

VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Victims, Witnesses, and Justice Reform (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 26–EN);
 - a Financial Memorandum (SP Bill 26–FM);
 - a Policy Memorandum (SP Bill 26–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 26–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

OUTLINE OF BILL PROVISIONS

4. The Bill responds to the need to improve the experiences of victims and witnesses within Scotland’s justice system, especially the victims of sexual crime. At the same time, it continues to safeguard the operation and principles of the system and protects the rights of those accused of crime.
5. The Bill contains a package of reforms which, taken together, form an overall transformed approach in how victims are treated in a more responsive and sensitive justice process which puts people at its heart. The Bill strengthens the rights of victims of crime and embeds trauma-informed practice across the justice system; it also improves the experience of vulnerable parties and witnesses in civil cases. The Bill looks to address, in a practical way, longstanding concerns and difficulties in how justice operates for victims of the most serious sexual crimes.

6. Further information about the background and policy intention behind the Bill is contained in the Policy Memorandum.

RATIONALE FOR SUBORDINATE LEGISLATION

7. The Bill contains a number of delegated powers. These are explained in more detail in the sections below with an explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure (where applicable) is considered appropriate.

8. In deciding whether legislative provisions should be set out in the subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- The need to make proper use of valuable Parliamentary time;
- The need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- The need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

DELEGATED POWERS

Section 3(1): Victims and Witnesses Commissioner – Civil function

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

9. Section 3(1) of the Bill provides the Scottish Ministers with the power, by regulations, to amend the Commissioner’s general function to include the civil function. The civil function is to promote and support the rights and interests of persons involved in proceedings other than criminal proceedings. The power allows Ministers to define the proceedings and persons included within the civil function, to provide for the exercise of the civil function to include certain activities (e.g. raising awareness, promoting best practice and commissioning research). It also allows modification of Part 1 of the Bill (including schedule 1 and schedule 2) to include aspects of the civil function within the Commissioner’s functions and powers.

Reason for taking power

10. The public consultation sought views on whether the experience of victims in the civil justice system should be within the remit of the Commissioner. The majority of respondents who answered this question agreed that experience of victims in the civil justice system should be within scope. Consultation responses also highlighted complexities and further issues to be considered in extending the Commissioner’s remit to the civil justice system. The Scottish Government recognises that vulnerable parties are found beyond the sphere of the criminal justice system. The policy ambition is to extend the Commissioner’s remit to certain aspects of the civil

justice system. Inclusion of this enabling power signals the policy direction and allows for further development work and engagement in this area, which would also take account of situations that emerge once the Commissioner is in place.

Choice of procedure

11. The affirmative procedure is considered appropriate given that the regulations would have the effect of extending the Commissioner's general function and could amend primary legislation. This would be a significant change to the Commissioner's remit, and would merit additional Parliamentary scrutiny.

Section 12(5): Victims and Witnesses Commissioner – Investigations: witnesses and documents

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative procedure

Provision

12. Section 10 of the Bill provides for the Victims and Witnesses Commissioner to carry out an investigation into whether, by what means and to what extent a criminal justice agency has, or has had, regard to the rights, interests and views of victims and witnesses in making decisions or taking actions that effect those victims and witnesses. Section 12 gives the Commissioner powers to require any person to give evidence on any matter within the terms of an investigation, and to produce documents in the custody or control of that person which have a bearing on any such matter, in order to enable the Commissioner to carry out an investigation.

13. Section 12(5) provides the Scottish Ministers with the power, by regulations, to make further provision in relation to the giving of evidence or the production of documents.

Reason for taking power

14. This power is sought to provide flexibility to make any detailed provisions that might be needed in relation to giving evidence and providing documents as part of an investigation. This will also allow the Scottish Government to respond to situations that emerge over time after the Commissioner is in place.

Choice of procedure

15. The Scottish Government considers that the negative procedure is appropriate given that this power relates to matters of detail about the giving of evidence or the production of documents for an investigation which may emerge over time. The power will not impact on whether the Commissioner chooses to carry out an investigation, nor on how they wish to carry one out. The use of the negative procedure will allow for flexibility for adjustments to take place whilst providing scrutiny by the Scottish Parliament.

