Criminal Justice Committee

3rd Meeting, 2024 (Session 6), Wednesday 17 January 2024

Victims, Witnesses, and Justice Reform (Scotland) Bill

Note by the clerk

Background

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

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

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

Today's evidence on the Bill

4. At today's meeting, the Committee will take evidence from the following witnesses.

Panel 1

- **Jennifer McCann**
- **Hannah McLaughlan**
- **Hannah Reid**
- **Ellie Wilson**

Panel 2

- **Sarah Ashby**
- **Hannah Stakes**
- **Anisha Yaseen**

Panel 3

- **Sandy Brindley**, Chief Executive, Rape Crisis Scotland
- **Dr Masha Scott,** Chief Executive, Scottish Women's Aid
- **Kate Wallace**, Chief Executive, Victim Support Scotland
- **Emma Bryson**, Speak Out Survivors

5. The individuals giving evidence on the first two panels of witnesses are survivors of sexual crime with experience of the criminal justice process.

6. They have been invited to give evidence on all Parts of the Bill.

7. The third panel of witnesses have been invited specifically to give evidence on Parts 5 and 6 of the Bill, namely—

8. The Committee's scrutiny of Part 5 and 6 of the Bill will continue until February. Further details of the Committee's phased approach can be found online.

9. The following organisations have provided submissions to the Committee.

   - Rape Crisis Scotland
   - Scottish Women's Aid
   - Victims Support Scotland

10. The relevant sections of their submission covering Parts 5 and 6 of the Bill are reproduced at the Annex.

Further reading

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

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

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

Previous evidence sessions

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

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

Clerks to the Committee
January 2024

ANNEX

Extract from submission from Rape Crisis Scotland

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

'Having specialist courts would encourage others to come forward.' (A survivor)

Rape Crisis Scotland is strongly supportive of this development. We believe it could improve the experiences of survivors of sexual violence and rape seeking justice in Scotland. Too many survivors tell us about the trauma and distress caused by the criminal justice process. There is a clear and compelling need for change. As this new court is formed, it is crucial that the experiences and voices of survivors are at the core of decision making. There are a number of key features that should be incorporated in the new court to ensure that it is genuinely trauma informed.

The bill seeks to create a standalone sexual offences court and we note that the policy memorandum states - '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.'

We have consulted with survivors and there is general support for this proposition including the ability of Sheriffs to sit on cases of rape that would have previously only been dealt with by a High Court Judge. However, we are concerned that the provisions in the Bill do not provide for the proper protection of complainers in serious sexual violence cases. The rights of audience that are provided for in the Bill mean that only cases of rape and murder will have the restriction that an advocate or solicitor advocate can defend an accused person and only an Advocate Depute can prosecute. We do not feel this restriction on the rights of audience goes far enough to provide protection as there are many cases that would have been heard in the High Court that would not have included a charge of rape, for example a case of attempted rape. All cases that would have been tried in the High Court under the current model should continue to have the protection afforded by the appropriate level legal representatives appearing.

We welcome the proposal for the introduction of an element of 'ticketing', where all those who appear in the Court are required to complete specialist training. However, a system of ticketing is only meaningful where there is a process to remove that 'ticket' where serious concerns arise about someone's suitability to be involved in the sexual offences court. A recent example is a high-profile KC who sent an intimate image of himself in an aroused state from the High Court toilets immediately after defending in a rape case. There appears to be no process currently to consider whether someone who engages in this type of behaviour should be involved in a specialist sexual offences court. The lack of such provision would undermine the principles of a trauma informed sexual offences court.

At RCS we hear consistently about poor experiences within the current court structure. There is a lack of awareness and sensitivity of the needs and experiences of survivors of sexual violence. Complainers of sexual offences tell us of additional, unnecessary trauma caused by floating trial diets, how evidence is taken and the layout/facilities in court buildings. Too often, the process of attending court and participating in a sexual offence trial causes significant levels of unnecessary re-traumatisation.

We see first-hand the effects of how the court delays are affecting survivors. This was a problem prior to the pandemic and has now been significantly compounded. Survivors are often waiting two to three years, and sometimes longer, for their case to be heard in court. This is unacceptable and must be urgently addressed. For some survivors, these delays mean that they feel they must keep their memories of their experience fresh so they can give evidence properly and remember details. Others will defer receiving therapy because they are worried that their therapy notes might be used against them. As Burman and Brooks Hay comment, ‘a range of adverse consequences will likely be precipitated by inordinate delays, impacting on the personal, domestic and professional lives of victim-survivors.’ A survivor stated that it felt like: ‘Building up to something that's always around the corner but never materializes. Our mental and physical state deteriorates over time and this set us up for the rest of our lives.’

We are impressed with the success of the court pilot scheme in New Zealand and feel like the Scottish model could learn a lot from this example. Features of this include dedicated judges, control of cross-examination and greater use of special measures. It also incorporated features for the comfort and safety of complainers for example, meeting all court parties, being shown round court and having separate entrances for complainers and the accused. It was considered that the court dealt with delays in an efficient way and improved trial quality with better evidence. The average time to disposal of a case was 134 days. Survivors were better prepared for the trial and the court was more alert to unacceptable questioning which afforded them protection. There were also firm trial dates. Independent victim advocates worked alongside the court. This led to more pre-trial guilty pleas. There was general reporting that complainers felt reduced re-traumatisation. There has been unanimous support for this to be developed nationally and this is in progress.

Pre- Recorded Evidence

We also welcome the introduction of a presumption in favour of pre-recorded evidence, including the taking of evidence on commission from survivors in rape and sexual offences cases.

All the survivors we spoke to, during consultation on these provisions, were in support of visually recorded evidence being available as standard. Even those who chose to give their evidence in court, with or without the use of special measures, were of the view that it should be available as an option for any survivor.

We are strongly in favour of a statutory presumption that survivors will be entitled to give evidence on commission and that they can have their cross examination pre-recorded prior to the trial. This can then remove the need for the survivor to be in court at all, in most cases, and help to reduce delays as the evidence will be captured before

the trial, meaning the survivor does not have the ongoing anxiety and stress caused by the prospect of having to give evidence in court. It means increased scrutiny over the style of questioning in cross examination. As stated in the Lady Dorrian review 'experience suggests that well-conducted visually recorded evidence taken by commissioner, can have at least as much impact as evidence given in person at trial.' The review also highlights evidence from procedure in England and their pilot scheme resulted in 'cross examinations to be more witness friendly, focused, relevant and pared down than in conventional trials.'

'We believe that pre-recorded evidence is a way of getting the best evidence from a survivor. We have had really positive experiences where evidence by commissioner has been used already and welcome this change to extend to the vast majority of survivors. Survivors report to us feeling much more relaxed and at ease and liked getting their evidence "out of the way" before the trial date' (A Rape Crisis Centre)

There are some concerns expressed by Rape Crisis advocacy workers that the increased use of evidence on commission means that survivors are being rushed to do it to 'get it out the way' or being pressured to take this up when it does not feel right for them. Giving evidence on commission should be available as a standard but should always be optional.

Implementation of this provision will require significant expansion of the availability of evidence on commission, otherwise we could see lengthy delays in complainers being able to access this, which would undermine one of the key benefits of evidence on commission, which is being able to give evidence early and with certainty about when it is happening.

Ground rules Hearings

The extension of the use of ground rules hearings as standard is a welcome proposal within the Bill. Ground rules hearings ensure that significant attention is placed on the examination of the witness, focusing on the questions asked and the form this will take.

