

**Written Evidence on The Victims,
Witnesses & Justice Reform Bill (Scotland)**

September 2023



scottish
women's aid

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Scottish Women's Aid ("SWA") is the lead organisation in Scotland working to end domestic abuse and plays a vital role in campaigning for effective responses to domestic abuse. SWA is the umbrella organisation for 34 local Women's Aid organisations across Scotland; each providing practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

We welcome the opportunity to submit our views and set out below our response to the questions posed by the Committee, in addition to additional observations on specific sections of the Bill.

For SWA it is important that the reforms to the system proposed for serious sexual offences will, in turn, be further developed and implemented to also support women involved in solemn prosecutions of domestic abuse offences, and that these will cascade down into summary proceedings, particularly around ways of giving evidence.

We strongly support

- the provisions in the Bill relating to sexual offending that take forward the recommendations from Lady Dorrian's Review, including provision of independent legal representation and anonymity for complainers in sexual offence cases; the creation of a specialist court for sexual offences and, the piloting of "single judge trials
- the removal of the not proven verdict

Our Main Concerns

- We do not support the establishment of a Victims and Witnesses Commissioner for Scotland as this presents, for the VAWG sector especially, an additional layer of bureaucracy and unnecessary complication.
- The Bill provisions around embedding and extending trauma-based practices in civil and criminal courts require strengthening, with clarification on the detail of how this will happen; monitoring and enforcement processes and provision of training and domestic abuse competency, since the system being trauma-informed is not the same as being domestic abuse informed.
- The provisions on special measures in civil cases in the Bill still do not go far enough in affording appropriate protection for women experiencing domestic abuse and need further amendment to replicate protections available in criminal proceedings.
- We are not convinced of the need to reduce the jury numbers from 15 to 12 as a consequence and "safeguard" relating to the removal of the not-proven verdict.

1. What are your views on Part 1 of the Bill which establishes a Victims and Witnesses Commissioner for Scotland? (Sections 1- 23)

Additional Bureaucracy

SWA opposes the creation of such a post. This matter has both been the subject of a proposal for a Private Members' Bill in 2009 and Scottish Government consultations. Our position then, which we reiterate here, is that we are not persuaded the creation of a Victims' Commissioner would add value to the work already being done across Scotland to support victims of crime, particularly in the area of violence against women. In fact, such an appointment will likely only duplicate work already being done and reduce the resources available for this work and may add a level of unwanted bureaucracy to an already unwieldy process.

Strong VAWG sector, differing from elsewhere

To look at findings from elsewhere, SWA's sister organisations in Wales, Northern Ireland and England, when queried about their experiences, have confirmed our reservations - underlining that the landscape and relationships in Scotland are distinctly different and that introducing a third party between the national strategic intermediaries would dilute our impact while draining much needed resources from the government purse.

In Scotland, the VAWG sector and victim support organisations, and those supported by them, benefit from a long history of positive and open engagement, as valued partners and stakeholders and critical friends, with the Scottish Government Ministers and officials, Scottish Parliament, and the various statutory agencies including Police Scotland, COPFS and SCTS.

VAWG Commissioner

The Bill does not establish an obligation on any Victims' Commissioner to engage with organisations in the VAWG sector, or indicate that an understanding of gender-based violence would be a prerequisite of the role. This does not engender confidence that such engagement would be underlined as necessary. It also poses the question that were the role to be rolled out as outlined, whether a VAWG Commissioner would also be needed to redress the balance of representation in this area.

Ombudsman or Good Practice

The Bill states that the Commissioner would not be expected to intervene on behalf of any one individual. This may conflict with victims' expectations of the purpose of the Commissioner and raises the suggestion that perhaps what is needed is an Ombudsman-type of appointment and a strengthening of Scottish Ministers' and the Parliament's powers under the Victims and Witnesses (Scotland) Act 2014 to hold the statutory agencies to account instead.

An alternative (but beneficial role) for a Commissioner, that removes any additional layer of possible bureaucracy, would be one of effective monitoring and evaluation of good practice and associated data collection; providing opportunities to progress work and bring levels of consistent good practice where required.

Financial Implications

The Bill's Financial Memorandum demonstrates significant financing is required to implement the Commissioner role. In these financially straitened times, frequently emphasized by

Women's Aid groups across the country, we would suggest that could be better utilised in supporting front-line services.