Section 23(2): Victims and Witnesses Commissioner – Interpretation of Part

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative procedure

Provision

16. Section 23(2)(a) provides the Scottish Ministers with the power, by regulations, to modify the list in the definition of “criminal justice agency” in subsection (1) to add, vary or remove entries. Section 23(2)(b) provides Scottish Ministers with the power, by regulations, to amend the definitions of “victim” and “witness” in subsection (1) to include additional persons. Section 23(2)(c) gives the Scottish Ministers power by regulations to make other changes to subsection (1) in consequence of changes to the definitions of victim and witness.

Reason for taking power

17. The enabling powers are sought to future-proof the legislation, and to allow a potential extension to victims and witnesses in cases being dealt with within the Children’s Hearings system. Criminal justice agencies in Scotland and the definition of victim are set out on the face of the Bill. An extension of the Commissioner’s remit beyond criminal proceedings, to the Children’s Hearing system, would require changes to the list of criminal justice agencies and the definitions of victim and witness.

18. The public consultation¹ sought views on whether the experience of victims where behaviour is addressed in the Children’s Hearings system should be within the remit of the Commissioner. The majority of respondents who answered this question agreed that experience of victims in the Children’s Hearings system should be within scope. Consultation responses also highlighted complexities and further issues to be considered in extending the Commissioner’s remit to the Children’s Hearings system. The Scottish Government recognises that vulnerable parties are found beyond the sphere of the criminal justice system. The Scottish Parliament is currently considering further changes to the youth justice system under the Children (Care and Justice) (Scotland) Bill. Further engagement and policy development work is required to establish how and to what extent the Commissioner’s remit should be extended to cover the Children’s Hearings system.

19. Inclusion of this enabling power allows for that work to take place and to take account of situations that emerge once the Commissioner is in place.

20. The extension of the Commissioner’s remit to the civil function (section 3) would also require changes to the list of criminal justice agencies, and changes to the definitions of victim and witness, to ensure that those agencies who come under the Commissioner’s remit are captured within the legislation and that the Commissioner is able to consider the needs of a wider group of victims and witnesses.

¹ [Improving victims' experiences of the justice system: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/cjrb/victims-witnesses-justice-reform-scotland-bill-2023/)

Choice of procedure

21. The affirmative procedure is considered appropriate. The additional Parliamentary scrutiny afforded by the affirmative procedure would be in line with recognising the importance of these changes to the Commissioner’s remit.

Section 25(2): Criminal courts: conduct of proceedings

Power conferred on: High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: Laid, no procedure

Provision

22. Under section 305 of the Criminal Procedure (Scotland) Act 1995 the High Court of Justiciary may, by Act of Adjournal, regulate practices and procedures in relation to criminal procedure. Section 25(2) specifies that, as part of that existing power, the High Court may regulate practices and procedures for the purpose of ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice.

Reason for taking power

23. Section 25(2) ensures that the High Court can make operational changes to criminal court procedure that help embed the principles of trauma-informed practice. A power is taken because it is considered most appropriate for court rules on operational matters to be set by the courts themselves, rather than prescribed by the Scottish Ministers. This approach also allows greater flexibility for rules to be updated as practices evolve and to deal with new eventualities or adapt to changing circumstances.

Choice of procedure

24. Section 25(2) amends an existing power which is exercisable by Act of Adjournal, and not subject to Parliamentary scrutiny. Acts of Adjournal are not usually subject to Parliamentary scrutiny, to preserve the courts from political interference in accordance with the principle of the separation of powers.

Section 26(2) and (3): Civil courts: conduct of proceedings

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary procedure: Laid, no procedure

Provision

25. Section 103 of the Courts Reform (Scotland) Act 2014 provides a power for the Court of Session to regulate its own practice and procedure, by Act of Sederunt. Section 104 of that Act provides a similar power for the Court of Session to regulate practice and procedure for civil proceedings in the sheriff court and Sheriff Appeal Court. These powers are each accompanied by

a non-exhaustive list of matters that the powers may be used to make provision in relation to. Section 26(2) and (3) add trauma-informed practice to those lists, to make explicit that, as part of its existing powers, the Court of Session may regulate practices and procedures for the purpose of ensuring that civil proceedings are conducted in a way that accords with trauma-informed practice.

Reason for taking power

26. Section 26 ensures that the Court of Session can make operational changes to civil court procedure that help embed the principles of trauma-informed practice. A power is taken because it is considered most appropriate for court rules on operational matters to be set by the courts themselves, rather than prescribed by the Scottish Ministers. This approach also allows greater flexibility for rules to be updated as practices evolve and to deal with new eventualities or adapt to changing circumstances.

