

Stage 1 Briefing

Victims, Witnesses and Justice Reform (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Victims, Witnesses and Justice Reform (Scotland) Bill¹ (the Bill) was introduced by the Scottish Government into the Scottish Parliament on 25 April 2023. The Bill's introduction followed two previous consultations on criminal law reform by the Scottish Government in December 2021² and May 2022³. We previously submitted written evidence on the bill to the Criminal Justice Committee of the Scottish Parliament⁴ and provided oral evidence as part of the Committee's stage 1 consideration of the Bill on 25 October 2023⁵, 13 December 2023⁶, and 24 January 2024⁷. The Criminal Justice Committee's Stage 1 Report on the Victims, Witnesses and Justice Reform (Scotland) Bill (the Stage 1 Report) was published on 29 March 2024. The Cabinet Secretary for Justice and Home Affairs wrote to the Criminal Justice Committee with her response to the recommendations in the Stage 1 Report on 16 April 2024⁸.

We hosted two roundtable events with key stakeholders to discuss Parts 4, 5 and 6 of the Bill. On 8 March 2024, we listened to views from representatives of the legal profession, working both in defence and for the Crown Office and Procurator Fiscal Service. We also had participants from academia and organisations that represent the interest of victims of sexual offences and advocate for the promotion of human rights. Some members of the Criminal Justice Committee attended the roundtable event. Lord Bonomy facilitated this first discussion.

On 10 April 2024, we hosted our second roundtable focused on discussing non-legislative measures to improve the criminal justice system and the single-judge

¹ [Victims, Witnesses and Justice Reform \(Scotland\) Bill – Scottish Parliament | Scottish Parliament Website.](#)

² [Consultation on the Not Proven Verdict and Related Reforms \(Dec 2021\) | Scottish Government Website.](#)

³ [Improving victims' experiences of the justice system: consultation \(May 2022\) | Scottish Government Website.](#)

⁴ [Scottish Parliament Criminal Justice Committee Call for Written Evidence – Law Society of Scotland | Law Society of Scotland Website.](#)

⁵ [Criminal Justice Committee | Scottish Parliament TV \(25 October 2023\).](#)

⁶ [Criminal Justice Committee | Scottish Parliament TV \(13 December 2023\).](#)

⁷ [Criminal Justice Committee | Scottish Parliament TV \(24 January 2024\).](#)

⁸ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#)



pilot proposed in Part 6 of the Bill. We had a similar range of participants as at the first roundtable. Baroness Hale of Richmond provided relevant conclusions after the discussion.

We welcome the opportunity to consider and provide comment for the benefit of MSPs ahead the Stage 1 debate scheduled to take place in the Scottish Parliament on 23 April 2024.

Executive summary

The Bill introduces structural changes to the criminal justice system focused on improving experiences of victims and complainers of sexual offences. We agree with the view of some of the Criminal Justice Committee members who consider that some of the proposals in the Bill may produce unintended consequences to the criminal justice system and, for those proposals, more empirical evidence and scrutiny is required⁹.

Part 1 – Victims and Witnesses Commissioner for Scotland

Part 1 focuses on the creation and operation of the Victims and Witnesses Commissioner for Scotland.

We welcome the establishment of the Commissioner. We are of the view that some consideration should be given to the resources that the Commissioner will require, the delimitation of his or her functions and the Children and Young People’s Commissioner for Scotland, and the enforcement mechanisms that the Commissioner will have to assure cooperation for guaranteeing the rights of victims and complainers.

Part 2 – Trauma-Informed Practice

Part 2 defines and recognises the principle of trauma-informed practice in criminal and civil proceedings.

We support the introduction of the principle. However, we consider that the definition of trauma-informed practice should be more concrete to ensure consistent experiences between complainers. We would welcome more details on how the principle will operate in practice.

Part 3 – Special Measures in Civil Cases

Part 3 introduces special measures for vulnerable witnesses and prohibits the personal conduct of a case in defined situations. For dealing with those cases, the bill introduces a register of solicitors for cases in which self-representation is restricted.