The introduction of grounds rules hearings as standard practice will ensure that there can be judicial oversight of the nature of cross examination, the lines of questioning, the length of cross, the breaks the survivor might need. This places a greater onus on parties to be mindful of trauma-informed practice and the nature and style of their cross examination which should not be inherently distressing or re-traumatising.

Survivor Voices

Members of our SRG were strongly in support of the creation of a specialist court; One stated:

'if you have a specialism that's a benefit and there's an ideology of it being compassionate and empathetic. It feels not as clinical or as brutal.' They also highlighted the importance of having the option to view proceedings and the control and information this gave back to them, but that the facilities to do so were not acceptable.

There was strong support for the creation of a private viewing area for survivors to watch proceedings. There is a requirement to understand that although giving evidence on video is desirable this does not mean that they do not want to know what else is said in trial. Survivors are frequently told they should not watch from the public gallery because it looks bad to the jury. One survivor said that in order to watch proceedings, she had to look over her attacker's shoulder. All survivors we consulted felt that a private viewing gallery or a live stream would be the best options. Miss M described how this caused her particular distress as she was encouraged to remain in the witness room throughout the criminal trial while a family member watched and tried to report back to her. Many survivors whose cases resulted in Not Proven verdicts described particular distress as not knowing what evidence led to this. In one example the survivor had been given reassurances about the case from the police and the Crown as there was a video recording of her rape. She was advised not to watch the rest of proceedings but was left in shock by the Not Proven verdict, she has been left unaware of what the accused could have said to convince the jury that the video recording was not sufficient evidence.

Survivors also highlighted the fear of bumping into the accused, or his family, at court. Many described this actually happening and there are far too many accounts of them being approached and intimidated. The importance of separate entrances and waiting areas is key.

During the course of giving evidence, complainers are often given the special measure of the use of a supporter however they are not always permitted to have the use of their own advocacy worker in court. They may, instead, be given a supporter from the witness service. While this can be a valuable service for many witnesses, rape complainers consistently speak of the benefits of having a known supporter with them in court. There are numerous difficulties with the trusted person not being with the survivor and it causes distress. Survivors are often not told until the last minute and this fact makes no sense to them. This was one of the key findings of the 'Justice Journeys' research.

Features of the Specialist Court

RCS supports the key elements of the specialist courts as recommended in Lady Dorrian's Review and reflected in the Bill;

1. The pre-recording of the evidence of all complainers
2. Increased judicial case management, including ground rules hearings for any evidence to be taken from a complainer, either on commission or in court
3. Accredited and specialist trauma-informed training for everyone involved in the trial, including judges and lawyers.

The ethos of this system must be trauma-informed and victim-centred in its approach. This does not mean providing a one-off training course to professionals, it is about an ethos which confers principles onto practice. Those of choice, collaboration, trust, empowerment and safety.

In addition, we believe that the court should feature:

1. Dedicated advocacy and court support provided by Rape Crisis advocacy workers – our staff are specially trained to deal with the needs of survivors and often have established relationships.

‘From my own experience I only felt truly supported and guided by my supported from rape crisis. Thereby having someone trained, equipped and with experience of supporting others I feel would make a significant difference for victim’s experiences of a court process.’ (a Survivor)

‘Having Rape Crisis workers present would be advantageous. RC workers make a world of difference to survivors but for some it may take courage to access the service, therefore it should be provided to all in court if they haven’t been able to access it beforehand.’ (a survivor)

2. A totally new approach to the scheduling of trials which avoids floating trial diets.

‘The impact of floating trials is a lot more severe than can be put in words….the uncertainty and rescheduling of hearing dates is significantly detrimental.’ (a survivor)

‘We feel that Fixed trial dates are essential, the rescheduling of trials is one of the most challenging things to support survivors through, it can’t be underestimated the effect that this has on the survivor’s life, we feel complicit in a system that causes harm to already vulnerable people.’ (A Rape Crisis Centre)

3. Separate entrances and waiting areas for the survivor and their family and the accused. Survivors have spoken of the fear of seeing the accused, or his family, at court and many reported that this happened to them.

‘This is very important… from my own experience I did bump into the offender’s family.’ (A survivor)

‘Survivors can be intimated and retraumatised simply by seeing the individual. It [can] bring back flashbacks of the incident. By the time the crime is heard in court, the victim knows the incident was horrific and the damage this dangerous perpetrator is to them, which in turn causes concentration issues, fear, and mental energy issues.’ (A survivor)

4. A protected area where the survivor and her family can watch proceedings. Survivors emphasised the importance of having the option to view proceedings and control what information they receive. The facilities to do so are currently not acceptable. All survivors we consulted felt that a private viewing gallery or a live stream would be the best options.

‘I was in to testify and not necessarily able to watch the case myself without stigma being associated to myself for being present in watching. However, I feel that it should be a right for victims to be able to watch the proceedings play out.’ (A survivor)

5. A standard of practice and ticketing service for Counsel and lawyers participating in the court.

‘There should be effort made in training lawyers specifically for this field.’ (A survivor)

‘Many legal professionals including defence lawyers… have no understanding of the impact on sexual abuse and trauma. Their actions and comments alone can traumatise victims throughout the trial. Causing further long-term damage to mental health.’ (A survivor)

We are strongly opposed to this court having any reduced sentencing powers as see this creating at the very least the impression of a downgrading of rape and other serious sexual offences and are glad that the Bill does not propose to do this.

Implementation

The implementation of the provisions in the bill relating to the specialist court will require the upmost care and consideration and considerable funding to ensure that the intentions of the bill are realised and the needs of survivors wholly considered. The principles set out in the Bill are excellent but need proper implementation and real investment. The new court (or courts) need to be genuinely trauma informed, including the lay out of the building and the scheduling of trials. Simply requiring personnel to undertake training in trauma, while important, is not enough.

‘ERCC as a whole also spends significant time providing emotional support to survivors who have been re-traumatised and made anxious or confused by the justice process and their interactions with COPFS. The proposed changes may enable us to focus more support time on the impact of survivors’ experience of sexual harm, as opposed to the negative impact of the justice system’ (A Rape Crisis Centre)

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

‘It’s not my identity I wish to hide, I know I did nothing wrong… But I know I would feel less vulnerable in an environment in which was made to take care of victims like me, to make us feel safe.’ (A survivor on the right to anonymity)

RCS are strongly in favour of the creation of a legal right to anonymity for survivors of rape and sexual violence. This has been a significant oversight of our current system which has left many vulnerable individuals at risk. This right should be automatic, the survivor should not need to apply to the court or go through any other procedure to obtain this protection. We are supportive of the Bill in this regard. Anonymity is key to ensuring that victims of sexual violence and rape feel able to come forward and report these matters through the justice processes. Many do not report at least in part because of a fear of being exposed themselves. It is particularly pressing that this is brought into force considering the risks to complainers over the rise of social media use and blogging. Survivors have been exposed on these mediums despite court orders being in place and the law needs to make a firm stance that this is unacceptable.

We strongly welcome the change in policy position from the original consultation regarding the point at which anonymity begins and recognise that the Scottish Government has listened and responded to the points raised by RCS on behalf of

survivors. It is right that anonymity should start at the earliest possible point; and with no positive actions required by the victim to report to the police and we welcome that –

'The right to anonymity provided for in the Bill takes effect from the moment a relevant offence is committed.'