Choice of procedure

27. Section 26(2) and (3) amend existing powers which are exercisable by Act of Sederunt, and not subject to Parliamentary scrutiny. Acts of Sederunt are not usually subject to Parliamentary scrutiny, to preserve the courts from political interference in accordance with the principle of the separation of powers.

Section 32(4): Vulnerable witnesses – Register of solicitors for section 22B of the Vulnerable Witnesses (Scotland) Act 2004

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative if textually amending primary legislation, otherwise negative procedure

Provision

28. Section 32(4) inserts a new section 22E into the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”). The new section 22E requires the Scottish Ministers to establish and maintain a register of solicitors. Solicitors on this register can be appointed by the court when a party has been prohibited from conducting their own case in civil proceedings in order to protect vulnerable witnesses.

29. Section 22E of the 2004 Act provides for certain provision about the register to be made by regulations.

30. In particular, it provides that the Scottish Ministers must by regulations:

- specify the requirements that a person must satisfy in order to be included, and remain, on the register (which may include requirements as to training and qualifications);
- set out the processes for including a person on, and removing a person from, the register or each part of it (including appeal rights).

31. Section 22E further provides that regulations may:

- provide for the register to be divided into parts by reference to type, subject matter, or category of civil proceedings;
- provide for the remuneration by the Scottish Ministers of solicitors appointed under section 22B(6) of the 2004 Act, including expenses and outlays (such as counsel’s fees); and
- confer on a person other than the Scottish Ministers the duty of maintaining the register, and in order to facilitate that the regulations may amend other enactments. This may be required, for example, to provide a basis in legislation setting up a statutory body for it to take on the duty of maintaining the register.

Reason for taking power

32. Detailed provision will be required to establish a register of solicitors who may be appointed by a court under section 22B(6) of the 2004 Act if a party is prohibited from personally conducting their case. In particular, flexibility will be required so the eligibility criteria, such as training and qualification requirements, and the rates of remuneration may be kept up to date on an on-going basis.

33. The provisions in this Bill on special measures are aimed at replicating for civil proceedings generally provisions, which have not yet been implemented, on special measures in the Children (Scotland) Act 2020 for some family proceedings. As the provisions in this Bill extend to civil proceedings generally, it may be helpful for the register of solicitors to be divided into parts to reflect, for example, that solicitors may specialise in specific areas of law such as family law.

Choice of procedure

34. The negative procedure is considered appropriate given that the nature of the power is to make administrative, operational and procedural provision in relation to establishment of a register of solicitors.

35. If, however, the power is used to add to, replace or omit any part of the text of an Act, it is considered that greater parliamentary scrutiny is appropriate, and its exercise will be subject to the affirmative procedure. This is in line with usual practice.

Section 33(3): Vulnerable parties

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative procedure

Provision

36. Section 33(3) inserts section 22F into the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”). This authorises the court to order the use of special measures to reduce distress to vulnerable parties caused by attending or participating in hearings.

37. Section 22F(6) specifies the special measures available to the court. Section 22F(6)(d) provides that the Scottish Ministers may by regulations prescribe further special measures that may be used to assist vulnerable parties.

Reason for taking power

38. These powers ensure there is flexibility to allow the range of special measures which the court may order to be kept up to date. This reflects that there could be developments such as the adoption of new or improved technology; the identification of other appropriate support measures; and changes in best practice for supporting vulnerable parties.

Choice of procedure

39. The affirmative procedure is considered appropriate to ensure a high level of scrutiny prior to the introduction of any additional special measures for vulnerable parties.

40. The use of the affirmative procedure is also consistent with section 18 of the 2004 Act² under which an order prescribing additional special measures for the protection of vulnerable witnesses is subject to the affirmative procedure.

Section 34(2): Jury size and quorum

Power conferred on:	High Court of Justiciary
Power exercisable by:	Act of Adjournal
Parliamentary procedure:	Laid, no procedure

Provision

41. Currently, the default size of juries in criminal trials (15 jurors) is provided for under the common law. Section 34(2) reduces the default jury size in a criminal trial from 15 jurors to 12 by substituting, for subsection (2) of section 88 of the Criminal Procedure (Scotland) Act 1995 Act, two new subsections (2) and (2A).