Additional Concerns

While we are opposed to the creation of this office, given that the Committee is seeking comments on all of the provisions of the Bill relating to this appointment, we would take the opportunity to raise additional concerns and make observations around specific parts of the Bill regarding the office of the Commissioner, as follows: -

Section 2 – Functions

Section 2(d) and (e) set out that one of their functions is to “

- **(d)** *...promote best practice, in particular trauma-informed practice, by (i) criminal justice agencies (ii) persons providing victim support services*
- **(e)** *undertake and commission research in order to (i) produce the Commissioner's annual report under section 16 (ii) make recommendations, in relation to any matter relevant to the Commissioner's general function, to criminal justice agencies and to persons providing victim support services.*

The Policy Memorandum, at paragraph 86, states “..., *particular activities which the Commissioner must carry out in exercising this general function, which include (but are not limited to) ...promoting best practice and a trauma-informed approach by criminal justice agencies **and those who provide support services to victims.*** “

Is there a value-added benefit to the current knowledge base?

“Crime” is not a homogenous phenomenon, and designing and delivering services for diverse groups of victims-survivors requires a sophisticated and deep understanding of the nature of their experience, the intersections of their identities (race, gender, disability, sexual orientation, etc.), and the context of their communities. We would therefore raise the need for any such role to only be put in place if there is a genuine purpose that adds something to the current survivor-led grass-roots services that have emerged over the last 5 decades, particularly in the Women's Aid network.

Trauma Informed is not DA Informed & Best Practice

SWA welcomes a trauma informed approach to many aspects of the workplace and people's practice. However, we continually need to emphasise that being “trauma informed” is not the same as being domestic abuse competent and one size of approach does not fit all, particularly in relation to best practice in delivering services to women, children and young people experiencing gender-based abuse, particularly domestic abuse.

There is considerable potential for well-meaning, but nonetheless, uninformed and non-gendered approaches to be taken in relation to “*promote best practice, in particular trauma-informed practice*” and making recommendations around service delivery by specialist gender-based violence support organisations that will have unforeseen and negative consequences for women, children and young people experiencing domestic abuse and may result in a conflict of interest and duplication of work for services. So, we would ask that this is always considered when looking at best practice moving forward.

Firstly, for Women's Aid services, best practice in relation to all aspects of support for women and children is primarily informed by their service users' feedback around needs, requirements, etc.

Avoiding a Conflict of Interest

Further, there is also a potential conflict of interest in relation to the Commissioner's role in making recommendations around service delivery. Local Women's Aid groups' practice is not only informed by their service users but they are already regulated by the Scottish Social Services Council and the Care Inspectorate in relation to training, practice, and also service-related complaints and are answerable to local authorities, funders, etc. Therefore, unilateral intervention by the Commissioner could be at odds with, not only service-user led practice, honed over 50 years of providing specialist, domestic abuse competent services, but these other regulatory requirements, particularly in relation to any "recommendations" made by the Commissioner, as noted in Paragraph 126 of the Policy Memorandum "*Consultation responses mentioned the need for clarity around powers, to ensure that the roles of various scrutiny bodies did not overlap.*"

Section 3 – Civil Function

The Explanatory Notes at paragraph 27 advise "*Section 3(1) gives the Scottish Ministers a power to make regulations extending the Commissioner's general function to cover persons involved in proceedings other than criminal proceedings, such as proceedings relating to contract disputes or civil damages, as described in subsection (2).*" This is expanded upon in paragraph 83 of the Policy Memorandum, in that the Scottish Government "... *has a long-term ambition to extend the Commissioner's functions to the civil justice system so they have a role in promoting and supporting the rights and interests of people involved in civil proceedings, and also to victims of harm caused by children who have been referred to the Children's Hearings system...*"

Section 3(3)(b)(i) has the potential to allow the Commissioner to engage with "...*persons involved in proceedings other than criminal proceedings...*" and 3(3)(b) (iii) would allow the Commissioner to engage with the SCTS in "...*promoting best practice, in particular trauma-informed practice...*" in the SCTS' role as "...*persons involved in the administration and management of proceedings...*"

However, it is not clear whether the Commissioners engagement under this section, in terms of ensuring best and trauma-informed practice would also extend further to other bodies involved in civil justice, the Scottish Legal Aid Board, for instance, in their capacity as "*persons involved in proceedings other than criminal proceedings*" and this point requires clarification in the Bill and Explanatory Notes.

In relation to 3(3)(b) (iii) and the "*promotion of best practice ... by persons providing support to persons involved in such proceedings*", we reiterate the comments made above, in sections 1 and 2, on the potential involvement of the Commissioner in connection with the practice of organisations providing support to victims in criminal proceedings. These would equally apply to the Commissioner's involvement with organisations supporting those engaging in civil proceedings and we emphasise again our misgivings on this role. The Scottish Government would be obliged to engage with specialist VAWG support organisations before extending the Commissioner's remit to civil proceedings, as the potential for confusion around what best practice would be promoted is considerable, particularly in the light of work already done and in progress, for instance the, yet un-commenced, provisions in the Children (Scotland) Act 2020 around children's advocacy in proceedings relating to parental rights and responsibilities, specifically child contact and residence.