⁹ [Stage 1 report, SP Paper 560](#), paragraph 1276.



We welcome the measures contained in Part 3. We call for more details on the operation of the new register of solicitors.

Part 4 – Criminal Juries and Verdicts

Part 4 abolishes the not proven verdict for solemn and summary cases. That means that the only two verdicts available will be guilty and not guilty. Furthermore, it changes the number of jurors from 15 to 12, states that when jurors die or are discharged the trial can continue with a minimum of 9 jurors, and change the simple majority requirement to convict for a qualified majority in the following terms:

- In juries of 11 or 12 jurors: 8 jurors must be in favour of a guilty verdict.
- In juries of 10 or 9 jurors: 7 jurors must be in favour of a guilty verdict.

We oppose the abolition of the not proven verdicts as it is a safeguard against wrongful convictions. We consider that if it is abolished, another safeguard should be introduced.

In our view, if the number of verdicts available and jurors is reduced, unanimity or close to unanimity should be required to convict. This is the formula used in comparable jurisdictions.

We are strongly convinced that the verdicts available, the number of jurors and the majorities required to convict are parts of the complex system of deliberation, and any alteration in each those parts will impact in the fairness of the trial.

Part 5 Sexual Offences Court

Part 5 creates a new Sexual Offences Court and states how it will be embedded in the criminal justice system.

We oppose to the creation of a new court for dealing with sexual offences. We are of the view that specialist courts as divisions of existing courts would have a better impact for the system.

We have strong concerns on the jurisdiction and competence of the Court. The competence of the Court is determined by the sexual offences definition, which can be amended by secondary legislation. We consider that the definition of sexual offence should be subject to parliamentary scrutiny. Additionally, we oppose the proposal to equate the sentencing powers between the Sexual Offences Court and the High Court of Justiciary. We have also strong concerns on the tenure of the Judges of the Sexual Offences Court. In our view, provisions in Part 5 can endanger judicial independence.

We noted that solicitors would have rights of audience in the Sexual Offences Court for offences different from rape and murder if they have completed an approved training in trauma-informed practice. We are very concerned on how this obligation will impact in the availability of defence solicitors that has been seriously affected by the unsustainability of the Legal Aid system. We anticipate



difficulties in appointing solicitors, particularly in rural areas, when self-representation is not permitted.

Part 6 – Sexual Offences Cases: Further reform

Part 6 introduces three important changes into the criminal justice system: first, the right to anonymity for victims of a list of offences; second, independent legal representation for applications under Section 275 of the Criminal Procedure (Scotland) Act 1995; third the implementation of a pilot of single judge for rape and attempted rape trials.

We welcome the legislative introduction of the right to anonymity for victims. However, we consider it should be perpetual.

We also welcome the introduction of independent legal representation for complainers in relation to Section 275 of the 1995 Act. We would appreciate more details on how it will work in practice regarding resources and the opportunities for making representations in the course of a trial.

We strongly oppose the implementation of single judge trials for rape and attempted rape. We are of the view that judges -as everyone- are subject of unconscious bias that could affect their decisions. Juries reduces that risk as they represent different sectors of society with their views and experiences. Additionally, the anonymity of jurors makes them less vulnerable to public and political pressure that could affect the deliberation process.

We consider that clear conviction rates are crucial, especially if they justify moving from jury trials in rape and attempted rape cases.

In the terms of the Bill, the accused will not be consulted for being part of the pilot. We strongly disagree with that approach.

We share the Criminal Justice Committee view that more detail is required about the implementation of this proposal.

Our Comments on the Bill

General remarks

We celebrate the initiative of the Scottish Government in introducing a Bill with the purpose of respond to the *need to improve experiences of victims and witnesses within Scotland's justice system, especially the victims of sexual crime*¹⁰. We acknowledge that the Bill introduces significant changes to the criminal justice system, some of them very controversial for the legal community.