42. New subsection (2) will replace the common law with provision for juries to consist of 12 jurors and re-enacts the part of section 88(2) that currently provides that the jurors should be chosen in in open court by ballot from the list of persons summoned, in the manner prescribed by Act of Adjournal.

Reason for taking power

43. Section 34(2) simply re-enacts the existing power currently provided for in section 88 of the Criminal Procedure (Scotland) Act 1995 Act.

² <https://www.legislation.gov.uk/asp/2004/3/section/18>

Choice of procedure

44. Section 34(2) re-enacts an existing power which is exercisable by Act of Adjournal, and not subject to Parliamentary scrutiny. Acts of Adjournal are not usually subject to Parliamentary scrutiny, to preserve the courts from political interference in accordance with the principle of the separation of powers.

Section 39(6): Sexual Offences Court – Jurisdiction: sexual offences

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

45. Section 39 makes provision for the jurisdiction of the Sexual Offences Court. Provisions permit the court to hear any “sexual offence” which is triable on indictment, together with any other offence which appears on the same indictment. The exceptions to this are treason and breach of duty by magistrates.

46. Section 39(5) defines what is a “sexual offence” for the purpose of the Sexual Offences Court’s jurisdiction. Section 39(5)(a) introduces schedule 3, which is an exhaustive list of the offences which are to be considered “sexual offences” for that purpose. The offences are broken down into crimes at common law and statutory offences. Section 39(5)(b) further expands the definition to incorporate attempting to commit an offence listed in schedule 3.

47. Section 39(6) provides a power for the Scottish Ministers to amend, by regulations, the jurisdiction of the court either by amending the definition of a “sexual offence” as set out in section 39(5) or by amending the list of offences included in schedule 3.

Reason for taking power

48. The power to amend the definition of a sexual offence, as it relates to the jurisdiction of the Sexual Offences Court, will enable the Scottish Ministers to make any changes which are considered necessary or desirable to the offences that the Court can hear. This may be as a result of the creation of new statutory offences in the period after the Bill has passed, if for any reason the legislation creating those offences does not itself extend jurisdiction to the Court. Equally it may be used to respond to emerging trends in sexual offending which occur from time to time (e.g. arising from greater use of technology) and require to be prosecuted using offences which are not, for any reason, covered by the Bill’s definition of sexual offence.

Choice of procedure

49. It is considered that the regulations made using this power should be subject to affirmative procedure given that they will be modifying primary legislation. Affirmative procedure will allow for appropriate Parliamentary scrutiny. Use of affirmative procedure here mirrors the approach taken at section 63 of the Bill which lists the offences which trigger the statutory right of anonymity for victims of sexual offences and gives the Scottish Ministers the power to amend that list.

Section 44(3): Sittings of Sexual Offences Court

Power conferred on:	President of the Sexual Offences Court
Power exercisable by:	Order
Parliamentary procedure:	None

Provision

50. Section 44 confers a power on the President of the Sexual Offences Court to make provision for scheduling sittings of the Sexual Offences Court. In scheduling sittings of the Sexual Offences Court the President may, by order, prescribe the number of sittings of the Court that are to be held and the dates and times of those sittings. The power is subject to the Lord Justice General's overall responsibility for ensuring efficient disposal of business within the Scottish courts as set out in section 2(2)(a) and the power to issue directions to the President under section 2(2A) of the Judiciary and Courts (Scotland) Act 2008.

51. Before exercising this power the President must consult the Lord Justice General (if the Lord Justice General has not assumed the role of the President) and the Lord Advocate. The provisions also place an obligation on the President to schedule additional sittings of the Sexual Offences Court as the Lord Advocate may require.

52. Should the President of the Court become incapacitated then the power to schedule sittings of the Sexual Offences Court falls to the Vice-President. Should both the President and Vice-President become incapacitated then this power is exercisable by the Lord Justice General, the Lord Justice Clerk or another Judge of the Sexual Offences Court as appointed by the Lord Justice General.

Reason for taking power

53. The power to schedule sittings of the Sexual Offences Court supports the President in fulfilling their responsibility to ensure efficient disposal of business indicted to the Court by enabling them to determine where, when and how often the Court will sit in order to manage its caseload. This power mirrors that granted to the principal judicial officers responsible for efficient disposal of business in other criminal courts including the High Court, sheriff courts and the Sheriff Appeal Court.