Section 4 - Engagement

This provides that the Commissioner may establish groups through which they would carry out engagement, particularly to reach groups who “...do not have other ways of interacting with the criminal justice system.”

Paragraphs 79 and 80 of the Policy Memorandum state the policy intention is that one of the key roles of the Commissioner will be implementing change in the protection and promotion of victims’ rights. It is therefore concerning to note that there is no requirement in this section on the Commissioner to include representation from organisations providing victim support services. Our recommendations would be as follows:

- As women, children & young people experiencing domestic abuse, and the impact on them of service-generated failure, risk and harm, are routinely marginalised, SWA stress the importance of working with us, our partners, survivors, and experts on domestic abuse in our local Women’s Aid groups to inform the Commissioner’s work and co-produce the strategy under section 4(2).
- We would also ask that This is particularly relevant to women, children and young people in black and minority ethnic communities experiencing gender-based violence and abuse such as forced marriage, so-called “honour-based abuse” and domestic abuse and women with disabilities experiencing domestic abuse.

Section 5 - Advisory Group

This provides for the establishment, in addition to the groups under section 4 above, of an advisory group, at the discretion of the Commissioner, appointed by the Commissioner -

- Again, we note that there is also no obligation on the Commissioner to include representation on this Advisory Group from organisations providing victim support services. Reflecting the policy intention and role of the Commissioner as noted above, the section must be amended to specifically require that the Commissioner includes representation from organisations providing victim support services.
- As set out in our response to the consultation, in relation to this Advisory Group, it is crucial that its membership of this Group includes relative representation from the VAWG sector, particularly Scottish Women’s Aid as the lead organisation working to end domestic abuse.
- While victim and survivor reference groups play an important part in this, in terms of victims of gender-based violence and abuse, specifically domestic abuse, engagement with specialist VAWG support organisations such as SWA, our local Women’s Aid groups and the women, children and young people they support must be an important and necessary part of this work if the anticipated objectives are to be achieved.

Section 6 - Power to Work with Others

This gives the Commissioner power to work with the parties named and listed in subsection (2); subsection (2) specifies 10, mostly statutory, organisations by name and while section 6(2)(k) does refer to “...such other persons as the Commissioner considers appropriate...” but this does not generally refer to persons providing support to victims. It would be helpful to clarify why this group has been omitted from this section and whether the section should be amended.

Section 8 - Restriction on Exercise of Functions

Notably this section states that the Commissioner will not champion or intervene in individual cases, as per section 8(2) but paragraph 82, page 18 of the Policy Memorandum states that

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

- The Bill states that the Commissioner would not be expected to intervene on behalf of any one individual. As noted earlier, this may conflict with victims’ expectations of the purpose of the Commissioner (raising the proposal that an Ombudsman appointment would more suitable). In addition to this, information available to victims around when, why and how the Commissioner would “consider” their case. With regards to particular experience, this must be quite explicit in what this means, particularly if the intention is that individual experiences will be considered in the context of the Commissioner taking a particular approach to specific, repeated and endemic failures in the system on the part of statutory agencies. We would therefore state that clarity is needed as to whether the Commissioner would undertake proactive intervention or only “intervention after the fact?”.
- The Bill and Explanatory Notes need to be clear as to whether the Commissioner is also to be a source of information and support to victims and support organisations and whether victims’ organisations would be able to contact the Commissioner to discuss legal issues, points of practice and policy to seek guidance.
- It is difficult to see how the Commissioner’s function with the powers granted them under sections 10, 12, 16, 17 and 18 below, fit in with the existing criminal appeals process, existing complaints processes and pathways already in place covering the actions of the police, the Crown, legal profession, SCTS and judiciary, remembering also that the SPSO can adjudicate in certain circumstances and PIRC can review complaints involving Police Scotland. Once again, given the potential for duplication, clarification on the role of the Commissioner under this and the other sections is needed here in these matters, and any outcomes must be clearly communicated across all relevant sectors.

Section 9 - Strategic Plan

Section 9(2) provides that before publishing their three-year Strategic Plan, the Commissioner must consult on a draft with the Parliamentary Corporation and “...such other persons as the Commissioner considers appropriate...”; similarly, section 9(5(a) sets out that when the Commissioner revises a strategic plan, the duty to consult these persons also applies -

Referring to our comments above on the role of the Commissioner, once more, there is no explicit duty on the Commissioner to consult with organisations supporting victims of crime when preparing this draft or any revision; an inexplicable gap in the Bill and the Commissioner’s duties. We would ask that section 9(2) be amended to specifically include persons providing victim support services.

