VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Victims, Witnesses, and Justice Reform (Scotland) Bill introduced in the Scottish Parliament on 25 April 2023.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 26-EN);
- a Financial Memorandum (SP Bill 26-FM);
- a Delegated Powers Memorandum (SP Bill 26-DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 26–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Terminology

4. The Scottish Government acknowledges that there are different words to describe those who have experienced crime, particularly sexual offences. Views on which terms are used can be strongly held. Some terms, for example 'complainer', are used when describing a person in a legal setting; 'victim' or 'survivor' are more commonly used when referring to a person in a broader context not restricted to the legal system. The policy memorandum uses a mix of these terms with the choice of term influenced by the context. A glossary of terms is provided at the end of the document. A list of abbreviations is also provided.

POLICY OBJECTIVES OF THE BILL

5. The Bill is ambitious in responding 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.

6. The Bill contains a balanced 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.

7. The Bill has 6 substantive parts which are summarised here and discussed at greater length throughout the policy memorandum. Some of the Bill's provisions relate only to the criminal justice system and others apply only to civil proceedings. Certain provisions apply to both. Details are provided in the material for each part of the Bill.

8. Part 1 of the Bill provides for the creation of a new office of Victims and Witnesses Commissioner for Scotland, which will be independent of the Scottish Government and accountable to the Scottish Parliament. The Commissioner will champion the rights and views of victims and witnesses and encourage policy-makers and criminal justice agencies to put their voices at the heart of justice. The Commissioner will monitor criminal justice agencies' compliance with the Standards of Service[1] and the Victims' Code[2], and promote best practice and trauma-informed approaches.

9. The Bill responds to calls for justice process and practice to be more trauma informed. It recognises the importance of treating people who are involved in court proceedings more compassionately and in ways that recognise the impact of trauma and seek to reduce the risk of retraumatisation.

10. The Bill defines trauma-informed practice (at Part 7) and at Part 2 places new duties on criminal justice agencies in relation to its adoption, including a requirement for the Standards of Service for Victims and Witnesses[3] to include this important matter. Part 2 also empowers courts to set rules and procedures on trauma-informed practice for both civil and criminal cases; and requires the judiciary to take trauma-informed practice into account when civil and criminal business is being scheduled.

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[1] These are set and published under section 2 of the Victims and Witnesses (Scotland Act 2014

[2] This is prepared and published under section 3B of the Victims and Witnesses (Scotland) Act 2014

[3] As required under section 2 of the Victims and Witnesses (Scotland) Act 2014.

11. The Scottish Government recognises that people who have suffered trauma, such as domestic abuse, may be less protected when giving evidence to, or participating in the business of, civil courts than they would be in the criminal courts. To enable vulnerable parties and witnesses to participate in a more sympathetic and protective environment, Part 3 of the Bill extends 'special measures' to non-evidential hearings and bans personal self-representation in civil cases in certain circumstances.

12. Maintaining public confidence is key to the operation of the criminal justice system – the framework within which decisions are made must be clear and transparent. Part 4 of the Bill abolishes the not proven verdict and introduces a two verdict system of guilty and not guilty to address significant concerns about the continued availability in criminal trials of a verdict which has no legal or generally accepted definition, and which judges are instructed not to attempt to define to jurors. In recognition of the complex and interlinked nature of the jury system, the Bill makes related reforms to the jury size and the majority required for conviction. These reforms are intended to increase confidence that verdicts are returned on a sound, rational basis while ensuring balance and fairness to all parties.

13. The criminal justice system must work for all victims and for all types of crime. In Scotland, there is a significant and longstanding disparity in conviction rates between rape and attempted rape relative to other crimes. This stark disparity endures despite previous reforms to improve the law in this area, to enhance the investigation and prosecution of these cases and to better equip jurors in their consideration of sexual offence cases.

14. Despite previous reform, victims of sexual crime continue to report significant challenges and the Appeal Court continues to highlight examples of poor practice in their treatment at trial. For too many, the court process is not seen as an environment for the robust, proper and timely scrutiny of allegations and the testing of evidence, but an environment and process characterised by hostility, delay and a disregard to the safety and well-being of those seeking justice.

15. Part 5 provides for the creation of a new specialist court, the Sexual Offences Court. The court will be distinct from and separate to existing court structures, with an emphasis on increased pre-recording of evidence, improved judicial case management and a requirement for specialist training for all personnel. This will help meet the needs of complainers and support them to give their best evidence, and to improve the overall administration of justice.

16. The Sexual Offences Court will provide a forum for developing best practice, strengthening judicial case management and improving confidence in the way the criminal justice system responds to sexual offending. In doing so it will not compromise the rights of the accused and will lead to broader improvements in efficiency and the flexible use of resources, contributing to an enhanced model for the treatment of these cases.

17. In contrast to other UK jurisdictions there is no statutory right to anonymity for complainers in sexual offence cases in Scotland. Statutory reform is long overdue in this area as while courts have a power to protect anonymity in individual cases, this power is not often used and, instead,

reliance is placed on a non-statutory convention among major media outlets that complainers will not be named without their consent. The increased use of social media platforms, where any member of the public can become a de facto publisher calls into serious doubt the suitability of the current arrangements to protect the identity of victims of these crimes.

18. Part 6 of the Bill protects the dignity and privacy of victims of sexual offences (and other certain offences, including human trafficking and female genital mutilation) by providing an automatic lifelong right of anonymity. In addition to the benefits this measure will bring to individual victims, it will promote greater confidence in the way these cases are handled which may, in turn, encourage greater reporting to the police.

19. There is a general rule against the leading of evidence in sexual offence cases about a complainer's sexual history or bad character. The defence or prosecution can, however, apply to the court to lead such evidence in certain circumstances which are set out in law ("section 275 applications"). This process is needed to ensure that the evidence can be lead in limited circumstances when it's necessary for the fairness of the trial. At the moment, when such applications are made, there is no mechanism in legislation which allows the complainer to give the court their views on the application. So, at Part 6 the Bill responds to calls from victims of sexual offences to have their views heard in court through an automatic right to independent legal representation (ILR) when applications to admit such evidence are made. Amendments to existing legal aid regulations will make provision for publicly funded ILR, in these circumstances, to be available to all complainers through legal aid on a non-means tested basis.

20. In exploring the effectiveness of the system in place to deliver justice in sexual offence cases, concerns are repeatedly raised about the role of the jury. There is a growing body of evidence that suggests that rape myths[4] may influence juror decisions in sexual offence cases. An independent cross-justice review led by the Lord Justice Clerk, Lady Dorrian, considered this matter in detail[5] and recommended that the issue be examined in much greater depth by conducting 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.[6]

21. The Scottish Government agrees with this recommendation. No part of our system should be exempt from scrutiny, no matter how long it has been in place. Part 6 of the Bill provides powers for Scottish Ministers to enable a time limited pilot of single judge rape trials. The pilot will gather evidence to support a debate – properly informed by empirical research – of the difficulties

[4] Rape myths can be described as false or prejudicial beliefs about the relevance of a complainer's actions before, during or after serious sexual assault to their credibility, or on issues of consent. Common rape myths include expectations that a genuine victims would seek to escape or resist an assault, that they would immediately report an offence once it has happened, that previous sexual contact between a complainer and an accused is indicative of consent and that 'real' rape victims will become emotional when giving evidence at a trial.

[5] Further information about Lady Dorrian's Review is provided in the policy context section below.

[6] Improving the Management of Sexual Offence Cases (scotcourts.gov.uk). per recommendation 5

encountered in Scotland in the prosecution of cases involving rape and the role of juries in these cases.

POLICY CONTEXT

The Vision for Justice in Scotland

22. The Scottish Government's Vision for Justice in Scotland was published in February 2022[7]. It commits the Government and its justice partners to a transformational approach to justice reform to ensure the system meets the needs and values of today's society. The Vision is clear that people must be at the heart of the justice system and that, where they no longer meet individuals' needs, historical processes should be redesigned to deliver an improved and modernised experience for all who come into contact with it. This Bill is part of a wider process of delivering the Vision.

23. The Vision sets out the route to a transformed system. The priorities include improvements to benefit and empower women and girls; ensuring joined-up, person-centred and trauma-informed services; and taking action to deliver effective justice where victims' voices are heard. These issues are particularly relevant to victims of sexual crime. The Scottish Government is resolute in its commitment to deliver a justice system in which all victims of crime, including the survivors of sexual abuse, can have confidence.

24. Over the last 15 years the Scottish Government has promoted and delivered legislative reform improving victims' rights including, but not limited to sexual offending, such as:

- Sexual Offences (Scotland) Act 2009 – which modernised the law relating to sexual offences including providing a statutory definition of consent.
- Victims and Witnesses (Scotland) Act 2014 – which improved the support and information available to victims and witnesses of crime; introduced a range of rights for victims, ensuring these are encapsulated in the Victims' Code for Scotland; and requires justice agencies to publish and report against Standards of Service.
- Abusive Behaviour and Sexual Harm (Scotland) Act 2016 – which introduced statutory jury directions in certain cases to address concerns that juries had preconceived views about the nature of sexual offences or the way that victims responded to these crimes.
- Domestic Abuse (Scotland) Act 2018 – which brought together within one offence the modern understanding of what is domestic abuse including criminalising explicitly psychological domestic abuse such as coercive and controlling behaviour.
- Vulnerable Witnesses (Criminal Evidence)(Scotland) Act 2019 – which created a new rule for child witnesses under 18 to ensure that, where they are due to give

[7] The Vision for Justice in Scotland - gov.scot (www.gov.scot)

evidence in the most serious cases, it will usually be pre-recorded in advance of the trial. The Act includes powers to extend the rule to adult witnesses deemed to be vulnerable, which includes complainers of sexual offences.

- Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021 – which established a legal framework for consistent access to "self-referral" whereby a victim can access healthcare and request a forensic examination without first having to make a report to the police. Self-referral is available to anyone aged 16 or over, subject to professional judgement.

25. These reforms, alongside linked non-legislative work, have significantly strengthened and modernised the delivery of justice in Scotland. Wider strategic work has also driven reform, such as action to tackle violence against women and girls underpinned by the joint Scottish Government and COSLA strategy Equally Safe[8]. The Scottish Government recognises, however, that more needs to be done and that further and wider transformation is required to deliver a system which is fully person centred, trauma informed and built around the needs of the people it serves.

The Victims Taskforce

26. The Victims Taskforce[9] was established in December 2018 with a primary role to co-ordinate and drive action to improve the experience of victims and witnesses within the criminal justice system, while ensuring a fair justice system for those accused of crime.

27. Based on direct feedback from victims and witnesses[10], the key areas identified for improvement were:

- **Being heard**. This relates both to particular stages of the criminal justice process where victims feel they struggle to be heard but also more generally in that victims often perceive they do not have a place in the system.
- **Accessing information**. Victims and witnesses consistently report difficulties in accessing basic information about their rights and what is happening in their case,
- and the way in which information is communicated is also often described as unfeeling and potentially retraumatising.
- **Feeling safe.** Victims and witnesses need to feel safe in their interactions with the justice system and that the system prioritises keeping them safe in terms of the outcomes sought.

[8] Equally Safe: Scotland's strategy to eradicate violence against women - gov.scot (www.gov.scot)
[9] Victims Taskforce - gov.scot (www.gov.scot)
[10] Victims+Taskforce+-+Secretariat+-+8th+Meeting+-+2020-12-09+-+Paper+1+-+Victims+Voices+Key+Themes.pdf (www.gov.scot)

- **Compassion**. Lack of compassion is often cited, which is one of the main challenges in terms of a system which currently does not feel person-centred.

28. This 'Victims' Voices' feedback has informed the work and furthered the core purpose of the Victims' Taskforce of 'improving support, advice and information for victims of crime'.

29. In response, the Scottish Government is committed to building confidence in the culture and processes of the justice system to ensure victims' rights are respected and their needs met without compromising fairness. It is crucial that victims are not deterred from reporting crime because of a criminal justice system characterised by delay, insensitivity and undue trauma or because of a lack of faith in the system. Victims must have their experience and voices fully recognised and heard, and be supported to give their best evidence. This ambition and the need for action applies to the criminal justice system as a whole and victims of any crime, with the Scottish Government clear that additional targeted action is specifically needed to tackle issues relevant to those experiencing crimes of a sexual nature.

30. The principles of person-centred and trauma-informed practice are central to the Bill. Justice cannot be delivered without the courage and confidence of victims to come forward. A great deal is required from victims and witnesses and while it is right that their evidence is tested and scrutinised, this should not be at the cost of victims' dignity or rights or at the risk of re-traumatisation.

Sexual Offences Cases

31. Crimes involving sexual offences including rape and attempted rape are some of the most serious dealt with by our criminal justice system. They involve a profound and fundamental violation of a person's autonomy and integrity and have distinct, significant and lasting consequences for victims – the majority of whom are women and girls.

32. Despite substantial legislative[11] and operational reform[12] to the treatment of cases involving serious sexual offences by the criminal justice system in Scotland, there exists significant and enduring concerns over the way in which these cases progress. Victims and survivors continue to report facing extensive challenges in engaging with a court process which often feels impenetrable to them, fails to secure their best evidence, can subject them to irrelevant and degrading questioning and exposes them to an unacceptably high (and in many cases avoidable) risk of re-traumatisation which compounds the trauma they suffer.[13]

[11] As discussed above.
[12] E.g. the establishment of the National Sexual Crimes Unit within the Crown Office and Procurator Fiscal Service in 2009; the launch of a National Rape Taskforce as well as Divisional Rape Investigation Units by Police Scotland following its formation in 2013; and the launch of the Rape Crisis Scotland National Advocacy Project in 2016.
[13] Justice Journeys – Survivor Stories (justicejourneysonline.com)

33. Growth in the number of prosecutions of serious sexual offences has led to increased pressure on the High Court and increased delays for complainers and accused.[14] As in other jurisdictions, those delays have also been unavoidably impacted by the pandemic.[15]

34. Delays are reported to give rise to a greater risk of secondary victimisation for complainers in cases involving serious sexual offences than for other sorts of trials because of the distinct and profound impact of those offences. A 2021 study carried out by Professor Michele Burman and Dr Oona Brooks-Hay (University of Glasgow and the Scottish Centre for Crime and Justice Research) looked at the implications of delays caused by the pandemic on victim-survivors of rape and serious sexual assaults.[16] It noted that delays can have far reaching consequences for the ability of complainers to function in all aspects of their lives and may also pose a threat to well-being by "*postponing their psychological recovery indefinitely while also requiring them to retain the detail of distressing events in preparation for going to court and give evidence."*[17]

35. The cumulative impact of a system that fails to effectively meet the needs of complainers of serious sexual offences cannot be ignored. Complainers may not be supported to give their best evidence and may be caused further, avoidable, harm. They may disengage from the process or be deterred from reporting further offences committed against them. Knowledge of delays and adverse experiences, including during trial, undermines public confidence in the system and may further contribute to under-reporting of sexual offences.[18] A system which fails to offer victims of sexual offences meaningful access to justice, is a system in which the proper administration of justice is frustrated and perpetrators are not held to account for their abuse.

36. The Appeal Court has issued a number of judgments[19] which address some of the concerns as to the conduct of trials and which underline the requirements of the 'rape shield' provisions[20] and the role and duties of all involved, including judges, in ensuring the examination of witnesses is kept within reasonable bounds. However, in *McDonald v HMA,* the court observed the efforts of the Appeal Court in this regard but concluded that: *"Despite this, and the clear import of these sections, the courts have continued to be criticised for failing to provide complainers in sexual*

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[14] Criminal Proceedings in Scotland statistics show that in the year 2010/11, 80 people were proceeded against where the main crime charged was rape or attempted rape. By 2019/20 this had increased to 300 - an increase of 275%. Serious sexual offences now make up the majority of High Court trials in Scotland – see para 1.2 of Lady Dorrian's Review.

[15] The average length of time it takes High Court cases to proceed to trial from an initial pleading diet is more than double pre-pandemic timescales. According to figures published by SCTS, as at end of Jan 23 it was 54 weeks, more than twice the 22 weeks pre-pandemic. SCTS Official Published Statistics (scotcourts.gov.uk)

[16] Delays-in-Serious-Sexual-Offence-Cases.-Dec-2021.pdf (sccjr.ac.uk)

[17] Ibid at page 4

[18] For an exploration of some of the reasons given for failing to report sexual crime, see the collection of results of successive Scottish Crime & Justice Surveys

[19] CJM v HM Advocate 2013 SCCR 215; HM Advocate v CJW 2017 SCCR 84; Dreghorn v HM Advocate 2015 SCCR 349;Donegan v HM Advocate 2019 JC 81; and McDonald v HM Advocate [2020] HCJAC 21

[20] Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 which apply to sexual offences and limit the scope of questioning relating to a complainer's character, sexual behaviour or history.

offence prosecutions with adequate protection from irrelevant, and often distressing, questioning. This case is a further illustration of a trial court's failure in this regard".[21]

37. *McDonald* has been highlighted as an egregious, but not an isolated, example of bad practice in the conduct and management of cases involving serious sexual offending, examples of poor and inappropriate practice remaining too common.

38. The Scottish Government considers more has to be done to improve the experience of complainers throughout the court process and to remove barriers to their access to justice. While previous reform has led to some improvements, the Scottish Government considers what is needed is systemic reform to decisively address the widespread concerns that have come to characterise the treatment of these cases in our justice system.

39. Scotland is not unique in the difficulties faced in the prosecution of these cases. Following a dramatic decline in the number of charges, prosecutions and convictions for rape in England and Wales, the UK Government published its End-to-End Rape Review report in June 2021 along with an apology from the Lord Chancellor and Secretary of State for Justice who said *"Too many victims of rape and sexual violence have been denied the justice they deserve as a result of systemic failings. We are deeply sorry for this and will not rest until real improvements are made".*[22] The Review cited concerning statistics in England and Wales: "There are an estimated 128,000 victims of rape a year. Less than 20% of victims of rape report to the police. Even worse, only 1.6% of rapes that are reported result in someone being charged. That means that considerably fewer than one in every 100 rapes actually leads to justice for its victim."[23] [24]

40. Outwith the UK, in New Zealand, the rate of successful rape convictions in 2020 was the lowest for more than 10 years. The figures published by the Ministry of Justice showed 31% of all people charged with rape were convicted, increasing to 38% in 2021.[25]

Lady Dorrian's Review on Improving the Management of Sexual Offence Cases

41. In early 2019, against a backdrop of the increased volume of cases and ongoing concerns over the experiences of victims of sexual crimes in the justice process the Lord President, Lord Carloway, commissioned the Lord Justice Clerk, Lady Dorrian, to carry out an independent review

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[21] [2020] HCJAC 21 at para 33

[22] Response to rape overhauled - GOV.UK (www.gov.uk)

[23] The end-to-end rape review report on findings and actions (publishing.service.gov.uk) at page iii

[24] The Action Plan which followed, set out plans to more than double the number of adult rape cases reaching court by the end of the current UK parliament by taking a number of cross-system actions including expanding victim support, improving transparency of the criminal justice system, and developing new models for the investigation and prosecution of rape.

[25] 0hyv25x-Justice-Statistics-data-tables-notes-and-trends-dec2021-v3.0.pdf

to develop proposals for an improved system to deal with serious sexual offence cases. The aim of the review was:

"To improve the experience of complainers within the Scottish Court system without compromising the rights of the accused; to evaluate the impact that the rise in sexual offence cases is having on courts; and to consider whether the criminal trial process as it relates to sexual offence cases should be modified or fundamentally changed. The review will then generate proposals for modernising the courts' approach. The review will examine potential changes to the court and judicial structures, procedure and practice as well as determining recommendations for changes to the law."

42. Lady Dorrian established a cross-justice Review Group with wide representation from stakeholders and justice partners. Membership included: members of the judiciary, Scottish Courts and Tribunals Service (SCTS), Police Scotland (PS), Crown Office and Procurator Fiscal Service (COPFS), the Faculty of Advocates (FoA), the Law Society of Scotland (LSS), Scottish Children's Reporter Administration (SCRA), Scottish Government (SG), Scottish Legal Aid Board (SLAB), Rape Crisis Scotland (RCS), Scottish Women's Aid (SWA) and Victim Support Scotland (VSS).

43. A 'clean sheet' approach was adopted to identify potential improvements, with the group noting "*the fact that a system has been sanctified by usage may make it difficult to change, but it should not make it exempt from thorough examination of its suitability*".[26]

44. The Review Group published its final report in March 2021.[27] Its recommendations are wide-ranging and propose modernisation of the existing court and judicial framework as well as procedures and practice. The review noted that many of the concerns expressed by complainers, echoed concerns which were being expressed 20 and even 40 years ago, referencing the 1983 Scottish Law Commission report, Evidence in Cases of Rape and Other Sexual Offences.[28] The Review Group concluded that "*without profound reform there is a real possibility that our successors will be examining the same issues forty years hence."*[29]

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[26] Improving the Management of Sexual Offence Cases (scotcourts.gov.uk) at para 5.52

[27] Ibid.

[28] Evidence: report on evidence in cases of rape and other sexual offences (SLC 78) (scotlawcom.gov.uk) E.g, Amongst the passages from the 1983 Report quoted by Lady Dorrian's Review as requiring little editing to be apposite to 2021: "*4.1 For a good many years now there has been widespread concern about, and criticism of, the way in which complainers are treated in rape trials. 4.2 The nature of this concern is both general and specific. On the general level it has been claimed that the police, prosecutors, the courts and perhaps society as a whole treat the victims of sexual crimes, and particularly rape, with a lack of proper sympathy and understanding. It is said that this lack of sympathy and understanding makes the whole experience up to and including an appearance in court much more traumatic and distressing for rape victims than is necessary. It is also suggested that a fear of having to undergo this experience may in fact deter some women from proceeding with a complaint of rape."*

[29] At para 5.52 of the Review

Implementation of the Review's recommendations

45. It was recognised that a collective approach to the delivery of Lady Dorrian's recommendations was required. The Scottish Government established a Governance Group in December 2021 comprising key stakeholder interests and representation from criminal justice agencies. Several working groups were established to give further detailed consideration to some of the specific recommendations. All but one of the working groups have now concluded and published final reports on their findings which are available on the Scottish Government's website: the creation of a specialist sexual offences court,[30] consideration of a time-limited pilot of single judge rape trials,[31] and measures to enhance the quality of jury involvement.[32] The remaining working group continues to focus on improving communication with complainers.

46. The work of the Governance Group, and its working groups, has informed development of the legislative reforms in the Bill which arise from Lady Dorrian's Review.

47. The Governance Group also keeps under review the implementation of recommendations which do not require legislative reform to implement. This includes ongoing work around the pilot of video recorded interviews with complainers and improvements to communications.

The Not Proven Verdict

48. The not proven verdict and its continued suitability in Scotland's criminal justice system is a matter of longstanding political and public debate. Following a recommendation in Lord Bonomy's Post Corroboration Safeguards Review published in 2015, the Scottish Government commissioned independent research to consider the effects of the unique features of the Scottish jury system on jury reasoning and jury decision making, as well as jurors' understandings of the not proven verdict and why might they choose this over another verdict.

49. The research, conducted by a team of research and legal experts from Ipsos MORI, Professors James Chalmers and Fiona Leverick from the University of Glasgow and Professor Vanessa Munro from the University of Warwick, was published in October 2019.[33] The research was undertaken over two years, using case simulations with nearly 900 mock jurors and was the first mock jury research project to consider the unique Scottish jury system of 15 jurors, three verdicts and conviction by simple majority.

50. The overarching finding of the research was that juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of

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[30] Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report - gov.scot (www.gov.scot)
[31] Lady Dorrian Review Governance Group: Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group Report - gov.scot (www.gov.scot)
[32] Lady Dorrian Review Governance Group: Enhancing the Quality of Jury Involvement Working Group Report - gov.scot (www.gov.scot)
[33] Scottish jury research: findings from a mock jury study - gov.scot (www.gov.scot)

verdicts available and the size of majority required do have an effect on verdict choice. In other words, jurors' verdict preferences, in finely balanced trials, are not simply a reflection of their assessment of the evidence presented but can also be affected by features of the jury system within which this evidence is considered. For example:

- Reducing jury size from 15 to 12 might lead to more individual jurors switching their position towards the majority view;
- Asking juries to reach a unanimous or near unanimous verdict might tilt more jurors in favour of acquittal; and
- Removing the not proven verdict might incline more jurors towards a guilty verdict in finely balanced trials.

51. The study also found that there were inconsistent views on the meaning and effect of the not proven verdict and how it differs from not guilty. An engagement programme on the findings of the research was undertaken in late 2019 and throughout 2020. A summary of discussions[34] was published in December 2020 which highlighted the complexity of the issues. Participants noted the interlinked nature of the jury system and emphasised that one feature, such as the not proven verdict, could not be amended or removed without considering the rest of the system.

CONSULTATION

52. The Bill content is the product of significant engagement with victims, witnesses, justice stakeholders and the general public. Proposals relating to improving victims' rights as they engage with the system have been informed by the work of the Victims' Taskforce and findings of Lady Dorrian's Review, both of which saw strong stakeholder involvement.

53. Two public consultations were held on the Bill policy: one that considered the not proven verdict and related reforms; and another that explored ways of improving victims' experiences of the justice system.

54. The consultation on the Not Proven Verdict and Related Reforms was published on 13 December 2021.[35] It sought views on the three verdict system in Scottish criminal trials and, if the not proven verdict were to be abolished, whether any accompanying reforms would be necessary to other aspects of the criminal justice system including jury size, majority required for verdict and the corroboration rule.

55. The consultation followed on from the 2019 large-scale independent mock jury research project looking at the unique nature of the Scottish system, and subsequent engagement events with stakeholders and other representatives across the country from sectors including legal

[34] Jury research - engagement events: summary of discussions - gov.scot (www.gov.scot)
[35] The not proven verdict and related reforms: consultation - gov.scot (www.gov.scot)

professionals (defence, prosecution and members of the judiciary), third sector organisations, academics and officials from various public bodies.

56. The consultation ran until 11 March 2022 and received 200 responses in total, with 179 submitted by individuals and 21 by organisations including academic/research, advocacy, justice and legal organisations.[36]

57. 62% of respondents supported changing to a two verdict system; reasoning including that it would be easier to understand, fairer and more straightforward.[37] Of the 37% who supported retention of the existing three verdict system, the key reason was that in their view the not proven verdict is a reflection of the prosecution having failed to present sufficient evidence to prove the accused's guilt beyond reasonable doubt but where there was a belief that the accused may be guilty.

58. The consultation on Improving Victims' Experiences of the Justice System was published on 12 May 2022.[38] The consultation invited views on the creation of a Victims' Commissioner for Scotland, special measures for vulnerable parties in civil cases and the recommendations arising from Lady Dorrian's Review which require legislation to implement.

59. As well as considering the recommendations from Lady Dorrian's Review, the consultation was informed by the work of the Victims' Taskforce, in particular the 'Victims Voices' feedback, which highlighted issues encountered by victims, witnesses and survivors.

60. The consultation ran until 19 August 2022 and received 69 responses; 24 submitted from individuals and 45 from organisations, including victim/witness support, children and young people's advocacy/support, local authorities/justice partnerships, academia, public bodies, campaigns, law enforcement, and legal and third sector organisations.[39]

61. Across the responses to the consultation, there were strong levels of support for almost all of the proposals and, while some attracted a more neutral response than others, very few proposals were met with a negative response.[40]

62. Alongside the two public consultations, the Scottish Government engaged with colleagues, partners and external stakeholders to highlight the proposals, encourage responses and seek feedback to support the development of policy for the Bill. This involved focussed discussions with representatives from these organisations, including but not limited to:

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[36] Published responses for The not proven verdict and related reforms - Scottish Government - Citizen Space (consult.gov.scot)
[37] The not proven verdict and related reforms: consultation analysis - gov.scot (www.gov.scot)
[38] Improving victims' experiences of the justice system: consultation - gov.scot (www.gov.scot)
[39] Published responses for Improving victims' experiences of the justice system: consultation - Scottish Government - Citizen Space
[40] Improving victims' experiences of the justice system: consultation analysis - gov.scot (www.gov.scot)

- Criminal Justice Voluntary Sector Forum
- Crown Office and Procurator Fiscal Service
- Faculty of Advocates
- Jury research academics
- Law Society of Scotland
- Lord President's Private Office
- Parole Board for Scotland
- Police Scotland
- Rape Crisis Scotland
- Scottish Association of Social Work
- Scottish Courts and Tribunals Service
- Scottish Legal Complaints Commission
- Scottish Prison Service
- Scottish Women's Aid
- Social Work Scotland
- Speak Out Survivors
- TARA (Trafficking Awareness Raising Alliance)
- UK Government Ministry of Justice
- Victim Support Scotland.

63. Engagement also included a workshop where stakeholders considered the proposals relating to the creation of a Victims' Commissioner[41], as well as the publication of an easy read summary of the proposals in the consultation on improving victims' experiences, which was used as the basis for discussion at an event for people with learning disabilities held with People First Scotland and the SOLD (Supporting Offenders with Learning Difficulties) Network.[42]

64. The Scottish Government continues to work with the cross-sector Governance Group which was set up to explore further the individual and collective recommendations from Lady Dorrian's Review, including those that do not require legislative reform. In particular, the consultation responses have been considered alongside the findings from working groups set up

[41] https://www.gov.scot/publications/summary-victims-commissioner-consultation-event/
[42] https://www.gov.scot/publications/making-justice-system-better-victims/

by the Governance Group to consider the creation of a specialist sexual offences court[43] and a limited pilot of single judge rape trials.[44]

65. Further and more specific information on the results of the consultations is provided throughout this document.

PART 1 OF THE BILL (SECTIONS 1 – 23) – VICTIMS AND WITNESSES COMMISSIONER FOR SCOTLAND

Key background and policy context

66. In a paper to the Victims Taskforce in 2020, victim support organisations set out four key themes raised from people affected by crime, regarding how their experience of the criminal justice system could have been improved. These were: being heard, accessing information, feeling safe, and experiencing compassion. The themes were used to inform the vision for a victim-centred approach agreed by the Victims Taskforce.

67. VSS, in its paper "Making the Case for a Victims' Commissioner for Scotland"[45] has suggested that the creation of an independent Victims' Commissioner for Scotland would "allow the voices, experiences and views of those affected by crime to be heard and to influence decision making" thereby offering a means of addressing some of the issues raised by victims and helping to achieve the vision agreed by the Victims Taskforce.

68. The concept of a Victims' Commissioner for Scotland has been raised a number of times since devolution. David Stewart MSP introduced a Member's Bill[46] on this issue in 2010, however, the Justice Committee did not have the necessary time to scrutinise the Bill at Stage 1. Accordingly, the Bill fell at the end of that Parliamentary session. There has also been a petition and campaign for the creation of a Commissioner role, led by a family bereaved by crime.

69. The Victims Taskforce considered the advantages and disadvantages of introducing a Victims Commissioner for Scotland at its meetings of September 2019[47], December 2020[48] and March 2021[49]. Despite differing views amongst members, it was agreed that there was an appetite

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[43] Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report - gov.scot (www.gov.scot)
[44] Lady Dorrian Review Governance Group: Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group Report - gov.scot (www.gov.scot)
[45] Report-Making-the-case-for-a-Victims-Commissioner-for-Scotland-2.pdf
[46] Commissioner for Victims and Witnesses (Scotland) Bill - Parliamentary Business : Scottish Parliament
[47] Victims Taskforce papers: September 2019 - gov.scot (www.gov.scot)
[48] Victims Taskforce papers: December 2020 - gov.scot (www.gov.scot)
[49] Victims Taskforce papers: March 2021 - gov.scot (www.gov.scot)

for a Victims' Commissioner. Most importantly, there was a clear mandate from victims (which was subsequently reflected in the VSS paper in 2021).