Choice of procedure

54. The making of an order under this section is a purely administrative act, exercised independently of Scottish Ministers and the Parliament, by the President of the Sexual Offences Court, in accordance with their obligations under the Bill. It is therefore not appropriate for such an order to be subject to Parliamentary procedure.

Section 53(2): Sexual Offences Court records

Power conferred on:	High Court of Justiciary
Power exercisable by:	Act of Adjournal
Parliamentary procedure:	Laid, no procedure

Provision

55. Section 53(2) insert a new section 1ZA into the Public Records (Scotland) Act 1937 which provides for the transfer of records from and to the Sexual Offences Court. This provision allows the High Court of Justiciary to prescribe the times and conditions under which the records of the Sexual Offences Court will be transmitted to and from the Keeper of the Records of Scotland (“the Keeper”).

Reason for taking power

56. When the Sexual Offences Court is established, it will be necessary to have rules in place regarding its records and when they are to be transmitted to and from the Keeper. As this is a procedural matter which is best determined by the High Court, secondary legislation is considered appropriate and is consistent with the procedures in place regarding other types of court records, including those of the High Court and the Court of Session.

Choice of procedure

57. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately dealt with by the High Court of Justiciary by Act of Adjournal. As is usual for court rules made by Act of Adjournal, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. It is not considered necessary or appropriate that such rules are made subject to Parliamentary scrutiny.

Section 54(4)(b): Sexual Offences Court records: authentication and electronic form

Power conferred on:	High Court of Justiciary
Power exercisable by:	Act of Adjournal
Parliamentary procedure:	Laid, no procedure

Provision

58. Section 54 makes provision for the authentication, keeping and producing of records generated by the Sexual Offences Court. It permits records of the Sexual Offences Court to be authenticated by being signed by a Judge of the Sexual Offences Court, or the Clerk of the Sexual Offences Court. The Sexual Offences Court may keep (and produce) records in electronic form. This allows an authenticated record, or a certified copy of such a record or an extract of such a record, to be considered sufficient evidence of the facts recorded in the record.

59. Section 54(4)(b) enables the High Court of Justiciary, through Act of Adjournal, to specify the types of authentication that may be used for record keeping but requires that the High Court must consult the Keeper of the Records of Scotland before doing so.

Reason for taking power

60. The power to make provisions by Act of Adjournal for how records generated by the Sexual Offences Court can be authenticated ensures that the Court has flexibility to determine how it manages records and ensures alignment with other criminal courts.

Choice of procedure

61. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately dealt with by the High Court of Justiciary by Act of Adjournal. As is usual for court rules made by Act of Adjournal, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. It is not considered necessary or appropriate that such rules are made subject to Parliamentary scrutiny.

Section 55(2) and (5): Sexual Offences Court procedure

Power conferred on:	The Scottish Ministers / High Court of Justiciary
Power exercisable by:	Regulations made by Scottish statutory instrument / Act of Adjournal
Parliamentary procedure:	Affirmative procedure / laid, no procedure

Provision

62. Section 55(1) applies the procedure of the High Court of Justiciary, as set out in the Criminal Procedure (Scotland) Act 1995, to proceedings in the Sexual Offences Court. This will not apply where such procedure is inconsistent with the other provision contained in the Bill or made using a power in the Bill. Section 55 contains two powers to make provision on procedure applying in the Sexual Offences Court: a power at subsection (2) for the Scottish Ministers to make regulations and a power at subsection (5) for the High Court to make Acts of Adjournal. An Act of Adjournal is secondary legislation made by the High Court to regulate the proceedings of Scottish courts hearing criminal matters.

63. The power in subsection (2) allows the Scottish Ministers to make, by regulations, provision which applies to proceedings in the Sexual Offences Court. This includes a power, by virtue of subsection (2) to modify any enactment, including the Bill itself.

64. The power in subsection (5) for the High Court is not as broad, and is restricted to making, by Act of Adjournal, any incidental, supplementary, consequential, transitional, transitory or saving provisions which the High Court considers appropriate for the purposes of, in connection with, or for giving full effect to, Part 5 of the Bill. This includes a power to modify any enactment, including the Bill.