The Bill goes some way to recognising that survivors, who choose to disclose, will do this in a number of different ways and for some, the criminal justice system is not the most appropriate forum for this. While the overall aim of introducing this right is to increase the confidence of survivors to report within the criminal justice system, we must recognise that, at present, this is a reality that is far removed for many. There may be issues of accessibility to reporting for those who are young or old or those with disabilities and care needs. There are communities who understandably might have mistrust in the police, for example, those with insecure immigration status. A woman living in a coercively controlling relationship could find it impossible to attend the police station. Children may disclose to social workers or teachers, university students to lecturers or supervisors.

In recent years, we have seen a number of successful cases in the civil courts where survivors, such as Miss M, have brought claims against their abusers. If a survivor chooses to use this forum to address the abusive behaviour, then protection of her anonymity should be enshrined in law. It is also important to note that the disclosure of abuse might be made during other civil proceedings such as child contact or divorce.

Entering the criminal justice system can be an intrusive and intimidating experience, survivors are concerned about how they might be treated and that they might not be believed. They may have made a conscious choice to disclose the abuse in a different forum. Sexual violence entails a large degree of shame and embarrassment, and the concept of publicity is a major deterrent to reporting. Survivors need to be reassured that their cases will be handled with sensitivity and respect for their privacy. Survivors should have the security and respect that anonymity provides, no matter how they disclose. We support that the right to anonymity should exist in all the offences covered within the Bill but submit that there should be a 'catch all' provision. This should include a right to anonymity where the offence has a significant sexual element, even if that offence is not specifically named on the list. For example, an offence under s39 of the Criminal Justice and Licencing (Scotland) Act 2010 (stalking) or s1 of the Domestic Abuse (Scotland) Act 2018 (coercive control) could contain elements of sexual abuse such as threats, or humiliation of a sexual nature. We see the Bill in its current form may not protect the anonymity of some survivors of sexual violence and we think this would ensure absolute protection.

The question of when anonymity should end is a difficult decision to address. The effect of sexual abuse and rape on a survivor can be so profound that the traumatic implications can seem to radiate beyond even the finality of death. Survivors will report the concern they have for their family members, children and loved ones and the secondary trauma that they suffer as well. It is easy to see how the idea of anonymity extending beyond death is appealing. We do however recognise that in legal reality, this may be a difficult to put into practice. As such, the Bill takes a sensible approach in proposing to end anonymity on the death of the victim.

Section 63 of the Bill makes clear that the anonymity protections do not prevent the victim themselves from self-publishing information regarding their experience, including on their own social media accounts. This includes self-publication for adults and children. We support this provision of the Bill and consider it to provide the required level of autonomy to survivors.

We are strongly supportive of complainers of sexual violence having the ability to set aside their anonymity without judicial intervention. These provisions should empower survivors and allow control over who they disclose to and when. We are aware of attempts in other jurisdictions to impose anonymity requirements that extend to the survivor themselves, for example in Victoria and Tasmania, Australia. The campaign #letherspeak showed that laws which were originally put in place to protect survivors from media exploitation had the effect of 'silencing individual survivors who wish to speak out publicly, thereby increasing their sense of isolation, powerlessness and voicelessness'.

We support that for a third party to publish the information relating to an adult survivor they must receive written permission to do so. This puts a positive onus on the publisher and will improve standards within journalism and online publications. Awareness of these provisions should be made to the public so they will be aware of the change of law and how it affects social media use.

We also support the requirement contained in Section 106D for a level of judicial oversight when children seek to waive their anonymity for third party publication, we welcome that 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 as this places the burden for doing to on the publisher and not the child.

In Scotland, 'children' are recognised as being under the age of 18. We, along with other bodies who support under 18s, recognise a distinction between children (usually under 12) and young people (around 12-18). We support many young people within our organisation and recognise the agency and maturity many demonstrate and feel that should they wish to discuss their own experiences they should have that freedom and be supported to make those decisions where appropriate. We need to consider the differences between children and young people because the application of this would be incredibly different if we are discussing the implications for a 10-year-old survivor or a 17-year-old. Children and young people should be appropriately supported to seek a waiver and Sheriffs and Judges should consider the autonomy and agency of young people in these circumstances.

We are pleased to see that the only circumstances that the right to anonymity can be set aside are where there is a relevant conviction, for example relating to perverting the course of justice. This will provide the strongest guarantee to survivors of sexual violence. We would stress that instances of relevant offences, as referred to in the Bill, being committed are exceptionally rare and in our experience, the individuals involved are usually particularly vulnerable and care should be taken when waiving any anonymity.

We note that defences have been provided to the offence of breaching a survivor's right to anonymity, we believe that this should be a robust offence that should deter people from sharing this information without permission and as such the defences should be used in limited circumstances. The Bill provides that 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. We suggest it should be reasonable to include a requirement that they demonstrate what steps they took to ascertain that written permission had been given.

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

We strongly believe that there should be an automatic right to independent legal representation (ILR) for survivors when applications are made under s275 to lead sexual history or character evidence in sexual offence cases and welcome the provisions set out in the Bill.

As stated by Keane and Convery, in many cases the nature of the questioning proposed in such applications would 'represent a particularly intimate, sensitive and important aspect of a complainer's private life.' The type of evidence they seek to raise speaks to the most private and intimate aspects of a survivor's personal life and the evidence is often used in cross-examination to undermine their credibility by depicting the survivor as not being of 'chaste' character. These are outdated and unhelpful concepts which draw on the potential prejudice of the jury, or 'rape myths' and bear no relevance to what we know about the causes of sexual violence. Recent crime surveys show that most rape and sexual assault goes unreported – only 23% of this gets reported to the police but sexual cases make up 75% of the High Court business. The Gillen review revealed that many complainers withdraw due to fear of their sexual past being publicly explored.

This would go some way to address the 'justice gap' in Scotland, and how effective the rape shield provisions are in practice, as routinely there are issues with their application.

The provisions in s274 and s275 are extremely complicated. For complainers to meaningfully protect their privacy rights, they require access to state funded legal advice and representation. It is important that this advice is independent. What we see from the evidence is that there are occasions where the Crown do not object to these applications where a complainer would wish to. There is no obligation on the Crown to pursue their position and they must weigh up the competing interests of complainer, accused and wider community and cannot pursue a survivor's interest above others. They cannot offer independent legal advice to her or assist her in understanding what the application entails. They cannot offer any degree of confidentiality. The nature of the relationship and the potential conflicts for the Crown in being able to effectively representing complainers' privacy interests has been highlighted in the writings of Fiona Raitt, Keane and Convery, Sharon Cowen and in the Lady Dorrian Review. There have been numerous appeal cases – for example of RR, RN, CH, LL and Macdonald – where the Crown's failure to object to a s275 application has been criticised by the Bench.

As pointed out in the Lady Dorrian review, a notable feature of many of these judgements is the lack of Crown opposition. Figures referred to in Cowen's article indicate that prosecutors rarely challenge the applications. In 2016 data from Scotland's Cabinet Secretary for Justice showed that between January to April 2016, 57 applications were made. Of these, 42 were granted in full and 5 in part. 5 were refused and of those the Crown only opposed in 1, demonstrating that even when the evidence sought was ruled inadmissible, the Crown fail to recognise this in advance. What is clear from the complex nature of the legislation and case law surrounding s275 applications, is that the court require to hear the position of the complainer on any application, and that complainers cannot meaningfully give an informed view without access to independent legal advice.

The provision of ILR available in Scotland currently falls short of what complainers in other countries are entitled to. A notable example of this is the Republic of Ireland where ILR with legal aid is currently available to survivors of rape, and the recommendation is to extend this beyond to all sexual offences. It is considered by practitioners, and by Rape Crisis Ireland, to have had a positive effect on the experience of complainers in sexual offence trials.