70. Victims' Commissioners, or similar roles, already operate in a number of jurisdictions, with a variety of remits and powers. The roles tend to have a statutory basis, with legislation prescribing the functions to be carried out by the post-holder and often containing reporting obligations, governance structures and a requirement to consult with victims and survivors. There are other examples where the appointment is more loosely defined, such as for example, as a mayoral appointment in London.

71. Such commissioners elsewhere tend to have a role that is heavily focussed on engagement with victims and witnesses (as individuals), their representative organisations, government and criminal justice agencies, and taking forward reviews and reports on matters of interest. The role of many commissioners is dedicated to identifying and addressing issues that are of general application and affect a number of victims, and do not involve the commissioner providing support or advice in relation to individual cases[50].

72. There are examples of other types of Commissioner in Scotland whose role is to essentially champion the rights of certain groups. For example, the role of the Children and Young People's Commissioner Scotland (CYPCS), is to promote and protect the rights of children.

73. The Scottish Government places a priority on hearing victims' voices and offering approaches in the justice system which place victims at its heart.

74. With this background and clear support from many victims and representative organisations for the establishment of a Victims' Commissioner for Scotland, the Scottish Government committed in its Programme for Government 2021-2022 to consult on establishing such an office. The matter was explored as part of the consultation on Improving Victims' Experiences of the Justice System with views sought on the role, remit and functions and powers a commissioner might have.

Specific provisions

75. Provision in the Bill relating to the creation of a Victims and Witnesses Commissioner for Scotland are broadly split into the following areas:

- Establishment of an independent Victims and Witnesses Commissioner for Scotland, their functions and powers, and engagement;

[50] Annex of Victims+Taskforce+-+Secretariat+-+8th+Meeting+-+2020-12-09+-+Paper+3+-+Victims+Commissioner.pdf (www.gov.scot) provides a summary of information about the role of Victim Commissioner in England and Wales, London, Northern Ireland, and two Australian states (Victoria and South Australia)

- Strategic plan;
- Investigations, information gathering and duty to co-operate with the Commissioner; and
- Reports and recommendations.

Establishment of a Victims and Witnesses Commissioner for Scotland, their functions and powers, and engagement

Policy objectives

76. Ensuring effective justice where victims' voices are heard is a key priority in the Scottish Government's Vision for Justice. The Bill creates a new office of Victims and Witnesses Commissioner for Scotland. The Commissioner will provide an independent voice for victims and witnesses, champion their views and encourage policy makers and criminal justice agencies to put victims' rights at the heart of the justice system. The role will benefit victims and witnesses of crime by providing an additional, statutory mechanism for their voices and experiences to be heard. It will also help raise awareness and monitoring of the rights of victims and witnesses. A key part of the role will be to engage with victims and organisations who support them.

77. Whilst early policy thinking was that the Commissioner would only focus on victims' experiences, the Bill provides that the Commissioner will also have a role in relation to witnesses, for example in monitoring compliance with the Standards of Service for Victims and Witnesses. Providing for a Victims and Witnesses Commissioner ensures that an artificial line is not drawn between a person who is a complainer and someone who is not a complainer, in order for their experience to be considered by the Commissioner. The equivalent Commissioner in England and Wales is a Victims and Witnesses Commissioner.

78. The Scottish Government considers it essential that the work of the Victims and Witnesses Commissioner is directly informed by victims' voices, through engagement with victims and those who support them. In its paper, "Making the case for a Victims' Commissioner for Scotland", VSS stated that the role of Commissioner should come with "a commitment to engage directly with victims and witnesses" and suggested that this could be facilitated through "victim experience panels to give victims a forum to advocate themselves for the changes they believe would make the most difference for them".

79. There are currently a number of victim and survivor reference groups operating in Scotland, facilitated by victim support organisations. These reference groups, in addition to other important functions, feed into the work of the Victims Taskforce to directly inform members of their experience and to advise on what needs to change. The Bill allows the Victims and Witnesses Commissioner to establish an advisory group, in recognition of the importance of their work being informed by victims.

80. The Scottish Government considers that it is important that the Commissioner's role and remit is clearly set out in order to provide clarity about who they represent. The policy intention is that the Commissioner has a key role in the protection and promotion of the rights of victims and witnesses, advancing their voices, influencing change and ensuring that criminal justice agencies meet their responsibilities under the Victims' Code.

81. For similar reasons of clarity, and to enable the Commissioner the independence and resources to focus on identifying common issues and influencing systems-level change, the Scottish Government considers it important that the Bill makes clear the limitations of their remit. The Bill at section 8 places restrictions on the exercise of the Commissioners' functions, notably that they will not champion or intervene in individual cases. Criminal justice agencies already have well-established complaints procedures which they are required to set out in their standards of service for victims and witnesses, and there are additional steps that can be taken if someone does not feel their complaint has been dealt with satisfactorily.

82. This approach does not preclude the Commissioner from considering individual cases in order to understand the national picture, and reflects what can be seen in other jurisdictions, where commissioners do not provide direct support to victims (though they can signpost or refer to services), offer legal advice, influence or interfere in criminal investigations or proceedings, or become involved in decisions around compensation for victims. They do not champion individual cases, rather they listen to victims in order to identify common issues and advocate for victims' rights within the justice system.

83. The Scottish Government acknowledges that the experiences of victims and witnesses may be complex and relate to the justice system as a whole, not only to the criminal justice system. The policy intention is for the Commissioner's remit to initially be limited to the criminal justice system. Whilst there are significant differences between the criminal and civil justice landscapes, the Scottish Government has a long-term ambition to extend the Commissioner's functions to the civil justice system so they have a role in promoting and supporting the rights and interests of people involved in civil proceedings, and also to victims of harm caused by children who have been referred to the Children's Hearings system. The Bill provides a power for Scottish Ministers to amend, by regulations, the general functions of the Victims and Witnesses Commissioner to include a civil function (section 3). It also includes a power (at section 23) to amend, by regulations, the definition of victims and witnesses, and add to the list of criminal justice agencies, thereby allowing for extension of the remit to the Children's Hearings system.

Key information

84. Establishing an independent Victims and Witnesses Commissioner for Scotland will actively protect and promote the rights of victims and witnesses in Scotland. It will address any perceived imbalance that the representation of issues affecting victims and witnesses is better provided elsewhere in the UK, due to the lack of an equivalent role in Scotland.

Establishment of the Commissioner

85. Section 1 establishes the Victims and Witnesses Commissioner for Scotland. The Victims and Witnesses Commissioner will be independent from the Scottish Government and criminal justice agencies. The advantage of a statutory and independent office will be a clear legislative underpinning for the role and a transparent relationship with the Scottish Ministers and criminal justice agencies, making provision for co-operation, collaboration and challenge. It will help to foster a sense of trust in the Commissioner's ability to act impartially and, where necessary, hold the Scottish Ministers, criminal justice agencies and those providing services to victims to account using the powers assigned to the role. Schedule 1 provides further detail for the creation of the role.

Powers and functions

86. Section 2 provides that the Commissioner will have a general function to promote and support the rights and interests of victims and witnesses. Section 2 also sets out particular activities which the Commissioner must carry out in exercising this general function, which include (but are not limited to) taking steps to raise awareness and promote the interests of victims and witnesses; monitoring compliance with the Standards of Service and the Victims' Code for Scotland; and promoting best practice and a trauma-informed approach by criminal justice agencies and those who provide support services to victims.

87. At section 7 the Bill provides general powers that may be necessary for the purposes of performing the Commissioner's functions. As discussed above, section 8 sets out the restriction on the Commissioner's exercise of functions, including that the Commissioner may not exercise any function in relation to an individual case.

88. When considering the complexity of the experiences of victims and witnesses, particularly where a person might be a victim for a criminal case and where prosecution of the case is not successful and a civil matter raised, section 3 provides for expanding the Commissioner's general function of promoting and supporting the rights and interests of victims and witnesses, by regulations, to include a civil function. The civil function is to promote and support the rights of persons involved in civil proceedings. This responsibility would include parties to the proceedings and witnesses (if different) and persons who may be the subject of proceedings (such as a child or a vulnerable adult about whom the civil matter relates). The Bill also provides for potential extension of the Commissioner's remit to victims in cases being dealt with within the youth justice system (in section 23).

Engagement

89. The work of a Victims and Witnesses Commissioner must be directly informed by victims' voices, through engagement with victims and witnesses, and those who support them. The Commissioner will engage closely with victim support organisations, and be a figurehead for championing the causes of victims and witnesses.

90. Looking to other commissioner models, the legislation establishing the CYPCS requires that the CYPCS takes reasonable steps to consult with children and young people, and organisations working with and for children and young people, on the work to be undertaken by the commissioner. There is a further stipulation that the CYPCS must pay particular attention to groups of children and young people who do not have other adequate means by which they can make their views known. The legislation establishing the Domestic Abuse Commissioner for England and Wales takes a different approach in that it requires the commissioner to establish an advisory board. The membership of this Board must include at least one person representing the interests of victims of domestic abuse and at least one person representing charities/other voluntary organisations working with victims of domestic abuse.

91. The Bill, at section 2, requires the Commissioner to engage with victims and witnesses and organisations who support them, as part of the general function. Section 4 empowers the Commissioner to establish and maintain such groups as the Commissioner considers appropriate. As seen in legislation for the CYPCS, the Bill requires that the Commissioner pay particular attention to groups of victims and witnesses who do not have other adequate means by which they can make their views known. Section 4 requires the Commissioner to prepare and keep under review a strategy for engaging with victims, witnesses and persons providing support services to victims. Section 5 provides the Commissioner with the power to establish and maintain an advisory group to give advice and information to the Commissioner about matters relating to the Commissioner's functions. This is discretionary to the Commissioner. Membership of the advisory group and payment of remuneration and allowances (including expenses) would be subject to the approval of the Scottish Parliament Corporate Body. The Bill also provides a power for the Commissioner to work with others (section 6), which enables the Commissioner to work jointly with, assist or consult specific persons on such terms as may be agreed.

Alternative approaches

92. An alternative approach would be to establish an independent, but non-statutory Commissioner. There are examples of such an approach being taken, such as that of the Scottish Veterans' Commissioner (SVC). The office of SVC does not have statutory functions, powers or duties. Their objectives are determined administratively by Scottish Ministers and set out in terms and conditions of appointment. The SVC must act within and in accordance with the expectations placed on the office by Scottish Ministers, and the SVC is accountable to Scottish Ministers for their actions and decisions of office.

93. This option has been discounted as the Scottish Government considers it is important for the Victims and Witnesses Commissioner to have statutory powers to hold criminal justice agencies to account.

94. Another alternative would be to establish a statutory Commissioner with either (a) a greater set of functions and powers; or (b) a more limited set of functions and powers. Victims have stated that their key areas for improving their experience of the justice system are around being heard, accessing information, feeling safe and compassion. The functions and remit of the

Victims and Witnesses Commissioner provided by the Bill have been shaped around this feedback, through discussions with the Victims Taskforce, and from feedback from public consultations.

95. Victims and witnesses are not limited to the adult criminal justice system in Scotland. Consideration was given to the breadth of the Victims and Witnesses Commissioner's remit, to situations where residents of Scotland are victims of crime outwith Scotland, and whether the Commissioner should be able to intervene in specific cases. The Commissioner's remit will focus on the role of Scottish criminal justice agencies interacting with victims and witnesses, and will therefore be limited by the reach of those agencies. This means that it will not be possible for the Commissioner's role to include situations where residents of Scotland are victims of crime outwith Scotland.

96. Another option would be for the Commissioner's remit on establishment of the office to reach beyond criminal justice and into civil matters and the youth justice system. Whilst this is the long-term policy ambition, the Scottish Government's view is that both require further and more detailed consultation, including with the Commissioner, before being implemented. As discussed previously, the Bill provides an enabling power for Scottish Ministers to amend, by regulations, the general function of the Commissioner to include a civil function, and an enabling power to amend, by regulations, the definition of criminal justice agency, victims, and offences, which would allow for the Commissioner's remit to cover the experience of victims in the youth justice system. This approach will allow for extension of the functions at a point in the future.

Consultation

Establishment of commissioner

97. Proposals to establish a Victims and Witnesses Commissioner for Scotland are the result of considerable consultation with victims, victim support organisations, justice stakeholders and the general public. The proposals are informed by the work of the Victims' Taskforce, the *Improving Victims' Experience of the Justice System* consultation, and a workshop with key stakeholders held on 14 July 2022.

98. Respondents to the public consultation were strongly supportive of the creation of the statutory office of a Victims' Commissioner (92% of those who answered the question either strongly or somewhat agreed).

99. The main reasons given in support were that making the role statutory would ensure transparency to the remit of the role and powers of the office holder, bringing with it clear lines of responsibility and accountability, and making clear the scrutiny, reporting and review mechanisms. Making the role statutory was seen as being necessary to give victims confidence in the person representing them; it would give the Commissioner "gravitas", the power to hold authorities to account, and foster and enhance collaborative working/financial relationships within the sector, giving victims their rightful voice. Making the role statutory provides parity with the role of other commissioners, including the CYPCS.

100. Two victim support organisations were opposed to the establishment of a Victims' Commissioner, on the basis that the role would potentially duplicate and detract from the role of existing victim and witness support organisations operating across Scotland. The Scottish Government considers that that there will be space for a Victims and Witnesses Commissioner for Scotland (as an independent statutory body) and for Third Sector campaigning and advocacy organisations in Scotland. The Victims and Witnesses Commissioner for Scotland will not be involved with individual cases; it is therefore very unlikely that the role would duplicate organisations' roles who do provide that service.

101. The consultation sought views on independence of the Commissioner from the Scottish Government, with 88% of respondents strongly in agreement. The main reasons given in support of independence were that accountability to Parliament would ensure transparency and garner trust. Several victim and witness support organisations indicated that independence would allow for a more credible system of handling complaints and reporting of potential failings within the justice system. The general view was that the Commissioner should be able to hold the Scottish Government and criminal justice agencies to account to ensure that victims' experiences are at the centre of the justice process.

102. The consultation sought views on the Victims Commissioner's remit. The majority of respondents who answered this question (84%) indicated that they felt the experience of victims in the criminal justice system should be within the remit of the Victims' Commissioner. Around three quarters (73%) felt that the experience of victims in the civil justice system and Children's Hearings System (76%) should also be in scope. More than two thirds (67%) expressed that the experience of victims resident in Scotland, but where the crime has taken place outwith Scotland, should also be within the Commissioner's remit.

Functions and powers

103. A number of suggested functions were set out in the consultation, including raising awareness / promotion of victims' interests and rights; monitoring compliance with the Victims' Code for Scotland, the Standards of Service for Victims and Witnesses, and any relevant legislation; promoting best practice by criminal justice agencies and those providing services to victims, including championing a trauma-informed approach; and undertaking and / or commissioning research in order to produce reports and make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims. The majority of respondents to the consultation supported all of the functions proposed in the consultation paper.

104. While many respondents indicated that all of the powers listed in the consultation were appropriate, those that attracted the most support were the powers to carry out investigations into systemic issues affecting victims of crime (85%) and the power to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims (85%). The power to require persons to respond to any recommendations made to them (by the Commissioner) was also very well supported (78%) and only the suggested power to require persons to give evidence in the course of an investigation attracted support from fewer than two thirds of the respondents.

105. The power to make recommendations to the Scottish Government, local government, criminal justice agencies, those providing services to victims, and other public bodies was seen as key to giving investigations and research the level of robustness required.

Engagement

106. There was strong agreement (81%) with the proposal that the Commissioner should be required to consult with victims on the work to be undertaken. Many respondents were of the view that this is central to the role, and that anyone appointed to the post would wish to place victims "front and centre" of any planning and operations in order to succeed. It was felt that any consultation with victims must be inclusive and open, to ensure that victims from a wide range of backgrounds have a chance to get involved, and that engagement should go beyond consultation to include things such as collaboration and co-production, whereby victims are directly involved in informing policy and practice change.

107. The majority of respondents selected multiple responses to how engagement should take place. The most popular option selected focussed on consultations with victims (81%), and an advisory board, including victim representation (74%). Comments reiterated that a combination of different engagement methods was the preferred approach, and that a menu of options would allow a greater number of different voices to be heard.

Strategic Plan

Policy objectives

108. The Commissioner will be independent from the Scottish Government, and accountable to the Scottish Parliament, and thereby to the people of Scotland. Being accountable to the Scottish Parliament means that the Victims and Witnesses Commissioner will be required to explain their actions and decisions. Preparation and publication of a strategic plan will assist with transparency and accountability, raise awareness of the role, allow any shortcomings to be regularly identified and challenged, and allow victims and witnesses represented by the Commissioner to keep abreast of activity, progress and plans.

Key information

109. Section 9 requires the Victims and Witnesses Commissioner to prepare and publish a strategic plan at three-yearly intervals, setting out how the Commissioner proposes to perform their functions for the period covered by the plan. This will include setting out their objectives and priorities for the period, how the Commissioner proposes to achieve them, a timetable, and estimated costs. The Commissioner may, at any time, review and revise a strategic plan.

110. Preparing and publishing objectives and priorities will ensure transparency of the Victims and Witnesses Commissioner's intentions for all those who wish to interact with the Commissioner. Being able to review and revise a strategic plan out with a fixed, three-year period

will enable the Commissioner to be flexible and respond to emerging issues over a quicker timeframe.

Alternative options

111. One alternative would be for the Commissioner to not be required to produce a strategic plan. This was discounted. In order to ensure full confidence from victims and witnesses, whose voices need to be heard, it is important to be open and transparent, and provide clarity about the work that the Commissioner will seek to undertake and the expected timeframes for this.

112. Another alternative would be for strategic planning to cover (a) a shorter; or (b) longer timeframe. A three-year period (with the potential to review and revise before the end of the three years) will provide sufficient opportunity for the Commissioner to set out a longer-term strategic direction whilst also requiring them to revisit that direction within a reasonable timeframe. This will help to ensure that victims and witnesses (and their representative organisations) are confident with the actions that the Commissioner is taking, and that progress is being made to improve their experiences in the justice system. There would be more limited opportunity to progress improvements over a shorter timeframe; with a longer timeframe, victims and witnesses might be concerned about the length of time before a change in strategic direction could take place.

Consultation

113. There was strong support or the proposal of the Commissioner producing annual reports and multi-year strategic plans, on the basis that both would assist with transparency and accountability, raise awareness of the role, allow any shortcomings to be regularly identified and challenged, and allow victims and others represented by the Commissioner to keep abreast of activity, progress and plans.

Investigations, information gathering and duty to co-operate with the Commissioner

Policy objectives

114. It is essential that the Victims and Witnesses Commissioner has the appropriate powers and means of recourse necessary to fulfil the functions of the role. These will be crucial in empowering the Commissioner to effectively carry out investigations into systemic issues affecting victims and witnesses, and to gather the necessary evidence to prepare reports and make recommendations to the Scottish Government, criminal justice agencies and those providing support services to victims and witnesses.

115. Looking to other commissioner roles, there are a number of different approaches. The CYPCS has the power to carry out what are referred to as ‘general investigations’ and ‘individual investigations’ into whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people (or a specific child or young person for individual investigations). In conducting an investigation, the CYPCS may require any person to give

evidence or to produce certain documents - but only where the Parliament could require that person, under section 23 of the Scotland Act 1998, to attend its proceedings for the purpose of giving evidence or producing documents. The Victims of Crime Commissioner in Victoria, Australia, has the power to carry out an inquiry on any systemic victim of crime matter, at the request of any person or at the Commissioner's own behest.

116. The CYPCS, Scottish Biometrics Commissioner, and Domestic Abuse Commissioner for England and Wales all have statutory powers to make recommendations to relevant persons/bodies and, significantly, require them to respond to those recommendations within a specified timescale. Their response must state what action the person/body has done or proposes to do in response to the recommendation or, if nothing, reasons for that decision. In contrast, the Victims' Commissioner for England and Wales has more limited powers. A report[51] published by that office in December 2020 identified significant gaps in the powers of the Victims' Commissioner in relation to the Victims' Code in England and Wales.

117. The Bill sets out a combination of these powers, and places a duty of cooperation on criminal justice agencies, which together will enable the Victims and Witnesses Commissioner to undertake their role effectively. Section 10 provides a power to carry out investigations. Section 11 sets out the steps that the Commissioner must take for initiating and conducting an investigation. Section 12 sets out requirements in relation to witnesses and documents for investigations. The Bill includes provisions in relation to information gathering into systemic issues affecting victims of crime (section 14), to report on these issues and to make recommendations to the Scottish Government, criminal justice agencies and those providing support services to victims in Scotland. There is a duty on specified criminal justice agencies to respond to a request to co-operate with the Commissioner (section 21), and a power that requires those persons to which recommendations are addressed (as part of the Commissioner's annual report) to respond within a specified timescale (section 17).

Key information

118. The Bill will empower the Victims and Witnesses Commissioner in the area of investigations of specific topics and areas (but not individual cases) and information gathering.

119. Section 10 empowers the Commissioner to carry out investigations into whether, by what means, and to what extent, a criminal justice agency has regard to the rights, interests and views of victims and witnesses in making decisions or taking actions that affect those victims and witnesses. Section 11 sets out steps that the Commissioner must take for initiating and conducting an investigation. Section 12 provides requirements in relation to witnesses and documents for investigations. Section 13 requires the Commissioner, at the conclusion of an investigation, to publish a report of the investigation. The report may include a requirement for the criminal justice agency to respond to the report, and may not be published until the criminal justice agency which

[51] Constitutional powers of the Victims' Commissioner for England and Wales - Victims Commissioner

was the subject of the investigation has been given a copy of the draft report and an opportunity to make representations on it.

120. The Bill empowers the Commissioner to gather information. Section 14 enables the Commissioner to require a criminal justice agency to supply information which the Commissioner reasonably requires for the purpose of determining compliance with the standards of service and the Victims' Code. Section 15 provides an offence for the disclosure of confidential information by the Commissioner, a member of the Commissioner's staff, or an agent of the Commissioner. This section provides that confidential information may only be authorized for disclosure if specific criteria are met.

121. Section 21 provides a duty on specified criminal justice agencies to respond to a request to cooperate with the Commissioner in any way that the Commissioner considers necessary for the purpose of the Commissioner's functions. The Commissioner may request that a specified criminal justice agency co-operate with the Commissioner, and a criminal justice agency which receives a request from the Commissioner must respond. Section 20 provides protection from actions of defamation, such that statements made to the Commissioner, or included in the Commissioner's report on an investigation have absolute privilege, and any other statement made by the Commissioner has qualified privilege.

Alternative approaches

122. An alternative approach would have been to give the Commissioner more limited investigative powers. For example, not placing a requirement on persons to give evidence in the course an investigation or not requiring criminal justice agencies to respond to reports of investigations (where stipulated to do so by the Commissioner). More limited powers could also have seen the duty on the criminal justice agencies to respond to a request to cooperate with the Commissioner omitted from the provisions.

123. Such an approach was discounted as it would not provide the Commissioner with the statutory powers necessary to fulfil its functions. Investigatory powers for systemic issues were seen by respondents to the public consultation as essential for enabling greater autonomy in determining the focus of the Commissioner's work, and in identifying problems and potential policy changes. Furthermore, the power to require persons to give evidence in the course of an investigation was considered by respondents to guarantee compliance of public authorities, voluntary bodies and others in a transparent and timely manner.

Consultation

124. There was support (from 85% of respondents) for a power to carry out investigations into systemic issues affecting victims of crime. Victim and witness support organisations were of the view that investigatory powers for systemic issues were essential for enabling greater autonomy in determining the focus of the Commissioner's work, and for identifying problems and potential policy changes.

125. Respondents also supported providing a power to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims (85%). The power to require persons to respond to any recommendations made to them (by the Commissioner) was also very well supported (78%). Some concerns were raised in relation to requiring persons to give evidence in the course of an investigation, with the view that no-one should be compelled to do so, especially not victims (for whom doing so could be traumatising and compound the original trauma).

126. Consultation responses mentioned the need for clarity around powers, to ensure that the roles of various scrutiny bodies did not overlap.

127. The power to require persons to respond to any recommendation made to them by the Commissioner and receive a response within an agreed timeframe was welcomed on the basis that it would ensure the Scottish Government and other relevant agencies were accountable to any recommendations made.

128. While respondents considered that the power to require persons to give evidence in the course of an investigation would guarantee compliance of public authorities, voluntary bodies and others in a transparent and timely manner, one respondent suggested this power should be extended to allow the collection and questioning of relevant data to inform an investigation (such as data on prevalence of victimisation, responses and criminal justice outcomes). The same respondent suggested it should also include the power to gain access to criminal justice agency records where necessary.

Reports and recommendations

Policy objectives

129. Preparation and publication of an annual report is a key part of the Victims and Witnesses Commissioner being accountable to the Scottish Parliament. Along with the strategic plan, annual reports will assist with transparency and accountability, raise awareness of the role, allow any shortcomings to be regularly identified and challenged, and allow victims and witnesses represented by the Commissioner to keep abreast of activity, progress and plans. This will ensure that the Commissioner will be accountable to victims directly, as well as to those who work with victims, witnesses, their families and supporters, and will allow scrutiny by such partners.

130. The Bill empowers the Commissioner to lay additional reports in the Parliament (in addition to those following investigations, or annual reports) if the Commissioner considers it appropriate to do so. This will enable the Commissioner to undertake their role fully and effectively.

Key information

131. Section 16 provides that the Commissioner must prepare and publish an annual report on their activities, which will contain a review of issues identified by the Commissioner as relevant

to their functions; a review of the Commissioner's activity in that year (including the steps taken to fulfil each of the Commissioner's functions), any recommendations by the Commissioner arising out of that activity, and an overview of the activity which the Commissioner intends to take in the financial year following the year to which the report relates. The Commissioner must ensure that the report does not include any information that would, or might, disclose the identity of an individual. The Commissioner must comply with any direction from the Scottish Parliamentary Corporate Body in relation to the form and content of the annual report.

132. Where an annual report includes a recommendation addressed to a criminal justice agency or person providing support services to victims, the Commissioner may impose a requirement to respond to the report (section 17). The Commissioner must publish any statement provided in response to a requirement to respond to the report (section 18), unless the Commissioner considers publication to be inappropriate. The Commissioner may publicise a failure to comply with a requirement to respond.

133. Section 19 empowers the Commissioner to lay before the Parliament any report, in addition to annual reports or reports following an investigation, prepared by the Commissioner if the Commissioner considers it appropriate to do so. In such miscellaneous reports, the Commissioner must ensure that a report does not name or otherwise identify an individual who has given information to the Commissioner, and has not consented to being named in the report.

Alternative approaches

134. One alternative would be for the Commissioner to not be required to produce an annual report. This was discounted. As previously mentioned, it is important for the Commissioner to be open and transparent about their work, and to provide clarity about what they are doing, in order to obtain full confidence from victims and witnesses, and for these key stakeholders to be of the sentiment that their voice is being heard.

135. Another alternative would be for a reporting period to cover a longer timeframe. This was also discounted, since it is considered good practice to provide annual reports on progress following strategic planning.

Consultation

136. Respondents to the consultation welcomed the proposal of the Commissioner producing annual reports; this was seen as enhancing accountability of the role. There was strong support for a combination of annual reports and a multi-year strategic plan (67% of respondents supporting this). Combining the two was seen as providing short-term transparency and up-to-date information alongside setting out longer-term vision and outcomes which would give partners confidence in the Commissioner's strategic approach. Regular reporting was seen as especially important when considering victims' desires to see what was being done in the immediate term. Annual reports (and a strategic plan) were seen as commensurate with reporting procedures for other similar public positions.

PART 2 OF THE BILL (SECTIONS 24 – 29) – TRAUMA-INFORMED PRACTICE

Key background and policy context

137. Trauma results from an event, series of events, or set of circumstances that a person experiences as physically or emotionally harmful, and that has lasting adverse effects on their functioning and wellbeing[52].

138. Trauma-informed practice is an approach to working with people that is grounded in being able to recognise when someone may have been affected by trauma, understanding the impact trauma may have on them, responding in ways that adapt to that impact, and trying to avoid re-traumatising them or causing any additional trauma. The core principles of a trauma-informed approach are safety, choice, collaboration, trust and empowerment.

139. The experiences that lead people to the justice system are often traumatic, and for some, their experiences of the system itself traumatise them further.

140. A report published in July 2020 on Transforming Service for Victims and Witnesses[53] highlighted 'pain points' in the criminal justice system that can be particularly distressing for victims and witnesses. These include opaque processes; a lack of information or regular contact from justice agencies; lengthy delays between reporting a crime and the trial; adversarial questioning; and a sense of having no control over the process.

141. Some victims have even described their interactions with the criminal justice system as more traumatic than the effect of the original crime against them. Trauma can also affect memory and how people give their evidence, so it is important that trauma is recognised and its potential impact is understood.

142. Lady Dorrian's Review stated that, "*The adoption of trauma-informed practices is a central way in which the experience of complainers can be improved*," and the Scottish Government's Vision for Justice sets out a commitment to embedding trauma-informed practice in the justice system.

143. In recent years, the Scottish Government has taken forward a number of initiatives to embed trauma-informed practice across services:

- In 2016 the Scottish Government commissioned NHS Education for Scotland to develop the National Trauma Training Programme[54]. The Programme has created

[52] Adapted from the definition developed in SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach
[53] Transforming Services for Victims and Witnesses
[54] National Trauma Training Programme

training resources to help promote and implement trauma-informed practice across all sectors of the workforce in Scotland.

- The Forensic Medical Services (Scotland) Act 2021 added trauma-informed care to the list of health care principles in the Patient Rights (Scotland) Act 2011, so that health boards must have regard "to the importance of providing health care in a way that seeks to avoid re-traumatisation and is otherwise trauma-informed," which applies in relation to the exercise of their functions under this Act.
- In 2021 the Scottish Government, in consultation with the Victims Taskforce, commissioned NHS Education for Scotland to create a 'Knowledge and Skills' framework specifically to support the development of a trauma-informed workforce in the justice sector. The Framework was endorsed by the Victims Taskforce in December 2022. It will help justice organisations identify the knowledge and skills their staff need to respond to victims and witnesses of crime (including children and young people) in a trauma-informed and trauma-responsive way. It is also designed to support the development and delivery of training in trauma-informed practice.

144. Training and the development of a trauma-informed workforce will play an important part in making our justice system more trauma-informed. However, the Scottish Government considers it crucial that each part of the system - justice agencies, third sector support organisations and the legal profession - consider their operational processes and procedures from a trauma-informed perspective.

145. The Bill aims to embed trauma-informed practice across the justice system, providing a legislative underpinning for both necessary cultural and procedural change.

Specific provisions

146. Provision in the Bill relating to trauma-informed practice can be broadly split into the following areas:

- A new requirement for criminal justice agencies to have regard to trauma-informed practice.
- A requirement for the Standards of Service produced by the criminal justice agencies to include standards on trauma-informed practice.
- Empowering 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.

147. Consultation respondents emphasised the need for a clear, shared definition of what constitutes trauma-informed practice in the context of the justice system. To support the provisions in this Part – and the provisions elsewhere in the Bill that relate to trauma-informed practice – the

Bill therefore creates a statutory definition of trauma-informed practice (section 69). The definition has been developed to align with work already underway across the justice sector, particularly the 'Knowledge and Skills Framework' which will be a key resource to support a trauma-informed and responsive workforce across the sector.

Requirement for justice agencies to have regard to trauma-informed practice, and for Standards of Service to cover trauma-informed practice

Policy objectives

148. The Bill places new requirements on criminal justice agencies in respect of trauma-informed practice, to help minimise the risk of undue re-traumatisation occurring.

