it seems much more likely that third parties will publish material identifying a complainer under 18 years of age by sharing media content created by the complainer themselves on social media platforms, unaware that there may be legal restrictions applying to them doing so, or that it is a criminal offence to republish this content.

38. Police and prosecutorial discretion may be used to address this issue – the public interest in prosecuting individuals innocently sharing content made available by the victim themselves seems likely to be elusive – but there is scope for this element of the Bill to be improved and clarified. As drafted, the Bill would criminalise a family member, friend – or stranger – who shared a child victim's social media post disclosing they were the victim of

[24] See: R Burgin, A Powell, A Flynn, "Why is Victoria fast-tracking reforms to sexual violence 'gag laws' and to what effect?" The Conversation 28 October 2020 accessible at: https://theconversation.com/explainer-why-isvictoria-fast-tracking-reforms-to-sexual-violence-gag-laws-and-to-what-effect-148905.
[25] Section 106C(4).
[26] This was a key point of controversy in Australia after Grace Tame discovered Tasmanian law prohibited her from publicly identifying herself with the sexual abuse she suffered. These provisions were criticised as "victim gag laws." ABC News (2019) "#LetHerSpeak: Grace Tame finally wins right to share her story of abuse" 11th August 2019 accessible at: https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044
[27] Section 106D(4)(a).
[28] Section 106D(4)(b).

a sexual crime. They would not necessarily benefit from the **public domain** defence already discussed – as this is only available if the publisher has "no reason" to believe the complainer is under 18 years of age. The Committee may wish to consider whether this is approach is appropriate – or whether stronger legal guarantees should be given to social media users sharing a child complainer's social media posts in good faith.

39. In our judgement, perhaps the most potentially contentious aspect of this aspect of the Bill is the choice of the **age threshold** for children to waive their anonymity and allow third parties to share their experiences without resort to the supervision of the court.

40. Most of the legal systems we studied establish the threshold of 18 years of age for child victims to authorise other publishers to waive their anonymity, whether this is the national broadcaster or a single social media account. In its favour, this approach is consistent with international definitions of childhood in the criminal justice context – definitions which have increasingly shaped Scottish criminal justice legislation during the last decade under the influence of the UN Convention on the Rights of the Child.

41. Jurisdictions adopting this approach include India, New Zealand, Tasmania, South Australia, and Queensland. In England and Wales, by contrast, complainants must currently be sixteen years of age to waive their anonymity under the 1992 Act – reflecting the fact that other areas of the law recognise the autonomy and capacity for self-determination which sixteen and seventeen-year olds can exercise. Some jurisdictions set the threshold even earlier. In New South Wales, for example, anonymity can be waived by children from the age of 14.

42. We are not children's rights specialists. Colleagues with more experience of working with children and young people in these contexts may be able to assist the Committee further in exploring which threshold seems most appropriate for Scots law.