There is therefore overwhelming evidence to support the incorporation of ILR for survivors in s275 applications. Survivors entering this process need to be guided through this complex legal landscape for their voices to be truly heard and their decisions regarding these applications be fully informed.

Keane and Convery highlight the important functions that ILR could provide for sexual offence complainers:

- Explain the legal framework within which the admissibility is assessed and appropriate case law
- Explain complex and constantly evolving areas of law which complainers cannot reasonably be expected to have a proper grasp of without ILR
- Informed opinion of likely outcomes
- Take detailed instructions in relation to the evidence that might be particularly offensive to the complainer's dignity and privacy
- Vindicate interests at hearings in a way 'no existing actor in the present process currently does'
- Properly explain the effect of any determination under s275 so that the complainer would be aware of what could and could not be asked of them

This amounts to more than having the right to object to the evidence. ILR would enable complainers to receive important advice on the process and potential outcomes of a complex legal landscape, contributing to towards reducing re-traumatisation and improving survivor experiences.

'Every survivor should have the right to a Witness Supporter or Rape Crisis Representative and trials should not be able to start until this is in place. It may be helpful for survivors to have independent legal representation - we are not experts on criminal law and so can't be expected to understand or act when we are not being treated reasonably or fairly.' (A survivor)

We support the mechanisms within the Bill which provide for the change in time limits for when the defence must lodge a s275 application to the court. However, we suggest the time frame should be wider to allow more time for the survivor to engage with a solicitor. The Bill's suggested timeframe is 21 days, but within that time the Crown will need to inform the complainer and thereafter they will have to obtain and instruct a lawyer and obtain legal aid. We suggest a minimum period of 28 days is a fair time period for this to be completed in. We agree that the most appropriate body to inform the complainer of the application and their rights is the Crown, but we do note the difficulties that have been reported to us by survivors in their ability to receive information from the Crown. We suggest that a timescale is imposed on the Crown to send the required information to the complainer (within 2 days) to ensure they receive the information straight away. A system must be implemented to ensure that complainers are directed to appropriate sources of legal advice and representation.

RCS call to extend the right to legal representation for complainers of rape and sexual violence

The provisions for ILR in the bill do not go far enough to protect the rights of complainers. There should be a right to independent legal advice (ILA) throughout proceedings within the criminal justice system. We understand that there has been a commitment made to address this in the future, but survivors have been waiting long enough and this Bill could be bolder in this regard. This proposal is distinct and separate from the proposed rights to ILR in relation to s275. There is a strong case for widening access to ILA for survivors throughout the entirety of the case, not just limited to representation in sensitive records or sexual history applications. The criminal justice system is a complex and intimidating environment for complainers to negotiate. It has a myriad of rules and potential pathways. It is demanding of a complainer's dedicated input and personal information often leading to no return. It is complex territory for lawyers to understand, let alone a survivor.

Complainers need information about legal rules and processes; they need the nature of evidence and procedure explained to them. The confusion that is caused to complainers contributes to secondary trauma and can mirror the loss of control and agency that they experienced through rape or sexual abuse. Lawyers can give impartial advice and offer confidentiality. They can explain the effects of different decisions or outcomes and guide through the process. They could inform of procedure, update on the case, process of evidence and general nature of the defence case. This could run through the investigation stages, the trial, outcome and any appeal or parole proceedings.

Support for this has been found in the pilot for providing ILR in Northumbria, England, where in addition to ILR they also provided legal advice at other stages in the process and preliminary stages. They found that even within police and Crown Prosecution Service requests for sensitive data were excessive and rooted in myths about sexual violence, decisions to give up data or have cases dropped were unfair and the presence of legal advice at these stages reduced the intrusion.

We have outlined the difficulties with cross-examination. Legal advice could be provided to mitigate against the trauma caused by this process. What we propose is very far from being able to 'coach' complainers of sexual violence regarding their

answers or to provide the full nature of the defence evidence but to advise them of the general line of defence and the nature of cross examination. Understanding this and having legal advice could lessen the most traumatic part or the process.

ILA could also provide essential improvements in information-sharing with complainers of sexual violence, including information on their rights and on the process of the investigation or trial. International comparisons provide a great deal of support for further extension of legal support to survivors.

In the article 'Review of Advocacy for Rape Complainants' the provision for legal advice in other countries is outlined. In Canada, in addition to ILR, five hours of state funded legal advice is offered. In India, there is provision for state funded legal advice which included advice prior to reporting to the police and to prepare the complainant for cross-examination. In Ireland, solicitors for the survivor have been permitted to sit in the trial and monitor the cross-examination, they can indicate to the prosecutor if something is wrong. Many of the Nordic countries afford far more by way of provision of legal advice and can represent complainers throughout proceedings. Sweden provides legal advice throughout proceedings and about police processes. In Denmark, guidance is given on cross examination. Research has found that legal advocacy positively impacted complainants wellbeing and caused no negative impacts on the accused right to a fair trial. We found universal support for ILA from survivors.

Miss M stated that having this in her criminal process:

'would have made a huge difference, you spend a lot of time trying to understand legal jargon, I could spend weeks trying to work out what something meant only to work out that I got it wrong. That is traumatic and stressful and takes up your life'

She commented that:

'So many people can't cope with the (criminal) legal system so pull out. ILA could lead to fewer people pulling out.'

Miss AB, who went through a similar legal process also compared the level of support she received her Civil case are favourable to that which she received in the criminal trial.

One survivor in the SRG stated that she had:

'No indication of kind of questioning which felt like a character annihilation. I didn't feel prepared for how vicious it was. The way I was treated, and the lack of knowledge felt left more trauma than the incident itself. Thinks more information would have been a bit more helpful.'

Another stated:

'people think the justice system is supposed to protect victims but it doesn't it protects the accused and the fact we don't have legal representation shows this.'

There is a strong case for the extension of legal advice to all survivors of sexual violence during their journey through the criminal justice system. This will help reduce secondary trauma and increase confidence in the system, potentially leading to more survivors reporting. This is not a change to the nature of the adversarial system – this is about understanding processes, reducing re-traumatisation, providing better access to rights which already exist and giving professional advice to the most vulnerable victims of crime.

'I feel extremely mislead, and left with no sense of direction. I don't feel like victims are well prepared for the length of time it takes to go through a trial, being blamed and shamed by defence. We were not educated on anything about floating trials, moved preliminary hearings, the intimidation of court. Victims do not get enough warning about the process they are about to endure; I wouldn't wish anyone to go through the awful experience I did. It's left me with far worse trauma than what it did before I had gone through court.' (A survivor commenting on ILA)

'Having access to legal representation would have helped me, I feel like he had all of these people he was paying to help him and I couldn't have any of that, I didn't understand so much of what was going on and although my worker was so helpful it would have been good to have the same rights as him.' (A survivor)

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

We support a pilot of single judge trials with no jury. We find these the proposals for this in the Scottish Government's policy memorandum to be thorough and convincing and agree that –

'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 only meaningful way to properly investigate the impact of making such a significant change to the current system is to run the pilot scheme.

In Scotland, conviction rates for rape are the lowest of any crime type. For cases that reach trial the conviction rate is around 51% compared to 91% for all other crimes. Most cases never make it as far as court: in 2021/22 there were 2,298 rape and attempted rapes reported to the police, but only 152 prosecutions and 78 convictions.