Reason for taking power

65. It is possible that unforeseen inconsistencies or ambiguities may arise from approach taken in section 55(1), which applies High Court procedure to proceedings in the Sexual Offences Court. Enabling the Scottish Ministers to make further provision on this will ensure that any such inconsistencies or ambiguities can be rectified.

Choice of procedure

66. The power in section 55(2) is broad and gives the Scottish Ministers the power to make changes to the rules of criminal procedure which will apply in the Sexual Offences Court. Given this, and the fact that such regulations made under section 55(2) may modify primary legislation,

it is considered appropriate that the power is subject to the enhanced level of parliamentary scrutiny which the affirmative procedure provides.

67. The power in section 55(5) is more restricted and limits the High Court to making incidental, supplementary, consequential, transitional, transitory or saving provision which it considers appropriate for the purposes of the Bill, in connection with it or to give full effect to Part 5 of the Bill. It therefore cannot be used to introduce new procedural rules which do not meet these criteria and is therefore limited by the contents of the Bill and any provision made under it. Provision of this nature is most appropriately dealt with by the High Court by an Act of Adjournal. Acts of Adjournal are not usually subject to parliamentary scrutiny, to preserve the courts from political interference, in accordance with the separation of powers. As is usual for court rules made by way of Act of Adjournal, the default laying requirement, in section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010, applies.

Section 63: Sexual offences: anonymity and restriction on publications

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

68. Section 63 makes provision in relation to anonymity for victims of certain listed offences. Section 63 inserts a new section 106C into the Criminal Justice (Scotland) Act 2016 which prohibits the publication of information likely to lead to the identification of a person as a victim of an offence listed in section 106(5).

69. Subsection (6) of the newly proposed section 106C includes a power for the Scottish Ministers to modify, by regulations, the list of offences set out at section 106(5).

Reason for taking power

70. The power to modify the list of offences which trigger an automatic right of anonymity for victims will enable the Scottish Ministers to make any changes which are considered necessary or desirable to the list. This may be as a result of the creation of new statutory offences in the period after the Bill has passed, or to adapt the scope of offences covered by a right of anonymity over time. This provides future flexibility to ensure that the anonymity framework can be applied to all sexual offences and offences where it is deemed appropriate that the benefits of a right of anonymity should be provided.

Choice of procedure

71. It is considered that the regulations made using this power should be subject to affirmative procedure given that they will be modifying primary legislation. Affirmative procedure will allow for appropriate Parliamentary scrutiny. The use of affirmative procedure here mirrors the approach taken at section 39 of the Bill which lists the offences which are “sexual offences” falling within the jurisdiction of the Sexual Offences Court and which includes a power for the Scottish Ministers to amend that list.

Section 65(1): Pilot of single judge rape trials

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative procedure

Provision

72. Section 65 of the Bill enables Scottish Ministers to make regulations to allow a time-limited pilot of single judge rape and attempted rape trials, which meet specified criteria, to be conducted. Those regulations will make further provision for how the pilot should be conducted such as criteria for the inclusion of cases in, and the duration of, the pilot. The regulations must also include provision allowing an accused to make representations as to whether the specified criteria are met in relation to their case. Before making such regulations, the Scottish Ministers must consult with various parties (including the Lord Justice General, the Lord Advocate, the Scottish Courts and Tribunals Service and persons providing victim support services).

73. Section 65 also provides that the pilot may be conducted in either the High Court or the Sexual Offences Court (which is established by Part 5 of the Bill). This ensures that the Scottish Ministers have the flexibility to enable that the pilot is conducted within the court that will best support of evaluation of the pilot against its intended policy aims and objectives.

Reason for taking power

74. The approach set out in the Bill is designed to provide sufficient detail to the Parliament to allow for meaningful scrutiny and consideration of the principle of the proposal to enable a pilot, whilst allowing for the operational detail of the pilot including case criteria and duration of the pilot, to be set out in regulations. Principally, this is to allow for the necessary further collaborative work on design and development to be carried out with justice partners to shape the model of the pilot which will feed into the development of the regulations submitted for future Parliamentary scrutiny.