As a matter of principle, we are of the view that the terminology has an impact on the presumption of innocence. We are concerned that the Bill uses the word

¹⁰ [Victims Witnesses and Justice Reform \(Scotland\) Bill, Policy Memorandum](#). Paragraph 5.



‘victim’ referring to complainers of an offence prior any conviction. In our view, this dismisses the presumption of innocence indicating that an allegation equates to guilt. We consider that the term ‘complainer’ should be used instead.

We note that the Bill contains some provisions related to vulnerable witnesses in the context of sexual offences. We welcome considering that people with vulnerabilities have special requirements when accessing to justice. However, we regret that the Bill did not provide any scope for improving the treatment of vulnerable accused persons. We are of the view that a review of this area is required.

Our Comments on individual Parts of the Bill

Part 1 – Victims and Witnesses Commissioner for Scotland (sections 1 to 23)

Part 1 establishes the creation of a new Commissioner that will be focused on the promotion and support of victims’ and witnesses’ rights and interest.

We support the establishment and the functions of the Victims and Witnesses Commissioner for Scotland. We agree that the Commissioner should not be involved in individual cases as this could affect the balance in a fair trial.

However, we have some concerns on the operation of this new Commissioner as defined in the bill. Firstly, we have identified that significant resources will be required to fulfil the Commissioner’s obligations. Secondly, we noted that there may be some duplication in the obligations of the Victims and Witnesses Commissioner and the Children and Young People’s Commissioner for Scotland (CYPCS). Thirdly, we noted that defence agents are not exempt for providing information to the new Commissioner while the Crown Office and Procurator Fiscal Service (COPFS) is. This, in our view, affects the principle of equality of arms. Fourthly, we consider that the Commissioner should have enforcement mechanisms to require criminal justice agencies to supply information and cooperate when required for assuring the rights of victims and witnesses.

We also have some concerns regarding the definition of victim for the purpose of the Commissioner’s scope. We are of the view that prior to a conviction, the person who has experienced a crime should be called the *complainer*. This should be reflected in the name and scope of the Commissioner’s work.

We note that the Criminal Justice Committee shared some of the concerns related to the costs associated with the establishment of the Commissioner¹¹, the potential overlap of function with the CYPCS¹², and the lack of enforcement mechanisms when the Commissioner requires information from criminal justice agencies¹³. We further note that the Cabinet Secretary for Justice and Home Affairs has reiterated the Scottish Government’s commitment to the establishment

¹¹ [Stage 1 report, SP Paper 560](#), paragraphs 159 to 162.

¹² *Ibid*, paragraph 167.

¹³ *Ibid*, paragraph 168.



of a Victims and Witness Commissioner¹⁴. We welcome the Scottish Government's commitment to exploring with the Children's Commissioner how the two roles can best work together for the interests of child victims and witnesses in Scotland¹⁵ and the Scottish Government's intention to bring forward an amendment at Stage 2 on enforcement measures¹⁶.

Part 2 – Trauma-Informed Practice (sections 24 to 29)

This part introduces the principle of trauma-informed practice into criminal and civil proceedings. Section 69 defines the principle of trauma informed practice indicating three pillars: first, the recognition that a person may have experienced a trauma; secondly, the understanding of its effect on that person; and thirdly the adaptation of the process and practices to the understanding of trauma effect with the purpose of avoiding or reducing the risk of further trauma.

We support the recognition and the definition of trauma-informed practice in statute. However, we have the following comments on its implementation in civil and criminal proceedings. We consider that the definition provided in section 69 is vague. This is an issue because the interpretation of the principle could vary between presiding judges. The Criminal Justice Committee recognises that the definition of trauma-informed practice should be strengthened following the Knowledge and Skills Framework created by the NHS Education for Scotland¹⁷. We note that the Scottish Government has indicated that it will keep the definition under active consideration¹⁸.