There are serious concerns about the ability of a jury to properly determine a trial involving rape or sexual violence. There is sound research that juries are overly affected by the concept of rape myths. Fiona Leverick's research demonstrates overwhelming evidence that rape myths impact jury decision making. These myths related to the effect of alcohol, length of time in reporting and assumptions about how 'real' rape victims should present, despite evidence to the contrary. Research also alluded to the fact that there is a real perception of jury members that 'false allegations are routine' (reported in more than half of the cases) and that delay in reporting is indicative of a false allegation. Meaningful and in-depth research has concluded that

the instance of genuine ‘false’ allegations sits somewhere around 3% of all cases reported. Rape myths can also have a basis in racism or involve a bias against someone’s sexual orientation or gender identity. There can also be misunderstandings about how people with disabilities are affected by sexual violence.

‘Standing in that witness box reliving my experiences, sharing it with a room full of strangers felt so intimidating- I felt like I was on trial, that I was the one who had done something wrong. Knowing that these strangers now know such personal and intimate details of my life is very strange to me.’ (A survivor)

‘I was terrified of the jury. I wondered, “who are these people?”, “what are they capable of?” and “how much do they understand about sexual violence?’ (A survivor)

‘The jurors don’t stand a chance in making an educated decision because they are so full of prejudice and societal behaviours that completely override their influences. Society tells you this is what a rape victim should look like, this is how a rape should happen, and anything that’s different from that definitely needs scrutiny and definitely needs doubt…it’s not their fault, it’s about the system that they are in.’ (A survivor)

There is also evidence that juries do not understand complicated legal rules. This was demonstrated in the mock jury research conducted in Scotland and published in 2019 – this found inconsistent and incorrect views on the meaning of ‘not proven’ and there were issues around understanding of concepts like the ‘burden of proof’ or special defences.

Research in New Zealand found that defence counsel would opt for a jury ‘nine times out of ten’ and the main reason for this was that, when it came down to credibility of the complainer it was easier to persuade a jury to entertain doubt.

Many countries do not use juries at all to decide cases (including Norway, Germany, Netherlands, Turkey and Italy). Jury free trials are not a breach of the right to a fair trial under Article 6 of the ECHR. Some positive outcomes were seen in a single judge trial pilot in New Zealand where it did appear that complainers were less negatively impacted, and the admission of irrelevant evidence was reduced. The sample size was too small to draw any substantive conclusions.

The Lady Dorrian review discussed several benefits that could result from single judge trials: improved complainer experience, mitigating the impact of rape myths, more focused questioning, the provision of a written verdict and saving court time and expense.

A written verdict could be a very positive development for complainers. A judge would be required to give reasons for a decision. Some survivors describe the lack of any explanation for a jury’s decision as distressing because it means they are never able to understand what happened. The written judgments from the three civil rape cases which have taken place over the past decade are positive examples of the benefit of reasoned decisions being given in writing.

One judge quoted in the report from Lady Dorrian’s review commented:

‘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. Every year I preside over several rape trials of this kind in which I would have no difficulty on the evidence in being satisfied beyond reasonable doubt of the guilt of the accused only to see the jury return a verdict of acquittal, usually not proven’.

Survivor Voices

Survivors we consulted were, in the most part, favourable to the concept of judge led trials. Concerns were raised about the demographic of the majority of judges but compared to the effects of a jury it was considered a better option and worthy of the pilot scheme. There are also concerns expressed by some Rape Crisis Centres about their experiences of supporting survivors in cases with unsympathetic and unreceptive judges. There are concerns about the reliance on such a small number of people who hold a lot of power.

Issues regarding the diversity of judges should be addressed by training and recruitment practices. Judges are legally trained in a way that juries are not. They are trained to evaluate evidence and are less likely to be distracted by irrelevant or collateral issues. It is also much easier to educate judges, if needed, on the falsity of rape myths as they are a small body of people who can engage in interactive training sessions.

While concerns have been raised by survivors, compared to the effects of a jury it was considered a better option and worthy of a pilot scheme.

‘It felt like a dramatic play where my actions could affect the jury.’ (Miss M, survivor)

Survivors described feeling ‘watched’ by the jury and feeling that everything had to be a performance for them. They were warned about how things might look to the jury and what they might think of them. This heightened anxiety immensely.

There were concerns that judges may hold biases and views that would impact their verdict. One survivor felt that the judge was normalising what had happened to her throughout the trial and showed favour towards the accused. There were concerns that even with trauma-informed training, judges may still hold biased views against survivors. Survivors also raised concerns over the lack of racial diversity among the judiciary and the potential for racist attitudes and biases to lead to unfair trials for both accused persons and complainers of colour. There were also concerns about judge led trials leading to a higher rate of appeals from perpetrators.

However, survivors also felt that the current jury system was not working for them. They felt juries weren’t informed enough about how trauma impacts survivors and that it was intimidating to give evidence in front of so many people.

‘I would have preferred to have had the jury removed when I gave evidence. I was terrified of the jury.’ (A survivor)

‘I am in two minds about the idea of removing juries from sexual cases. On one hand the comfort of knowing that more than one person is getting to look at the evidence…and judgment can’t be made until all parties agree. I feel more time is on hand with this as the jury do not come back into court until a decision has been reached, and this is left to however long it takes, whereas you may get individuals feeling like if its left to a judge alone it may be a rushed decision due to busy schedule. I feel like their needs to be so much in-depth information of the reason why this has been considered to allow individuals to have a better understanding.’ (A survivor)

‘I think removing the jury would be a massive step forward in the right direction as often there is too much bias in the jury. In my case, for example, I had a jury of 15 which composed of a small minority of females (around 3) the rest were male and of the older generation. I know this sounds stereotypical, but I think it does play a part.’ (A survivor)

‘My greatest trepidation before my case reached its conclusion was that I would be forced to relive some of the most harmful experiences of my life for people who were untrained or ill-equipped or too into victim blaming culture to recognise the truth when they heard it.’ (A survivor)

‘To be honest, I found it quite bizarre that there were people in that room who have studied and trained to get to the position they are now in as lawyers, solicitors and judges however the verdict is decided by the general public that just doesn’t make sense to me.’ (A survivor)

‘Sexual violence is not like any other crime therefore we should not prosecute it like any other crime. We need recognise the reasons behind the low conviction rates and that although we have come so far, we are still part of a society where rape myths are believed, where misogyny is rife, where sexual violence is trivialised and where we do not treat victims of trauma with the kindness and respect that they deserve.’ (A Rape Crisis Centre)

‘The single judge pilot could see a lot of positive developments. Firstly, it would ensure that an explanation is given on decisions made. Survivors are often left asking why, even after a guilty verdict. Secondly, sexual offences law is very complex and often juries are fully informed or don’t fully understand the law, Moorov, corroboration, not proven, etc. It would decrease the chances of decisions being made based on rape myths and personal bias. It would also ensure that verdicts are given with a legal understanding; judges know what the law is while juries don’t. And finally, we’ve had negative experiences such as jury members laughing while the survivor was giving evidence, and these negative experiences could be avoided.’ (A Rape Crisis Centre)

‘My attacker was found not guilty and I felt like the jury’s judgement of me had a lot to do with this. I know I did not come across as upset I came across as angry because I had to stop giving evidence lots of times because I was so angry and frustrated at what lies his lawyer was trying to say. I was frustrated that my case had already been part heard 18 months previously and had been rescheduled 3 times. It was 4 years since I reported it.’ (A survivor)

Extract from submission from Scottish Women's Aid

What are your views on Part 5 of the Bill which establishes a Sexual Offences Court? (Sections 37- 62)

Section 37- Sexual offence Court

SWA supports the establishment of this court, noting the comments in Lady Dorrian's Review, Chapter 3 (page 48, at paragraph 3.13), setting out the principal arguments in support of specialism and the other, compelling reasons for establishing this court. We would also refer to the terms of the RCS Briefing[1] on the issue.