Key information

149. Section 1 of the Victims and Witnesses (Scotland) Act 2014 ('the 2014 Act') sets out a list of general principles which the Crown Office and Procurator Fiscal Service (through the Lord Advocate), the Scottish Prison Service (through the Scottish Ministers), Police Scotland, the Scottish Courts and Tribunals Service and the Parole Board for Scotland must have regard to when they are carrying out their functions in relation to victims and witnesses of crime. Section 24 of the Bill adds 'trauma-informed practice' to that list, as defined in section 69. This means that these agencies will be required to have regard to trauma-informed practice when carrying out their functions in relation to victims and witnesses in criminal cases. The Bill does not prescribe fixed approaches, as what having regard to trauma-informed practice entails will depend on the circumstances and on the context in which each agency is working, and on the needs of each individual.

150. The 2014 Act also requires these agencies to set and publish 'Standards of Service' for victims and witnesses. By law, these must set out the standards the agencies aim to meet in their work with victims and witnesses. They must also set out the process people can use to make a complaint, if they are not happy with the service received from one of the agencies. Section 24 of the Bill will require that, in future, the Standards of Service also include standards on how the agencies carry out their functions in a way that reflects trauma-informed practice. Part 1 of the Bill establishes an independent Victims and Witnesses Commissioner for Scotland, whose role will include monitoring compliance with the Standards of Service and promoting trauma-informed approaches.

151. Currently, the 2014 Act does not specify how often the Standards of Service must be revised and published. In practice, the agencies have worked together to produce the Standards annually. Section 24 of the Bill specifies that revised Standards of Service must be published within 18 months of the provisions coming into force. This is to ensure that trauma-informed practice is incorporated into the Standards at an early opportunity, but without disrupting the finalisation of annual Standards that may be nearing publication at the time of commencement.

Alternative approaches

152. The Bill could have included no provision on trauma-informed practice. The other UK jurisdictions have not legislated for trauma-informed practice in their justice systems. However, as the Vision sets out, the Scottish Government sees embedding trauma-informed practice as an important part of developing modern, person-centred justice services that treat people with respect and compassion, and support their recovery. Although trauma-informed practices can be adopted without legislation, legislating is a powerful tool to promote change across the sector, by enshrining trauma-informed practice as a priority for justice agencies and requiring them to report on its implementation.

Consultation

153. Proposals for embedding trauma-informed practice were included in the Improving Victims' Experience of the Justice System consultation. Consultation respondents were strongly supportive of adding trauma-informed practice to the principles in the 2014 Act (92% of those who answered the question either strongly or somewhat agreed), and of including trauma-informed practice in the legislation underpinning the Standards of Service (94% either strongly or somewhat agreed). It was felt that these changes would send a powerful message to both victims and practitioners about the importance of trauma-informed practice; encourage greater consistency across the sector; increase accountability; and give victims more clarity on what to expect as they moved through the criminal justice system.

Court rules and procedures on trauma-informed practice

Policy objectives

154. The 2014 Act applies to the justice agencies previously noted[55] but not to other parties who may have a direct bearing on victims and witnesses' experiences of the justice system, like defence lawyers and the judiciary. This means that the new principle on trauma-informed practice provided for by section 24 will not apply to them.

155. This is significant, because the way in which a defence is conducted is often highlighted by victims as one of the most distressing aspects of the justice process, and can contribute to their re-traumatisation[56]. The consultation asked for views on whether the court should have a duty to take 'such measures as it thinks appropriate' to direct legal professionals to consider a trauma-informed approach in respect of all witnesses, including their clients (i.e. accused people). Consultation respondents raised suggestions of specific ways in which court rules might support trauma-informed practice, like codifying a requirement for the respectful questioning of witnesses, or prescribing more regular and consistent use of special measures and pre-recorded evidence.

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[55] Crown Office and Procurator Fiscal Service, the Scottish Prison Service, Police Scotland, the Scottish Courts and Tribunals Service and the Parole Board for Scotland

[56] Transforming Services for Victims and Witnesses

156. The policy approach taken in the Bill is to ensure the courts can make operational changes to court procedure and practices that help embed the principles of trauma-informed practice in the conduct of court business, with the objective of improving the experience of people involved in court cases and minimising the risk of retraumatising them.

Key information

157. There is a common law power for every judge to regulate the conduct of matters in their court. They can interject when evidence is being led, and can intervene in questioning in court (for example, if they believe inappropriate questions are being asked during cross-examination)[57]. However, responses to the consultation highlighted that these powers are not consistently used in practice. This was also notably illustrated in the case of *McDonald v HM Advocate*[58], where the Lord Justice General, Lord Carloway, noted:

"This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or Sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable."

158. In addition to common law powers, the criminal and civil courts can create court procedure and practice rules through their own legislation (these are called 'Acts of Sederunt' for the civil courts, and 'Acts of Adjournal' for the criminal courts). The Courts Reform (Scotland) Act 2014 lists illustrative, non-exhaustive examples of the sort of matters they have the power to make rules and procedure on for civil business. Section 26 of the Bill adds trauma-informed practice to that list, to make clear that the court may regulate its practice and procedure in a way to promote trauma informed practice in the operation of the civil courts. Similarly, for criminal business section 25 makes explicit that the courts may set rules designed to ensure that criminal proceedings are conducted in accordance with trauma-informed practice.

Alternative approaches

159. The Legal Services (Scotland) Act 2010 sets out the professional principles that people who provide legal services are required to follow. The Scottish Government explored the possibility of adding a new professional principle on trauma-informed practice to that Act, so that legal professionals (including defence agents instructed in criminal cases) were required to act in a trauma-informed manner. However, it was concluded that this would not be an effective

[57] Dreghorn v HM Advocate 2015 SCCR 349, Donegan v HM Advocate 2019 JC 81
[58] [2020] HCJAC 21

or proportionate way of improving people's experiences of the justice system, for several reasons:

- The professional principles in the 2010 Act apply to all providers of legal services, including those who do not work in the justice sector. As the policy intention is specifically to improve the experiences of people in the justice system, the impact of adding a new principle on trauma-informed practice is considered best done in a focused manner as is proposed in this Bill.
- Challenges in terms of the effective enforcement of such a principle, particularly in relation to the conduct of a defence agent in the course of a trial which is alleged to have breached the principle of acting in a trauma-informed way. Engagement with stakeholders highlighted that those charged with dealing with complaints on conduct and practice (including the Scottish Legal Complaints Commission, the Law Society of Scotland or Faculty of Advocates) could take the view that conduct during the course of a trial is most appropriately dealt with by the trial judge exercising their common law powers to regulate proceedings before them. If the trial judge did not intervene at the time, it may be difficult for others to conclude that they were better-placed than the judge, to assess the appropriateness of the lawyer's behaviour. Adding trauma-informed practice to the professional principles in the 2010 Act could, then, result in people bringing forward complaints for which the complaints system does not offer them a satisfying remedy. This could compound the distress of people who already feel let down by the justice system.
- Trauma-informed practice is a relevant consideration for all professionals working in court, not only solicitors.

Consultation

160. The consultation responses showed strong support for the idea of the court taking measures to direct legal professionals to consider a trauma-informed approach: 96% of respondents who answered this question were in favour, and none disagreed.

Requirement for judiciary to take trauma-informed practice into account when scheduling court business

Policy objectives

161. Court scheduling and churn – which is when cases do not proceed as planned, resulting in repeated hearings before they move on to the next stage – can have a traumatic impact on the experience of all those involved in a case. For victims, witnesses and parties to a case, any delay or uncertainty can have an adverse effect, particularly where the person is due to appear physically in court, but also more generally in terms of being unable to move forward with recovery from trauma, as well as the inconvenience and expense associated with repeated rescheduling. For accused persons in criminal cases, delay and uncertainty can have equally significant impacts, particularly if an accused is being held on remand.

162. Sections 27, 28 and 29 of the Bill require the judiciary to consider trauma-informed practice when criminal and civil court business is being programmed. This has the objective of minimising the traumatising effect that decisions on scheduling can have on people who are involved in court proceedings, whether they are victims, witnesses, accused people, or parties to civil cases.

163. In criminal cases, this could have the practical effect of encouraging consideration of the use of fixed trial dates in certain circumstances – for example, when a complainer in a serious sexual offence case needs to attend court to give evidence during the course of the trial, because their evidence has not been pre-recorded. This was a recommendation of the Lady Dorrian Review Specialist Sexual Offences Court Working Group report[59]. However, this is just one possible way in which the judiciary might apply trauma-informed practice when scheduling court business. The following paragraphs set out in more detail some of the considerations that may inform the use of trauma-informed scheduling.

Key information

164. Court scheduling is complex and there are a range of factors that can cause delay and churn in the progress of cases, not all of which are within the direct control of the courts. For example, the estimates of trial duration provided by the prosecution and defence may be inaccurate; a key witness or an accused person may not attend court on the day; defence agents may not be available to take a case on the desired date; late guilty pleas may be entered, or there could be unexpected and urgent court business.

165. One way in which the criminal courts try to manage some of this uncertainty, and maximise the use of court time, is the use of 'floating trials' for solemn business.[60] This means that the trial is allocated to a five day period, and it may start at any time during that period (the 'float'). A witness will not know in advance exactly when their case will call within the float, and may be given just one working day's notice. Most High Court and sheriff and jury cases are floating trials, and their use has been criticised by victims' organisations.

166. Criminal trials may also be adjourned, often at short notice[61]. As the Transforming Services for Victims and Witnesses report highlighted, adjournments can lead to people feeling anxiety and loss of control, and losing confidence in the process. They can also cause considerable practical disruption, with implications for witnesses' travel, childcare and work arrangements.

167. Lengthy delays to criminal trials are another source of distress. As the Scottish Centre for Crime and Justice Research's Justice Journeys report set out, long delays, coupled with waiting

[59] Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report (www.gov.scot)

[60] Floating trials are only used for solemn cases - summary trials are scheduled for a fixed date.

[61] Frequency of adjournments varies. As an illustration, in 2019-20 (the last year for which pre-pandemic data is available), on average 6% of High Court cases were adjourned each month due to lack of court time. In 2018-19, however, the figure was 1.5%. Note that these figures do not cover other reasons for adjournments.

for news of court dates, can affect witnesses' ability to function at home, work or school. It can also make it harder for them to move on from what has happened.

168. Delays to cases have been exacerbated by the Covid-19 pandemic. As in jurisdictions around the world, Scotland's capacity to progress criminal cases was severely reduced by the pandemic. As a result, the number of cases in the system awaiting resolution has grown, and the length of time it typically takes for a case to conclude has increased.

169. Operational decisions on scheduling are properly an independent function of the judiciary, and often arrived at in consultation with other justice agencies to take account of operational realities elsewhere in the system. However, issues around court scheduling highlight that operational practices need to be reconsidered to help achieve an optimum balance between efficiency, flexibility, and the aspiration for a compassionate, person-centred justice system that minimises the re-traumatisation of those who need to use it.

170. Currently, the judiciary's statutory duties in relation to programming court business are framed around 'ensuring the efficient disposal' of business.[62] That will continue to be the primary consideration. However, sections 27 - 29 add an additional requirement to take trauma-informed practice into account when programming court business, in both the civil and criminal courts. This is intended to support the shift in culture and practice that this set of provisions is seeking to achieve, by creating a framework that enables and promotes more trauma-informed practice. Such a requirement will also apply in the Sexual Offences Court as a result of the amendment made under paragraph 2(2), schedule 4 of the Bill.

171. The Lord President has overall responsibility for the efficient disposal of business in Scottish courts, and as noted above this will remain the overarching principle.

172. There are certain types of business which, by law, the court must hear within fixed time limits. There are also circumstances in which the courts will schedule hearings urgently because the circumstances require it (for example, applications for Child Protection Orders, or interim interdicts). The provisions within the Bill do not change the court's ability to schedule business in line with statutory time limits, or inhibit its ability to act quickly where cause is shown: instead, they seek to embed consideration of trauma-informed practice within those existing parameters.

Alternative approaches

173. The Bill could have prohibited, or placed new restrictions on, the use of floating criminal trials. Requiring the use of fixed trial dates could have had the benefit of providing increased certainty to complainers, witnesses and accused people. It could also help justice agencies to plan

[62] These duties are found in section 2 of the Judiciary and Courts (Scotland) Act 2008; in sections 27 and 56 of the Courts Reform (Scotland) Act 2014; and in section 61 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

their own services more proactively. For example, if a trial date were known at an early stage, COPFS could more easily allocate an Advocate Depute to the case well in advance.

174. However, by their very nature floating trials are more flexible than fixed trials. This means that floating trials increase the amount of the court's available time that can be used. If all trials were set for fixed dates but then some did not proceed as programmed (for instance, if a late guilty plea were entered), the court would sit unused for the remaining time on that day. From an initial high-level analysis based on recent caseloads, SCTS has estimated that moving entirely from floating trials to fixed trials in the High Court would add an average of at least 11 weeks of additional delay to each individual case's trial date, before other variables are considered (which have the potential to increase timescales further). This additional delay could increase anxiety and distress for victims, witnesses and accused people. If an accused person is being held on remand, it could increase the length of time they are on remand, subject to the statutory time limits. There are, therefore, tensions between the earlier dates a floating diet can offer and the relative certainty a fixed trial date can offer. However, even when a trial date is fixed, this does not mean that a person is guaranteed to be called to give their evidence on a set date. The trial may still be adjourned, or, if a trial is scheduled to last for several days or weeks, it may not be possible to specify in advance when each witness will be called.

175. It is also important to consider what impact changes to court scheduling might have on the backlog of criminal cases. Although progress has been made in reducing the number of outstanding criminal cases, justice agencies have been clear that it will take several years to fully recover from the impact of the pandemic. The SCTS figures set out above suggest that prohibiting floating trials would be likely to add significantly to the length of time needed to reduce the backlog of solemn cases to roughly pre-Covid levels, which would have negative impacts for those entering the justice system in the coming years.

176. For these reasons, the Scottish Government considers that prohibiting or restricting the use of floating trials in the Bill would not achieve the policy objective of improving people's experience of the justice system – and could inadvertently make many people's experiences worse. The Scottish Government supports the aspiration to reduce the use of floating trials where that can be done without negatively impacting people's experiences, but does not believe that prescriptive legislation is the most constructive way to achieve that.

177. A wider range of developments – some of which are already underway – have the potential to further reduce any negative impact of criminal court scheduling, and to improve programming. These include:

- Greater use of pre-recorded evidence. By enabling complainers and witnesses to give their evidence in advance of the trial, this can reduce the direct impact that a distant or uncertain trial date has on them;
- A reduction in the number of outstanding criminal trials (often referred to as the 'backlog'), reducing the length of time it takes for a case to reach its trial date;

- The summary case management pilot, helping to reduce late pleas and unnecessary adjournments in summary cases; and
- Justice agencies working together to improve estimates of trial duration.

Consultation

178. There was a general consensus from consultation respondents that the current approach to court scheduling for criminal cases is not adequate and that it should be more trauma-informed. Less than a quarter (24%) of those who answered the question agreed that the current legislative arrangements were sufficient to inform trauma-inform practice, and over half said that they either somewhat disagreed (25%) or strongly disagreed (30%). In particular, concerns were repeatedly expressed about the use of floating trials, and the frequency of adjournments. However, there was less agreement on whether any specific legislative changes would improve the situation. This helped to inform the approach taken in the Bill, using legislation to promote and support a more trauma-informed approach to scheduling while maintaining sufficient flexibility for the judiciary and court service to make operational decisions that often need to balance a wide range of factors.

PART 3 OF THE BILL (SECTIONS 30 – 33) – SPECIAL MEASURES IN CIVIL CASES

Key background and policy context

179. Part 2 of the Vulnerable Witnesses (Scotland) Act 2004[63] ("the 2004 Act") contains provisions on special measures in civil court cases to protect vulnerable witnesses. However, the 2004 Act does not cover two specific areas.

180. First of all, the 2004 Act as it currently stands only covers evidential hearings where there are "witnesses". In civil cases, there can be non-evidential hearings where the parties involved are not "witnesses" but may still be vulnerable.

181. Secondly, the 2004 Act does not give civil courts the power to prohibit a person from conducting their own case and carrying out personal cross-examination of a witness, even though there may have been abuse between parties involved in the case.

182. The Children (Scotland) Act 2020[64] ("the 2020 Act") contains provisions, not yet implemented, in both of these areas.

183. Section 8 of the 2020 Act amends the Children (Scotland) Act 1995[65] ("the 1995 Act") to make provision for special measures in non-evidential hearings in proceedings under section 11 of

[63] Vulnerable Witnesses (Scotland) Act 2004 (legislation.gov.uk)
[64] Children (Scotland) Act 2020 (legislation.gov.uk)
[65] Children (Scotland) Act 1995 (legislation.gov.uk)

the 1995 Act, which relates to matters such as parental responsibilities and rights and child contact and residence.

184. Section 4 of the 2020 Act amends the 2004 Act to introduce a new special measure allowing the court to prohibit parties from personally conducting their own case and carrying out personal cross-examination of a witness. Under the amendments by the 2020 Act, this new special measure is available only in court proceedings arising out of children's hearings or where the court is considering making an order under section 11(1) of the 1995 Act.

185. The provisions in the Bill on special measures in civil cases are in line with the general aims of the Bill to improve the justice system for people who have suffered trauma. The Vision for Justice in Scotland says that "many of the issues that bring people to the justice system are very traumatic. It is our duty to ensure that we minimise further trauma or re-traumatisation". This can apply to a number of civil cases as well as criminal cases. For example, civil cases, like criminal cases, can involve people who have suffered domestic abuse.

Specific provisions

186. Provision in the Bill relating to special measures in civil cases can be broadly split into the following areas:

- Extending the provisions in the 2020 Act on special measures in non-evidential hearings to cover civil cases generally; and
- Allowing the court to prohibit parties from personally conducting their own case and carrying out personal cross-examination in civil cases generally.

187. The broad aim is to extend the provisions on special measures in the 2020 Act so they cover civil cases generally.

Extension of special measures to non-evidential hearings

Policy objectives

188. Section 33 of the Bill repeals amendments made by the 2020 Act and substitutes provisions extending the availability of special measures in non-evidential hearings to civil cases generally. The special measures which may be authorised by the court are (a) use of a live television link, (b) use of a screen, (c) use of a supporter, (d) any other measure prescribed by the Scottish Ministers by regulations. The expansion of the availability of special measures will benefit vulnerable parties involved in non-evidential hearings with the aim of reducing any undue trauma.

Key information

189. Extending special measures to non-evidential hearings for civil cases generally reflects that parties in civil cases may be vulnerable (e.g. because of domestic abuse) and may need protection. Special measures can involve use of a live television link; a screen; the presence of a supporter;

and any other measure prescribed by the Scottish Ministers by regulations. The aim of special measures is to provide support to persons in court who are vulnerable and ensure they can fully participate in the process.

Alternative approaches

190. An alternative is not to extend special measures for non-evidential hearings to civil cases generally and just proceed to implement the provisions in the 2020 Act covering some family cases. One advantage of this option is that there are specific issues in family cases. Domestic abuse is often alleged in child contact cases which go to court[66] and when a child contact case is dealt with by the Sheriff Court, there are usually a number of non-evidential Child Welfare Hearings. Therefore, the provisions in the 2020 Act on special measures in non-evidential hearings cover a significant area where the need for special measures at non-evidential hearings is likely to arise.

191. However, the disadvantage of this approach is provision on special measures in non-evidential hearings in civil cases would only be in place for some types of cases. The 2020 Act was largely about child contact and residence cases and children's hearings and so the provisions in the 2020 Act on special measures related to these areas. This Bill is an opportunity to extend special measures to civil cases generally and ensure consistency for all those who are vulnerable who may benefit from use of special measures.

192. Some consultees argued special measures should be automatically available to vulnerable parties and witnesses in civil proceedings involving domestic abuse and sexual assault. The Bill makes provision for a presumption in favour of the use of special measures in civil cases when there are civil protection orders in place or there are convictions or live prosecutions for certain criminal offences. Where there are no civil protection orders or convictions or live prosecutions, the court has a wider discretion in relation to ordering special measures. The Scottish Government considers this is the right approach.

Consultation

193. Chapter 3 of the consultation on improving victims' experiences of the justice system specifically covered special measures in civil cases. The analysis of responses to the consultation showed support for what was proposed in this area. Just over three quarters of respondents who answered this question (77%) strongly agreed that special measures should be available when required for all civil court hearings in Scotland, whether the hearings are evidential or not. The main reservation was that it may not be proportionately practical to do so (in terms of resources/equipment). It was suggested that increased demand for relevant specialist equipment, especially at short notice, or for cases heard in settings outside of a normal court room, could be difficult to manage. Any lack of availability in equipment (due to increased demand) could then

[66] There is research suggesting that domestic abuse is alleged in 50% of court cases on contact – see, for example, page iv of The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse by Dr Kirsteen Mackay

impact on case progress and cause delays (unless additional funding for equipment was put in place). One other caveat raised was that, unless a party was representing themselves, they may not always attend a procedural hearing and so the demand for such measures may not always be required

Prohibition on personal conduct of a case

Policy objectives

194. Section 31 in the Bill makes provision so that the courts can prohibit a person conducting their own civil case and carrying out personal cross-examination. This again builds on existing provisions, which have not yet been implemented, in the 2020 Act.

195. The key policy aim is to protect persons who have suffered abuse, such as domestic abuse, from being cross-examined by their abuser.

Key information

196. As a consequence of this new protection, the Bill, through section 32, will establish a register of solicitors who may be appointed by the court to act for a person when that person has been prohibited from representing themselves and hasn't taken steps to appoint a solicitor. This register will be maintained by the Scottish Ministers although the Scottish Ministers could confer the duty of maintaining the register on another body. Assuming the duty of maintaining the register is not conferred on another body, the Scottish Government may award a contract so that the day to day operation of the register is carried out by a contractor on behalf of the Scottish Ministers.

197. The 2020 Act provisions contain a presumption that the new special measure on a person being prohibited from representing themselves should be applied when:

- A witness is deemed vulnerable because they have a civil protection order against another party in the case or the other party committed, or is alleged to have committed, certain criminal offences against the witness; and
- The party in question intends to examine, or cross-examine, the witness.

198. The provisions in the Bill extend that presumption to cover civil cases generally.

Alternative approaches

199. One alternative is not to extend this special measure on banning a person from conducting their own case to civil cases generally and just implement the provisions in the 2020 Act covering some family cases. A significant proportion of cases in which domestic abuse is alleged are child contact cases. Therefore, it could be argued that the provisions in the 2020 Act cover the main area in relation to civil cases where domestic abuse is likely to be raised.

200. The disadvantage of just implementing the provisions of the 2020 Act is this special measure on banning a person from conducting their own case would only be in place for some types of civil cases. The 2020 Act was largely about child contact and residence cases and children's hearings and so the provisions in the 2020 Act on special measures related to these areas. This Bill is an opportunity to extend special measures to civil cases generally and ensure consistent treatment.

201. Another alternative could be to prohibit self-representation generally in civil cases although this could be disproportionate as it would cover court actions where there are no allegations of abuse.

202. On the register of solicitors, an alternative to contracting out its day to day operation would be for the Scottish Government to run it in-house: however, running a register of this nature is likely to be an area where there would be more expertise externally than in-house. The Bill also provides that the Scottish Ministers could confer the duty of maintaining the register on another body such as, for example, a justice agency. Before conferring this duty on another body, the Scottish Government would need to discuss with the body to check they were prepare to take the duty on.

Consultation

203. The analysis of responses to the consultation showed support for what was proposed in this area. Most who answered this question (74%) strongly agreed that the courts should have the power to prohibit personal cross-examination in civil proceedings in certain cases (e.g. when there has been abuse between the parties) 15% somewhat agreed; 8% were neutral and 3% strongly disagreed).

Vulnerable witnesses

Policy objectives

204. Section 30 amends section 11B of the 2004 Act, which was added by the 2020 Act. Section 11B will require civil courts to treat certain witnesses as vulnerable if there is a civil protection order such as an interdict in place to protect them from abuse by a party to the proceedings, or if the witness is the victim, or alleged victim, of an offence for which a party to the proceedings is being prosecuted or has been convicted.

205. These provisions currently only apply where the court is considering making an order under section 11(1) of the 1995 Act. The key policy aim of the amendment is to extend section 11B to civil proceedings generally so as to help offer the protection of being deemed vulnerable to more witnesses if certain criteria are met. If the witness is deemed to be vulnerable the court will have to address its mind to the issue by either authorising the use of a special measure or specifically ordering that the witness is to give evidence without the benefit of any special measure.

Key information

206. Interdicts are regularly granted in the civil courts to protect a person from domestic abuse. They can, for example, prohibit someone from approaching or contacting a person. The courts may also grant civil non-harassment orders under sections 8 and 8A of the Protection from Harassment Act 1997[67].

Alternative approaches

207. The alternative would again be to make no changes to the provisions added by the 2020 Act. The disadvantage of that approach is again this would mean that some cases would be covered and others not. At the moment, for example, the provisions of the 2020 Act do not cover applications for a civil protection order against domestic abuse as the 2020 Act only covered certain types of family actions. Applications for civil protection orders are a type of family action where special measures could be needed by their very nature. Another alternative would be to require courts to consider the use of special measures in all civil cases but this could cover cases where there were no allegations of abuse or witness vulnerabilities.

Consultation

208. As indicated above, special measures in civil cases was covered in chapter 3 of the consultation on improving victims' experience of the justice system There was general support for what was proposed. Several respondents (e.g. a victim/witness support organisation) said the proposed changes would be particularly important for domestic abuse and sexual assault cases in the civil courts. The main concern raised was that that it may not be proportionately practical to do so in terms of resources and equipment.

PART 4 OF THE BILL (SECTIONS 34 – 36) – CRIMINAL JURIES AND VERDICTS

Key background and policy context

209. In Scottish criminal trials there are three verdicts available: guilty, not guilty and not proven. If a guilty verdict is returned the accused is convicted of the crime. Not guilty and not proven are both verdicts of acquittal and generally the accused cannot then be tried again for the same offence except under the very limited circumstances provided for in the Double Jeopardy (Scotland) Act 2011.[68]

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[67] Protection from Harassment Act 1997 (legislation.gov.uk)

[68] Such as where there has been interference with a juror or judge and the court is unable to conclude that there was no outcome on the original proceedings; an acquitted person has made an admission, or an admission they made previously has only become known after the acquittal; where there is new evidence that would have been admissible at the original trial (provided certain tests are met, which include that the evidence could not with reasonable diligence have been available at that time). A re-trial in light of new evidence is only permitted in the case of acquittals following indictment in the High Court, and must substantially strengthen the case against the acquitted individual.

210. These three verdicts are available in all criminal cases in Scotland, that is to say, they are available in both solemn proceedings which take place before a jury, and summary proceedings which take place without a jury and are decided by a sheriff or justice of the peace sitting alone.

211. There is nothing in legislation or case law to define the not proven verdict and no generally accepted legal definition. Similarly, there is nothing in law which defines the difference between the not proven and not guilty verdicts. There have been occasions where judges have attempted to explain the significance of the two acquittals, but this has resulted in appeals on the grounds of misdirection. Jurors therefore receive no instruction on the meaning of the not proven verdict or how it differs from not guilty. It is understood to be good practice for the court to simply inform the jury that not proven and not guilty are both verdicts of acquittal and that the accused cannot be tried again for the same offence.

212. Whilst there is no legal distinction between not proven and not guilty, the former is generally not used as frequently as the latter.[69] This is particularly the case in summary prosecutions where verdicts are reached by sheriffs and justices of the peace: statistics from 2019/2020 show that on average only 1% of accused persons in all summary trials received a verdict of not proven. This figure is notably higher for particular offences: it was delivered in 12% of sexual assault cases at summary level in that same year. In the same year, in solemn cases, where verdicts are reached by juries, a not proven verdict was delivered in 5% of all crimes and offences, in 14% of sexual assault cases and 25% of rape cases.

213. The suitability of Scotland's three verdict system has long been debated. Criticism of the not proven verdict can be traced back at least as far as 1846 when Lord Cockburn described it as "confusion of a legal duty with a private suspicion".[70] He then went on to describe the verdict as being incompatible with the presumption of innocence and casting a stigma on the accused.

214. Nearly two hundred years later the criticism has not, in many respects, moved on from this in any considerable way. As well as the above criticisms by Lord Cockburn, it is also often said that the existence of the not proven verdict encourages jurors to avoid the proper discharge of their functions (by allowing them to 'sit on the fence'), that it may cause additional trauma to complainers, that it is confusing and that the lack of legal definition for the verdict is undesirable in a criminal justice system where jurors should be able to make their decisions with certainty as to what those decisions mean.

215. As noted in the policy context section of this memorandum, the Scottish Government has undertaken significant work to examine and assess the effect of Scotland's three verdict system. This has included commissioning the independent Scottish jury research[71], conducting a

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[69] Criminal Proceedings in Scotland statistics - gov.scot (www.gov.scot)
[70] Lord Cockburn, "*Scottish Criminal Jurisprudence and Procedure"* (1846) 83 Edinburgh Law Review 196 at 206
[71] Supporting documents - Scottish jury research: findings from a mock jury study - gov.scot (www.gov.scot)

programme of engagement on its findings[72] and seeking wider views through a public consultation.[73]

216. The Scottish Government considers the evidence overwhelming: that the existence of a verdict that people do not understand, that can stigmatise the acquitted and may cause additional trauma to victims, does not serve the interests of justice or the people of Scotland.

217. Accordingly, sections 35 and 36 of the Bill remove the not proven verdict in criminal cases in both summary and solemn proceedings.

218. The Scottish Government is clear that since the Scottish jury system is a complex inter-related system, verdicts must be considered alongside the other key aspects of jury size and majority. It is essential to maintain an overall balance of fairness in the system for both complainers and accused. The overarching finding of the mock jury research was that juror verdicts were affected by the structure of the jury system. This means that amending one feature of that structure, such as the number of verdicts, in isolation may of itself impact on verdict choice and therefore shift the existing balance in the system.

219. Following careful consideration of the evidence, the Scottish Government considers that removal of the not proven verdict cannot proceed as standalone reform if balance in the system is to be protected. Accordingly, the Bill proposes changes to the jury size and seeks to increase the majority required for conviction.

Specific provisions

220. Provision in the Bill relating to jury and verdict can be broadly split into the following areas:

- Removal of not proven as a verdict in all criminal trials
- Changes to jury size and quorum for a jury
- Majority of jurors required for conviction.

Removal of not proven as a verdict in all criminal trials

Policy objectives

221. A key aim of the Scottish Government's Vision for Justice is to have an effective, modern, person-centred and trauma-informed approach in which everyone can have trust, including victims and those accused of crimes. The policy objective of abolishing the not proven verdict in criminal

[72] Jury research - engagement events: summary of discussions - gov.scot (www.gov.scot)
[73] The not proven verdict and related reforms - Scottish Government - Citizen Space (consult.gov.scot)

trials is to improve the fairness, clarity and transparency of the framework within which the courts make decisions in criminal cases.

Key information

222. The Bill makes provision to, in effect, abolish the not proven verdict in all criminal trials in Scotland. It will be removed for summary and solemn proceedings for all offences. The Bill provides that the only verdicts available will be guilty and not guilty.

Alternative approaches

Retention of not proven verdict

223. The main alternative to removing the not proven verdict would be to retain it as a third verdict. However, it would not be tenable to maintain this given the evidence has made clear that the verdict is not understood by jurors, and can cause stigma for the acquitted, and trauma for complainers.