While sections 27 to 29 amends existing provisions in the Criminal Procedure (Scotland) Act 1995 and the Courts Reform (Scotland) Act 2014 to include trauma-informed practice, we consider that the provisions do not explain how this will operate in practice. We noted that the Criminal Justice Committee arrived at a similar conclusion¹⁹. We note that the Scottish Government has indicated that they will consider whether amendments should be brought forward at Stage 2 to strengthen this aspect of the Bill.²⁰

We are of the view that the implementation of trauma-informed practice in court procedures requires more than legislative change. For instance, improving judicial consistency, achieving effective communication between complainer and criminal justice agencies, and avoiding delay could significantly reduce the trauma that complainers experience when going to court.

¹⁴ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 1

¹⁵ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 2.

¹⁶ Ibid, page 5

¹⁷ Ibid, paragraph 417.

¹⁸ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 8.

¹⁹ Ibid, paragraph 419.

²⁰ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 9.

Part 3 – Special Measures in Civil Cases (sections 30 to 33)

Part 3 focuses on the implementation of new provisions for civil cases. Section 31 includes as a special measure for section 18 of the Vulnerable Witness (Scotland) Act 2004, the prohibition on personal conduct of a case in specific cases²¹ defined in section 4(5) of the Children (Scotland) Act 2020. Section 32 provides the Scottish Government with the facility to create a register of solicitors for cases in which self-representation is not permitted. Section 33 extends the availability of special measures in non-evidential hearings to civil cases generally.

We supported the measures of Part 3. Nevertheless, we consider that the provisions are not clear on how the register is going to operate in practice. The Bill does not provide further details on the administration of the register and how solicitors will be paid for this work. We consider that Scottish Government must consult with both the Law Society and the Faculty of Advocates before implementing the registration process.

We have some reservations on Section 32(4), which permits the Scottish Ministers to confer the duty of maintaining the register to another person and to provide remuneration for solicitors appointed to provide representation in cases in which the prohibition on personal conduct of a case operates. In our view, those provisions should not be discretionary but mandatory. It is crucial to define who will be responsible for the solicitor's payments, its operation and the maintenance of the register.

We broadly support the extension of special measures throughout the civil process.

We noted that the Criminal Justice Committee shared our concerns related to the resources required to implement the measures in Part 3²². In addition, the Committee called for more details in the implementation of the register of solicitors established in section 32 before stage 3²³.

Part 4 – Criminal Juries and Verdicts (sections 34 to 36)

Abolition of the not proven verdict:

Section 35 abolishes the not proven verdict in solemn trials, allowing the jury to deliver only a verdict of guilty or not guilty. Section 36 abolishes the not proven verdict in summary trials.

We oppose to the abolition of the not proven verdict. We have indicated that it constitutes an important variable in the balance of the criminal trial. We noted the comments made by the Criminal Justice Committee that indicated that *"it is unsatisfactory to have a verdict in a criminal trial which has not accepted legal*

²² Ibid, paragraph 487.

²³ Ibid, paragraph 490.



*definition*²⁴. However, when providing oral evidence to the Committee we indicated that the not proven verdict serves as a “*matter of emphasis*” and provides jurors with the possibility to express a verdict when they had doubts about the case²⁵.

The Criminal Justice Committee states that it is not clear on the relationship between the abolition of the not proven verdict and the requirement for changes to jury size and majority²⁶. In our view, the not proven verdict is a crucial safeguard against wrongful convictions and if it is abolished, another safeguard should take its place.

We disagree with the Committee’s view that the verdicts available are not clearly related to the size of the jury and the majority required to convict. We consider that all of those factors are interconnected parts of a complex system that assure fairness in the criminal trial.

Jury size and majorities

Section 34 reduces the number of jurors from 15 to 12. If a juror dies or is discharged, the trial can continue with at least 9 jurors. Section 35 indicates that the jury must deliver a verdict of guilty or not guilty. For reaching a guilty verdict, the bill contemplates a qualified majority of at least 8 jurors in favour when deciding 11 or 12 jurors, or at least 7 jurors in favour when decided by 10 or 9 jurors.

We note that there are reliable sources that suggest that 12 jurors are the optimal number for jury size²⁷. In addition, many comparable jurisdictions have 12 jurors in criminal trials. We understand the benefits of reducing the jury size to 12 such as it would increase the chances that fewer dominant jurors effectively contribute to deliberations.