Lady Dorrian particularly noted the role of the judiciary in delivering a better experience for complainers in sexual offence cases. We also note that such a court would better encourage the development of systems, practices and policies through a "trauma-informed lens" to the benefit of, not only complainers in safeguarding their welfare, but also that of judiciary, court staff and specialist practitioners.

Section 37- Jurisdiction - Sexual Offences

We note that sexual offences under this Part of the Act are set out in Schedule 3 and that paragraph 16 of Schedule 3, includes an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 (abusive behaviour towards partner or ex-partner) "where it is apparent from the indictment that there was a substantial sexual element present in the alleged commission of the offence. "

Section 37(3), as explained in Paragraph 11 of the Explanatory Notes, "... allows the Court to continue to try offences other than sexual offences even if the sexual offence which was originally included on the indictment is removed during the course of the trial, as long as it was still on the indictment at the time the trial diet started. This ensures that offences can be tried together rather than split across different courts and proceedings, and removes the risk of a trial being disrupted, and proceedings having to be transferred to a different court, if a sexual offence is removed. "

This means that solemn cases involving rape and sexual assault as part of the course of conduct as domestic abuse could be tried by this new court and could continue even where the sexual offence was removed, which could have implications for complainers and witnesses, as noted below.

Section 40 - Appointment of Judges of the Sexual Offences Court

This section provides that such a person can only be appointed by the Lord Justice General if they have completed "an approved course of training on trauma-informed practice in sexual offence cases and the Lord Justice General considers the person has the skills and experiences necessary to fill the office."

We are particularly pleased to see this commitment. Noting that sexual offences can, and do, form part of the course of conduct offence under section 1 of the Domestic

[1] https://www.rapecrisisscotland.org.uk/resources/Specialist-Sexual-Offences-Court---Briefing.pdf

Abuse (Scotland) Act 2018, it would be helpful if this training was extended to include domestic abuse and gender-based abuse generally, therefore encompassing stalking, commercial sexual exploitation, honour-based abuse.

We also hope that this will develop into a more formalised programme of training for the judiciary generally in relation to trauma-based practice in domestic abuse related cases under both criminal and civil law.

Section 47 – Rights of Audience: Solicitors

This provides that a solicitor can have the right to an audience in the Sexual Offences Court, only if they have completed a course of training on trauma-informed practice which has been approved by the Lord Justice General, with The Law Society of Scotland being required to keep and publish a record of solicitors who have rights of audience in the Sexual Offences Court in accordance with the section. SWA support this as a positive development and, tying into our comments in section 40 above on training requirements, this should be expanded to cover domestic abuse and the various gender-based offences referred to above. In particular, it would be very helpful for such a requirement to be made obligatory for legal professionals practicing in the civil and criminal courts in cases involving domestic abuse.

Section 48 – Rights of Audience: Advocates

SWA supports this section which essentially replicates the above training requirements for members of the Faculty of Advocates and we would reiterate our comments in section 47 in relation to training on gender-based violence generally, with specific reference to domestic abuse in the civil and criminal courts.

Section 49 – Statement of Training Requirement for Prosecutors

Again, SWA supports the requirement placed on the Lord Advocate to publish a statement setting out what, if any, training requirement in respect of trauma-informed practice will apply to prosecutors who will appear in the Sexual Offences Court on behalf of the Crown. Again, carrying on the discussion above, it would be helpful to have such a statement in relation to domestic abuse offences.

Section 56- prohibition on personal conduct of defence

SWA supports the intention of this section that an accused in the Sexual Offences Court may not conduct their own case at a hearing if a witness will be giving evidence at that hearing, requiring to instruct a solicitor to conduct their case and that the Court has powers to appoint a solicitor, as required.

Section 57 - Vulnerable Witnesses

SWA support that all complainers in the Sexual Offences Court against whom a sexual offence is alleged to have been committed are automatically deemed to be vulnerable witnesses.

There is a possible issue as set out the Explanatory Notes, paragraph 149 on page 29 in relation to other vulnerable witnesses appearing in the court –

- *"Section 57 modifies section 271 of the 1995 Act in respect of its application to proceedings in the Sexual Offences Court. Section 271 makes provision for certain witnesses in criminal proceedings to be treated as vulnerable, and sections 271A to 271M provide for special measures which can be used in relation to those vulnerable witnesses in the course of proceedings, to better enable them to give evidence and to protect them from certain risks which might arise from their giving evidence.*
- *Section 57 amends section 271(1)(c) of the 1995 Act to the effect that, in the Sexual Offences Court, all complainers against whom a sexual offence is alleged to have been committed are automatically deemed to be vulnerable witnesses, and so the special measures set out in the 1995 Act can be applied to them in accordance with sections 271A to 271M.*
- *A complainer in the Sexual Offences Court against whom an offence which is not a sexual offence is alleged to have been committed (for example, where a person is charged with both a sexual offence and assault on the same indictment, the complainer in respect of the assault) is not automatically deemed to be a vulnerable witness. However, they might fall to be treated as a vulnerable witness by virtue of one of the other conditions set out in section 271 of the 1995 Act.*

It would be expected that where the case involved domestic abuse in this situation, that the complainer would be treated as a "deemed vulnerable witness" under section 271 of the Criminal Procedure (Scotland) Act 1995 Act but would welcome the Scottish Government's reassurance of this.

There is the further issue that complainers in cases outwith those specified in section 271 may not fall to be considered vulnerable witnesses and, given the stress of appearing in this court under solemn proceedings, in the interests of trauma-based practice, any complainer appearing in the Sexual Offences court should be considered vulnerable and eligible for at least standard special measures, using the provisions under sections 59, 60 and 61 where appropriate.

Section 59 - Pre-recording of Evidence
Section 60 - Taking of Evidence by a Commissioner
Section 61 - Giving Evidence in the Form of a Prior Statement
SWA strongly supports the use of these measures.

Section 62 - Sentencing Power of the Sexual Offences Court
SWA strongly supports this section.

What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims? (Sections 63)

Section 63 – sexual offences cases: anonymity and restriction on publications

SWA supports the introduction of section 63, inserting new sections 106C to 106H, into the Criminal Justice (Scotland) Act 2016. It is positive, in particular that:

- There is to be an automatic statutory right of anonymity, which persists throughout the lifetime of the victim, automatically expiring upon death, for victims of a qualifying offence listed in new section 106C (5).
- Protection will be available from the moment a relevant offence is committed and that, as set out on paragraph 375, page 77 of the Policy Memorandum… "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."
- The victim may publish this information themselves and/or they are also able to consent to the publication of the information by another, both subject to the exception of information that would lead to the identification of another victim of a relevant offence.

New Section 106D – Power to Dispense with Restriction; Child Victims

We note that while children may "go public" themselves in terms of publishing information about themselves including on social media, information about a child victim of a sexual offence who was under 18 years of age, cannot be published by a third party and that this would constitute an offence under section 106F, even where the child victim purports to give consent. However, we are concerned that 106D also allows a Sheriff, on an application by a third party who wishes to publish information relating to such a child victim, to dispense with the restriction, even though the child is given the opportunity to "...make representations to the sheriff" but that the child victim can withdraw consent to publication by giving the applicant written notice before the information is published.