Statutory definition of not proven verdict

224. Providing a statutory definition of the not proven verdict was considered and discounted. It was considered impossible to define the verdict in any meaningful way that would not cause further confusion or undermine the presumption of innocence e.g. by establishing two tiers of acquittals.

Names of verdicts

225. Some stakeholders, particularly from the legal profession, consider that if Scotland moves to a two verdict system those verdicts should be proven and not proven. This is based on a belief that it is not the role of the jury to determine a person's guilt or innocence, but rather to assess whether the Crown has *proven* the charge beyond reasonable doubt. This approach also reflects concerns regarding what some would describe as emotive language relating to the terms guilty and not guilty.

226. The Scottish Government considers that the use of the terms guilty and not guilty is the most appropriate approach within the context of a two verdict system. These terms are considered to be easier to understand, as they are unambiguous, and familiar terms that have been proven to work well in other jurisdictions.

Consultation

227. 62% of respondents to the consultation on the Not Proven Verdict and Related Reforms thought that Scotland should change to a two verdict system (compared to 37% who thought Scotland should keep all three verdicts currently available).[74] A broad range of respondents

[74] Some respondents did not answer this question so percentages do not add up to 100%.

including from the third sector, academia, people with direct experience of the justice system, and those who had worked in a professional or voluntary role in the justice system were in favour of a move to two verdicts. A key reason for supporting this change was confusion over what is meant by the not proven verdict. It was also seen as a compromise verdict which allows jurors to 'sit on the fence'. A two verdict system was seen to be easier to understand, fairer and more straightforward.

228. For those who supported retention of the existing three verdict system, the key reason was that the not proven verdict is, in their view, a reflection of the prosecution having failed to present sufficient evidence to prove the accused's guilt beyond reasonable doubt but where there was a belief that the accused may be guilty. Seven of eight legal organisations supported keeping all three of the verdicts currently available as did majorities of individuals who had been charged with a crime and those who had been jurors in a criminal trial.

229. The views offered on how any two verdicts could be named were mixed. 50% of respondents to the consultation favoured guilty and not guilty (compared to 41% who supported proven and not proven)[75] with support particularly strong among legal and third sector organisations. Some also felt that the perceived problems with the current system such as lack of understanding of the verdict, would be replicated in a proven/not proven system, particularly in sexual offence cases.

Jury size and quorum

Policy objectives

230. The Bill reduces the size of a jury from 15 to 12. The policy objective is to ensure that Scotland's jury system facilitates the effective participation of jurors and maximises the opportunity for meaningful and robust deliberations. Reducing the size of the jury will help individual members of juries to participate more fully and result in fewer dominant or minimally contributing jurors.

231. It will also reduce the impact of jury service on society with fewer people unable to attend work or attend to other commitments such as caring responsibilities, while also reducing the potential for traumatisation that can arise if sitting on a jury in certain cases. Crucially, these benefits can be delivered without an adverse impact on the quality of decision-making of a jury.

232. Associated with the reform in the jury size from 15 to 12 is a change to ensure that where jurors are excused during a trial, as happens from time to time because of illness and other reasons, those trials may continue provided that the number of remaining jurors does not fall below nine. This maintains parity with the existing principle that up to three jurors can be excused from a jury and the trial may continue and a verdict reached. The Scottish Government considers having at

[75] 6% answered "Other" and some respondents did not answer this question so percentages do not add up to 100%.

least nine jurors is sufficient to balance the need for a fair and just process with some flexibility to reflect the nature of jury trials where jurors may need to be excused for various reasons over the course of a trial.

Key information

233. In Scotland, currently the jury in criminal trials is made up of 15 people. This is higher than in other jurisdictions where 12 jurors is typical.[76] In civil cases in Scotland, juries also consist of 12 jurors.[77] The question of what is the most effective jury size has been the subject of international debate and the focus of some cases before courts in other jurisdictions.[78]

234. The independent Scottish jury research showed that juries of 15 persons appeared to deliberate less effectively than juries of 12 persons, with findings including that:

- Jurors were more likely to be observed wanting to contribute, but being unable to do so in 15-person juries.
- There were more dominant jurors and more minimally contributing jurors, on average, in 15-person juries.
- Jurors in 15-person juries were more likely to agree that "some members of the jury talked too much".
- Jurors in 15-person juries gave lower ratings of their own influence over the verdict.

235. When reviewing 15-person juries, it was common for researchers to note the existence of side conversations running concurrently within discussions, and the existence of higher levels of interruption and speaking over one another, which was perceived to lead to a less ordered deliberation overall.

236. In addition to this, within the research, there was no difference in average deliberation length between 12-person and 15-person juries. Similarly, there was no difference between 12 and 15-person juries in the number of evidential issues discussed, or the extent or accuracy of discussion of legal issues.

237. The juries of other common law jurisdictions generally consist of 12 members and there is a considerable amount of experience and data for other jurisdictions available on the effective operation of the 12-person jury.

238. In respect of jury quorum, meaning the minimum number of jurors required to allow a trial to continue following excusal of one or more of the original jurors, the Scottish Government has

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[76] Including England and Wales, Ireland, New Zealand and Canada.
[77] Section 63(5), Courts Reform (Scotland) Act 2014.
[78] For example, US Supreme Court specifically considered the question of jury size in Claude D. Ballew, Petitioner v State of Georgia 435 U.S. 223 and 98 S. Ct. 1029.

considered to what level the quorum may reduce to when starting from the smaller jury size of 12, without affecting the fairness of the trial and reliability of the verdict.

239. At present, up to three jurors may be excused and section 34 maintains that approach resulting in a quorum of nine.

240. Currently, where a juror has been excused, either the prosecutor or the defence may apply to the court for the trial to continue before the remaining jurors (provided there are at least 12 jurors remaining).[79] The Bill adopts a broadly similar approach and does not require that trials proceed with a reduced number of jurors: the power of the court to make these decisions on a case by case basis is preserved. The Scottish Government considers that no case should continue with fewer than 12 jurors if it is not in the interests of justice to do so. Therefore, section 34 introduces a procedural safeguard to apply in any situation where a juror or jurors are excused.

241. For the trial to proceed with fewer than 12 jurors, the court must be satisfied that it is in the interests of justice to do so and must give the prosecutor and the accused an opportunity to make representations on that question. This provides flexibility for the court to take particular considerations into account (e.g. a potentially lengthy fraud trial in its early stages which the court might consider could be restarted without retraumatising participants or causing much inconvenience; as opposed to the late stages of a rape trial in which most of the evidence has been given, potentially including the evidence of vulnerable witnesses, where the court might consider the case should continue).

242. Additionally, for 9-person juries, the majority required for conviction remains at seven out of nine (the same as for 10-person juries). This provides a further safeguard. Further details on this are set out in the section on majority required for conviction below.

Alternative approaches

Retain 15-person juries

243. The main alternative to reducing jury size would be to retain 15-person juries which many stakeholders prefer, with a key reason being their view that the greater size allows for a more diverse range of jurors with a broader range of views and opinions.

244. However, as set out above, the evidence suggests that 12-person juries deliberate more effectively, and the reduced requirement for jurors will lessen the impact of jury duty on society with fewer people having their day to day lives disrupted or, in some cases, being exposed to potentially traumatic material. It has also been suggested[80] that any gain in diversity caused by a

[79] Section 90(1), Criminal Procedure (Scotland) Act 1995

[80] Professors James Chalmers, Fiona Leverick and Vanessa Munro's response to the Not Proven Verdict and Related Reforms consultation, available at Response 718361798 to The not proven verdict and related reforms - Scottish Government - Citizen Space (consult.gov.scot)

larger jury would be undermined if members are unable to participate effectively in discussions. Furthermore, it may be that these diverse perspectives are the ones most at risk of going unheard.

Alternative size of jury

245. Other sizes of jury smaller than 15 would be alternatives. However, as set out above, civil juries in Scotland and the juries of other jurisdictions with common law traditions generally consist of 12 members. There is therefore a considerable amount of experience and data for other jurisdictions available on the effective operation of the 12-person jury.

Quorum of 10 jurors

246. The current approach to quorum requires that 80% of the original number of jurors remain to allow a trial to continue. Applying this to a jury with 12 members would result in only two excusals being permitted and the quorum being 10 jurors. This would be in line with the rules on civil juries in Scotland and typical of the quorum for other 12-person juries in common law jurisdictions. However, those with operational experience have indicated that moving to a system in which only two jurors could be excused may result in a small number of trials being abandoned each year. The Scottish Government considers that even if only small numbers of trials are abandoned in the reformed jury system, each occasion could be expensive, wasteful and potentially traumatising to those involved. It is therefore appropriate to set a lower quorum, with appropriate safeguards, to prevent this occurring.

Consultation

247. A majority of respondents to the consultation (58%) supported jury size remaining at 15 jurors. The key reasons being that in their view the current number of jurors works well, larger juries allow for a diverse range of jurors and offer a range of differing views and opinions.

248. Of those who supported 12-person juries, the most common reasons provided were that this would bring Scotland into line with other jurisdictions, that it would encourage higher levels of participation and deliberation from jurors, and may reduce pressure on the jury pool.

249. For respondents wanting to see some other size of jury (14%), there was little agreement on what this size should be, although there were consistent comments on the need for an odd number of jurors to enable a majority verdict. However, the Scottish Government notes that given that a two thirds majority requirement is being introduced in this Bill (as detailed below), there is no longer any need to maintain a jury comprising an odd number for these purposes.

Majority required for conviction

Policy objectives

250. Associated with the proposed move to two verdicts and changes to the jury size from 15 to 12, the Bill adjusts the proportion of a jury required to reach a guilty verdict. It seeks to change

from a simple majority requirement to at least two thirds majority for conviction in juries of 10 or more jurors, and seven jurors in nine-person juries.

251. The policy objective is to safeguard the delivery of justice through maintaining fairness and the balance of safeguards in the system. This will help maintain confidence in the jury system and the decisions being made and bring Scotland closer to other jurisdictions with common law traditions where unanimity or near unanimity decision making is required.

Key information

252. In Scotland, a simple majority of jurors is required for a guilty verdict to be returned. This is unlike most other jurisdictions where unanimity or a qualified majority is needed for convictions or acquittals.

253. Since Scottish juries are made up of 15 people, this means that at least eight jurors must be satisfied that the guilt of the accused has been proven beyond a reasonable doubt. As noted previously, if jurors are excused during the trial, for example due to illness, it can continue with a minimum of 12 jurors, but the support of eight jurors is still needed for a guilty verdict;[81] anything less is treated as an acquittal.

254. Some stakeholders have concerns with simple majority decision-making, arguing that it is difficult to reconcile with the requirement of proof beyond reasonable doubt when seven of the 15 jurors could opt for an acquittal verdict, yet the accused still be convicted. To put it another way, it allows a conviction in cases where 47% of the jurors that considered the evidence are not satisfied beyond reasonable doubt of the accused's guilt.

255. The Scottish Government has also noted key research[82] supporting a view that jurors may be more likely to convict in a system with two verdicts of guilty and not guilty. This includes the 2019 Scottish jury research. If there is any possibility that more guilty verdicts would arise from the removal of the not proven verdict, it is important to demonstrate that such convictions are safe and result from a balanced and fair justice system.

256. At present, the simple majority is balanced by the other safeguards of the current system including the availability of two verdicts of acquittal. Having considered the evidence, the Scottish Government is persuaded that removal of the not proven verdict requires associated reforms to jury majority to maintain balance and confidence in the system.

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[81] S 90(2), Criminal Procedure (Scotland) Act 1995.

[82] R. Ormston et al, Scottish Jury Research: Findings from a Large Scale Mock Jury Study (2019); L. Curley *et al*, "Proven and not proven: A potential alternative to the current Scottish verdict system" Behaviour Sciences and the Law (2002) 40(3): 452 - 466; L Hope *et al,* "A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making" (2008) 32 Law and Human Behaviour 242

257. The Scottish Government considers that the potential for juror excusals to place the accused person at any disadvantage or advantage should be minimised. The existing law provides that where a jury reduces below 15 persons, the simple majority rule does not strictly apply. Regardless of the size of jury, the requirement remains that eight jurors must agree to a guilty verdict to return a conviction. To illustrate that, where a full jury of 15 sits, a majority of 53% is required for conviction (eight out of 15). If, however, one juror is excused, that majority increases to 57% (eight out of 14). For two jurors being excused it is 62% (eight out of 13) and for three, 67% (eight out of 12). Therefore, the majority required for conviction can fluctuate substantially depending on factors that are nothing to do with the quality of the Crown's case.

258. The Scottish Government considers that the requirement for at least a two thirds majority should remain constant in cases where the jury reduces in size to 11 or 10 jurors. However, with a smaller jury, it is recognised that further safeguards are appropriate. Therefore, on the rare occasions that nine-person juries deliberate on a verdict, the majority required for conviction has been set at a higher threshold. Section 35 therefore provides that a conviction may follow if:

- in a jury of 11 or 12 jurors, at least 8 of the jurors are so in favour; or
- in a jury of 9 or 10 jurors, at least 7 jurors are so in favour.

Alternative approaches

Retain conviction by simple majority

259. An alternative approach would be to retain the current need for a simple majority for a guilty verdict. This would mean in a 12-person jury, seven jurors would be required for a guilty verdict, in a 11 or 10-person jury, six would be required to convict and in a nine-person jury, five jurors would be required to convict.

260. While the Scottish Government notes that retaining the simple majority is the preference of a minority of stakeholders, it is not considered that this would deliver the appropriate balance in safeguarding the delivery of justice and fairness for all. Any changes to the system would apply to all crimes and offences, so changing the verdicts and majority required would not be an appropriate tool to try and impact the balance for any particular crime. Furthermore, retention of a simple majority with 12-person juries would be unique in countries with common law traditions such as Scotland.

Conviction by unanimity or near unanimity

261. A further alternative approach would be to set the majority required for conviction to unanimity or near unanimity. However, the Scottish Government considers this would be too high a threshold to reach and would not deliver fairness for all. Furthermore, the responses to the consultation made clear that the majority of stakeholders are not persuaded that requiring unanimous verdicts would be in the interests of justice.

262. Although a move to unanimity or near unanimity would bring the Scottish criminal justice system in line with other countries with common law traditions,[83] Scotland retains particular safeguards that other jurisdictions do not have. These include that if the majority is not achieved the accused must be acquitted rather than re-tried; and that the Crown must always corroborate the essential facts of the case. These safeguards must be considered carefully when setting the majority required for conviction to ensure the system remains balanced.

Hung juries

263. In most jurisdictions with a common law tradition such as Scotland, a particular majority is required for a guilty or not guilty verdict. If a jury fails to reach this majority (leading to a "hung jury") in these jurisdictions, then the prosecution may be able to re-raise proceedings. This is not the case in Scotland, where anything short of the required majority for conviction is treated as an acquittal and the accused cannot be tried again, except under the very limited circumstances provided for in the Double Jeopardy (Scotland) Act 2011.

264. An alternative approach would be to allow for a new trial to take place in Scotland where the original trial resulted in a hung jury. The Scottish Government believes that hung juries should not be introduced for the following reasons:

- The onus is on the Crown to prove guilt and if it cannot persuade the requisite majority of jurors of proof beyond reasonable doubt then acquittal is the appropriate verdict.
- In the consultation, over twice as many respondents – including a large majority of organisations - agreed that where the required majority was not reached for a guilty verdict the jury should be considered to have returned an acquittal (52% respondents agreed compared to 25% who did not).
- Hung juries, leading to retrials, would sometimes lead to witnesses and complainers giving evidence and being cross-examined twice. This could take place months or years later, is not conducive to obtaining best evidence and would risk causing further traumatisation.
- Retrials would contribute to the backlog in the criminal justice system, which would delay justice for complainers and the accused, as well as leading to substantial costs.

Consultation

265. In the consultation, a majority of respondents (approximately 52%), including victims, victims' family members and jurors, supported a qualified majority of some kind and the highest level of support was for a change to require a qualified majority in which at least two thirds of jurors must agree (40%). This was consistent across almost all respondent sub-groups. The main reasons given in support of an increase to majority were that this builds safeguards into the system,

[83] Including England and Wales, Ireland, New Zealand, Australia and Canada.

ensures a greater proportion of the jury is convinced beyond reasonable doubt; and helps to safeguard against wrongful conviction.

266. Some stakeholders believe that the not proven verdict should be abolished as a standalone reform without corresponding changes to the majority required for conviction. However, this was a minority view (28%) in the consultation and none of the individual respondent groups were in favour of this, including victims of crime, family members, and those who have served on a jury.

PART 5 OF THE BILL (SECTIONS 37 – 62) – SEXUAL OFFENCES COURT

Key background and policy context

267. The Bill establishes a new specialist court for Scotland, the Sexual Offences Court, building on the recommendation of Lady Dorrian's Review and the work of the cross-sector working group tasked with critically examining key aspects of a new court to deal with these offences.[84]

268. The creation of the Sexual Offences Court offers unrivalled opportunities to:

- Recognise the sensitivities and complexities of serious sexual offence cases, including the risk of re-traumatisation to complainers involved in the criminal justice system, and to make provision in relation to specialist training for all those involved in the court (including the judiciary, prosecutors, defence practitioners, court and support staff);
- Embed specialism in the court from the outset and develop best practice in conducting trials in a manner which does not compromise the accused's right to a fair trial whilst recognising the impact of trauma, reducing the risk of causing distress or re-traumatisation to complainers, enhancing their opportunity to give their best evidence and improving the overall administration of justice.
- Improve judicial case management. Dedicated judges for preliminary hearings have demonstrated the benefits of having greater control exercised by a small, focussed number of judges who develop skills and expertise in the management of these cases.
- Benefit complainers, accused and the wider justice system by contributing to reductions in overall delay and increased efficiency in these cases which has been a key feature of specialist sexual offences courts that have been adopted in other jurisdictions such as New Zealand.
- Allow for the more flexible use of court, judicial and other resources, which will follow from the ambition to combine solemn level sexual offences which are currently separated into the High Court and sheriff courts. The Sexual Offences

[84] Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report

Court will provide a sustainable model for the future, mitigating current pressures on the High Court and improving the experience of complainers.

- Provide a springboard for continuous improvement and future reform as well as evaluation of interventions to improve the management of these cases.

Specific provisions

269. The Bill provides for the creation of the Sexual Offences Court as a new court for Scotland distinct from the sheriff courts or the High Court. It will have Scotland wide jurisdiction for sexual offences prosecuted on indictment, including rape, and any other charges appearing on the same indictment, including murder.

270. Specially trained judges will be appointed to preside over the court. Their sentencing powers will include the power to impose custodial sentences of up to life imprisonment and the power to impose an Order for Lifelong Restriction (OLR) [85]. The rules on rights of audience will preserve the existing requirement for counsel or solicitor advocates to appear in rape and murder cases but otherwise will allow solicitors to appear. As with the judges sitting in the court, legal professionals will have to successfully complete specialist training if they wish to appear in the court.

271. Although all interconnected, the key provisions of the Bill can be broadly split into the following areas:

- Establishment of the Sexual Offences Court
- Jurisdiction
- Judicial appointments
- Sentencing powers
- Rights of audience
- Procedural matters, including provision for pre-recorded evidence.

[85] An Order for Lifelong Restriction (OLR) is provided for by section 210F of the Criminal Procedure (Scotland) Act 1995 and is currently available only to the High Court. It is mandatory in the case of offenders who are convicted of a relevant offence. However, the sheriff court will remit a case to the High Court for sentencing where the sheriff holds that any competent sentence which he can impose is inadequate or where the risk criteria in section 210E of the 1995 Act are met. An OLR provides for the lifelong supervision of high risk violent and sexual offenders including in some circumstances, their retention in, or return to, custody, after they have served the punishment part of their sentence.

Establishment of the Sexual Offences Court

Policy objectives

272. The objective is to establish the Sexual Offences Court as a new court for Scotland, distinct from existing structures to maximise its ability to deliver targeted, meaningful and enduring improvements in a consistent manner to cases involving serious sexual offences. By seeking to gather together all solemn level sexual offence cases in one court, the Sexual Offences Court will allow a specialist approach to apply consistently across these cases and provide for the flexible use of resources (including court and judicial resources which are currently restricted by distinctions drawn between the sheriff courts and the High Court). Lady Dorrian's review identified that approaches which involve simply *"fast-tracking and clustering of cases within the current work stream of a court... are clearly not sufficient".*[86]

273. Accordingly, section 37 of the Bill establishes a court to be known as the Sexual Offences Court, the effect of which is to create an entirely new criminal court within Scotland's justice system.

Alternative approaches

274. An alternative approach would have been to reject this recommendation from Lady Dorrian's Review and leave the existing court structures unreformed. Indeed, some argue that given the case profile of the High Court (it was noted in Lady Dorrian's Review that sexual offence cases made up 69% of evidence led trials in the year April 2019 to March 2020[87]) it already operates as a specialist sexual offences court in all but name. However, as noted earlier, the need for change in how our justice system deals with these cases is clear and previous attempts at reforming practice in existing courts have failed to secure the transformational change needed.

275. Consideration was given to establishing a Sexual Offences Court by introducing specialist divisions of existing courts, namely the High Court and sheriff courts. This option was discounted on the basis that it would facilitate only iterative, cosmetic changes and would fail to deliver the meaningful and lasting improvements necessary to deliver a better experience for complainers. Situating the Court within existing structures and splitting it between two levels of court would blunt its capacity to develop and implement specialist approaches that could apply consistently to the management of indictment level sexual offence cases across Scotland. It would have provided less flexibility in the use of existing court and judicial resources that can deliver improvements in the efficiency and effectiveness of how sexual offences cases are managed.

Consultation

276. Creation of a Sexual Offences Court was discussed in the Improving Victims' Experience of the Justice System consultation. Responses indicated strong support for establishing such a

[86] At para 3.11 of the Review
[87] At para 1.2 of the Review

court with 82% in support and just 10% in disagreement with the proposal. Support was strong across both individual and organisational responses and spanned different sectors including support and advocacy organisations as well as the legal sector and other justice partners. The main rationale for supporting the creation of a Sexual Offences Court was that it would provide a more sensitive and less traumatic experience for complainers. Respondents highlighted that improvements in complainer experience may also translate into increased reporting of sexual offences, fewer complainers disengaging from trial processes and improved conviction rates for sexual offences. Among those who disagreed with the proposal, the main concern was that the rationale for establishing a specialist court such as more efficient disposal of business and the embedding of trauma-informed approaches to case management should be standard across all courts and should not restricted to sexual offence cases. Some respondents also expressed concern that creating a specialist court for hearing sexual offence cases could detract resources from other areas of the justice system.

277. The consultation also asked whether a Sexual Offences Court should be created as a distinct court or as part of existing structures. A clear consensus in favour of creating a distinct court emerged, with 69% of respondents supporting that approach. The primary rationale for supporting the creation of a distinct court was that the current system is failing to address the challenges facing complainers and that a distinct court would help to cultivate specific skills and expertise that would encourage better efficiency in the management of sexual offence cases and improve the experience of complainers. Of those who felt the court should sit within existing structures, some of the reasons given included the need to retain prosecutions of rape in the High Court in order to avoid any perception these cases were being 'downgraded' or treated as less important.

Jurisdiction of the Sexual Offences Court

Policy objectives

278. The objective is, subject to independent prosecutorial decision making in individual cases, to extend the benefits of the Sexual Offences Court to complainers in all cases involving a sexual offence which are prosecuted on indictment and to deliver consistency in the development and implementation of specialist approaches to sexual offences by the criminal courts in Scotland.

279. The Bill accordingly provides that the Sexual Offences Court will have national jurisdiction to hear any indictment which includes a 'sexual offence' (as set out below, this includes offences of rape) as well as any other charges that appear on the same indictment, including murder.

280. 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. Given the experience of the surviving complainers and the nature of their evidence (where historical sexual offending is libeled alongside a murder charge), the policy objective is to afford those complainers the benefits of the case being prosecuted in the Sexual Offences Court.

281. The Sexual Offences Court will therefore have the jurisdiction it needs to deal with the most serious cases involving sexual offending including rape and murder.

282. For the avoidance of doubt, the decision as to whether any individual case, including those involving rape or murder, is to be prosecuted in the Sexual Offences Court, will be a decision for independent prosecutors acting on behalf of the Lord Advocate. The Bill permits, rather than requires, cases under its jurisdiction to be heard in the Sexual Offences Court.

Key information

283. Currently offences of rape and murder are amongst a small number of offences which must be prosecuted in the High Court.[88] For other offences, unless the matter is set out in legislation, prosecutors make decisions on the appropriate forum for prosecution, taking into account a range of factors including the sentencing powers of the court.

284. More serious cases are prosecuted on indictment which means they are subject to solemn procedure and any trial will take place before a jury. Cases prosecuted on indictment can generally be heard either in the sheriff court or the High Court, it being a matter for prosecutorial judgement as to which court is more appropriate.

285. The Bill provides that the Sexual Offences Court will have jurisdiction to hear any case on indictment which includes at least one 'sexual offence' as defined in section 39 and listed in schedule 3 of the Bill. The Sexual Offences Court's jurisdiction includes indictments where a 'sexual offence' appears alongside any other sexual or non-sexual offence, including murder.

Sexual offences

286. Schedule 3 of the Bill sets out an exhaustive list of 'sexual offences' for the purpose of the court's jurisdiction. Section 39 gives the Scottish Ministers the power to amend this list by way of affirmative regulations. The Court's jurisdiction also extends to cases involving attempts to commit the offences listed in schedule 3.

287. As recommended by Lady Dorrian's Review, the starting point for the list of 'sexual offences' is the offences listed at paragraph 36 to 59ZL of schedule 3 of the Sexual Offences Act 2003. This represents a comprehensive list of sexual offences that can be prosecuted on indictment, including:

- Rape of an adult or child under common law or the Sexual Offences (Scotland) Act 2009;
- Indecent assault at common law or sexual assault under the Sexual Offences (Scotland) Act 2009;

[88] Section 3(6) of the Criminal Procedure (Scotland) Act 1995

- Other offences under the Sexual Offences (Scotland) Act 2009 including offences of sexual coercion, indecent communications and voyeurism; and
- Common law and other statutory offences used to prosecute sexual offending, particularly historical cases e.g. clandestine injury to women, abduction or assault with intent to rape, lewd and libidinous practices or behaviour, and offences under the Criminal Law (Consolidation) (Scotland) Act 1995.

288. Offences set out at paragraphs 44, 44A, 45 and 46 of schedule 3 of the Sexual Offences Act 2003 have been excluded on the basis that they are unlikely to involve an individual complainer providing evidence (e.g. offences involving the possession or distributing of indecent images which normally proceed on forensic evidence without complainers having been identified or, where a complainer is giving evidence, are normally accompanied by other sexual offence charges).

289. The list of sexual offences has, however, been expanded beyond those recommended by Lady Dorrian's Review and the Working Group, to include further offences for which it is considered there are complainers who may reasonably be expected to give evidence of a similar nature, or experience similar barriers in accessing justice regarding conduct that can also be considered to amount to sexual or physically intimate abuse. Specifically, these include offences involving:

- section 1 of the Domestic Abuse (Scotland) Act 2018 where it is apparent from the charge that there was a substantial sexual element present in the alleged commission of the offence
- the non-consensual disclosure of, or threat to disclose, an intimate image or film (contrary to section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016)
- carrying out hymenoplasty, virginity testing and associated offences under the Health and Care Act 2022
- female genital mutilation under section 1 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

290. Provisions are also included in the Bill at section 45 to allow applications on cause shown, from prosecutors, or joint applications from prosecutors and the accused, to apply to transfer cases to the Sexual Offences Court, where they have been initially indicted to either the High Court or the sheriff court. It is anticipated that these provisions will be useful to allow the Court to build up an initial caseload and to allow prosecutors to seek, on cause shown, to change a previous decision not to prosecute any individual case in the Court.

291. Similarly, section 46 allows applications for cases to be transferred out of the Sexual Offences Court. Again, these can only be made on cause shown by the prosecutor or jointly by the prosecutor and the accused.

Alternative approaches

292. An alternative approach to jurisdiction would have been to follow the recommendation of Lady Dorrian's Review, and the Working Group, and only grant the Sexual Offences Court jurisdiction to hear cases in which the qualifying offence was the *primary* charge on the indictment. This approach was discounted as it introduces too much uncertainty and subjectivity as to the jurisdiction of the court. It was also rejected because of the Scottish Government's ambition to ensure that prosecutors have the option to choose the Sexual Offences Court for all complainers of serious sexual offences, regardless of whether the accused was also facing additional charges or not. The existence of other charges on the indictment does not change the challenges faced by the complainer in respect of their experience or the evidence they are to give.

293. A further related alternative approach would have been to preserve the High Court's exclusive jurisdiction over murder and prevent cases including a murder charge from falling within the Sexual Offences Court's jurisdiction. This was the recommended by both Lady Dorrian's Review and the Working Group on the basis that permitting the Sexual Offences Court to hear cases involving murder could call into question the role of the High Court as Scotland's superior criminal court. However, given the potential for cases to involve the escalation of offending as described above, it is considered that in some cases, the Sexual Offences Court will be the most appropriate forum even where a murder charge is included on the indictment. It is considered that it is right for prosecutors to have the option of choosing the Sexual Offences Court where they deem it appropriate. It was also felt that the High Court's appellate jurisdiction provided sufficient clarity regarding its constitutional position as Scotland's superior criminal court.

Consultation

294. The consultation asked respondents to indicate whether the Sexual Offences Court should be able to hear non-sexual offences where these feature on the same indictment as a sexual offence. Respondents overwhelmingly agreed with 86% of those who answered this question in agreement compared to just 7% against. The main reasons for supporting this recommendation were that splitting cases would place additional demands on the court system and would not be consistent with a trauma-informed approach.

Judicial appointments

295. Those appointed to preside over cases in the court will play a crucial role in determining the success of the Sexual Offences Court. A key objective in making judicial appointments to the Sexual Offences Court is ensuring that those who preside over cases have the appropriate skills, knowledge and training to deliver against the aspirations of the Court.

296. The Bill therefore establishes the role of Judge of the Sexual Offences Court to preside over the Court and section 40 provides that appointments to this role are made by the Lord Justice General subject to criteria relating to specialist training, skills and experience. Appointments are to be made from the pool of certain existing judicial office holders including Lord Commissioners of Justiciary (High Court judges), temporary judges, sheriffs principal and sheriffs. The Bill also

provides that the Lord Justice General and the Lord Justice Clerk may preside over cases in the Sexual Offences Court.

297. The Bill allows appropriately trained sheriffs and sheriffs principal, with the necessary skills and experience, to be appointed to the role of Judge of the Sexual Offences Court and in that capacity to be able to hear cases of rape and murder and sit with unlimited custodial sentencing powers. This arises from a recognition that it is largely the knowledge, experience and training of a judge, rather than which judicial office they currently hold that ought to determine their suitability to hear these cases. It is also consistent with the current and commonplace practice of sheriffs being appointed as temporary judges and presiding over these cases in the High Court.[89]

298. In recognition of the anticipated caseload of the Court, the Bill also provides for the creation of two new statutory judicial officer roles to be known as the "President of the Sexual Offences Court" and the "Vice-President of the Sexual Offences Court". These roles will further enhance the development and operation of the Court by having the responsibility of ensuring the efficient disposal of business in the Court. The President will also have the power to prescribe various matters in relation to sittings of the Court but must consult the Lord Justice General and the Lord Advocate before exercising that power. The Bill sets out that the Lord Justice General may assume office as President of the Court and may appoint the Lord Justice Clerk to the office of Vice President.