We are of the view that, if we move to a 12-person jury and two available verdicts, the current requirement of simple majority will not reach the standard of proof beyond reasonable doubt. Comparable jurisdictions require unanimity or close to unanimity for arriving at a guilty verdict. We consider that the jury verdict should be seen as a collective decision rather than the result of counting votes.

We appreciate the worries related to hung juries and re-trials should the unanimity requirement be established for guilty verdicts. However, studies such as the one made by Professor Cheryl Thomas²⁸ in London showed that in comparable jurisdictions, such as England and Wales, the number of re-trials required as a result of hung juries is lower than one per cent.

²⁴ Ibid, paragraph 673.

²⁵ [Official report of the Criminal Justice Committee \(13 December 2023\)](#), page 2 and 3.

²⁶ [Stage 1 report, SP Paper 560](#), paragraph 687.

²⁷ [Scottish Jury Research: Findings From a Mock Jury Study \(2019\)](#).

²⁸ Thomas, C. *Juries, Rape and Sexual Offences in the Crown Court 2007-21*. [Available on 14 April 2024 here](#).

We are seriously concerned about the Criminal Justice Committee's conclusions on Part 4 of the Bill. We appreciate that the Committee is not able to support changes in jury sizes and majorities to convict due to lack of compelling evidence²⁹. Nevertheless, we consider that the number of verdicts available is part of the complex system of jury deliberations, and, if the Committee support the abolition of the not proven verdict, more consideration must be given to jury size and majority required to convict.

Part 5 – Sexual Offences Court (sections 37 to 62)

Part 5 of the Bill focuses on the creation of a new Sexual Offences Court. Section 37 indicates that the Court consists of the Lord Justice General, the Lord Justice Clerk and the Judges of the Sexual Offences Court.

We appreciate that the creation of a new court for dealing with sexual offences was part of Lady Dorrian's Review in Improving Management of Sexual Offence Cases. We noted that 4 members of the Criminal Justice Committee support the creation of the new court³⁰ while the 4 other members do not support the proposals as, in their view, *"a new specialist court will not in itself achieve a meaningful improvement to the experience of victims."*³¹

We share the concerns of the Committee members who consider that the new Sexual Offences Court will not achieve a significant improvement for the victim's experience within the criminal justice system. While we do not oppose specialisation, we found evidence that specialist courts as divisions of existing courts, rather than separate new courts, have provided improvements in terms of efficiency and effectiveness in the field of domestic abuse and commercial law.

Besides the general concern about the creation of a new court, we consider some of the Part 5 proposals problematic as indicated below:

Jurisdiction and competence

Section 39 indicates that the Sexual Offences Court has competence to try any sexual offence that is triable on indictment in any place of Scotland. It would include indictments with various charges of different natures but with at least one sexual offence. Section 39(6) allows Scottish Ministers to modify, by regulations, the definition of sexual offences and the list of sexual offences at Schedule 3.

We consider that the definition and list of sexual offences, if amended, should be by primary rather than secondary legislation. We are of the view that the definition of serious offences -as the ones discussed in this bill- should be subject to parliamentary scrutiny.

We noted that Judges of the Sexual Offences Court would be able to deal with charges of murder if the indictment has at least one sexual offence. This will mean

²⁹ [Stage 1 report, SP Paper 560](#), paragraph 690.

³⁰ *Ibid*, paragraph 893.

³¹ *Ibid*, paragraph 894.



that those Judges will have the same sentencing powers as the High Court, including the ability to impose a sentence of life imprisonment.

We share the Committee's view³² that Judges of the Sexual Offences Court should not try murder cases. Murder cases should be tried only in the High Court given the seriousness of the offence. We note that the Scottish Government has indicated that it will consider whether Stage 2 amendments on this point are appropriate³³.