If this was to happen , it would have to be in line with UNCRC principles, namely that setting aside anonymity was in best interests of the child, meaning a process of assessing these matters would have to be put in place, considering whether the child gave full and free consent in relation to their age, capacity and any vulnerabilities and whether the publisher has misled/exploited/ exerted any undue influence, of any kind, over the child. This could be added into section 106D(4)(a).

However, it is hard to see how it would ever be considered in a child's best interests to be publicly named as a victim of sexual violence when we know that information will be available `18 online more or less permanently, even taking the availability of the "Right to Be Forgotten" application process into account.

Note that this does not restrict the ability of the child who is a victim of a sexual offence, or a support organisation on behalf of the child, from publishing anonymous material about their experiences of, say, the criminal justice system or child contact procedures, as long as the material does not identify the child or could lead to their identification.

New Section 106F - offences and defences

106F (3) - provides that third party publication is prohibited unless the third party has written consent of the victim, aged 18 or over, was given. As we noted in our response to the consultation, there may be circumstances where it may be unclear whether a complainer has, in fact, consented to waive their right to anonymity and it is not clear what protective procedures (that respect women's agency) might be needed to ascertain that waivers are not a product of coercion, a possible issue in relation to cases where the rape has occurred in the context of domestic abuse; ensuring women have a clear understanding of the implications of waiving anonymity in the media and protections for women who do so.

In relation to third party defences: -

- section 106(F)(4) (b) provides that a person charged with an offence under this section has a defence if it is established that "…the information published was in the public domain (having already been published by the person to whom the information relates **or otherwise**),"

It is not clear how a third party would satisfy themselves that this information was legally and legitimately published by another person who is not the victim, so clarity is needed on this point, which will likely also require the publication of guidance on the matter.

- *(b)"where the information was in the public domain as a result of it being published by a person other than the person to whom it relates, there was no reason for the person charged to believe that the conditions mentioned in subsection (3) were not met in relation to that prior publication.*"

It is entirely possible that abusers or stalkers, or their families, or other third parties acting on their behalf, may maliciously publish information about the victim that the victim is unaware of. Again, clarification is needed on the steps is it envisaged that third party publishers must take and evidence in this situation and guidance will be needed.

- 106(F)(5) states *"A person charged with an offence under this section has a defence if it is established that they were not aware, and neither suspected nor had reason to suspect, that the publication included relevant information."*

Again, what steps are envisaged that third party publishers must take to evidence in this situation and guidance will be needed.

- 106(F)(7) states *"For the purposes of subsections (2) and (3)(a)(ii), that a person was at least 18 years of age is established only if the person charged with the offence took reasonable steps to establish the person's age."*

Again, what steps are envisaged that third party publishers must take to evidence in this situation and guidance will be needed?

8. What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers? (Section 64)

Section 64 - Applications to Admit Certain Evidence Relating to Sexual Offences: Rights of Complainers

SWA supports the introduction of this section, in pursuance of the recommendation made in Lady Dorrian's Review and long campaigning by RCS. Currently, the complainer has no right to oppose or make representations to the court in relation to applications made for the purposes of section 275(1).

This section will allow complainers to participate effectively, with automatic entitlement to fully publicly funded ILR, on a non-income assessed basis, in relation to applications under section 275 and allows their legal representative to make representations to the court.[2]

We do note a certain contradiction in procedure that requires clarification. On one hand, new subsection 275(4A) indicates that the prosecutor must, as soon as reasonably practicable after the 275 application is made, make certain notifications to the complainer and their legal representative, including a copy of the evidence but then requires that they must apply to the court for authorisation to provide that evidence, under (4C). The court can refuse this application under (4D) or impose conditions on the disclosure of the evidence, which seems to defeat the purpose of the section.

"(4D) On an application under subsection (4C)(a), the court may, after giving the prosecutor, the accused and the complainer's legal representative an opportunity to make representations—

(a) refuse the application,
(a) authorise the sending of the evidence in the form, and subject to any limitations, the court thinks is in the interests of justice,

impose conditions on the disclosure of the evidence by the complainer's legal representative to the complainer or any other person."

9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury? (Sections 65 and 66)

Sections 65 & 66– Pilot of single judge rape trials SWA was a joint signatory in the 2020 letter to the Scottish Parliament seeking emergency use of single judge trials to end the COVID backlog of solemn cases awaiting prosecution. We supported the view advanced by RCS in their CEO Briefing of 2020 on the same issue[3] which has been expanded upon and clarified in their most recent position statement[4]

We also supported the consideration on removing juries and introducing single judge trials for serious sexual offences for rape cases, in terms of the arguments in favour of this position set out in Lady Dorrian's Review, namely –

• an approach which deliberately targets at any prejudices or rape myths
• a more focused consideration of the evidence and questioning,
• the benefit of a judge providing a written verdict

[2] 1666867844_Beyond-Independent-Legal-Representation.pdf (rapecrisisscotland.org.uk)
[3] https://archive2021.parliament.scot/S5_JusticeCommitee/Inquiries/20200420_VictimsOrganisationstoMSPs(1).pdf
[4] Why we support single judge trials | Rape Crisis Scotland

• the potential to make the proceedings more efficient, thus saving court time and expense.

carefully noting the arguments against, also set out in the paper, on pages 91 and 92 and the Scottish Government research[5]

These proposals have the potential to improve the experiences of rape survivors engaging with the justice system, as the process-generated trauma caused by going to court has a significant impact on them. Therefore, we support the proposal in the Bill that certain trials on indictment for rape or attempted rape may, for a period specified in the regulations, be conducted without a jury. We are aware that, as the consultation paper and Lady Dorrian's Review state, judges themselves are not immune to prejudice or unconscious bias and therefore safeguards will be necessary to mitigate concerns. It is therefore supportive that before making any regulations Scottish Ministers must consult the Lord Justice General, the Lord Advocate, representatives of the legal profession, the Scottish Courts and Tribunals Service, victim support organisations, and any other person Ministers consider appropriate.

Extract from submission from Victim Support Scotland

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

It is the opinion of VSS that there requires to be a meaningful change in the way sexual offence-related cases are dealt with in the criminal justice system. We have championed a more trauma-informed approach with all victims and witnesses in all courts, but a trauma-informed approach is required in sexual offence type cases.

These cases are both sensitive and at times complex, requiring a specialist approach to be taken. The investigation of the types of cases by both the police and COPFS have become specialist areas of business.

We agree with Lady Dorrian's Review (recommendation 2)[6] that there should be specialist courts in place with an equally specialist group of lawyers on the defence and prosecution as well as a judge who has the knowledge and experience to oversee such courts.

A trauma-informed approach should be adopted at all stages of the court process and everyone connected with the new court should receive training in trauma-informed practices particularly relating to victims of sexual abuse.

We are pleased to note that Section 40 provides that a Judge of the sexual offences court can only be appointed by the Lord Justice General if they have completed "an approved course of training on trauma-informed practice in sexual offence cases and the Lord Justice General considers the person has the skills and experiences necessary to fill the office."

[5] https://www.gov.scot/publications/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/documents/
[6] Improving the Management of Sexual Offence Cases – Scottish Courts and Tribunal Service

We are also particularly supportive of provisions within the Bill that ensure all complainers in the Sexual Offences Court against whom a sexual offence is alleged to have been committed are automatically deemed to be vulnerable witnesses.

We also agree that more use should be made of pre-recorded evidence and ground rules hearings to ensure the experiences of the court process for victims of sexual crime can be improved.