Key information

299. The Bill establishes a new and distinct category of judicial officer specifically for the purposes of presiding over cases in the Sexual Offences Court. This role is to be known as a "Judge of the Sexual Offences Court". Only the Lord Justice General, the Lord Justice Clerk and those appointed to this position will be able to preside over cases in the Court. The Bill makes clear that power to make appointments rests with the Lord Justice General where they are satisfied that the candidate has completed the requisite training and has the necessary skills and experience to preside over cases in the Court. There are no restrictions on the number of Judges of the Sexual Offences Court that can be appointed.

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[89] Temporary judges were created by section 20B of the Judiciary and Courts (Scotland) Act 2008 and may be appointed to sit in High Court to carry out the same work as a judge of the High Court with equivalent sentencing powers. Temporary judges are appointed by Scottish Ministers following consultation with the Lord President. There is no formal application or assessment process for the position of Temporary Judge and the Judicial Appointments Board for Scotland is not involved in the recruitment or selection process. However, temporary judges must be qualified for the appointment which means that they must be: a sheriff principal or a sheriff who has exercised these functions continuously for a period of at least five years, an Advocate of five years standing, a solicitor who has had rights of audience before either the Court of Session or the High Court of Justiciary continuously for a period of not less than five years or a Writer to the Signet of ten years standing who has passed the examination in civil law two years before taking up their seat on the Bench. Currently there are around 26 temporary judges, all of whom hold the substantive office of Sheriff.

300. Provisions within the Bill set out some parameters on who the Lord Justice General can appoint to the role of Judge of the Sexual Offences Court. Specifically, the appointee must have, immediately before the appointment, held any of the following judicial offices: Lord Commissioner of Justiciary (High Court judge)[90], sheriff principal, sheriff or temporary judge. Appointees will retain their substantive role (e.g. as a High Court judge or sheriff) and will cease to be a Judge of the Sexual Offences Court if/when their substantive role comes to an end.

301. To avoid putting in place legislative requirements that could result in the loss of knowledge and experience from the pool of judiciary appointed to the Court, there are no restrictions on the length of time that an individual can hold the position of Judge of the Sexual Offences Court. It is therefore left to the Lord Justice General's discretion to determine the period of appointment. The Lord Justice General can, however, following consultation with the President and Vice President of the Court remove a Judge from that role.

Alternative approaches

302. An alternative approach considered was to restrict criteria for appointments to the Court so that only High Court judges would be able to preside over cases. However, this option fails to deliver on the aim of the Court to allow more flexible use of judicial resources and also fails to recognise the importance of experience, training and expertise as the main considerations for appointments rather than perceptions associated with judicial title. This approach is also considered undesirable and unworkable given the ambition of the Court to consolidate all serious sexual offences into one court. This would lead to a caseload which would be unable to be serviced by High Court judges alone and would deprive sheriffs of valuable experience in presiding over these cases. It would also undermine and fail to take account of the existing and commonplace practice of using temporary judges in the High Court to hear cases including those involving rape and murder.

303. Another option explored was to allow sheriffs to be appointed as Judges of the Sexual Offences Court but to restrict them from being able to preside over cases of rape and attempted rape (and murder). This would however result in a two tier Sexual Offences Court, replicating existing distinctions but at the same time introducing additional complexity to the current system. It would fail to deliver the change needed and, by separating cases within the Court, would blunt its capacity to develop best practice and raise standards across the board.

Consultation

304. The outcomes of the consultation identified a lack of consensus on who should be able to preside over cases in the Sexual Offences Court. 58% of respondents supported the recommendation that both High Court Judges and sheriffs (with appropriate training) be appointed to sit in the Court. The primary reason was that it could reduce delays in cases coming to court and that training and experience were more important than status. However, a significant proportion

[90] As Senators of the College of Justice are known when sitting as judges in the High Court.

of victim support and advocacy organisations specified within those supportive consultation responses, a preference that only High Court judges should be allowed to preside over rape cases, otherwise there would be a perception that serious sexual offences were being downgraded. 16% of respondents indicated that they were against the proposal to allow both sheriffs and High Court judges to preside over cases and 26% provided a neutral response.

Sentencing powers

Policy objectives

305. The policy objective is to ensure that Judges of the Sexual Offences Court have all the powers they need to adequately deal with the wide range of offending that will make up the cases before them, up to and including offences of rape and murder.

306. The sentencing powers of the Sexual Offences Court must ensure that it is equipped with the tools it needs to deal with the most serious cases and in doing so is perceived as being of equivalent stature as the High Court when it sits as a court of first instance, which currently has exclusive jurisdiction over rape and murder. It is important that in establishing the Sexual Offences Court and allowing cases involving rape to be heard by a court other than the High Court, there is no perception that those cases are being 'downgraded'.

307. Accordingly, section 62 of the Bill provides that those presiding over cases in the Sexual Offences Court will have the equivalent sentencing powers to the High Court. That means that Judges of the Sexual Offences Court will have the ability to impose unlimited custodial sentences as well as the power to impose OLRs. Nothing in the Bill changes the process to be followed when considering the imposition of an OLR.[91]

Key information

308. Currently, sheriffs have sentencing powers in solemn cases of a maximum of five years' imprisonment whereas High Court judges are able to sentence up to life imprisonment (although both sheriffs' and judges' sentencing powers are subject to any restrictions on sentence specified by the legislation governing the particular offence an accused has been convicted of[92]). Following a conviction, sheriffs may remit individual cases to the High Court for sentencing if they consider their powers to be insufficient. Where a sheriff is sitting as a temporary judge in the High Court,

[91] Broadly, the process is that after conviction, if a judge considers at his/her own instance, or on the motion of the prosecutor, that the risk criteria may be met, they may issue a Risk Assessment Order. The risk criteria are defined in Section 210E of the Criminal Justice (Scotland) Act 2003. The High Court will then appoint a Risk Assessor, accredited by the statutory Risk Management Authority, to prepare a Risk Assessment Report (RAR). The Risk Assessor will have up to 90 days to complete the risk assessment. The RAR will allow the judge to make an informed decision on whether it is appropriate to impose an OLR. As of 31 March 2021, the RMA reports that there are a total of 206 individuals with an active OLR.

[92] e.g. a person convicted on indictment of threatening or abusive behaviour, under Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, cannot be sentenced to more than five years imprisonment, or a fine, or both, regardless of whether prosecution has progressed in the sheriff court or the High Court.

for the purpose of dealing with High Court cases, they have the same sentencing powers as High Court judges.

309. The ambition of the Sexual Offences Court is to bring together all solemn level sexual offence cases into one unified court, removing the existing distinctions between those cases tried in the sheriff court and the High Court. This recognises the common challenges faced by all complainers in serious sexual offence cases regardless of the forum their case is prosecuted in. A unified court requires rationalising the sentencing powers of the Court to ensure that tiers are not created within the Court and that all cases are treated consistently. This will mean that cases that formerly would have been heard in the sheriff court, and subject to maximum sentencing powers of five years' imprisonment (although capable of being remitted to the High Court for a lengthier sentence), will now be heard by a court with unlimited custodial sentencing powers.

310. In proposing the sentencing powers of the Court, consideration has been given not only to the training requirements that will be introduced for Judges of the Sexual Offences Court, but also to the fact that the Scottish Sentencing Council is currently developing sentencing guidelines on sexual offences including rape and sexual assault. All judges must have regard to such guidelines when sentencing.[93] Sentencing guidelines are approved by the High Court and help to ensure sentences are consistent, fair and proportionate.

Alternative approaches

311. Lady Dorrian's Review recommended a ten year sentencing limit for the Sexual Offences Court, with the ability to remit cases deserving of a lengthier sentence to the High Court. In part, this was to preserve the status and superiority of the High Court. This aspect of the recommendation has not been adopted for a number of reasons which are well articulated in the Working Group's Report.[94] There was unanimity among the Working Group that placing a limitation on sentencing powers risked giving the perception that serious sexual offences were being 'downgraded', and that it was counter intuitive to create a Sexual Offences Court that did not have all the powers it needed to deal with the most serious sexual offences.

312. Unpublished data identified by justice partners, and shared with the Working Group, indicates that the proportion of those convicted of a sexual offence that receive a custodial sentence in excess of ten years appears to be significantly higher than the five per cent identified by the Lady Dorrian Review, with one analysis placing it at 18%.[95] A custodial sentencing limit of ten years for the Sexual Offences Court would therefore not be fit for purpose. It would also not be

[93] Section 6, Criminal Justice and Licensing (Scotland) Act 2010
[94] See Part 4 of the Working Group's report: conclusions and recommendations of the Working Group and next steps - Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report - gov.scot (www.gov.scot)
[95] Ibid

compatible with the intention to allow, in appropriate cases, prosecutors to indict cases including a charge of murder to the Sexual Offences Court.

Consultation

313. The consultation asked respondents to indicate the extent to which they agreed or disagreed with the proposal to limit the sentencing powers of the Sexual Offences Court to ten years' imprisonment. Those who disagreed with this were then asked to indicate what they felt constituted appropriate sentencing powers for the court.

314. Responses to the consultation demonstrated strong opposition to placing any limit on the sentencing powers of the Sexual Offences Court with 62% of respondents expressly disagreeing with a ten year limit compared to 26% in favour. 94% of those who disagreed with the proposal for a ten year sentencing limit, felt the Sexual Offences Court should have unlimited sentencing powers. A clear theme that emerged from the responses was that limiting the Court's sentencing powers risked creating the perception that sexual offences were being downgraded. Concerns were also raised that requiring cases to be remitted to the High Court for sentences in excess of ten years was not an effective use of court and judicial resources nor constituted a trauma-informed approach. Those who agreed with the Review's recommendation on the Court's sentencing limit indicated that they felt a custodial sentencing limit of ten years was appropriate for the types of cases that the Court would hear.

Rights of audience

Policy objectives

315. Targeting specialist training and introducing an element of 'ticketing', where all those who appear in the Court are required to complete specialist training, is at the heart of the model of the Sexual Offences Court provided for by the Bill.

316. The Bill provides for a requirement for solicitors, solicitor advocates and advocates who wish to appear in the Court to successfully complete specialist trauma-informed training in sexual offence cases, as approved by the Lord Justice General. This requirement seeks to deliver on the ambition for a specialist and trauma-informed approach. It ensures that those with a role in questioning the complainer will have a grounding in understanding trauma before doing so, the giving of evidence frequently being identified as the most difficult part of the trial process for complainers.

317. The ambition for the Court's jurisdiction is to consolidate into one single court, serious sexual offences that would previously have been heard in both the High Court and the sheriff courts. To ensure that the accused retains access to broadly the same level of representation as under existing court structures, the Bill makes further provision for rights of audience.

Key information

318. The law surrounding rights of audience in the current Scottish criminal courts can be found over a range of legislative provisions but is also a product of tradition and common law. In the High Court, only advocates and solicitor advocates may appear to conduct an accused's defence. In the sheriff court, solicitors, solicitor advocates and advocates may appear in cases which are prosecuted on indictment (or indeed on summary complaint).

319. The provisions in the Bill provide that appropriately trained advocates, solicitor advocates and solicitors will have rights of audience in the Sexual Offences Court. This recognizes the range of cases and offences that will be heard in the Court.

320. The exceptions to this are cases which involve a charge of rape or murder, in which case the provisions specify that only those with rights of audience to appear in the High Court (advocates and solicitor advocates) are able to appear in these cases. Limiting the rights of audience for cases involving these offences ensures that the accused continues to be entitled to receive the same level of representation as where the case is heard in the High Court and avoids creating the perception that these offences are being downgraded.

321. In terms of presenting the case for the prosecution, in the High Court prosecutions are conducted by advocates depute (known collectively as "Crown counsel") who are appointees of the Lord Advocate. In the sheriff solemn courts, prosecutions are normally conducted by procurator fiscal deputes on the authority of having been granted a "Lord Advocate's Commission". 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.

Requirement for completion of trauma-informed training

322. Provisions in the Bill specify that rights of audience to appear in the Sexual Offences Court are contingent on the completion of training on trauma-informed practice in sexual offence cases. The content of this training is to be accredited by the Lord Justice General for the purposes of determining who is able to appear in the Court. The provisions also place a requirement on the body that regulates solicitors, the Law Society of Scotland, to keep a record of those who have rights of audience to the Court. A similar requirement is also placed on the Faculty of Advocates as the organization that regulates advocates.

323. While 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, section 49 places a duty on the Lord Advocate to publish a statement which provides details of any training on trauma-informed practice that prosecutors will be required to complete before appearing in the Court.

Legal aid

324. Paragraph 1 of schedule 4 of the Bill amends the Legal Aid (Scotland) Act 1986 to allow the Court to come under the scope of legal aid provision. Further provision setting out entitlement to Legal Aid for an accused indicted to the Sexual Offences Court and, in particular, the circumstances within which an accused will be granted enhanced Legal Aid entitlement for the purposes of employing counsel will be set out through regulations prior to the Court becoming operational.

325. Legal aid is made available to the accused in criminal cases on a means tested basis to help meet the costs of legal advice or representation associated with the offences with which they are charged. The level of legal aid that an accused is entitled to is contingent on a number of factors including the offences with which they are charged and the court in which their case calls in. For cases indicted to the High Court, such as is currently always the case for rape and murder, an accused that is granted legal aid automatically receives an enhanced entitlement for the purpose of instructing an advocate or solicitor advocate (given only those persons have rights of audience to appear in the High Court to represent an accused). In the sheriff courts, where cases can be conducted by solicitors as well as advocates and solicitor advocates, an accused wishing to receive funding to instruct an advocate or solicitor advocate must apply to SLAB for sanction to do so. As the Sexual Offences Court brings cases together that would previously have been heard across these two courts, consideration will be given as to how to best reflect and provide for this in terms of legal aid entitlement across the range of cases the Court will hear.

Prohibition on Personal Conduct of Defence

326. Section 56 of the Bill prohibits an accused from being able to represent themselves in any case which is heard in the Sexual Offences Court where a witness is required to give evidence and ensures that mechanisms are in place for the Court to appoint a solicitor for an accused where they have not instructed a solicitor to represent them. Where the Court does appoint a solicitor to act on behalf of an accused because of the prohibition on self-representation, the provisions grant them an automatic entitlement to criminal legal aid assistance mirroring what happens in other courts. This is to ensure that trauma-informed approaches are embedded within the Court by preventing cross-examination of a complainer by the accused and is in line with existing legislation which prohibits self-representation in other courts for the majority of sexual offences.[96]

Alternative approaches

327. Consideration was given to limiting rights of audience to the court to advocates and solicitor advocates. This was recommended by Lady Dorrian's Review on the basis that it reflected the serious nature of the offences heard by the Court. This proposal was explored by the Working Group and discounted on the basis that it would require advocates and solicitor advocates to take

[96] Section 288C, Criminal Procedure (Scotland) Act 1995

on a significant number of additional cases by virtue of the redistribution of sheriff solemn court cases into the Sexual Offences Court and was therefore unachievable given existing pressures on advocates and solicitor advocates. The proposal was also considered to be undesirable in that it would prevent solicitors from gaining experience in appearing in solemn level sexual offence cases.

Consultation

328. A clear majority of respondents supported the recommendation in Lady Dorrian's Review that the Sexual Offences Court ought to have rights of audience which mirror the High Court with 78% agreeing with this proposal compared to just 5% of respondents who disagreed. The primary rationale for this was that it would instill confidence in the Sexual Offences Court and was commensurate with the seriousness of the crimes being heard by the Court although it fails to recognise the significant additional pressures that this requirement would place on advocates and solicitor advocates as a result of being required to represent accused in cases that would have previously been indicted to the sheriff courts .

329. On the requirement for those appearing in the Court to undergo trauma-informed training, the overwhelming majority of respondents agreed that this should be a legal requirement with 83% in favour and just 11% against this proposal. This recommendation was particularly popular among victim support and advocacy organisations that responded to the consultation with all of them expressing their support for this proposal on the basis that it could make a significant contribution to the experience of complainers. The legal sector was firmly against this recommendation on the basis that it should be for the legal profession to determine what training requirements solicitors and advocates should undergo and that it may deter some from appearing in the Court.

Procedural matters, including provision for pre-recorded evidence

Policy objectives

330. The primary objectives of rules and procedures for the Sexual Offences Court is to ensure that there is clarity in the procedure that is to apply to individual cases and capability for the Court to develop and embed trauma-informed processes to effectively and efficiently manage the cases it will hear. The Court is also expected to develop new ways of managing sexual offence cases and best practice will inevitably evolve over time. The Court must therefore have flexibility to adapt its rules and procedures to embed specialist, trauma-informed approaches to how the court operates.

331. Following the recommendation of Lady Dorrian's Review, the procedure in the Sexual Offences Court is intended to mirror that of the High Court other than where the Bill makes provision to the contrary or when bespoke court rules and procedures are made in future under the relevant powers contained in the Bill. The provisions therefore do not indefinitely tie the Sexual Offences Court rules and procedure to those of the High Court but rather ensure there is flexibility to develop distinct rules and procedures over time including for the purposes of embedding specialist, trauma-informed approaches.

Key information

Rules and Procedures of the Sexual Offences Court

332. Court rules and procedures are a fundamental part of how cases are managed as they progress through the court system and cover all aspects of how cases are managed. This ranges from detailing time limits and specific requirements on the scope and content of hearings, to the taking of evidence from witnesses and the process for appealing decisions made by the courts. These rules and procedures do not apply uniformly across the criminal courts but rather different courts have distinct rules and procedure based on their specific remit and jurisdiction. The High Court, for example, has different rules and procedures from those which apply in the sheriff courts. Rules and procedures can be introduced through a variety of different mechanisms although it is most commonly achieved through passing primary legislation, amending the Acts of Adjournal or the issuing of Practice Notes by a principal judicial officer such as the Lord Justice General.

333. The effect of section 55 is that the procedure that governs cases in the Sexual Offences Court will, unless otherwise provided for by the Bill, mirror procedure currently in place to govern cases in the High Court as set out in the Criminal Procedure (Scotland) Act 1995. The purpose of creating a separate court for hearing sexual offences is, however, to encourage the development of new approaches to cases which can improve the experience of complainers. To that end, section 55 ensures there is flexibility to introduce new procedure which is distinct from that which applies in the High Court. Scottish Ministers may therefore by regulations make provision for the procedure which applies to proceedings in the Court.

Pre-Recorded Evidence

334. The merits of enabling children and adult vulnerable witnesses to pre-record their evidence in advance of the trial were clearly set out in SCTS's Evidence and Procedure Review (EPR). This Review considered the use of pre-recorded evidence in other jurisdictions and, in doing so, identified several advantages for vulnerable witnesses as well as wider benefits for the management of cases more generally. In particular, the EPR found that permitting vulnerable witnesses to pre-record their evidence reduces the stress associated with giving evidence in front of a jury and also supports witnesses to provide their best evidence by enabling them to provide a more 'contemporaneous and accurate account'.[97]

335. The Scottish Parliament recognised the benefits and value of pre-recorded evidence as articulated in the EPR when it passed the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 ("the 2019 Act"). The 2019 Act provides for an expansion of pre-recorded evidence from child and 'deemed vulnerable' witnesses in serious cases by, in effect, providing for a presumption in favour of pre-recording their evidence. To date, the 2019 Act has been implemented in respect of all child witnesses giving evidence in the most serious cases being heard in the High Court. The 2019 Act gives Scottish Ministers the power to extend the presumption in favour of pre-recording evidence to other child and 'deemed vulnerable' witnesses, which includes adult complainers in

[97] evidence-and-procedure-full-report---publication-version-pdf.pdf (scotcourts.gov.uk)

cases involving solemn level sexual offences. The phased implementation of the 2019 Act is underway although has been inevitably affected by the COVID-19 pandemic and its impact on the justice sector.

336. Introducing a presumption towards the pre-recording of evidence for complainers was a core tenet of the Sexual Offences Court as envisioned by Lady Dorrian's Review. In support of this recommendation, the Review drew particular attention to the experience of complainers in sexual offence cases, highlighting that they will often be required to recount events that were "*particularly traumatic, threatening or harmful; with the accused often representing a figure of fear for the witness"*[98]. The result of this is that complainers are at a significantly increased risk of re-traumatisation where they are required to give evidence in a courtroom environment.

337. In recognition of these concerns and in the interests of establishing a specialist court with trauma-informed practice at its heart, section 59 builds on and complements previous reform introduced by the 2019 Act and provides that a presumption in favour of pre-recording evidence will apply to all vulnerable complainers giving evidence in the Court. Section 59 provides that the court must enable all of a vulnerable complainer's evidence to be given in advance of trial by the use of either or both the special measures: evidence by commissioner and evidence in chief in the form of a prior statement. Exceptions to this general rule are provided where the court is satisfied that pre-recording evidence would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice or that the complainer expresses a wish to give evidence at the trial.

338. There is considerable overlap between the jurisdiction of the Court and the vulnerable complainers who will benefit from a presumption in favour of pre-recording evidence because of the Bill and those that would otherwise have fallen subject to a presumption once the 2019 Act had been rolled out in full. This underlines the need for a strategic approach to the implementation of this key measure to ensure appropriate capacity is built across the system.

Vulnerable Witness Ground Rules Hearings

339. Ground Rules Hearings (GRHs) have to take place wherever a child or other vulnerable witness gives evidence by commission in advance of the trial.[99] The purpose of a GRH is to bring together parties involved in taking evidence from the vulnerable witness, including prosecutors and defence agents, in order to try to ascertain a number of issues including: how long parties think examination in chief or cross-examination may take, to decide on the form and wording of the questions to be used (to the extent that the commissioner thinks it appropriate) and to consider whether the proceedings should take place on the date fixed by the court (which includes a consideration of whether parties are likely to be ready). Lady Dorrian's Review observed that

[98] Improving-the-management-of-Sexual-Offence-Cases.pdf (scotcourts.gov.uk)
[99] Section 271I of the 1995 Act.

experience shows that GRHs have been successful in improving the experience of complainers and are working effectively.[100]

340. While a presumption towards the pre-recording of evidence from vulnerable witnesses (including complainers) will apply in all cases that are indicted to the Sexual Offences Court, there will inevitably be circumstances in which a vulnerable witness will want to or be required to give their evidence in front of a jury. In such instances, the case for GRHs is arguably even greater in the interests of reducing the challenges associated with giving evidence at trial and reducing the risk of re-traumatisation. The provisions at section 58 therefore have the effect of extending the use of GRHs to all cases in which a vulnerable witness (including a complainer) is giving evidence in the Sexual Offences Court.

Alternative approaches

341. An alternative approach was considered to only extend trial diets GRHs to complainers giving evidence in the Sexual Offences Court and to exclude other vulnerable witnesses. However, it was considered that the value and benefits brought by trial diets GRHs apply to all vulnerable witnesses giving evidence in the Court, particularly in the context of the Court's jurisdiction. A further alternative was considered whereby a requirement would be introduced for trial diet GRHs to apply in all cases where a vulnerable witness is giving evidence, expanding this requirement beyond the Sexual Offences Court. It was however considered that before such an expansion, it would be appropriate to introduce GRHs in the Sexual Offences Court first to provide an opportunity for the impact of expanding GRHs to be assessed and understood against the additional demands that it will place on the court system.

Consultation

342. Respondents were asked to what extent they agreed or disagreed that Ground Rules Hearings should be extended to all child and vulnerable witnesses required to give evidence in the High Court, irrespective of the method in which their evidence is to be provided to the court. The majority of respondents to this question (89%) agreed with the proposed extension to Ground Rules Hearings to all child and vulnerable witnesses required to give evidence in the High Court with just one respondent indicating that they disagreed with this proposal. This proposal to expand the use of Ground Rules Hearings was particularly popular among victim support and advocacy groups.

[100] At para 2.21 of the Review.

PART 6 OF THE BILL (SECTIONS 63 – 66) – SEXUAL OFFENCE CASES: FURTHER REFORM

SECTION 63 – ANONYMITY FOR VICTIMS

Key background and policy context

343. Courts in Scotland have a long tradition of hearing cases in public in line with the principle of open justice. This principle of open justice extends to other countries in the UK and across many countries of the world. There are occasions, however, when it is necessary to restrict the public nature of certain court proceedings. An example of this relates to the identity of complainers in certain cases, particularly sexual offence cases.

344. The regulation of the media to provide anonymity for complainers in sexual offence cases (and certain other offences in some jurisdictions) is practised in a number of countries, either through statutory provision (for example, England and Wales, Northern Ireland, Australia, Canada, India and New Zealand) or through non-statutory provision (for example, most of the United States). At the moment in Scotland this is provided for through a mix of statutory and non-statutory protections.

345. A majority of those countries which provide complainers with a statutory right to anonymity, provide that this right is automatic – there is no requirement for the complainer (or the prosecutor) to apply to the court for an order to be put in place. This avoids any requirement for the complainer to initiate a court action to obtain such an order. One advantage of this is that a complainer cannot lose their right to anonymity either because of an oversight or, if they were required to initiate a court process themselves, because they lacked the resources to do so. Providing for an automatic statutory right to anonymity would bring Scotland into line with the remainder of the United Kingdom and international practice in this area.

346. A more detailed exploration of the different approaches both across the United Kingdom and internationally in the area of complainer anonymity is set out in the consultation paper on improving victims' experiences of the justice system.[101]

347. The Bill provides comprehensive, automatic statutory protection of anonymity for victims of certain offences in Scotland for the first time. This protection will apply to publication by anyone of information that identifies a complainer. This will help protect the dignity and integrity of victims in these cases.

[101] Improving victims' experiences of the justice system: consultation - gov.scot (www.gov.scot)

Current legal framework in Scotland

Child complainers

348. Certain anonymity protections exist for children who are currently participating in the Scottish criminal justice system. Under section 47 of the Criminal Procedure (Scotland) Act 1995 ("the CPSA 1995"), all child accused, complainers and witnesses are given automatic anonymity protection in respect of newspaper reports and sound and television programmes.

349. There are exceptions to this general rule. Where the child is a witness and the alleged perpetrator(s) is aged 18 or older, then the anonymity requirements will only apply if the court directs. In addition, the court, at any stage of the proceedings, and the Scottish Ministers, after completion of the proceedings, retain the power to lift these restrictions if satisfied it is in the public interest to do so.

350. The term "newspaper reports" extends to such reports which are published on the internet by newspaper organisations. The provisions do not, however, extend to information displayed or published by independent persons, including on social media. In that situation, it would require the court to take pro-active action to prevent such publication by making a separate order under section 11 of the Contempt of Court Act 1981 ("the 1981 Act"), discussed further below.

351. Reforms to anonymity with regards child accused, complainers and witnesses in general terms i.e. not specific to sexual offences, are being taken forward separately through the Children (Care and Justice) (Scotland) Bill, introduced to the Scottish Parliament on 13 December 2022.[102]

Adult complainers

352. Scotland differs from the remainder of the United Kingdom and many other countries around the world in that there is no automatic legal right to anonymity for adult complainers in sexual offence cases in Scots law.

353. In practice, complainers in cases of rape and other sexual offences usually give evidence under 'closed court' conditions, which means that the public is excluded from the court during the giving of their evidence.[103] This exclusion does not apply to members of the press whose presence is permitted in accordance with the principle of open justice.

354. While a court can expressly prohibit the publication of details of complainers in sexual offence cases, this does not happen automatically: it requires a court in any given case to make such an order. As such, it is important to recognise in most cases in Scotland anonymity is

[102] Children (Care and Justice) (Scotland) Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website

[103] see sections 92(3) and 271HB of the Criminal Procedure (Scotland) Act 1995

generally provided through reliance placed on a long-standing, non-statutory convention against naming complainers in sexual cases by the mainstream media.

355. The existing legal tools available to Scottish courts in this regard are found in the 1981 Act. Under section 11 of the 1981 Act, where a court allows a name or other matter to be withheld from the public during the proceedings, for example further identifying information such as a person's address, photograph or place of work, "the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld". A person who breaches such an order can be found in contempt of court and could be sentenced to imprisonment for up to two years, made subject to a fine, or both.

Current non-statutory protections for complainer anonymity

356. The mainstream media have a longstanding practice of keeping the names of complainers confidential in news reports. There is a recognised convention that the identity of complainers is withheld from publication by the mainstream media.[104]

357. The Independent Press Standards Organisation ('IPSO') is a voluntary regulator for the press in the UK. It publishes an Editors' Code of Practice[105] ('the Code') which places restrictions on the reporting of sexual offences to protect the identity of victims. The Code is enshrined in the contractual agreement between IPSO and newspaper, magazine and electronic news publishers.

358. The Code is self-described as, "the cornerstone of the system of voluntary self-regulation", which "balances both the rights of the individual and the public's right to know."

359. A number of clauses in the Code are relevant to the issue of reporting sexual offences. The most relevant are Clause 7, which prohibits the identification of children under 16 who are victims or witnesses in cases involving sex offences; and Clause 11, which concerns victims of sexual assault. Clause 11 provides:

"The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault."

360. It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of their publications. Therefore, this method of voluntary self-regulation can be said to rely to a significant extent on what could be termed the more traditional

[104] see Sweeney v X | [1982] ScotHC HCJAC.
[105] Editors' Code of Practice (ipso.co.uk)

forms of media and publishing structures, where there is a governing editor and/or publisher with oversight and control over what is ultimately published, and who will have regard to the Code.

361. This means in the absence of a section 11 order made by the court, there is no legal prohibition in Scotland to publish identifying information of a complainer in a sexual offence case. Therefore, in terms of the Code, it falls upon users to consider whether there is "adequate justification" for such disclosure. It is also noteworthy that some major national newspapers are not signed up to the Code (however, it is understood these media organisations follow the convention not to name sexual offence victims).

362. The issue of complainer anonymity was considered by Lady Dorrian's Review, which recommended that legislation be brought forward to introduce a statutory right to anonymity for those complaining of rape and other sexual offences along the lines of equivalent legislation in England and Wales.

Specific provisions

363. Provision in the Bill relating to the creation of an automatic statutory right of anonymity for victims of a qualifying offence can be broadly split into the following five areas:

- Automatic statutory right of anonymity for victims of certain offences, including start and end point of any such right
- Offences to which the right of anonymity applies
- The right of victims to waive their own anonymity
- The circumstances in which anonymity may be set aside by the court
- Offence of breaching anonymity and applicable defences.

Anonymity for victims of certain offences

Policy objectives

364. The policy objective is to enshrine into legislation an automatic right of anonymity for victims of sexual and other qualifying offences with protection provided at the earliest possible point; and with no positive actions required by the victim to engage such a right. For example, it is not dependent on them making a report to the police.

365. The right to anonymity should be lifelong, expiring upon the death of the victim.

366. The benefits of this change will be to maintain as best as possible the dignity and privacy of a person when they are a victim of a qualifying offence during their lifetime, which is helpful to the well-being of the individual in itself. This may also, as a secondary benefit, help increase the confidence of victims to report offending behaviour to the police through certainty of their legal right to anonymity.

Key information

367. The detrimental impact of the publicity of being a victim of certain offences, such as sexual offences, both directly upon the victim and more generally upon its impact on the willingness of victims to come forward and report such crimes, has long been recognised.

368. The Helibron report (1975) observed[106]:

"...public knowledge of the indignity which [a complainer] has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bring proceedings……"

"We are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as [complainers] would be less unwilling to come forward if they knew that there was hardly any risk that the judge would allow their name to be disclosed."

369. Preserving the anonymity of complainers in sexual offence cases can therefore be said to serve an important protective function. It helps to minimise the re-traumatisation of victims of such offending behaviour through the court process, and in turn can increase the confidence of victims to come forward and report such crimes in the first instance.