We consider that having the possibility for the Sexual Offences Court to sit in any place of Scotland could impact positively on complainers, reducing the potential trauma that they experience when they need to travel long distances to appear at Court. However, we would welcome details on how it will operate in practice. We share Committee's concerns³⁴ about the resources that will be needed for the new court, especially if it can sit in 39 locations as mentioned in the evidence sessions.

Section 40 indicates the appointment process for the Judges of the Sexual Offences Court. Judges will be appointed by Lord Justice General if they meet three requirements: first, they should hold a relevant judicial office. Second, they should have completed an approved course on trauma-informed practice in sexual offences. Third, the Lord Justice General considers the person has the skills and experience necessary for the role.

Section 40(7) states that the Lord Justice General can remove a Judge of the Sexual Offences Court without reason.

We have strong concerns on the absolute discretion that the Bill provides to the Lord Justice General in the appointment and removal of the judges of the Sexual Offences Court. The bill does not indicate that reasons should be given for removing a judge. We are of the view that this provision can jeopardise judicial independence, particularly in the case that the single judge pilot outlined in section 65 comes into force.

We welcome the comments of some members of the Criminal Justice Committee that indicated that the provisions regarding the removal of judges of the new court could "*constitute interference with a judge's security of tenure, with knock-on implications in respect of the ECHR article 6 right to a hearing by an independent and impartial tribunal established by law*"³⁵.

We note, however, from the Scottish Government's response to the Stage 1 report that it is considering alternative mechanisms for removal.³⁶

³² Ibid, paragraph 883.

³³ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 19

³⁴ Ibid, paragraph 887.

³⁵ Ibid, paragraph 886.

³⁶ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 22.

We consider that the Bill should provide details on the trauma-informed course that Judges of the Sexual Offences Court should take. Especially, if the course will have the same content than the training that other actors of the criminal justice system are required to undertake.

Organisation of business

Section 44 indicates that the President of the Sexual Offences Court may prescribe the number of sittings in each place in which the court will operate and the dates and times in which the sittings will be held. Before making any order, the President of the Sexual Offences Court must consult the Lord Justice General and the Lord Advocate.

We consider that the Sheriff Principal should also be consulted as the Sexual Offences Court will have national jurisdiction.

Section 45 and 46 focus on the procedure for transfer cases to the Sexual Offences Court from the High Court of Justiciary or a sheriff court and vice versa. The transfer can be done by the court from which transfer is sought on application either by the prosecutor or jointly by the prosecutor and the accused. We are of the view that the accused should have the sole right to apply for a transfer.

Rights of audience

Sections 47 and 48 deal with the rights of audience of solicitors and advocates respectively. Regarding the rights of audience of solicitors, section 47(2) indicates that only solicitors with rights of audience in the High Court of Justiciary under section 25A of the Solicitors (Scotland) Act 1980 would be able to conduct a defence in the Sexual Offences Court when the indictment includes murder, rape, or both. For all other sexual offences, solicitors who do not have extended rights of audience can conduct defences only if they have completed approved training in trauma-informed practice for sexual offences. The requirement of the training is also applicable to solicitors advocates who want to appear before the new court.

We have strong concerns on how the obligation of undertaking trauma-informed practice training for sexual offences as a requirement for conducting a defence in the Sexual Offences Court will restrict the capacity of defence practitioners who are already heavily constrained by the unsustainability of legal aid.

We welcome that the Criminal Justice Committee supports the initiative of the Cabinet Secretary to include mechanisms to identify cases that will be heard in the new court and make them eligible for legal aid for solicitors advocates and advocates³⁷. Nevertheless, we still have strong concerns on whether the fundamental issue of legal aid funding will be addressed to assure that all accused persons in the new court will be able to have appropriate representation.

Section 56 prohibits personal conduct of defences in the course of proceedings in the Sexual Offences Court. In those terms, the Court may appoint a solicitor who

³⁷ Ibid, paragraph 879.



has rights of audience regarding section 47. We anticipate that in rural areas, the new court may find difficulties in appointing solicitors.