We have received the following feedback from one of our service users on a sexual offences court to evidence our position:

"My case was a sexual offence so going to the specialist sexual offences court would reassure me. I would hope that the lawyers defence and prosecution would be more trauma informed and this would make the experience less daunting."

Individual who had experienced sexual assault

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

Victim Support Scotland are supportive of provisions within the Bill which grant survivors of sexual violence and rape the legal right to lifelong anonymity.

As noted in the Policy Memorandum, Section 63 of the Bill will bring Scotland in line with the rest of the UK and other Western countries by providing the right to anonymity for adult complainers in sexual offence cases.

Recommendation 3 of Lady Dorrian's Review into the management of sexual offence cases states: "*legislation should be introduced granting anonymity to those complaining of rape or other sexual offences along the lines of the Sexual Offences (Amendment) Act 1992.*" VSS are therefore supportive of the Scottish Government's provisions to implement this recommendation.

The Policy Memorandum highlights that these provisions have an important protective function in that it: "*helps to minimise the retraumatisation 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.*"

People affected by crime have highlighted to us the importance of anonymity in supporting them to feel safe:

"Default anonymity should be the case as it is not appropriate or relevant to know complainer's name. There is already the horror of it all, so this is one less additional thing… As a victim of a sexual offence, I felt really unsafe from when I reported it. Knowing that my name was safe was a part of it. If it had been leaked it would have made the process harder."

Individual who had experienced sexual assault

We are supportive of the maximum privacy approach which applies the right to privacy from the moment the offence occurs. We have previously noted within the consultation that rape is an offence which is highly underreported. As highlighted by Rape Crisis

Scotland, only just over half of survivors (52.05%) seeking support from Rape Crisis Centres in 2021-22 in Scotland had reported to the police.1 It is vital that all victims of sexual offences have the right to anonymity, regardless of whether they have reported it to the police. This approach accounts for the many barriers that victims of sexual offences face regarding reporting to the police.

Regarding the types of offences covered by provisions within the Bill, we would seek to see this expanded further. People affected by crime have told VSS that they would like to see domestic abuse and stalking offences included in anonymity provisions, as proposed in the initial consultation for the Bill.

"An automatic right of anonymity should apply in sexual offence cases and in domestic abuse and stalking too. By their very nature, perpetrators (of these crimes) will go after victims again and again. Should go on for in perpetuity."

Person who experienced stalking.

7.1 Power to dispense with restriction: child victims

Persons under the age of 18 in Scotland are considered children. Victim Support Scotland understand that there will be people affected within this age bracket who will be in a position to consent to the publication of their story.

Autonomy can be vital for victims, and we understand that for some, the ability to tell their story to a third-party publisher will be an important stage in their journey, including young people affected by crime.

However, the vulnerabilities and capacity of a child to consent will depend on the individual. As such we would seek reassurance that any decision by a Sheriff or Judge to waive anonymity is based on the best interest of the child and an assessment of their ability to give informed consent.

7.2 Power to dispense with restriction: conviction for relevant offence

As noted above, autonomy and choice can be vital for people affected by crime. We have recently seen survivors choosing to waive their right to anonymity to tell their story and campaign for a better justice system.

Regardless of why an individual may choose to waive their right to anonymity, the ability to choose is essential.

7.3 End of Anonymity

VSS would recommend the extension of anonymity to exist in perpetuity, rather than ending upon the point of death as outlined in the Bill. Families bereaved by crime have told VSS of the distress and trauma they have experienced of repeatedly seeing their family member's details in the media and press following their death.

Families have seen reports regarding their family member's death on social media and seen the image of their family member printed next to the person convicted of their murder in the press. This is understandably traumatising and without the right to

anonymity, the family are unable to take action to defend their family member's privacy.

Further, VSS highlights the impact on surviving family members, both adults and children, when graphic details are often widely available following a simple online search.

People affected by crime have also told VSS that they would not wish for their anonymity to be lifted following their death and their identity to then be revealed.

"There should be no end point for anonymity for the complainer. Should be anonymous from the start and no end point, for the person's dignity. Even if I was to die, or another complainer to die, the family would have to deal with it (if anonymity ended upon death)."

Person who had experienced sexual assault

As such, VSS would recommend anonymity in perpetuity, with a right for families to waive this right should they choose to share their family member's story.

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

Victim Support Scotland support the provisions within the Bill which outline the right to independent legal representation (ILR) for survivors when applications are made under s275 to lead sexual history or character evidence in sexual offence cases.

Victims of sexual crime are at a distinct disadvantage in any application to introduce evidence relating to their sexual history or character. Whilst we appreciate the Crown can oppose such applications, their role in the criminal justice system does not allow them to objectively act for the victim of crime. As we have previously noted the Equality and Human Rights Commission Report, The use of sexual history and bad character evidence in Scottish sexual offences trials,[7] found that the little evidence available on the operation of Rape Shield laws suggested that "prosecutors rarely challenge the introduction of sexual history and bad character evidence.", We believe that the lack of access to independent legal advice effectively means victims' voices are not heard or represented during an application process.

The court process can be a traumatic process for victims of crime. The thought of having their sexual history or character examined by a court without their voice and interest being heard by the court would, without doubt, be an even more traumatic experience. We believe that victims of sexual crime must have access to independent legal representation, funded by Legal Aid, for matters relating to sexual history and character evidence, and access to medical records.

[7] The use of sexual history and bad character evidence in Scottish sexual offences trials – The Equality and Human Rights Commission Scotland.

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

Victim Support Scotland strongly support the pilot of single judge rape trials. Our organisation does not believe that the current system of trial by jury is suitable for the prosecution of serious sexual offence.

Our opinion is supported by the significant issues identified in the large-scale Mock Jury Research completed published in 2019[8]. This study identified numerous issues with jury understanding of legal issues including:

- understanding of legal issues, including their understanding of the meaning and effects of the not proven verdict.
- several potential misunderstandings on the part of individual jurors arose relatively frequently across the mock juries (e.g. a belief that the accused should prove his innocence),
- a belief that the accused can be retried following a not proven verdict but not a not guilty verdict, and
- misunderstanding of the fact that self-defence is a legitimate defence to an assault charge, even when the fact the accused inflicted the injury is not in dispute)

The study also identified that *"juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of 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."*[9]

In 2020, VSS and several of our victim support organisation partners wrote to MSPs to call on the Scottish Government to reconsider jury-less trials to address the court backlog cause by the Coronavirus pandemic.[10] As the court backlog continues to cause significant delays for victims, we believe the pilot could go some way to addressing this issue for survivors of rape and attempted rape.

There are examples of jury-less trials already taking place in Scottish courts for serious offences. Domestic abuse cases are mostly dealt with through summary proceedings that do not require juries. This has allowed thousands of serious cases to be heard in Scotland without a jury present.

There is also a precedent for the use of judge-only trials in serious cases in emergency situations with the establishment of 'Diplock courts' in Northern Ireland for political and terrorism-related cases[11]. The Criminal Justice Act 2003, applicable throughout the UK, also allows jury-less trials in complex fraud cases and where there is a risk of jury tampering.

[8] Scottish jury research: findings from a mock jury study – The Scottish Government.
[9] Scottish jury research: findings from a mock jury study - gov.scot (www.gov.scot)
[10] Open Letter to MSPs from Victims Organisations – Victim Support Scotland
[11] Use of non-jury trial system to continue in NI – BBC News

The pilot of single judge rape trials has the potential to transform the experiences of survivors in the criminal justice system. We would strongly urge the Scottish Government to standby this commitment and listen to the voices of campaigners and survivors in Scotland calling for change.