370. Lady Dorrian's Review identified a similar rationale for complainer anonymity when considering the underlying reasoning behind the practice in Scottish courts of allowing complainers in sexual cases to give evidence in closed court conditions:

"The purpose behind allowing witnesses to give evidence in closed court conditions is to enable the witness to speak freely, to limit the embarrassment and awkwardness which may be felt, and to encourage complainers in other cases to feel able to come forward without concern that they may have to give evidence in a crowded court and before members of the public."[107]

371. It can be said the same considerations apply to providing for an automatic statutory right to victim anonymity for certain offences in Scots law.

372. Another key factor driving legislative reform in this area is the possible repercussions of the rise of social media within our culture when it comes to sensitive cases involving sexual offending. This has been explicitly recognised by Lady Dorrian's Review which provided:

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[106] 37318NCJRS.pdf (ojp.gov), at paragraphs 153 and 154

[107] Improving-the-management-of-Sexual-Offence-Cases.pdf (scotcourts.gov.uk), at para 4.31

"This is an issue of particular pertinence given the proliferation of social media, its use in the reporting of criminal trials, and the phenomena of "new" journalism and blogging."[108]

373. The relative ease and speed by which information can now be published online to the public has exponentially increased the risk of causing lasting damage to a victim of sexual offending by either naming them or posting information publicly which may lead to their identification.

374. While the non-statutory approach of the media has worked well over many years, the emergence of 'new media' does not fit neatly within the current legal and non-legal framework and presents real challenges in ensuring anonymity is preserved.

375. Accordingly, section 63 of the Bill amends the Criminal Justice (Scotland) Act 2016 ("the 2016 Act") by inserting a new section 106C. New section 106C introduces an automatic statutory right of anonymity for a victim of a listed qualifying offence, which persists throughout the lifetime of the victim, automatically expiring upon death.

376. The right to anonymity provided for in the Bill takes effect from the moment a relevant offence is committed. That is to say, the gaining of anonymity is not contingent upon certain positive actions of the victim, for example, reporting the matter to the police, or making a disclosure to a specialist support service.

377. Instead, the effect of the new section 106C is that any third party publication of identifying information about victims of sexual and other certain offences is prohibited during the lifetime of the victim, unless that third party has written consent or (in the case of children) court agreement (discussed below). This includes publication by individuals on, for example, social media as well as more traditional media outlets, such as newspapers and television programmes.

378. The adoption of a maximum privacy approach seeks to guard against the potential for public disclosures at an earlier point in time which would render any right to anonymity ineffective were it only to be triggered by a (later) formal report to the police.

379. For example, it is very common and normal for victims not to first make an allegation or disclosure to the police but instead to someone else in a position of trust such as a specialist support service, teacher, carer, or a friend or family member. It is important a gap in protection is not left during this time where any subsequent right of anonymity might therefore be eroded.

380. Providing for anonymity at the earliest possible point also serves to limit the fear of unwanted publicity, and the associated worry and anxiety that this may cause, providing welcome legal certainty to victims that identifying information will not be disclosed.

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[108] *ibid*, at para 4.27

Alternative approaches

Start point for anonymity

381. An alternative approach which was explored during the public consultation exercise was for an automatic right of anonymity for complainers in sexual offence cases to take effect at the point an allegation of a qualifying offence is made to a police constable.

382. The approach of making the right of anonymity contingent upon report to the police was not supported in the consultation responses received by a number of stakeholders. In particular, Rape Crisis Scotland considered the trigger point for when a right of automatic anonymity could take effect is at the point a disclosure of a criminal offence is made, but this should not be contingent upon a disclosure to a police officer. Other stakeholders including Scottish Women's Aid shared this view.

383. As a result of these views, further direct engagement was undertaken and this has led to the policy approach in the Bill which has evolved from the policy proposed in the consultation. In particular, having regard to consultation responses and further direct engagement with stakeholders, the Scottish Government considers the right of anonymity should not be tied to the criminal justice process at all or to any disclosure being required by the victim – whether to the police or anyone else.

384. It is recognised that many victims never make an allegation/disclosure to the police for various reasons including lack of trust, and this is an active choice not to enter the criminal justice process. It is considered any victims in this position are not any less deserving of anonymity and should benefit from the same protections as those who choose to report to police or any other third party. In addition, stakeholders highlighted that some victims are opting to pursue the civil route and have not necessarily been down the criminal route first, and may choose never to do so. Ensuring anonymity operates in that context is important.

385. The Scottish Government considers no person should ever feel deterred from reporting a sexual offence to the police through fear, shame or embarrassment at the possibility of the matter then becoming public knowledge as a result. As such, these are important reasons why the original proposed policy of tying a right of anonymity to point of report to the police has not been considered as being sufficient. This would leave gaps in protection for victims of sexual offending and a disparity in protection available depending on what legal avenues a victim chooses (or declines) to pursue.

386. More broadly, it was apparent from further discussions with stakeholders including Rape Crisis Scotland that an overall approach of maximum privacy for victims of sexual offending was actually the clear preference. As such, this is why policy has been set by the Scottish Government in the Bill as applying from the moment an offence is committed.

End point for anonymity

387. In respect of the policy of anonymity ending upon the death of the victim, an alternative approach considered was for a right of anonymity to persist in perpetuity, with no identifiable end point.

388. There are differing approaches internationally as to the point at which a victim's right to anonymity ceases to have effect. In some jurisdictions, most notably India, the right to anonymity not only extends throughout the victim's lifetime, but also following death. However, this approach has been criticised, as it prohibits next of kin or family members from sharing their loved one's story if they wished to. This has resulted in people seeking to tell the stories of their family members in the press outwith India in order to lawfully share the victim's experiences.

389. Some jurisdictions, like New Zealand, extend anonymity beyond a victim's lifetime but provide the courts with the authority to set anonymity aside upon application, including following the death of the victim.

390. Other jurisdictions, including England and Wales, Northern Ireland and some Australian jurisdictions, adopt the approach that anonymity automatically expires on the death of the victim.

391. It is considered the approach adopted in England and Wales and Northern Ireland has the advantage of simplicity and certainty for the victim during their lifetime while also representing a natural end point. This is consistent with approaches in other areas of law when it comes to privacy and personal data protection. This is echoed in comments by academic Dr Andrew Tickell, who recognises attempts to extend anonymity laws beyond a victim's lifetime results in surviving family members and others being subject to court processes and restrictions on reporting where the victim dies in the course of or aftermath of a sexual assault. He suggests victim anonymity rights should be regarded as personal, non-transferable and extinguished on death and has commented:

"This approach has the additional benefit of giving legal certainty to potential publishers, researchers, and historians that their future work will not inadvertently be compromised, while protecting the legitimate interest of complainers during their lifetimes."[109]

[109] How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak, Andrew Tickell, Tickell_A._2022_How_should_complainer_anonymity_for_sexual_offences_be_introduced_in_Scotland_Learning_the_international_lessons_of_LetHerSpeak.docx.pdf (gcu.ac.uk)

Consultation

392. The consultation on Improving Victims' Experiences of the Justice System sought views on how to bring forward legislation to protect the anonymity of all complainers of sexual crimes under Scots law.

When anonymity should take effect

393. On the question of when any automatic right of anonymity should take effect, 60% of respondents indicated that they felt that an automatic right to anonymity should take effect when an allegation or disclosure of a sexual offence is made. Almost all victim/witness support organisations and most local authorities (including justice partnerships) agreed with this option.

394. Many argued that anonymity for the complainer (and any children) should be provided from the earliest opportunity, with several indicating that anonymity could not then be provided at a later stage if names, etc. had been released earlier in the process. This was considered to be particularly acute given the use of social media.

395. A few respondents (including a public body and an advocacy/support organisation for children and young people) stressed the need for children to be provided with immediate anonymity, and argued that this should be provided across all types of sexual offences and be relevant to all types of media (including online and social media).

396. It was felt that not providing such anonymity could act as a barrier against a victim coming forward to report offences, whereas providing anonymity from the outset would support them through the criminal justice system.

397. It was also argued by several respondents, (largely from victim/witness support organisations), that anonymity was required at this stage because not all disclosures or allegations will be made to the police or the criminal justice system in the first instance.

When anonymity should end

398. On the question of when any automatic right of complainer anonymity should end, responses were mixed, with 43% of those who answered the question favouring no automatic end point, 36% supporting the point of death of the complainer and 21% supporting other options. Those who supported there being no automatic end point (and who gave reasons why) generally felt that anonymity could and should continue indefinitely. It was felt that removal of anonymity after death might be against the complainer's wishes and/or could negatively impact surviving family members. Reasons put forward for complainer anonymity expiring on the death of the complainer included that such an approach upholds anonymity for the complainer in order to protect the victim, but defaults to the important principle of open justice upon the complainer's death; it would be consistent with other privacy and personal data protection laws; and it is an easily ascertainable point in time and represents a natural end point. Several of those who supported other options felt that the ending of anonymity should be complainer led and/or handled

on a case-by-case basis. Other timings suggested included "upon conviction" and "one year after the death of the complainer", with flexibility for this to be shortened or extended based on the family's wishes.

399. As set out above, of all the options considered, it is the Scottish Government's view anonymity expiring upon death is the preferred approach, providing simplicity and certainty for the victim during their lifetime while also representing a natural end point.

Offences to which the right of anonymity applies

Policy objectives

400. It is proposed that the anonymity measure in the Bill applies automatically to sexual offences under Scots law and certain other offences that can be described as containing a significant sexual element.

401. It is further proposed that certain other offences which share the same underlying concerns regarding privacy and vulnerability are also included as a qualifying offence to gain an automatic right of anonymity.

402. The benefits of this approach will be to strike an appropriate balance between full coverage of the anonymity protections for appropriate offending behaviour and the overarching principle of open justice, to which a statutory right of anonymity is a justifiable departure.

Key information

403. The new section 106C of the 2016 Act provided for under section 63 of the Bill sets out an exhaustive list of offences which will automatically gain a statutory right of anonymity.

404. The public consultation exercise approached this aspect of the policy by suggesting anonymity should operate for sexual offences. This was the proposed approach suggested by Lady Dorrian in her report. However, the views offered in the consultation followed up by direct engagement with stakeholders highlighted the importance of including some additional offences of limited scope beyond those which are strictly deemed sexual offences.

405. As such, the new section 106C, in addition to the prescribed sexual offences/offences with a significant sexual element, also includes the offences of human trafficking, modern slavery, servitude and forced or compulsory labour, female genital mutilation (FGM), virginity testing and hymenoplasty as offences within the scope of the anonymity protections.

406. While the extended list of offences will not necessarily involve a sexual element, the Scottish Government recognises similar questions of vulnerability and privacy arise where a person is, for example, held in slavery/servitude or exploited for the purposes of human trafficking, as exists with a victim of sexual offending. This approach also, in part, reflects precedent set by

UK legislation, where human trafficking, modern slavery and FGM are also protected by complainer anonymity laws.

Alternative approaches

407. As set out above, an alternative approach considered was to restrict the right of anonymity to listed sexual offences or certain other offences with a significant sexual element. This approach was rejected following consideration of the consultation responses and direct engagement with stakeholders, the outcome of which supported a departure from the general policy of anonymity applying solely to what may be termed sexual offences, in order to cover certain other specified offences that share the same underlying concerns regarding privacy and vulnerability that sexual offences gives rise to.

408. Another alternative approach considered was to widen the scope of the anonymity measure further, and to include offences such as domestic abuse or stalking. This approach was rejected for two reasons.

409. Firstly, as the offence of domestic abuse must occur between a partner or ex-partner, and the offence of stalking often occurs in a domestic context, extending anonymity in this way would likely also mean that anonymity for accused persons would have to be provided for in law, in order for victim anonymity to be effective. This would be necessary to guard against the prohibition on what is termed 'jigsaw identification' of a complainer of domestic abuse, or an offence of stalking by an ex-partner. Jigsaw identification means that while one piece of information may on its own seem innocuous, when taken together with other information, it may lead to the identification of an individual in breach of the anonymity protections in the Bill. Were domestic abuse or stalking to be added as a qualifying offence, there may be a high risk of jigsaw identification of the complainer as the accused person's partner or ex-partner, if the accused's anonymity was not also provided for.

410. It is not the Scottish Government's intention to extend the anonymity provisions to accused persons in law, which involve distinct and different underlying policy rationales. In this regard, the question of an accused's anonymity was not a proposal consulted upon nor was it a recommendation of Lady Dorrian's Review. It is also of note other jurisdictions internationally and across the UK who have existing automatic anonymity laws, including England and Wales, Northern Ireland and the Republic of Ireland do not also provide for anonymity in relation to the offence of domestic abuse.

411. Secondly, where domestic abuse involves sexual offending behaviour, the start point for anonymity provided for in the Bill means the victim of this behaviour would gain an automatic right of anonymity. This is because the right to anonymity applies to a listed qualifying offence whether or not it is reported to the police and therefore, whether or not the accused is charged with that offence. This means if a person's partner or ex-partner sexually assaulted them, then under the Bill's policy they would have a right to anonymity from the moment that sexual assault was alleged to have happened. The right of anonymity would not be affected if the victim chose to

report the offence to the police or if criminal justice agencies decided to charge the perpetrator with a (qualifying) sexual assault offence as opposed to including that behaviour as part of a (non-qualifying) alternative domestic abuse offence. Instead, as the behaviour constitutes a sexual assault, it would trigger the right to anonymity from the moment it occurred; and what later offence the accused is subsequently charged or prosecuted with (if any) is irrelevant.

Consultation

412. The consultation suggested the following offences should be covered by any automatic right of anonymity:

- Offences contained at section 288C of the Criminal Procedure (Scotland) Act 1995
- Disclosing, or threatening to disclose, an intimate photograph or film under section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016
- Certain offences contained in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

413. Of the respondents who provided an answer to this question, 80% supported that all three categories of offence should be included in the anonymity protections.

414. Around half of the victim/witness support organisations (and most of those who commented on this question) suggested that there was also a need for a "catch all" provision to ensure automatic anonymity could be applied in all relevant cases with a sexual element, regardless of whether they were specifically named in the legislation.

415. A few organisations also advocated for domestic abuse cases to be provided with similar considerations and protections.

Waiver of anonymity by the complainer

Policy objectives

416. It is proposed a statutory right to anonymity serves the dual purpose of increasing the protection, dignity and confidence of complainers in sexual offence cases while at the same time recognising and preserving their autonomy and 'right to be heard', should survivors wish to speak publicly about their lived experiences.

417. This will be achieved by ensuring complainers, adults or children, are not criminalised for unilaterally self-publishing their story if they wish to; while also providing a process through which third party publishers may do so on their behalf.

418. The benefit of this approach is to provide maximum privacy protection as the default under the anonymity provisions while also maintaining autonomy in the hands of victims who wish to dispense with their own anonymity.

Key information

419. The policy is based on the premise that victims should have the right to set aside their own anonymity. Within that, the key question explored during the consultation and policy development process was the specific detail of how a right of anonymity may be waived for adult compared to child complainers and what role, if any, the court should play in this process.

420. The Scottish Government considers there is a balance to be struck between, on the one hand, avoiding placing unnecessary administrative and cost burdens on a victim of a sexual offence (or other listed qualifying offence) who wishes to tell their story and, on the other hand, ensuring that they have genuinely consented to waive their anonymity.

421. Many jurisdictions permit complainers to waive their anonymity without first obtaining the permission of a court. This has the benefit of making the waiving of anonymity for those complainers who wish to do so easy and costless while also minimising any trauma that may arise. In England and Wales and Northern Ireland this is achieved by providing that it is a defence to the offence of disclosing the identity of the complainer for the publisher to show that the complainer consented to the disclosure in writing and such consent was freely given. The Scottish Government considers this approach provides safeguards to the victim while ensuring they may disclose their identity by telling their story to a media outlet if they wish.

422. As such, section 63 of the Bill makes clear that the anonymity protections do not prevent the victim themselves from self-publishing information which is likely to lead to their own identification as the victim of a listed qualifying offence. For example, through their own social media accounts or a chosen online platform. This applies to both adults and children.

423. In addition, and reflecting the approach in England and Wales and Northern Ireland, the Bill enables adult victims to elect to waive their anonymity through a third party publisher subject to the victim providing written consent to the publisher. This operates as a defence to the offence of breaching anonymity (discussed further below) and does not require the involvement of a court.

424. The Scottish Government considers additional safeguards are needed in respect of victims who are children (deemed persons under 18) when it comes to potential publication of identifying information by third party publishers, such as newspapers or television programmes. This safeguard is contained in the newly proposed section 106D of the 2016 Act by virtue of section 63 of the Bill.

425. Section 106D introduces a requirement of judicial oversight for the waiving of anonymity by a child where a third party wishes to publish identifying information. In particular, the Bill provides that any third party publisher wishing to tell a child victim's story on their behalf must apply to the sheriff court for an order to dispense with the anonymity restrictions. Following the receipt of any such application, a sheriff may order the lifting of anonymity where: the child to whom the information relates understands the nature of the court order sought; appreciates what the effect of making such an order would be; and gives their consent to the making of an order. As

an additional safeguard, the Bill provides the court must also ensure it is satisfied there is no other good reason why an order dispensing with the child's anonymity should not be made. This may include, for example, because the court does not consider that the order would be in the best interests of the child.

426. This judicial oversight role seeks to serve a protective function, specifically where a third party publisher wishes to publish a child survivor's story. This is on the basis a child may be particularly vulnerable and lack the maturity to fully understand what they are consenting to if they are approached by a third party wishing to tell their story, irrespective of whether the child has already self-published some details or not. This approach also recognises that the situation is different where a third-party publisher is involved, which has the potential to lead to undue influence over a vulnerable child. As such, the Bill operates an additional safeguard that self-publishing by a child does not amount to an absolute waiver of anonymity.

Alternative approaches

427. An alternative approach considered was to prohibit children from being able to waive their anonymity at all, either through self-publication or through a third party publisher, with a blanket ban until age 18.

428. The Scottish Government considers it is important to recognise the realities of the social media landscape we are now living in and which is used and readily accessible to children and young people (those aged under 18). While it is acknowledged children may spontaneously or without a full appreciation of the implications of doing so, decide to publish their own story on social media, the Scottish Government does not consider the appropriate response to prevent online child disclosures is to prohibit this through criminalisation. Instead, the policy underpinning this aspect of the Bill is to respect a child's autonomy and to encourage through non-legislative means children to engage with specialist support services if they are considering making their experiences public.

429. This was noted during the consultation exercise, with a legal stakeholder commenting:

"Any child with a smartphone or other internet enabled device can publish their identity as the victim of a sexual offence to a wider audience than would be available to any Scottish newspaper. In practical terms, it is difficult to see how a child could be precluded from broadcasting to their immediate social circle, or a far wider audience, that they were the victims of a sexual offence. [We] note that it is unlikely that the legislature or the Crown would consider it appropriate to bring criminal proceedings against a child who unilaterally set aside their anonymity without there having been an application to the court."[110]

[110] Improving victims' experiences of the justice system: consultation analysis - gov.scot (www.gov.scot)

430. A more nuanced approach has been taken in the Bill in respect of a child's ability to consent to a third party publisher telling their story, irrespective of whether the child has already self-published some identifying information into the public domain. In this area, particular regard was given to the views expressed by children centred stakeholders to the consultation and in recognition of child participation rights under article 12 of the UN Convention on the Rights of the Child.

431. A number of stakeholders, representing the interests of children and young people, considered the question of child waiver in response to the consultation exercise. They acknowledged the tensions between children's protection and autonomy and considered a child's rights based approach ought to be taken which takes into account the individual circumstances of each child and their capacity.

432. The Scottish Government agrees with this assessment and considers that judicial oversight is the mechanism to strike the appropriate balance between respecting child autotomy while enabling an individualised assessment of the capacity of the child to provide free and fully informed consent to third party publication of their story.

Consultation

Adults waiving their anonymity

433. During the consultation exercise, the majority of respondents either strongly agreed (71%) or somewhat agreed (21%) that the victim should be able to set their anonymity aside.

434. Both individuals and organisations who agreed that the victim should be able to set aside their anonymity generally argued that this was a decision for the victim and that they should be able to speak out about their situation if they wanted to. It was highlighted that to enforce anonymity on a victim was to apply further controls and could be perceived as silencing victims, while some survivors found it empowering to speak out publicly, reclaiming their autonomy and voice, with it also being helpful to others going through similar experiences.

435. While still advocating for the victim's ability to choose, two organisations did stress the need for informed consent in such situations to ensure that victims were fully aware of the possible impacts and consequences of setting aside their anonymity.

436. A few organisations also felt that victims should be able to set aside their anonymity without the need for judicial interventions or authority, which they argued added an unnecessary administrative, financial and emotional burden on the victim. In this regard, 65% of respondents felt that, if victims were to be given the power to set their anonymity aside, this should be unilaterally by consent of the victim.

Children waiving their anonymity

437. On the question of the ability for children to set their anonymity aside, responses were mixed. The dominant view was that such decisions should be dealt with on a case-by-case basis, taking into account the age, stage and capacity of the child or young person, while also ensuring they were supported in making such a decision.

438. Individuals and organisations of various different types who disagreed, argued that children were too young and lacked capacity to make such decisions or to fully understand the possible consequences of setting aside their anonymity in such cases. Respondents were concerned that this would leave children open to coercion and exploitation, and felt that children should be subject to safeguarding and protection.

439. While there were also mixed responses with regards to whether judicial oversight would be needed in relation to children and young people, more than half who answered the question (59%) strongly agreed and a further 18% somewhat agreed.

440. Generally it was felt important that, if such provision was to be made, then there should be judicial oversight of the process to ensure the child understood the implications and potential consequences, that they were making a fully informed decision, and to be able to provide safeguards against coercion and exploitation.

Power of the court to dispense with anonymity

Policy objectives

441. The policy objective is to provide a very limited discretion to the court to dispense with a victim's right to anonymity if the victim were convicted of any subsequent crime against public justice in connection with the criminal allegation(s) which triggered the right to anonymity.

442. The benefit of this approach is to provide the victim with certainty about the operation of a statutory right to anonymity while acting as a safeguard where an offence against public justice is committed which is connected to the granting of anonymity.

Key information

443. Many jurisdictions do not provide the court with a power to override complainer anonymity in the course of criminal proceedings. In this regard, the approach in England and Wales and Northern Ireland under section 3 of the Sexual Offences (Amendment) (Scotland) Act 1992 ("the 1992 Act") can be described as unusual, where the court has the power in certain circumstances to direct that the complainer's right to anonymity shall not apply.

444. Examples of the circumstances in which the courts in England and Wales and Northern Ireland can override anonymity include:

- To persuade defence witnesses to come forward and if the court does not lift the restriction the conduct of the applicant's defence at the trial is likely to be substantially prejudiced
- To help obtain evidence in support of an appeal and that otherwise the appellant is likely to suffer substantial injustice
- The court is satisfied that the restriction is a "substantial and unreasonable restriction" on the reporting of the trial and it is in the public interest to remove or relax it.

445. On one view, the ability of the court to override a victim's anonymity, irrespective of the victim's wishes, erodes the certainty that anonymity provisions in law are seeking to provide to victims of sexual offences. A competing argument may be that there could be very exceptional circumstances where the court considers it is nonetheless in the interests of justice to override a victim's right to anonymity.

446. A core element of the Scottish Government's underpinning policy of a legislative right to anonymity in Scots law is to provide a victim with the certainty of legal protection.

447. Therefore, the Bill does not follow the approach in the 1992 Act. Instead, the overarching policy is that the court should not have a residual discretion to waive or override a victim's anonymity save in the very limited situation where a complainer is subsequently convicted of a relevant offence against public justice as set out in the Bill. The offence against public justice must relate to an allegation having been made that the victim was the victim of a sexual or other listed qualifying offence. For example, the offence of perjury in relation to an allegation of being a victim of a sexual assault.

448. Having regard to stakeholder feedback, the Scottish Government considers anonymity should not be dispensed with automatically in these circumstances due to the underlying vulnerabilities and complexities that may be involved. As such, the Bill provides the test for the court to apply is whether the overriding of the victim's anonymity in such a situation is in the interests of justice, determined on a case by case basis. Discretion of the court to weigh up whether the overriding of anonymity is in the interests of justice is critical to ensure regard is had to the individual facts and circumstances of each case.

Alternative approaches

449. An alternative approach considered was to adopt the UK 1992 Act model of the court's wide powers to override anonymity.

450. This approach was rejected on the basis it would seem to erode the legal certainty of a victim's right to anonymity that the provisions are designed to achieve. In addition, the Scottish Government considers it is notable that other comparable jurisdictions which provide for

anonymity rights have not felt it necessary to have the same list of exceptions as the 1992 Act. This is noted by Dr Tickell who provides:

"It is striking, however, that most of the jurisdictions considered have not felt it is necessary to adopt this series of exceptions. The scope of judicial discretion to remove anonymity in England has been criticised by some commentators as "too broad," though it is unclear in practice "how often or for what reason judges are prepared to override the anonymity provisions" of the 1992 Act."[111]

Consultation

451. On the question of whether the court should have a power to override any right of anonymity in individual cases, there was an organisational split in opinion with all legal and law enforcement organisations who provided a response agreeing with this proposal, while all victim/witness organisations who answered the question disagreed.

452. The consultation specifically sought views on whether any right of anonymity should expire upon conviction of the victim for an offence against public justice.

453. Respondents who agreed with this proposal (and a few who were neutral) varied between those who felt this was a reasonable provision, to those who felt a conviction should overrule the right to anonymity, to others who felt this should be decided on a case-by-case basis. Those who argued for the issue to be decided on a case-by-case basis noted that later convictions may be unrelated to the case where they were the victim, or that the individual may have additional needs or vulnerabilities which needed to be considered, and therefore a blanket approach was inappropriate.

454. One legal organisation, whilst in agreement with the proposal, suggested that the intimation of an appeal should mean that anonymity remains in place until the conclusion of the appeal process.

455. A few victim/witness support organisations, individuals and other organisations cautioned that 'false allegations' in rape cases are extremely rare and that often such complainers are vulnerable people. A few also argued that victims could be coerced into changing their statements or dropping charges, and that removing anonymity would act as a punishment towards victims. One individual also argued that publicly disclosing the information would perpetuate the image that women bringing false allegations is common when, in reality, it is not. These were important reasons why the Scottish Government's preferred approach to waiver of anonymity, as set out above, is narrowly framed. Namely, that the court should not have a residual discretion to waive

[111] How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak, Andrew Tickell, Tickell_A._2022_How_should_complainer_anonymity_for_sexual_offences_be_introduced_in_Scotland_Learning_the_international_lessons_of_LetHerSpeak.docx.pdf (gcu.ac.uk)

or override anonymity except in the very limited situation where a victim of a qualifying offence under the Bill is subsequently convicted of a relevant offence against public justice; and the court considers it is in the interests of justice to do so. This may arise, for example, where a victim is convicted of perjury or attempt to pervert the course of justice in relation to a sexual offence allegation. In this situation the court would have the power – but would not be required – to dispense with anonymity. Importantly, the court's decision would depend on the individual facts and circumstances of each case, which would include the complexities set out by victim/witness support organisations as relevant.

Offence of breaching anonymity and applicable defences

Policy objectives

456. It is proposed to provide in legislation that a person who publishes identifying information in breach of a victim's right to anonymity shall be guilty of a criminal offence. The scope of the offence should cover the 'mainstream' press/publishers; any non-mainstream independent publishing entities, and any individual third party publishers, to capture the modern social media environment we now live in.

457. In addition, it is proposed relevant safeguards are provided through some limited statutory defences to reflect the challenges of social media and to avoid unfairly criminalising individuals or publishers for the sharing or retweeting of already published information when they had no reason to know or suspect the original publication was done unlawfully.

458. The benefits of this approach is to provide for a robust criminal offence provision for the anonymity protections while ensuring its operation is fit for purpose in the modern social media age.

Key information

Offence of breaching anonymity

459. The Bill provides it is an offence for any person to publish information capable of identifying someone as the victim of a sexual offence in the absence of the consent of that individual, or in the case of children, court agreement. The offence is also subject to the general ability of the court to override anonymity in the specific circumstance a victim is convicted of an offence against public justice, as set out at above.

460. Importantly, and as a matter of policy against the criminalisation of victims, the offence of breaching anonymity does not capture victims who wish to self-publish their own identifying information.

461. In addition, for the operation of the offence of breaching anonymity, a wide definition of what constitutes 'publication' is provided for in the Bill to ensure all possible modes of publication are covered, both online (including the social media landscape) and offline.

462. The Bill also makes clear that publication means publication to the world at large by third parties, e.g. through social media, TV or newspapers. This means the new offence does not strike at private conversations between the victim and third parties nor private disclosures between third parties, e.g. between professionals to whom the victim has shared information. This reflects the overarching policy that what the anonymity protections are seeking to prevent is the publishing of information capable of identifying the complainer as a victim of a sexual (or other listed qualifying offence) to the world at large, or a section of the general public. What the anonymity protections do not seek to stifle, discourage or inadvertently criminalise is the victim themselves telling their story publicly should they wish or the private sharing of information by a victim of their experiences to and between sources of support or members of authority, such as a teacher, support worker, health care professional or member of police staff.

Penalties for the offence

463. Turning to the available maximum penalty for the new offence, in England and Wales and Northern Ireland the maximum penalty on conviction for the offence of publishing without consent the details of a complainant in a sexual offence case is an unlimited fine. This approach is unusual amongst comparable international jurisdictions who provide for a legislative right of anonymity in that imprisonment is not a possible penalty.

464. The Scottish Government's preferred policy approach in this area is that maximum penalties should be provided for similar to that for contempt of court. This is more appropriate to offences committed by corporate bodies due to the financial resources available to large media outlets. Accordingly, the offence of breach of anonymity provided for in the Bill carries a maximum sentence on indictment of two years' imprisonment and/or an unlimited fine.

Defences to the offence

465. As set out above, the ability for adult victims (aged 18 or older) to unilaterally waive their right to anonymity through a third party publisher is set out as a defence to the offence of breaching anonymity. In particular, for primary publishers, the Bill provides it is a defence for the person to show: (1) that the victim had, as a matter of fact, given written consent to the publication of identifying information about a listed qualifying offence; (2) that the information published relates to the offence to which the consent had been given; and (3) that the victim was at least 18 years of age when the consent was given and had not withdrawn their consent before the information was published.

466. Finally, the Scottish Government considers some safeguards are also needed in light of the social media age we are now living in and the ease by which information can be shared online by secondary publishers. The online social media environment may result in situations where identifying information is published into the public domain in the first instance without the consent of the complainer and in breach of the victim's right to anonymity. The material in question may then be shared or retweeted by third parties who were not aware and had no basis to suspect that the original material was published in breach of the law.

467. To guard against unfairly criminalising an individual or publisher for the sharing of information in these circumstances, the Bill provides for a general defence where the person or publisher in such circumstances had no reason to believe that the victim had not consented to the already published information or had not themselves already published the information. In light of the policy that it is not competent for a child (namely someone under the age of 18) to unilaterally consent to third party publication, this defence is restricted to third party publishers where it is reasonably believed the victim was 18 years of age or over at the time of the original publication.

468. In addition, and following a similar approach to equivalent provision in England and Wales and Northern Ireland, the Bill provides where a person is charged with an offence of breaching anonymity, it is a defence if it can be proven they were not aware, nor did they suspect or have reason to suspect, that the publication included the matter in question. As a matter of policy the Scottish Government considers it is sensible to include such a defence as a safeguard for the innocent sharing or republishing of identifying information in breach of a victim's right to anonymity.

Alternative approaches

469. An alternative approach considered was to have maximum penalties in line with equivalent provision across the remainder of the United Kingdom, constituting an unlimited fine and with no option for imprisonment. This was ultimately rejected following consideration of the views offered in response to the consultation in this area.