Administration and procedure

Section 52 indicates that the Clerk and the Depute Clerk of the Sexual Offences Court must have completed an approved course of training on trauma-informed practice in sexual offences cases approved by the Lord Justice General. We have some concerns in the resources that will be required for training clerks in rural areas where the Sexual Offences Court may infrequently sit.

Section 55(2) allows the Scottish Ministers to make further provisions for the procedure of the Sexual Offences Court. As we indicated earlier regarding the definition of sexual offences, we consider that the procedure of the new sexual offences court should be subject of parliamentary scrutiny and enacted by primary legislation.

Section 58 focuses on the procedure for vulnerable witness ground hearings in the sexual offences court. We have identified that in some cases, practitioners that have agreed a set of question need to rephrase them to assure that the vulnerable witness fully understands their meaning. We are of the view that ground hearings can be appropriate to ring fence the nature of questioning rather than agreeing specific questions. We note that vulnerabilities are not always obvious, and a trauma-informed approach requires that when identified, vulnerabilities are addressed as far as possible. Despite its resource implications, we consider that expert input is quite relevant to address properly vulnerabilities in ground hearings.

Sentencing powers

Section 62 indicates that the Sexual Offences Court has the same sentencing powers as the High Court of Justiciary. We have strong concerns that sheriffs appointed as Judges of the Sexual Offences Court following the procedure in Section 40 will have increased power in sentencing without having made an application to the Judicial Appointment Board for Scotland.

Part 6 – Sexual Offences Cases: Further Reform (sections 63 to 66)

Anonymity for victims

Section 63 makes it an offence to publish information relating to a person if that information is likely to lead to the identification of the person as being the victim of an offence listed at Section 106C(5) of the Criminal Justice (Scotland) Act 2016. The list of offences at Section 106C(5) of the 2016 Act is extensive, including offences of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, among others. The anonymity stops on the complainer's death.

We note the Scottish Government comments on the length of the right to anonymity and its relationship with privacy and data protection³⁸. However, we are of the view that complainers' anonymity should be perpetual in order to protect their dignity. Should someone wish to name complainers of sexual offences after their death, an application should be made to the court seeking for the court's approval to do so.

Independent legal representation for complainers

Section 64 introduces the possibility for complainers to obtain Independent Legal Representation (ILR) for complainers in relation to Section 275 of the Criminal Procedure (Scotland) Act 1995. Section 275 provides exceptions to the restrictions under Section 274 of the 1995 Act.

We welcome the introduction of IRL for applications under section 275. We consider that ILR would ensure that the complainers' right to have private life respected is protected when those applications are made. Furthermore, IRL could reduce the level of distress that many complainers experience when sexual history and character evidence is disclosed.

We still have some questions on how ILR will operate in practice. Firstly, we would like to know if representation will be funded with Legal Aid resources. Paragraph 493 of the bill's accompanying Policy Memorandum states that "*It is intended that complainers will automatically be entitled to fully publicly funded legal aid, on a non-income assessed basis.*" Rather than amending existing legal aid regulations, we believe that this should be reflected in the bill. Secondly, we would welcome clarification on whether ILR would be available for cases where a Section 275 application is made during the course of a trial. On that basis, we have concerns on the impact that ILR could have in terms of delays and resources should any extension be provided to the complainers or their representatives.

We note that the Criminal Justice Committee called for the simplification of the procedures related to ILR, and particularly, to assure that they do not contribute to the delays in the courts³⁹. We welcome that the Scottish Government is considering the Committee's views on this point and discussing with relevant stakeholders a simplified procedure⁴⁰.

Pilot of single judge rape trials

Section 65 indicates that Scottish Government may, by regulations, provide that trials of rape or attempted rape can be conducted by a single judge. This time-limited proposal will require that judges provide written reasons for their verdicts.

³⁸ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 30.

³⁹ [Stage 1 report, SP Paper 560](#), paragraph 1038.

⁴⁰ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 39.

Section 66 indicates that Scottish Government must provide a report on the findings of the single judge pilot after the period specified in the regulations.