75. A cross-sector working group chaired by the Scottish Government previously considered the issue of implementation of a pilot of single judge rape trials. However, the working group recognised that their recommendations ought not to be seen as prescriptive as to how any pilot may operate, and that it may be necessary for aspects of procedure to be adapted to account for detailed design and development. The group recognised that further work would be required to plan a pilot, refine the case criteria and determine how long it ought to run for. The desired sample size for meaningful evaluation will be determined by the final case criteria, the agreed objectives against which evidence is to be gathered and the design features of the data gathering/evaluation process. It is therefore appropriate that this detailed work is set out in regulations rather than primary legislation.

Choice of procedure

76. It is considered that the regulations made using this power should be subject to affirmative procedure given that they will be modifying primary legislation and will have the effect of creating a significant procedural change for certain cases which are currently only heard by a jury.

Affirmative procedure will allow for appropriate Parliamentary scrutiny of the proposed model of the pilot as these are reflected in the secondary legislation. This will give Parliament the opportunity to consider key aspects of the pilot model including the types of cases that will be included in the pilot, where it will take place and the period of time over which the pilot will be conducted.

Section 65(6): Pilot of single judge rape trials

Power conferred on: High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: Laid, no procedure

Provision

77. Section 65(6) enables the High Court of Justiciary, through Act of Adjournal to make any incidental, supplementary, consequential, transitional, transitory or saving provision which it considers to be appropriate for giving full effect to section 65 or any regulations made under it which make provision for certain cases to be conducted by a court sitting without a jury. An Act of Adjournal is secondary legislation made by the High Court to regulate the proceedings of Scottish courts hearing criminal matters. The power in section 65(6) includes the ability to modify any enactment, for the purpose of, in connection with, or for giving full effect to section 65 or regulations made under it. This power compliments that set out at Section 65(1) of the Bill in enabling the High Court to make rules and procedures on matters relating to the operation of the Pilot.

Reason for taking power

78. The power to make further provisions by Act of Adjournal ensures that the High Court can make any changes to criminal procedure which it considers appropriate for the purpose of piloting single judge rape trials. This may involve, for example, making rules to clarify any potential procedural inconsistencies between the pilot and the usual procedure that applies to such cases.

Choice of procedure

79. The power in section 65(6) is restricted and limits the High Court to making incidental, supplementary, consequential, transitional, transitory or saving provision which it considers appropriate for the purposes of the Bill, in connection with it or to give full effect to it, or any provision made under it. It therefore cannot be used to introduce new general procedural rules which do not meet these criteria and thus is limited by the contents of the Bill and provision made under it. Provision of this nature is most appropriately dealt with by the High Court of Justiciary by Act of Adjournal. Acts of Adjournal are not usually subject to parliamentary scrutiny, to preserve the courts from political interference in accordance with the principle of the separation of powers. Accordingly, as is usual for court rules made by act of adjournal, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies.

Section 68(1): Ancillary provision

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative if textually amending primary legislation, otherwise negative procedure

Provision

80. Section 68(1) provides Scottish Ministers with the power, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provisions as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Any such regulations may also make different provision for different purposes, and may modify any enactment.

Reason for taking power

81. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Several of the Bill's provisions are inserted into or interact with other legislation, particularly the Criminal Procedure (Scotland) Act 1995, the Criminal Justice (Scotland) Act 2016 and the Victims and Witnesses (Scotland) Act 2014. While the Scottish Government has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision to ensure these changes operate as intended. This power will also be important for the exercise of other powers under the Bill, to ensure that appropriate provision can be included for example, ensure that regulations made under the Bill will operate effectively alongside the existing law. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

82. The Scottish Government considers that it is important to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

83. Section 67(4) provides that if regulations are made using the section 68(1) power to modify any primary legislation then they would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure.

84. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 71(2): Commencement

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Laid, no procedure

Provision

85. Section 71(2) confers a power on the Scottish Ministers to appoint, by regulations, the day on which each provision of the Bill comes into force (except for sections 67, 68, 69 and 72 which come into force on the day after Royal Assent). Section 69(3) provides that the regulations may include transitional, transitory or savings provision, and may make different provision for different purposes (including different provision for different courts or descriptions of court, different proceedings or types of proceedings, and different descriptions of witnesses); and make different provision for different areas.

Reason for taking power

86. It is standard for the Scottish Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

Choice of procedure

87. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. It is considered that this provides for an appropriate level of Parliamentary scrutiny.

*This document relates to the Victims, Witnesses, and Justice Reform (Scotland) Bill (SP Bill 26)
as introduced in the Scottish Parliament on 25 April 2023*

VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

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