470. Only 3% of respondents favoured an unlimited fine as the overall maximum penalty. By contrast, 44% of respondents supported a penalty of 'up to two years' imprisonment and/or an unlimited fine' and argued that such a breach was a serious issue with potentially far reaching and long lasting consequences and, as such, there should be a serious penalty. This was seen as needed to send a message about how important maintaining anonymity should be, to act as a sufficient deterrent and a punishment.

471. One legal organisation who supported this option also noted that this was in line with penalties for breach of a court order and/or contempt of court provisions.

Consultation

472. On the question of statutory defences, just over half of those who answered this question either strongly agreed (29%) or somewhat agreed (23%) that there should be statutory defence(s) to breaches of anonymity. Just over a third (34%) gave a neutral response.

473. Of those who agreed with this proposal, a few felt that the creation of statutory defences to breaches of anonymity provided a pragmatic response, and argued that this was necessary to deal with real life situations and the realities of modern life.

474. A few organisations (mostly legal and law enforcement organisations) agreed this would be a positive step, providing clear guidelines for what would and would not be a suitable defence of such breaches. Although, one did argue that breaches would still need to be dealt with on a case-by-case basis.

475. On the specifics of what a statutory defence should be, 45% of respondents supported adopting the model in section 5(2) and (3) of the Sexual Offences (Amendment) Act 1992[112] in England and Wales and Northern Ireland, where the right of a complainer to waive their anonymity operates as a defence to the offence of breaching anonymity, so long as the publisher can show the complainer consented to the disclosure of their identifying information in writing and such consent was freely given. 50% supported the inclusion of a 'reasonable belief' defence.

476. Arguments in support of the 'reasonable belief' defence included that the 1992 Act could unfairly penalise publishers who repeat information, where they have relied in good faith on the appropriateness of the original publication:

"The English approach, requiring written consent, appears overly narrow. It would seem to suggest, for example, that if a publisher infringes a person's right to anonymity then another person who repeats that information, relying in good faith on the initial publication, has no defence. It might therefore follow, for example, that if a newspaper were to infringe a person's right to anonymity then individuals who in good faith posted links to that publication on social media would be guilty of an offence, which seems an unduly broad application of the criminal law and applies it to circumstances where no deterrent effect could be achieved."[113] *(Other (academia))*

477. Those who disagreed on the inclusion of statutory defences at all mainly argued that there should not be any excuses for breaching anonymity.

SECTION 64 – INDEPENDENT LEGAL REPRESENTATION FOR COMPLAINERS

Key background and policy context

478. Under the current law in Scotland, there are established restrictions on what evidence can be led in trials for certain sexual offences.

479. Section 274 of the Criminal Procedure (Scotland) Act 1995[114] ('the CPSA 1995'), also commonly referred to as the 'rape shield', details that during the trial of a person charged with certain offences, the court shall not admit any evidence which shows or tends to show particular behaviour or sexual history of the complainer. This includes evidence that the complainer is not of good character (whether in relation to sexual matters or otherwise) and evidence that they have

[112] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[113] Improving victims' experiences of the justice system: consultation analysis - gov.scot (www.gov.scot)
[114] Criminal Procedure (Scotland) Act 1995 (legislation.gov.uk)

at any time engaged in sexual behaviour that doesn't relate to the case. This rule means that witnesses should not be asked any questions which are designed to bring out such evidence.

480. The rule is designed to protect complainers in sexual offence trials from having to give evidence about irrelevant, sensitive and private matters, or being asked distressing questions, when this is not necessary.

481. There are exceptions to this rule, and the court can allow such evidence where an application is made under section 275 of the CPSA 1995[115] and the court is satisfied of certain requirements under the legislation.

482. If the court does not grant the application, the evidence cannot be led at trial. Where the court grants the application and admits the evidence, it must state its reasons for doing so, and at any time may review and further limit the evidence which is permitted. Furthermore, the prosecution or defence for the accused have certain rights to appeal to the High Court against the court's decision on this matter.

483. At present, there is no statutory obligation on the courts to notify the complainer of the application nor does a complainer have the right to tell the court they oppose the application or to have their views heard. Furthermore, should an application be considered during the course of the trial, section 275B provides that the complainer must not be present during its consideration. Whilst the Crown plays a role in that application process, its role as public prosecutor is to prosecute independently and in the public interest. It does not act on behalf of the complainer. COPFS's role as a public prosecutor restricts the scope for supporting the complainer as it cannot provide independent legal advice and its role to act in the public interest may compete with the private interests of the victim. The complainer's role in the process is a witness, not a party, and therefore they do not have legal representation during proceedings.

Independent advice

484. Complainers can currently access independent support and advice at any stage of the criminal justice process through a range of specialist support services. The Scottish Government fund such services including Rape Crisis Scotland, local Rape Crisis centres and their National Advocacy Project which provides advice, and practical and emotional support to victims of sexual crimes before, during and after criminal proceedings. The Scottish Government also fund the Scottish Women's Rights Centre which provides free and confidential legal advice and advocacy support via a helpline to women experiencing gender-based violence.

485. A number of recent high profile cases[116] have called into question the current approach in relation to a complainer's rights and access to legal advice when applications are made under

[115] Criminal Procedure (Scotland) Act 1995 (legislation.gov.uk)
[116] As discussed in the Policy Context section of this memorandum.

section 275. Most recently, a High Court judgment[117] found that "in order to respect a complainer's article 8 rights, the court must be given information on the complainer's position on the facts and (their) attitude to, any section 275 application". In particular, it has been held that although section 275 itself does not include a right for the complainer to be notified of the application or to communicate their views on it, this is necessary to ensure the proceedings are compatible with article 8 of the ECHR (right to respect for private and family life), and the general commitment to deliver a person-centred, trauma-informed justice system.

486. In the absence of a statutory regime, it has been ruled that the duty falls to the Crown to present the complainer's position to the court. As a result, prosecutors now routinely gather and present this information to the court. Despite this, there is a developing general consensus towards the introduction of independent legal representation (ILR) to enhance the privacy rights of complainers when section 275 applications are made. This is, in part, because prosecutors do not provide legal advice to a complainer because, as noted above, they represent "the public interest" rather individual witnesses.

Lady Dorrian's Review

487. The report from the cross-justice Review Group, chaired by Lady Dorrian, included a recommendation to 'provide an automatic right to public funded ILR when applications are made to lead sexual history or character evidence in court'.

488. The Scottish Government consultation on Improving Victims' Experiences of the Justice System sought views on the Review's recommendation and on a number of specific issues relevant to the introduction and operation of ILR, including how it should be funded.

489. The Scottish Government is clear that the justice system should always take a victim-centred perspective in addressing sexual crime, whilst balancing and respecting the rights of the accused. Improving the complainer's experience of the criminal justice system in respect of an especially intrusive aspect of criminal prosecution is in line with this aspiration, as set out in the Vision for Justice.

490. Arising from the recommendation of Lady Dorrian's Review and responses to the consultation, the Bill strengthens victims' rights through the criminal justice process by introducing ILR for complainers in relation to section 275 applications.

Legal Aid

491. The policy objective is to ensure that there are no financial barriers to a complainer who seeks advice and independent legal representation in relation to a section 275 application. This

[117] Appeal Court, High Court of Judiciary. RR v HMA October 2021. 2021hcjac21.pdf (scotcourts.gov.uk)

will remove any concern that a complainer's financial position might affect their rights and should also encourage greater use of the ILR initiative.

492. The consultation invited views on whether ILR in respect of the applications under section 275 should be funded by legal aid. While almost all respondents who answered the question (89%) agreed with the provision of legal aid to facilitate ILR for complainers, responses varied on how this would be delivered and highlighted some challenges. Individuals and organisations from all sectors argued that financial barriers should be removed, and that legal aid was needed to ensure that a complainer's financial situation did not limit their ability to access justice. However, some respondents indicated increasing concerns regarding capacity levels within the legal sector and pressures on legal aid and therefore proposals should not provide additional unfunded burden.

493. It is therefore intended that complainers will automatically be entitled to fully publicly funded ILR, on a non-income assessed basis, in relation to applications under section 275. Amendments to existing legal aid regulations will make provision for legal aid for ILR, in these circumstances, to be available to all complainers on a non-means tested basis.

ILR Delivery Model

494. Parallels can be made to existing provision in legal aid regulations, which gives complainers the right to publicly funded legal advice and representation in respect of proceedings relating to applications to recover their medical records. The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017[118] amended existing legal aid legislation to allow complainers to access publicly funded ILR when an application is made to recover their medical or other sensitive documents. Under this process, legal aid provision is available for complainers to oppose recovery of medical and sensitive records by way of assistance by way of representation ('ABWOR') (albeit subject to relevant tests). This is a form of publicly funded advice and assistance that allows for a solicitor to represent a client at a hearing.

495. The makeup of any operational delivery mechanism for ILR is still being considered and defined, and it is not considered necessary or helpful to frame that within the Bill. The Scottish Government has explored options with the SLAB on how best to implement ILR to achieve security of service, sufficient capacity and quality of service delivery. The Scottish Government considers that there should be flexibility around the delivery mechanism to allow models to be tested and adapted against service demand, including any wider changes arising from the implementation of the other provisions within the Bill such as implementation of provisions in relation to the trauma informed practice and the Sexual Offences Court and any other non-legislative reforms in relation to victims of sexual offences.

[118] https://www.legislation.gov.uk/ssi/2017/291/contents/made

496. The Scottish Government will work with SLAB, justice partners and the wider legal sector to create a service design framework for ILR, which will include relevant quality standards, prior to commencement.

Specific provisions

497. Provisions in the Bill relating to the right to independent legal representation can be broadly split into the following five specific areas:

- Right to ILR for complainers in relation to section 275 applications
- Notification of the right to ILR
- Disclosure of evidence
- Timescales for submitting applications under section 275
- Appeals.

Right to ILR for complainers in relation to section 275 applications

Policy objectives

498. The policy intention is to enable complainers to participate as a party to the proceedings when an application is made under section 275 and where they choose to progress their automatic entitlement to public funded legal advice and representation as part of that process.

499. Section of the Bill will insert new provisions into the CPSA 1995 which give complainers a right to ILR when an application is made under section 275. The right to ILR will improve the complainer's experience in sexual offence trials. In particular, it will improve their understanding and ability to provide their views and their right to be heard in court in respect of an especially intrusive aspect of criminal procedure.

Key information

500. It is proposed that the right to ILR should apply at all stages of proceedings when an application under section 275 is made, including when such applications are made during a trial. Consideration has been given to the practical and procedural implications of this, including for example potential delays in the trial. Nonetheless, we are aware that such applications are rare and statistically occur about 3 – 4 times per year. Difficulties may also be minimised where a complainer has already instructed ILR in respect of an earlier application.

501. New section 275ZA(2)(b) ensures that the complainer's representative is given the opportunity to make representations on behalf of the complainer to the court in relation to the section 275 application, including on the accuracy of any statements and whether the evidence sought to be admitted or questioning proposed should be admitted, or allowed.

Alternative approaches

502. Consideration has been given to alternative approaches in relation to the scope of ILR and the functions of the role. Following engagement and consultation, some stakeholders called for the scope to go further than the proposed provisions e.g. for representation to be permitted at other stages of the criminal proceedings such as during police investigation or at other stages of the trial. The Scottish Government considers that this approach is not viable at present as any extension of ILR into other parts of the trial process would amount to a significant and profound change to the law on criminal proceedings. It is also unclear if the application of ILR is necessarily the right approach to address any other perceived gaps in policy and practice. It is recognised that the procedural implications would require to be carefully considered including how this will interact with other parts of the trial process. The availability of suitable qualified individuals and the impact on other areas of work would also need to be considered.

503. The model of ILR consulted on and which is contained in the Bill broadly follows that which was recommended in Lady Dorrian's Review and wider models have not been developed or consulted on. It is therefore considered that any wider scope of ILR offering could be examined further following implementation and evaluation of the provisions contained in the Bill.

504. Another alternative would have been not to introduce ILR. Some consultation responses reflected that a greater focus on ensuring complainers were kept informed of progress and developments in their case would have been sufficient for them. While these responses were few in number they raise points in relation to improvements in practice that could be considered as part of any future evaluation of ILR provision. The Scottish Government considers however that legislation is required to improve complainers' rights by placing into statute their right to be informed and to have their voice heard in respect of section 275 applications, rather than solely relying on operational and practice improvements.

Consultation

505. The consultation exercise explored whether complainers in sexual offence cases should have the automatic right to ILR, and what it should cover. The majority who answered the question (89% of respondents) supported an automatic right to ILR as outlined in the consultation. 89% also agreed with the provision of legal aid to facilitate ILR for complainers. Other issues raised in consultation with stakeholders are highlighted below and formed part of the consideration of the wider provisions.

506. More generally, several respondents were keen to see the right to publicly funded ILR expanded to all aspects of criminal justice system for complainers of sexual crimes and to other vulnerable victims.

507. The consultation specifically sought views on when the right to ILR should apply and whether this should include exceptional circumstances where an application is made after the start of the trial. Responses overwhelmingly supported that the right should apply throughout proceedings for any section 275 application.

Notification of the right to ILR

Policy objectives

508. The policy objective is to provide victims with a right to have their voice heard in relation to applications to lead sexual history or bad character evidence about them. The Scottish Government considers that the notification process about these rights should be consistent with trauma-informed practice.

509. Section 64 inserts new subsection (4A) into the CPSA 1995, which will place a duty on prosecutors to notify the complainer when a section 275 application is made in relation to them. The complainer will be given an explanation of the application, the evidence sought and proposed questioning about the evidence. The complainer will also be informed of their right to publicly funded ILR in relation to the application, including the opportunity for that legal representative to make representations to the court, on behalf of the complainer, on the accuracy of the application and whether the evidence should be admitted.

Key information

510. COPFS existing operational guidance requires them to notify the complainer about a section 275 application, seek comments on its accuracy and ascertain whether they have any objection to it, and inform the court about the complainer's comments and any objections to the application.

511. It is acknowledged that not all complainers will seek to appoint ILR therefore a process which upholds the complainer's rights to have their voice heard by the court, in the absence of ILR, is necessary. Where the complainer chooses not to instruct ILR, the current process whereby prosecutors inform the complainer of the application, seeks their views and puts those views before the court, will be able to continue.

Alternative approaches

512. The consultation invited views on alternative approaches to notifying the complainer about a section 275 application and their rights to ILR. Consideration was given as to whether this duty should fall to prosecutors, SCTS or the party making the application which would include prosecutors and/or defence representatives. It has been decided that the duty to notify should be placed on prosecutors, on the basis that this would be a more trauma-informed option because the complainer will not receive potentially distressing communication directly from the accused's solicitor. Furthermore, prosecutors will already be engaging directly with the complainer.

Consultation

513. Consultation responses and engagement with stakeholders strongly supported the need for a clear process for informing complainers when an application is made and about their rights to seek legal advice and that legal aid will be made available.

Disclosure of evidence

Policy objectives

514. In order to ensure the complainer is properly advised and able to make fully informed views about the application to provide to the court, it is considered essential that the complainer's independent legal representative has the relevant information they need, including the section 275 application itself. For this reason, it is proposed that disclosure of certain relevant information in the case should be made to the complainer's legal representative.

Key information

515. Section 64 inserts a new subsection (4B) of section 275 of the CPSA 1995, which will place a duty on prosecutors to disclose specific information in the case to a complainer's independent legal representative when they are instructed by a complainer in relation to an application under section 275.

516. Subsection (4B) requires that COPFS disclose the following to the complainer's independent legal representative in the first instance:

- A copy of the application under section 275(1)
- A copy of the complaint or, as the case may be, indictment to the extent that it relates to the application
- A copy of any evidence referred to in, or relevant to, the application.

517. The Scottish Government considers that it should be for the court to determine and authorise the disclosure of any additional information. New subsection (4D) therefore places a duty on prosecutors to apply to court before sending any further evidence referred to in, or relevant to the application. Prosecutors must also send a copy of the application to the accused or as the case may be, multiple accused and the complainer's independent legal representative. The court will determine whether to refuse the application, authorise the sending of further evidence subject to any limitations it considers and/ or impose any restrictions on the subsequent disclosure of the evidence to the complainer or other person (e.g. through discussion between the complainer and their independent legal representative). This process is seen as necessary to ensure the fairness of the proceedings.

518. Subsection (4D) will allow all other parties, including prosecutors, the accused and the complainer's legal representative to make representations to the court on such applications for the disclosure of further evidence.

Alternative approaches

519. An alternative approach would be to place a duty on prosecutors to disclose all of the evidence in the case to a complainer's independent legal representative in relation to an application

made under section 275. If such an approach were taken, the complainer's solicitor would likely be in possession of evidence which could prejudice the fairness of the trial if the complainer were to see it. It would therefore be necessary to consider placing a duty of confidentiality, on the complainer's legal representative, to prevent them from discussing the evidence with, or showing it to, the complainer. The Scottish Government considers that such a duty might be necessary to prevent the trial being prejudiced by the complainer having sight of the evidence prior to giving their evidence at trial. This approach was therefore discounted due to concerns about how such a duty would operate in practice.

Consultation

520. The consultation invited general views on other matters relating to ILR for complainers in sexual offence cases. Several respondents indicated that any ILR in relation to section 275 applications would require disclosure of relevant evidence about the case in order to conduct their duty. Furthermore, some respondents specifically indicated that this should include a copy of the section 275 application, any documents referred to in the application and a copy of the charge.

Timescales

Policy objectives

521. It is important that the complainer has sufficient time to consider the section 275 application and effectively implement their right to ILR prior to any determination on the application. Where ILR is instructed, the complainer's legal representative should also have adequate time to conduct their duties.

522. To provide sufficient time for applications to be considered, section 64(4)(b) of the Bill amends the existing timescales to submit an application under section 275. The provisions will also align the existing fixed time periods for all solemn and summary cases, removing the existing distinction which affords additional time to make an application in sheriff court proceedings.

Key information

523. The CPSA 1995[119] requires that section 275 applications are made no less than 7 clear days before the preliminary hearing in High Court cases and in any other case, no less than 14 clear days before the trial diet.

524. Section 64(4)(b) amends the time limits so that applications are to be made within 21 days in all cases. In High Court cases, this should be no less than 21 days before the preliminary hearing and in sheriff and jury cases, no less than 21 days before the first diet. In summary proceedings, it should be no less than 21 days before the first intermediate diet, or where no such diet is set, within 21 days of the trial diet. It is considered that 21 days reflects the additional time that will be needed

[119] At section 275B

for complainers to instruct a legal representative, seek their advice and for representations to be prepared by the complainer's legal representative.

Alternative approaches

525. One alternative approach would have been to maintain existing time periods in relation to making section 275 applications. However, irrespective of the provision in relation to ILR, it has been argued that the time periods in relation to section 275 applications are already challenging and should be adjusted.

526. The recent HM Inspectorate of Prosecution Report[120] on the inspection of COPFS practice in relation to sections 274 and 275 of the CPSA 1995 highlighted that timescales within which COPFS is currently required to engage with complainers about section 275 applications is short. The HM Inspectorate made a recommendation to the Scottish Government to consider extending the statutory time limits for making section 275 applications in the High Court, irrespective of whether a right to ILR is introduced.

527. An alternative approach would be to further extend the time periods. It was recognised that there may still be occasion when 21 days will not be sufficient and additional time might be needed. It was however determined that in such circumstances the court would have discretion to continue consideration of the application to another time.

Consultation

528. The consultation invited views on whether time periods should be adjusted to provide additional time for the complainer to consider the application and effectively implement their right to ILR. 73% of those who responded to this question strongly agreed with the proposal to extend time periods. Individuals argued that this was needed to preserve victims' rights, and that they should not be 'rushed'.

Appeals

Policy objectives

529. Lady Dorrian's Review recommended that complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the CPSA 1995 in circumstances where sexual history or other character evidence is sought under section 275 application. The policy objective is to further improve a complainer's rights when decisions are made in respect of section 275 applications and to align with the rights of the accused and prosecution to appeal certain decisions on section 275 applications.

[120] Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (www.gov.scot)

530. Consistent with Lady Dorrian's Review Group recommendation it is proposed that complainers should have the right to appeal certain decisions.

Key information

531. Rights of appeal are currently available to both defence and the prosecution. There are a number of different ways in which such an appeal can be made, depending on whether the case is subject to solemn or summary procedure.

532. Where the High Court determines a section 275 application at preliminary hearing, or indeed if the sheriff court determines such an application at first diet, a party may appeal that decision under section 74(1) of the CPSA 1995. The Bill therefore extends this right of appeal to include the complainer, when the decision being appealed relates to an application made under section 275(1) which has been granted.

533. Section 64(5) of the Bill therefore provides a right for the complainer to appeal certain decisions in relation to a section 275 application through ILR and for their legal representative to be a party to any appeals of the decision of the High Court in relation to a section 275 application.

Alternative approaches

534. The main alternative approach would be to not provide a right of appeal to the complainer. However, Scottish Government considers that in the interest of fairness to the complainer they should have a right to appeal that is consistent with rights of the prosecution and accused. This is the expectation from Lady Dorrian's Report.

535. Consideration was given to whether the right of appeal should also apply to decisions on section 275 applications made in summary proceedings. Similar rights of appeal for the prosecution or the accused does not exist in relation to section 275 applications considered in summary cases. This approach therefore raises concerns of fairness and is broader than Lady Dorrian's Group recommendation which would require the development and further consultation on new procedure with all parties in proceedings.

536. Another alternative approach considered was whether the right of appeal should also apply where section 275 applications are made at a later stage of the proceedings (i.e. after the trial has started). It could be argued that the complainer should be able to appeal such decisions made during the trial; however, there are difficulties associated with providing a right of appeal at this point, including how such an appeal, mid-trial, would affect the trial including the impact of delay on any jurors which have been sworn in. Furthermore, this approach also raises concerns of fairness as the prosecution and accused do not have similar rights to appeal mid-trial - any appeal can only be made following conclusion of the trial. A parallel right of appeal for complainers once the trial has concluded would not be of benefit as the evidence will have already been led by that stage, and a verdict returned.

537. Furthermore, consideration was given to whether the complainer should have a right to self-represent under any appeal of the decision of the court in relation to a section 275 application. It was considered that a mechanism is provided for complainers to instruct ILR and that this will be equally available to all complainers, regardless of their means. All complainers will have the same rights but if they choose not to instruct a solicitor then they will, in effect, be choosing to waive these rights.

Consultation

538. The consultation sought views on the complainers right to apply to appeal a decision on a section 275 application consistent with the existing rights of appeal for the prosecution and defence. Almost all respondents who answered this question (94%) agreed with the right to appeal.

539. A few individuals argued that everyone should be able to appeal a decision, with others arguing that it was such an important and emotive issue that the victim's voice needed to be heard. It was also argued that the right to appeal would improve justice for complainers and give them greater control over their information. A few organisations also spoke of the fairness of allowing the complainer to appeal the decision, with a legal organisation arguing that complainers should have the same rights of appeal as the defence.

540. The consultation also specifically invited views on whether the right to ILR for complainers should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made). Again, the majority of respondents who answered this question (83%) strongly agreed that a right to ILR should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made).

SECTIONS 65 - 66 – RAPE TRIALS PILOT

Key background and policy context

541. In Scotland, juries return verdicts of acquittal at a significantly higher rate for sexual offences cases than for other crimes.

542. Data on conviction rates shows that 51% of people proceeded against in court for rape and attempted rape in 2020/21 were convicted compared to an average of 91% across all offences.[121] These figures are not an anomaly and form part of a long term trend in which conviction rates for rape and attempted rape have been the lowest of all offences in each of the last ten years for which comparable data is available. The average rate of conviction over this period for rape and attempted rape was 46% compared to 88% for all offences.[122] While specific data is not available for cases

[121] Criminal Proceedings in Scotland: 2020-21
[122] Ibid

involving single complainers known to the accused, where the defence advanced is one of consent, there is a concern that the conviction rate for these cases is even lower.[123]

543. The degree and persistence of the disparity between conviction rates for rape and attempted rape relative to other crimes cannot, as the Lady Dorrian Review highlights *"...simply be explained away by poor prosecutorial decision making, rogue cases or the like".*[124] Instead, the significant and enduring nature of the disparity indicates that there are systemic problems with the treatment of these cases within the criminal justice system in Scotland.

544. Scotland is not alone in the issues faced in the prosecution of these type of offences. Statistics from other jurisdictions are also characterised by significant differentials in the number of cases proceeding and the number of convictions secured.[125]

545. It is clear that urgent attention is needed and that fundamental aspects of the system on which the prosecution of serious sexual offences is based require close examination. No part of that system is beyond scrutiny: "*The fact that a system has been sanctified by usage may make it difficult to change, but it should not make it exempt from thorough examination of its suitability".*[126]

546. Growth in the number of rape cases being prosecuted in court over the last 10 years brings the issues into sharp focus.[127] It is not compatible with a trauma informed approach to require complainers to participate in a system which they perceive is stacked against them. Any shortcomings of the systems in place to administer justice cannot be left unchecked and must be identified, analysed and, if necessary, reformed. The need for an effective justice system to deal with these offences cannot be overstated. Without it, victims of some of the most serious crimes in our society, the majority of whom are women, are denied access to justice and perpetrators are not held to account.

547. The strength of trial by jury is often seen as being the delivery of a verdict reached impartially by an accused's peers, with all the accumulated knowledge and wisdom that they bring to the task of interpreting the evidence, assessing credibility and deliberating on the decision. However, the inevitable consequence is that those peers will embody a mix of societal attitudes and prejudices which, if not adequately corrected for by the process, will influence how they approach those very tasks. Trial by a jury of one's peers is suggested by some to result in a system in which, rather than the case and the evidence being tried impartially and thoroughly in

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[123] Improving the Management of Sexual Offence Cases, Final Report from the Lord Justice Clerk's Review Group
[124] Ibid at para 5.6
[125] See Policy Context section of this memorandum.
[126] Improving the Management of Sexual Offence Cases, Final Report from the Lord Justice Clerk's Review Group at para 5.52
[127] Criminal Proceedings in Scotland statistics show that in the year 2010/11, 80 people were proceeded against where the main crime charged was rape or attempted rape. By 2019/20 this had increased to 300 - an increase of 275%. Serious sexual offences now make up the majority of High Court trials in Scotland.

accordance with the law, victims of sexual offences, the majority of whom are women, and their actions, are judged according to prevailing social attitudes.

548. A compelling body of evidence suggests that the existence of rape myths has an influence on decision-making by juries in these cases.[128]

549. Rape myths can be described as false or prejudicial beliefs about the relevance of a complainer's actions before, during or after a serious sexual assault to their credibility, or on issues of consent. Common rape myths include expectations that a genuine victim would seek to escape or resist an assault, that they would immediately report an offence once it has happened, that previous sexual contact between a complainer and a perpetrator is indicative of consent and that 'real' rape victims will become emotional when giving evidence at trial.[129] Numerous studies have indicated that jurors not only subscribe to rape myths and preconceptions but that they carry those with them in their deliberations, impacting the verdicts they reach in these cases.[130] Professor Fiona Leverick argues that "*there is overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases. This evidence is both quantitative and qualitative."*[131] The previously discussed jury research that took place in Scotland found clear evidence of rape myth adherence among those eligible for jury service.[132]

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[128] See: Chalmers. J, Leverick. F, & Munro. V, The provenance of what is proven: exploring (mock) deliberation in Scottish rape trials, Scottish Jury Research Working Paper 2 (2019). Accessible at: The provenance of what is proven: exploring (mock) jury deliberations in Scottish rape trials, James Chalmers, Fiona Leverick and Vanessa E. Munro; ; Willmott, D., Boduszek, D., Debowska, A., & Hudspith, L. (2021). Jury Decision Making in Rape Trials: An Attitude Problem? In G. Towl & D. Crighton (Eds.), Forensic Psychology. Chichester: Wiley, accessible at: Willmottetal2021JDMinRapeTrialsChapter5-Authoracceptedmanuscript (1).pdf

[129] Ibid

[130] Chalmers. J, Leverick. F, & Munro. V, The provenance of what is proven: exploring (mock) deliberation in Scottish rape trials, Scottish Jury Research Working Paper 2 (2019). Accessible at: The provenance of what is proven: exploring (mock) jury deliberations in Scottish rape trials, James Chalmers, Fiona Leverick and Vanessa E. Munro and see Leverick. F, What do we know about rape myths and juror decision making: an evidence review, Scottish Jury Research Working Paper 2 (2019), accessible at What do we know about rape myths and juror decision making?; Fiona Leverick which captures a broad range of empirical research.

[131] Leverick. F, What do we know about rape myths and juror decision making? The International Journal of Evidence & Proof 2020, Vol. 24(3) 255-279 at page 273

[132] This study was conducted as part of the Scottish Mock Jury Study which was commissioned by but independent of the Scottish Government. As part of this study 400 individuals eligible for jury service were shown the same 1 hour simulation of a rape trial and then formed into groups of 15 to deliberate on a proposed verdict replicating the dynamic of a jury in Scotland. Researchers then recorded where rape myths were raised by participants in the study and where these impacted on outcomes.

550. Some also argue that jurors are risk averse in their approach to exercising their functions, particularly when it comes to convicting those accused of rape, because of the social and legal consequences that follow from such a conviction.[133]

551. Concerns have been expressed by those with operational experience. Within Lady Dorrian's Review, discussions with experienced members of the judiciary took place, some of whom spoke of difficulties in understanding the rationale for acquittal verdicts in some sexual offence cases:

"In cases where there is evidence of a quality and quantity which for any other kind of crime would lead to a conviction, I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence."[134]

552. Scotland is not the only jurisdiction in which concerns have arisen over the prevalence of rape myths and preconceptions and their impact on jury decision-making. Studies from a number of other jurisdictions indicate that this is a challenge faced around the world: *"Research examining the existence and influence of rape myths is now vast and empirical evidence is reliable enough to conclude that widespread endorsement of rape mythology spans varied societies, cultures and distinct social groups."*[135]

553. Concerns about belief in rape myths led to the senior judiciary in England and Wales commissioning research on the extent to which these can influence jury decision-making in rape cases. Led by Professor Cheryl Thomas KC (hon), this study was based on interviews with individuals recently discharged from jury service in order to assess the extent to which they subscribe to certain common rape myths. While evidence of rape myth adherence was more limited than in the other studies mentioned above, it too found clear indications that some jurors held troubling misconceptions about the significance of actions by victims/complainants before, during or after a serious sexual assault[136] Professor Thomas KC (hon) has recently published a companion

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[133] For a discussion on the main arguments advanced, see: Willmott, D., Boduszek, D., Debowska, A., & Hudspith, L. (2021). Jury Decision Making in Rape Trials: An Attitude Problem? In G. Towl & D. Crighton (Eds.), Forensic Psychology. Chichester: Wiley available at: (PDF) Jury Decision Making in Rape Trials: An Attitude Problem? (researchgate.net)

[134] Lady Dorrian's review at para 5.7

[135] Lilley, Caroline, Dominic Willmott, Dara Motjahedii and Danielle Labhardt. 2023 Intimate partner rape: A Review of Six Core Myths surrounding Women's Conduct and the Consequences of Intima Partner Rape. *Social Sciences* 12:34. See also Leverick. F, What do we know about rape myths and juror decision making: an evidence review, Scottish Jury Research Working Paper 2 (2019), accessible at What do we know about rape myths and juror decision making?; Fiona Leverick ; Willmott, D., Boduszek, D., Debowska, A., & Hudspith, L. (2021). Jury Decision Making in Rape Trials: An Attitude Problem? In G. Towl & D. Crighton (Eds.), Forensic Psychology. Chichester: Wiley, accessible at: Willmottetal2021JDMinRapeTrialsChapter5-Authoracceptedmanuscript (1).pdf

[136] The 21st century jury: contempt, bias and the impact of jury research; Cheryl Thomas KC The findings of the research included that 20% of participants would have concerns about the credibility of someone who did not report a rape immediately and 43% of participants would expect that someone who has been raped would be very emotional when giving evidence.

piece to that research examining conviction rates for rape in England and Wales.[137] The findings do not provide any insight into the Scottish system. However, the research does highlight the importance of gathering robust data to help inform policy making, as the Scottish Government has determined to do through the pilot of single judge rape trials.