We strongly oppose the implementation of a single judge pilot for rape and attempted rape cases. We noted that 4 members of the Criminal Justice Committee supported the pilot while the other 4 members were against the proposals⁴¹.

As some members of the Criminal Justice Committee indicated in the report, having the right to be trial by a jury for serious offences is a fundamental feature of the Scots law⁴².

We note that one of the main arguments in favour of the establishment of the pilot is that jurors are prone to believe in rape myths. We highlight the comments of some members of the Committee that indicated that only in September 2023 juries started to be directed about rape myths and time is required to assess the impact of those directions⁴³. In addition, we consider that judges are subject of unconscious bias that could affect the fairness of their decisions.

Scottish Government indicated that convictions rates for rape and attempted rape are dramatically lower than for other serious offences. We agree with the Committee comment related to the limitation of current conviction rates for those types of offences⁴⁴, especially when identifying, for example, cases with a single complainer and a single accused. The Scottish Government indicates that:

*"We cannot break down the National Statistics by number of complainers, but Justice Analytical Services have utilised a data set that is provided to Scottish Government to calculate conviction rates for case accused, by crime type. Thanks to that work, we can now report that in each of the five years 2018-19 to 2022-23, the conviction rate for cases of rape and attempted rape where there was a single charge was **between 22% and 27%**.*

Whilst we cannot guarantee that these single charge cases involved single complainers and single accused, as that could only be guaranteed through a manual checking of indictments, we are confident those are sensible assumptions to provide a proxy to determine this conviction rate"⁴⁵.

A clear conviction rate baseline would be fundamental for determining whether a single judge pilot is required on the basis that conviction rates remain as one of the reasons for the pilot.

⁴¹ [Stage 1 report, SP paper 560](#), paragraphs 1268 and 1269.

⁴² Ibid, paragraph 1269 and 1270.

⁴³ Ibid, paragraph 1269.

⁴⁴ Ibid, paragraph 1253.

⁴⁵ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 41.

We have the firm view that juries represent, in principle, all sectors in society. Unfortunately, the judiciary in Scotland is less diverse than the wider population. This is a concern shared by some members of the Committee⁴⁶.

We are also concerned that while juries are anonymous, judges are not. In our view, this could make judges subject of public and political pressure affecting the independence of the judicial system.

We appreciate that one of the main arguments that supports the single judge pilot is that judges will be required to provide written reasons for their decisions in terms of Section 65(7) of the Bill. However, we consider that the implementation of reasons for jury verdicts is possible. Should the pilot continue in terms of the bill, we anticipate that the number of appeals will dramatically increase. In our view, this will negatively impact in the current backlog that faces the criminal justice system.

We are aware that some comparable jurisdictions have moved from jury to judge-only trials. However, any of them implemented judge trials for one specific offence as is defined in the Bill.

We note that the pilot, as defined in the Bill, does not contemplate the accused's consent to proceed. This is a requirement in jurisdictions where judge trials for single offences have been adopted such as New Zealand, Australia, Canada and the United States.

Section 65 indicates that the single judge pilot may be conducted either in this new court or in the High Court of Justiciary. As we indicated earlier, we have serious reservations about the establishment of the Sexual Offences Court, and we do not consider it appropriate to conduct the pilot in this new court.

We note that all Committee members expressed their concerns about the lack of details in the implementation of the pilot. They ask for clarity on the case criteria⁴⁷, timescales⁴⁸, and methodology of assessment⁴⁹. We welcome that the Scottish Government is considering amend the bill to provide further details on those matters⁵⁰. We also welcome the clarification provided by the Scottish Government on the estimated timelines for implementation⁵¹.

⁴⁶ [Stage 1 report, SP Paper 560](#), paragraph 1269 and 1270.

⁴⁷ Ibid, paragraph 1260.

⁴⁸ Ibid, paragraph 1263.

⁴⁹ Ibid, paragraph 1236.

⁵⁰ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 41-44

⁵¹ [VWJR Bill Scottish Government Response to Stage 1 Report 16 April 2024 \(parliament.scot\)](#), page 42



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