554. Questions about the ability of jurors to properly discharge their function are not restricted to concerns over the prevalence of rape myths and the way in which these impact jurors' evaluation of evidence. The Scottish jury research also highlighted a lack of understanding amongst mock jurors about key legal concepts, such as the rule requiring corroboration. Some commentators question the appropriateness of jury decision making in these cases which often occur in private and are evidentially complex. It is argued that the interests of justice are not best served by requiring lay jurors to understand and apply complex legal principles such as the *Moorov* doctrine which is commonly engaged in cases involving sexual offences.[138]

555. The Scottish Government considers that in order to ensure a fair justice system, accessible to all, it is necessary to consider the most effective way to address this critical issue within the context of Scotland's justice system.

Jury trials in Scotland

556. There is no right to trial by jury in Scotland. Whilst all accused persons in Scotland have a right to a fair trial, that does not, as a matter of law, mean a right to a jury trial. This position has been confirmed by the European Court of Human Rights, which has expressly ruled that the right to a fair trial does not require that the determination of guilt is made by a jury.[139]

557. The vast majority of offences in the Scottish criminal justice system are prosecuted under 'summary procedure', designed to deal with less serious offending, where trials proceed before a justice of the peace or sheriff sitting without a jury.

558. Juries are, however, a longstanding feature of the procedure used for the prosecution of serious offences. Currently, under 'solemn procedure', trials for serious offences are heard by a sheriff/judge sitting with a jury either in the sheriff court or the High Court.

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[137] Thomas C, Juries, rape and sexual offences in the Crown Court 2007-21, Criminal Law Review, 2023; 3: 200-225.

[138] This allows the evidence of single witnesses to different incidents to provide mutual corroboration in certain circumstances. For example, in the Moorov case itself where an employer carried out a series of sexual assaults against female staff, it wasn't necessary for the complainers to have witnessed the assaults on each other; each complainer's testimony about what happened to them was considered enough to corroborate the evidence of other complainers where the incidents were sufficiently similar in "time, character and circumstance" from which an overall course of criminal conduct could be inferred.

[139] Twomey, Cameron and v United Kingdom and Callaghan v United Kingdom (2013) 57 E.H.R.R.SE15

559. In 2019/20, of all criminal trials that proceeded in Scotland, 8,489 (84%) were tried under summary procedure, with verdicts reached by a sheriff or justice of the peace and 1,632 (16%) were tried under solemn procedure with verdicts reached by a jury.[140]

560. There is no single approach to the use of juries in criminal cases in jurisdictions across the world. The majority of countries whose criminal justice systems could be considered as broadly comparable to that of Scotland, use a combination of both judge-led and jury trials for the purposes of determining an accused's guilt or innocence. However, there is significant variation in how juries are constituted and the specific types of cases for which they are used. In New Zealand, cases involving rape can be heard in front of a single judge rather a jury where the accused elects for this mode of trial. In England and Wales, legislation provides for non-jury trials in cases where there is danger of jury tampering or where jury tampering has taken place.[141] In France, reforms were recently announced which will see the use of juries discontinued in many trials, including rape trials. Instead, verdicts will be reached by a panel of judges.

561. The role of juries is not fixed and continues to evolve as different jurisdictions determine the most appropriate approach to the effective administration of justice within the context of their criminal justice systems.

Piloting single judge trials for cases of rape and attempted rape

562. Consistent with its 'clean sheet' approach, Lady Dorrian's Review considered the justifications for the continued use of jury trials for serious sexual offence cases.

563. The Review identified that moving from a system in which determinations of guilt are made by juries, to one in which these were made by a single judge, could mitigate the impact of rape myths and pre-conceptions on verdicts in these cases. The Review also recognised, however, that further evidence was needed to determine the matter as well as whether single judge trials would deliver wider benefits to the management of these cases such as improvements in complainer experience and increased efficiency in case management.

564. The Review was not able to reach agreement on whether the jury system should be retained in serious sexual offence cases and members were strongly divided. The report noted that the question ought to be examined in much greater depth and made the following recommendation:

"*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.*"[142]

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[140] See Annex 1 of SCTS published statistics

[141] Sections 44 to 50 of Part 7 of the Criminal Justice Act 2003

[142] Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review at page 118

565. The Scottish Government is convinced by the arguments that a pilot will provide an important opportunity to critically assess matters and gather evidence to inform the debate. While important research into single judge rape trials has been conducted in other jurisdictions[143] as identified by an international evidence briefing on alternatives to jury trials commissioned by the working group[144], the Scottish Government shares the ultimate conclusion of Lady Dorrian's Review that it is only by studying these in the context of our justice system that we can form an objective and informed understanding of their impact in Scotland.

566. Accordingly, section 65 of the Bill includes powers for Scottish Ministers to enable a time limited pilot of single judge rape and attempted rape trials.

Policy objective

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[145] 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.[146] The pilot will therefore provide important insights into whether single judge trials can improve complainers' experiences of the court process and increase efficiency.

Key information

569. The use of single judge trials for all solemn level serious offences was previously considered during the development of what became the Coronavirus (Scotland) Act 2020 and a proposal was included within the draft legislation introduced to the Scottish Parliament in March 2020. At that time, it was proposed as a temporary, emergency measure to ensure the continued operation of the criminal justice system in light of the developing Covid-19 pandemic. The

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[143] Studies have taken place in other jurisdictions comparing single judge and jury trials specifically for cases of rape, these are few in number and are based on relatively small sample sizes which limits their value. Moreover, differences in the justice systems within which these studies have taken place means that the conclusions of these studies are of limited relevance to Scotland. See In the absence of a jury: examining judge-alone rape trials; Elisabeth McDonald

[144] Alternatives to Jury Trials: an evidence briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group

[145] Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review at page 93.

[146] Alternatives to Jury Trials: an evidence briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group at page 27

proposal proved to be controversial, in part because alternatives that took advantage of technology and/or physical distancing were seen by some to be more proportionate and appropriate solutions. The Scottish Government ultimately removed the proposal for single judge trials from the draft legislation voted on by the Parliament.

570. The scope and aims of the provisions to pilot single judge trials within the Bill are fundamentally different to that previously considered by the Parliament as part of emergency legislation. The proposal is to enable a time limited pilot for a restricted type of case for the particular reasons outlined above. The provisions also afford greater scrutiny to the Parliament in terms of the future development and reporting on the pilot.

571. Section 65 gives a power to the Scottish Ministers to make regulations which will allow trials for rape and attempted rape, which meet specified criteria, to be conducted without a jury for a time limited period. Before making such regulations, the Scottish Ministers must consult with various parties (including the Lord Justice General, the Lord Advocate, SCTS and victims' organisations). The regulations will be subject to the affirmative procedure.

572. 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 evaluation of the pilot against its intended policy aims and objectives.

573. Section 65 further provides that judges conducting trials in the pilot must give written reasons for their verdicts. This is in line with European Convention on Human Rights ('ECHR') requirements and delivers one of the key suggested benefits of single judge trials: clarity and transparency in decision making. This is in stark contrast to verdicts delivered by juries which are accompanied by no explanation. In terms of an accused's rights, the requirement for written reasons provides an opportunity that does not currently exist, to challenge those reasons as a ground for appeal against conviction.

574. At section 66 the Bill places an obligation on Scottish Ministers to review the operation of the pilot and to publish a report of that review and lay a copy in the Scottish Parliament.

575. The approach set out in the Bill is to provide an appropriate level of detail to the Parliament to allow 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. That detailed proposal will be subject to further parliamentary procedure when secondary legislation, subject to affirmative procedure, is progressed.

576. As discussed previously a cross-sector working group established as part of the governance arrangements for implementing Lady Dorrian's Review considered the implementation of any

pilot on single judge trials. It made recommendations on some key aspects of the pilot, in particular:

- **Case criteria**: the pilot should encompass all single complainer rape and attempted rape cases in which there are either no other charges on the indictment or in which those other charges are only minor or evidential. Single complainer cases were selected because concerns over jury decision making are most acute in these cases due to their typical characteristics. Consent of the accused, or the complainer, should not be a requirement for the inclusion of a case within the pilot.
- **Objectives**: to assess how the process of conducting a single judge trial for rape cases is perceived by those involved in the trial process; to explore the impact of single judge trials on the effectiveness and efficiency of managing rape trials; and to consider the impact of single judge trials on outcomes.
- **Evaluation:** a number of potential research questions and evaluation methods, involving the gathering of both qualitative and quantitative data and insights, were suggested by the working group and set out in their report.

577. However, the working group recognised that their recommendations at this stage ought not to be seen as prescriptive as to how any pilot may operate, and that it may be necessary for aspects to be adapted to account for detailed design and development. The group recognised that further work supported by analysts would be required to identify robust data to assist in planning a pilot, refining the case criteria and determining how long it ought to run for. Ideally the Working Group considered that work should be the subject of further cross-sector collaboration.

578. The Bill therefore specifies that the power granted to Ministers is to facilitate a time limited pilot, the duration of which will be set out in secondary legislation subject to affirmative procedure. The desired sample size and duration for meaningful evaluation will be determined by the final case criteria, the objectives against which evidence is to be gathered and the design features of the data gathering/evaluation process.

Alternative approaches

579. Consideration was given to not proceeding with a pilot of single judge rape trials. It is recognised that there are strongly held views by those who oppose a pilot. Some argue that the evidence of rape myths influencing jurors ought not to be unduly relied on given the limitations of research. Furthermore, even if that evidence is accepted, there is an argument that a pilot is premature and alternatives including better jury education ought to be pursued first.

580. Others argue against the principle of restricting the use of juries and believe that juries serve an important function by bringing a diverse accumulation of knowledge and experience to the assessment of evidence and witnesses. They argue that this applies as much to sexual offences as to any other type of crime, if not more. Sexual offences commonly involve assessments of an

accused's reasonable belief that there was consent. It is argued that juries are well equipped to make those assessments.

581. The Scottish Government finds the evidence of rape myths compelling and disagrees with the suggestion that a pilot is premature. Previous reform has attempted to better educate jurors, including the introduction of statutory jury directions in 2016 and further efforts should be made and evaluated in this regard. It is noted that Lady Dorrian's Review made relevant recommendations on jury education which are being examined by the judiciary, assisted in this task by a report of the findings of a cross-sector working group on the matter.[147] However, the Scottish Government considers that this does not negate the need for other research and measures: the debate requires to be urgently progressed. A properly evaluated pilot of single judge rape trials can make an important contribution and the alternative approach of not proceeding with it has been discounted.

582. In relation to the arguments over the principle of having juries involved in these cases, the concerns that give rise to the proposal suggest that there is a question to be answered over whether juries are properly discharging their function. That question needs to be robustly examined with the benefit of objective evidence and a pilot provides an important opportunity to do so. The Scottish Government considers that to do nothing would erode confidence in the system and fail the significant calls from victims to take bold action to deliver a more effective system of justice for these cases.

583. An alternative approach to a pilot of live cases was also considered. In particular whether a 'shadow verdict' exercise could be carried out in which a judge would observe live cases being heard before a jury and separately provide a verdict to compare to the actual verdict delivered by the jury. This has been discounted on the basis that it would present significant and insurmountable ethical and practical challenges and would provide data only on the impact on the outcomes of trials without providing insight as to whether changes were seen in the conduct of trials, the experience of complainers or matters in relation to efficiency of the process e.g. trial duration.

584. Lady Dorrian's Review gave consideration to moving to other forms of decision-maker for cases of rape and attempted rape such as a panel of judges sitting together or a judge sitting with two lay jurors. The former proposal was discounted by the Review Group on the basis of pressures on the existing cohort of High Court judges and that moving to a model which required three judges preside over these cases would place unsustainable pressures on court and judicial resources without adding any specific value to the consideration of the facts at these trials. Single judge trials were preferred to the latter approach on the basis that they were already an established feature of the Scottish judicial system and had proven effective.

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[147] Lady Dorrian Review Governance Group: Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group Report - gov.scot (www.gov.scot)

Consultation

585. Responses to questions on the proposal to pilot single judge trials for rape and attempted rape were highly polarised with strongly held views on either side of the debate. Respondents to the consultation were asked to specify the extent to which they felt jury trials continued to be suitable for the prosecution of serious sexual offences including rape. 61% of respondents either somewhat disagreed or strongly disagreed with this assertion, the majority of whom were from victim support and advocacy organisations. This was on the basis that respondents felt rape myths were influencing jury decisions in these cases and that the current system is leading to re-traumatisation of complainers. By comparison, just 26% of respondents agreed that the use of jury trials continued to be suitable for prosecuting cases of rape highlighting the important role that juries play in Scotland's justice system, public confidence in verdicts reached by juries and questioning evidence relating to the impact of rape myths on jury decision-making. Those who agreed that juries continued to be suitable for the prosecution of rape trials were primarily from the legal sector as well as from some justice agencies.

586. Respondents were also asked the extent to which they agreed that trial before a single judge, without a jury, would be suitable for the prosecution of rape and attempted rape. The majority (61%) of those who responded to this question either strongly agreed or agreed. Support largely came from individual respondents as well as victim support and advocacy organisations who felt that this approach would help to mitigate the impact of rape myths and improve complainers' experiences of the trial process. By contrast, 28% of respondents either disagreed or strongly disagreed with single judge rape trials with the strongest opposition from the legal sector. These respondents highlighted a number of concerns notably that judges may themselves hold biases and prejudices which could impact on verdicts while also highlighting that decisions reached by judges in these cases could be influenced by external factors such as media and political interest in particularly contentious cases. Those in favour of single judge rape trials however commented that judges could be trained to mitigate against these risks to an extent that was simply not possible with jurors.

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

587. A suite of impact assessments has been drafted for the Bill and will be published on the Scottish Government website. These include an Equality Impact Assessment (EQIA), Business and Regulatory Impact Assessment, and Children's Rights and Wellbeing Impact Assessment. Other impact assessments were screened and it was determined that, as a collective package, the proposed changes in the Bill would not have a significant differential impact; these include: Island Communities Impact Assessment (ICIA), Fairer Scotland Duty Assessment and Strategic Environment Impact Assessment.

588. In addition to the Bill-level impact assessments mentioned above, Data Protection Impact Assessments are being undertaken for the proposals relating to special measures in civil cases and the establishment of a Victims and Witnesses Commissioner. These will be published on the Scottish Government website.

Equal opportunities

589. The intention of the Bill is to improve the experience of victims in the criminal justice system and vulnerable parties in the civil justice system so, overall, the Bill is anticipated to have a positive impact on all equality groups. An EQIA has been carried out to determine if there will be any particular impacts on victims and vulnerable parties with protected characteristics and this has found that certain measures may have a greater impact on certain groups. In all cases the impacts have been found to be positive and no negative impacts have been identified.

590. In particular, the provisions relating to sexual offences will have a greater impact on women and girls as they are more likely to be a victim of this type of crime. The research undertaken for the EQIA also found evidence that suggests some groups are more likely to be the victims of crime in general, to be vulnerable to trauma, or both - notably women, young people and disabled people. The policies intended to recognise the impact of trauma and seek to minimise re-traumatisation may therefore impact more on these groups.

591. The research also found evidence which suggests that confidence in the Scottish justice system may be lower among some of the protected characteristic groups, including women, older people, disabled people and LGBTQ+ people. Improving the experiences of those who come into contact with the justice system should lead to increased confidence in the system and this may have a greater impact on groups where confidence is lower.

Human rights

592. As noted below, there are a number of areas covered by the Bill that potentially engage rights under the ECHR. However, the Scottish Government considers that the provisions of the Bill are ECHR compliant.

Special measures in civil cases

593. Restriction on self-representation and personal conduct of a case engage the right to a fair hearing under article 6 ECHR. The Scottish Government considers these provisions in the Bill are compatible with article 6. The restrictions only apply when there is a need to protect another party to the case and ensure their rights are respected. In addition, the Bill makes provision to ensure legal representation is available to a person who has been restricted from conducting their own case without impacting on their ability to select a legal representative of their own choosing.

Criminal juries and verdicts

594. In general, the subject matter of these provisions falls within the ambit of article 6 of the ECHR. Article 6 of the ECHR protects everyone’s right to a fair trial.

595. The Scottish Government considers that Part 4 of the Bill is compatible with article 6. The European Court of Human Rights has confirmed that while the use of juries in criminal trials is

compatible with article 6, it is not a requirement and there is no "right to trial by jury" under the ECHR.[148]

596. Sections 34 - 36 of the Bill propose reforms to the verdict and jury system (abolishing the not proven verdict, increasing the majority required for conviction and reducing the size of the jury). Article 6(1) of the ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The ECHR does not specify the composition of such a tribunal nor the framework within which their decisions should be made. Therefore, the Scottish Government does not consider that these sections of the Bill are incompatible with article 6(1) of the Convention.

597. Article 14 prohibits discrimination in the enjoyment of ECHR rights. The courts have ruled that the protection from discrimination under article 14 includes indirect discrimination. The not proven verdict is used proportionately more in rape and attempted rape cases compared to any other type of crime. The majority of complainers in rape and attempted rape cases are women and girls, who also have rights under the ECHR including the right under article 3 not to be subjected to inhuman or degrading treatment. Some stakeholders believe that some factually guilty people are acquitted due to the existence of the not proven verdict, and thus it leads to complainers in those cases (who are more likely to be women than men) being denied justice. If this argument is correct, then abolishing the not proven verdict may have a positive effect on eliminating indirect discrimination.

598. Any changes to the Scottish criminal justice system must be carefully considered and consistent with the principles of the system which recognise the presumption of innocence, maintain the rights of all those involved and minimise the risk of miscarriage of justice.

599. In particular, any proposed changes to the system must respect the rights of accused persons including the right to liberty under article 5 and the right to a fair trial under article 6.

600. Many stakeholders argue that if one of the verdicts of acquittal were to be removed, it would not be tenable to keep the simple majority while at the same time having a fair and safe system of criminal justice that upholds the rights of the accused. These views have helped inform the decision to increase the majority required for conviction to two thirds in the new two verdict system.

601. Article 6(2) of the ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The consultation disclosed concern as to whether the use of proven and not proven as verdicts would be compatible with article 6(2). The

[148] See *Twomey, Cameron and Guthrie v United Kingdom* (2013) 57 E.H.R.R. SE15, *Callaghan v United Kingdom* (1989) DR 60 296, *Taxquet v Belgium* (2012) 54 E.H.R.R. 26 and *Judge v United Kingdom* (2011) 52 E.H.R.R. SE17.

Scottish Government has carefully considered this point and favours guilty and not guilty as verdicts.

Sexual Offences Court

602. The Scottish Government considers that the creation of a Sexual Offences Court and the specific features of the court as set out in the Bill are compatible with article 6 of the ECHR which safeguards an accused's right to a fair trial. The objective in establishing the court is to develop and embed specialist, trauma-informed approaches to the way in which sexual offence cases are managed for the benefit of complainers and does not introduce any changes to the trial process which impact or infringe on the rights of the accused. Provisions in the Bill specify that the Sexual Offences Court will adopt High Court rules and procedures including the established safeguards therein which ensure an accused's right to a fair trial.

Anonymity for victims of sexual offences and certain other offences

603. Article 10 of the ECHR provides for a right to freedom of expression. This right is not, however, absolute. It can be interfered with if such an interference is set out in law, is necessary in a democratic society and is in the interests of one or more "legitimate aims" which are set out in article 10(2). One of those "legitimate aims" is where the interference is for the protection of the rights of others. The provisions on victim anonymity will provide protection to victims of offences who are particular vulnerable to interference with their rights under article 8 ECHR (respect for private and family life). The Scottish Government considers that the provisions strike an appropriate balance between publishers' article 10 rights and the article 8 rights of victims.

Pilot of single judge rape trials

604. Article 6 of the ECHR, which guarantees the right to a fair trial, does not provide a right to trial by jury. This is reflected in the fact that the vast majority of criminal trials in Scotland are heard by a sheriff or justice of the peace, sitting without a jury. The Scottish Government therefore considers that provisions giving Scottish Ministers the power to conduct a pilot of single judge rape trials are compatible with article 6 of the ECHR.

605. Human rights will also be an important consideration in the design and development of the pilot to ensure that individual trials conducted as part of the pilot proceed in a manner that is compatible with the ECHR.

Island communities

606. The provisions in the Bill are intended to benefit all communities across Scotland. The Scottish Government is satisfied that, as a package, the Bill has no significant differential effects upon island or rural communities and a Bill-level ICIA is not required. A record of, and rationale for, that decision and a summary of the information that has informed it will be published on the Scottish Government website.

Local government

607. Local government plays a key role in the justice system in Scotland. The majority of statutory responsibilities placed on local authorities in relation to the criminal justice system are associated with those accused or convicted of crime[149].

608. COSLA and Scottish Government are co-owners of 'Equally Safe', Scotland's strategy to prevent and eradicate violence against women and girls.

609. The purpose of the Bill is to improve the experience of victims and witnesses as they engage with the justice system and enhance their rights. The Bill does not place any new responsibilities on local government and there will be no direct impact on local authorities.

610. The Scottish Government acknowledges that, following implementation, there could be indirect impacts on local government should the reforms to improve the experience of victims result in more cases coming before the courts (perhaps through increased confidence in reporting crimes) or changes in the level of successful prosecutions. It is not possible to predict these potential indirect impacts but the Scottish Government is committed to constructive engagement with COSLA, Social Work Scotland and other social work organisations as the Bill is implemented.

Sustainable development

611. The Bill contributes to implementation of the Vision for Justice, which is aligned with and underpinned by the Scottish Government's National Performance Framework and contributes to Sustainable Development Goal 5 (gender equality); 10 (reduced inequalities); and 16 (peace, justice and strong institutions).

612. The potential environmental impact of the Bill has been considered with a pre-screening report completed. No significant environmental impacts are expected.

CROWN CONSENT

613. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Great Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

[149] For example, functions in 27 – 27B of the Social Work Scotland Act 1968, and under sections 1, 2 10 and 11 of the Management of Offenders (Scotland) Act 2005.

614. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998, and rule 9.11 of the Parliament's Standing Orders. For further information about the considerations that go into determining whether Crown consent is required for a Bill see Erskine May, the guide to procedure in the UK Parliament.

APPENDIX 1 – GLOSSARY

Accused – a person charged with committing a crime or offence.

Act of Adjournal – court procedure and practice rules created by the criminal courts through their own legislation.

Act of Sederunt – court procedure and practice rules created by the civil courts through their own legislation.

Acquittal – an outcome after a trial which means that the accused is not convicted of the offence. In Scotland this can be through either a not guilty or not proven verdict.

Admission – a statement by the accused admitting an offence or a fact.

Advocate – a type of lawyer who specialises in the preparation and presentation of court cases and has rights of audience in the higher courts in Scotland such as the High Court of Justiciary for criminal cases and the Court of Session for civil cases. Advocates are regulated by the Faculty of Advocates.

Advocate Depute – a lawyer who prosecutes cases and who is appointed by the Lord Advocate.

Appeal – a challenge to a conviction and/or sentence, or court order.

Appellant – a person challenging a conviction and/or sentence, or court order.

Beyond reasonable doubt – the standard of proof in a criminal case. The standard judicial direction for this as set out in the Jury Manual is "….a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation. It's the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it's more than a suspicion of guilt, and more than a probability of guilt. This doesn't mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you've to be satisfied of the guilt of the accused beyond reasonable doubt."

Charge – the crime that the accused is believed to have committed.

Civil case – court proceedings that are not criminal prosecutions.

Common law – a system of laws based on custom and court decisions (also known as "precedent") rather than on written laws made by a parliament. Common law forms a large part of the legal system in Scotland.

Complainer – a person who, in criminal proceedings, claims to have been the victim of an offence.

Consent – in Scottish criminal law, consent in a sexual offence case means that the complainer freely agreed to have a particular type of sexual contact with the accused. Most sexual offences require proof that the accused acted without the complainer's consent.

Contempt of court – behaviour that interferes with court proceedings or possible outcome of a court case, punishable by a fine and/or imprisonment.

Conviction – when a person pleads guilty or is found guilty of a crime.

Corroboration – the requirement in Scottish criminal law that an accused cannot be convicted of a crime unless there are at least two separate sources of evidence that (a) the crime was committed; and (b) the accused was the person who committed the crime.

Cross-examination – when a witness is questioned in court by other lawyers after giving their evidence-in-chief. For example when a prosecution witness is questioned by the lawyer representing the accused.

Crown – an alternative term for the Crown Office and Procurator Fiscal Service.

Crown Office and Procurator Fiscal Service – the organisation responsible for the prosecution of crime and investigation of deaths in Scotland.

Defence (lawyer/counsel) – the lawyer who represents the accused.

Deliberations – the process of discussion by which juries reach a verdict.

Diet – a court hearing.

Directions – the instructions given by a judge to a jury at the end of a criminal trial that tell the jury the legal tests that they should apply during their deliberations.

Evidence – what a witness says when they're asked questions in court. Evidence can also be physical items that are used in the case, including documents, clothing, and photographs.

Evidence by commission – when a witness gives their evidence in advance of the trial. This is filmed and played during the trial.

Evidence-in-chief – when a witness is questioned in court by the person who asked them to come to court.

First diet – a hearing in a Sheriff Court case when the Crown and defence lawyers tell the court if they are ready for the case to go to trial.

Floating trial – a High Court case where the date and location of the trial can vary.

High Court – the supreme criminal court of Scotland, where the most serious criminal cases are heard.

Hung juries – in some countries where a jury is required to reach a certain majority in order to return a verdict, and cannot do so, it is referred to as a hung jury. Hung juries are not a features of the current Scottish system as they have 15 members and return verdicts by a simple majority of votes.

Indictment – a document listing the charges against the accused.

Interdict - an order granted by the civil courts to prevent a person from doing something. In relation to domestic abuse, an interdict could, for example, prohibit a person from approaching or contacting a person at risk.

Judge – the legal expert who is in charge of court proceedings.

Judiciary – the collective name for the judges and panel members who sit in the courts of Scotland and make decisions about criminal and civil cases.

Jurisdiction – the power a court has to hear cases and decide what will happen in the case; the territory covered by the court.

Lord Advocate – the senior Scottish Law Officer who is the head of the Crown Office and Procurator Fiscal Service. The Lord Advocate is also a Minister in the Scottish Government.

Lord Justice Clerk – the second-most senior judge in Scotland.

Lord Justice General – the most senior judge in Scotland, who holds this title and also the title of Lord President. The title of Lord Justice General relates to criminal business.

Lord President – the most senior judge in Scotland, who holds this title and also the title of Lord Justice General. The title of Lord President relates to civil business.

Majority required – the number of jurors required to support a verdict before it can be returned.

Mock jury research – an established type of research in which members of the public who are eligible to serve on a jury are asked to come to a verdict based on viewing a fictional filmed trial simulation rather than a real criminal trial.

Miscarriage of justice – when a court proceeding has an unfair outcome, for example a person is convicted of a crime they did not commit.

Offender – a person who has been convicted of committing a crime.

Open justice – a principle that requires criminal proceedings to be conducted in a transparent way and allows public scrutiny.

Perjury – a crime that is committed if a person deliberately lies when giving evidence in court.

Person centred – when the person is placed at the centre of the service, their needs are understood and they can participate effectively in proceedings.

Practice note – a document issued by a member of the judiciary which sets out a practice that the court is going to take or inform practitioners such as lawyers about a practice that the court expects them to take.

Preliminary hearing – a hearing in a High Court case when the Crown and defence lawyers tell the court if they are ready for the case to go to trial.

Presumption of innocence – fundamental principle of the criminal justice system which states that every accused person is presumed innocent until proved guilty and is not required to prove his or her innocence.

Procurator Fiscal – a lawyer who works for the Crown Office and Procurator Fiscal Service.

Prosecutor – a lawyer who presents the case against the accused in a criminal trial

Scottish Courts and Tribunals Service – an independent body that provides administrative support to the Scottish courts, judges and tribunals.

Sheriff – a judge who is in charge of court proceedings in the Sheriff Court.

Sheriff principal – the head of each of Scotland's six sheriffdoms (areas) who are responsible for managing the business in the sheriff courts in their own area.

Simple majority – a rule requiring a majority of jurors to support a verdict before it can be returned.

Solemn cases/proceedings/procedure - criminal cases which are determined at trial by a jury, either in the High Court or a sheriff court. These cases are usually considered to be more serious.

Solicitor – a type of lawyer who is regulated by the Law Society of Scotland. They can provide legal advice on a range of matters and have rights of audience to appear in court in certain cases.

Solicitor advocate – a solicitor who has been granted extended rights of audience before the higher courts, similar to those held by advocates.

Special measures – measures such as a live television link, a screen or a supporter to help vulnerable people when they appear in court. In relation to evidential hearings, another special measure which may be available is the taking of evidence by a commissioner.

Statutory defence – a defence which is created in written laws.

Statutory offence – offences which are created through written laws.

Summary cases/proceedings/procedure – criminal cases that are considered less serious and are determined at trial by a Sheriff or a Justice of the Peace. Juries are not used for summary cases.

Standard of proof – the level of certainty needed to prove a legal claim. In a criminal trial this is "beyond reasonable doubt".

Survivor – alternative term for a victim. The term 'survivor' is commonly used when speaking about victims of sexual offences.

Trauma informed – providing a service that recognises the impact that trauma can have on a person and that puts in place measures to avoid re-traumatisation.

Trial/trial diet – proceedings that take place in a court if an accused pleads not guilty. The court hears evidence about the alleged crime and at the end of the trial a judge or jury will decide if the prosecutor has proven the guilt or not.

Unanimity and near unanimity – a rule requiring that either all, or in the case of near unanimity almost all, jurors support a verdict before it can be returned.

Victim – a person who has been directly affected by a crime.

APPENDIX 2 – LIST OF ABBREVIATIONS

COSLA – Convention of Scottish Local Authorities

CYPCS – Children and Young People's Commissioner Scotland

COPFS – Crown Office and Procurator Fiscal Service

ECHR – European Convention on Human Rights

EPR – Evidence and Procedure Review

EQIA – Equalities Impact Assessment

FoA – Faculty of Advocates

FMG – Female genital mutilation

GRH – Ground rules hearing

ILR – Independent legal representation

IPSO – Independent Press Standards Organisation

LSS – Law Society of Scotland

OLR – Order for Lifelong Restriction

RCS – Rape Crisis Scotland

SCRA – Scottish Children's Reporter Administration

SCTS – Scottish Courts and Tribunals Service

SLAB – Scottish Legal Aid Board

SVC – Scottish Veterans' Commissioner

SWA – Scottish Women's Aid

TARA – Trafficking Awareness Raising Alliances

VSS – Victim Support Scotland

1981 Act – Contempt of Court Act 1981

1992 Act – Sexual Offences (Amendment) (Scotland) Act 1992

1995 Act – Children (Scotland) Act 1995

CPSA 1995 – Criminal Procedure (Scotland) Act 1995

2019 Act – Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019

2000 Act – Children (Scotland) Act 2000

2004 Act – Vulnerable Witnesses (Scotland) Act 2004

2014 Act – Victims and Witnesses (Scotland) Act 2014

2016 Act – Criminal Justice (Scotland) Act 2016

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

POLICY MEMORANDUM

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