Section 10 - Carrying out Investigations

This refers to the Commissioner’s powers to investigate policy and practice of “criminal justice agencies” defined in section 23. While section 10(2) refers to evidence and information received, there is no detail on the circumstances under which such an investigation would

take place or whether third parties such as victims themselves, and organisations supporting them, can call for the Commissioner to undertake such an investigation. We would welcome clarification of these matters; the section will require amendment accordingly to include these points.

Section 12 - Investigations; Witnesses and Documents

Section 12 (1) provides that any person may be required to give evidence on any matter within the terms of reference of an investigation and produce documents –

Clarification is needed on certain concerning aspects of this section. Firstly, it appears possible for the Commissioner to oblige victims, already traumatised by the failure of the criminal justice system, or those supporting victims, to give evidence in quasi-legal proceedings. Indeed, the Policy Memorandum, at paragraph 125 refers to this *“...Some concerns were raised in relation to requiring persons to give evidence in the course of an investigation, with the view that no-one should be compelled to do so, especially not victims (for whom doing so could be traumatising and compound the original trauma).”*

The section also suggests that victim support organisations could be compelled to provide confidential documents relating to the support provided by them to a victim during an investigation into contemporaneous detrimental practice by a criminal justice agency in relation to that victim. This appears to require further consideration, or changes to the initial proposal.

Sections 16 - Annual Report

Section 17- Requirement to respond to annual report

Section 18 - Publication of responses to annual report

Section 16 places a requirement on the Commissioner to publish an annual report and notes that this report may include “recommendations”, primarily aimed at criminal justice agencies, with no mention being made of victim support services or duties placed on them regarding this report.

It is therefore confusing that section 17 then provides the report may “name” (and neither the section nor the Explanatory Notes explain what this means) either a criminal justice agency or a victim support organisation, which may be required to “respond” to the report.

- Firstly, in relation to the purpose of being “named” in the report and then being required to “respond”, it is not clear what information will be contained in the Report, the purpose of this and why the victim support organisation should “respond.” This appears completely disproportionate in relation to victim support organisations and could put the anonymity of some at risk.
- It also appears that this Report would be published without the victim support organisation being first allowed to respond to being “named” and any information published about the organisation by the Commissioner in this regard. This is unacceptable, given the provisions of sections 12 and 13 covering investigations of criminal justice agencies, where they are allowed to respond before any information is published.
- Section 18 requires that any “response” to being “named” provided under section 17 must be published and laid before the Scottish Parliament. We would reiterate that the purpose (and benefit) of this response is not clear.

2. What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts? (Sections 24- 29)

We note the definition defined of “trauma-informed practice in section 69 as “...a means of operating that (a) recognises that a person may have experienced trauma, (b) understands the effects which trauma may have on the person, and (c) involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to (i) any recurrence of past trauma, or (ii) further trauma.”

While we agree that a legislative reference to trauma-informed practice is helpful, as noted in our response to question 1, we would strongly emphasise that the system being trauma-informed is not the same as being domestic abuse competent. This is a crucial difference to take into account and in order to avoid women-blaming practices that only serve to re-victimise and re-abuse women, children and young people, it is necessary for all the actors in the system to receive training on, and understand domestic abuse-informed practice and how this builds on the key principles of trauma-informed practice to both improve outcomes for women, children and young people affected by domestic abuse and hold perpetrators to account^{1,2,3,4}. We would also add that this is an area of learning and development that requires ongoing learning, and a one-off training session will not suffice.

In addition to this, it must be recognised that reform and system change cannot be achieved through training of the actors in the system alone. As we have stated above, the issue central to these discussions is the nature of the criminal justice system itself. Therefore, for any domestic abuse competent, trauma-informed approach to work, requires significant and consistent culture change where the systems and processes themselves become trauma aware, victim friendly and victim informed and structural inequalities are broken down.

It is crucial that all those involved in the design and implementation of trauma-informed approaches and in the commissioning of training and awareness raising understand that in relation to VAWG, understandings of domestic abuse are rooted in a gendered analysis of this abuse, its causes, effects and impact, recognising it as a form of gender-based violence, that relies on historical and systemic discrimination and structural inequalities experienced by women and children.

Our colleagues at Children 1st give the example that the work done to establish Scotland’s first Bairns Hoose demonstrates the level of system change required to legitimately improve victims and witnesses’ experiences, achieve trauma-informed practice and environments throughout the justice system.

Section 24 – Principle of Trauma-based Practice

We note and support the amendment to section 1(3) of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) to the effect that the COPFS (through the Lord Advocate), the Scottish Prison Service (through Scottish Ministers,) Chief Constable, the Scottish Court Service, and Parole Board for Scotland, in relation to relation to victims and witness, will now have to work to principles, and revised the standards of service, “in way that accords with trauma-informed practice.”

¹ <https://education.gov.scot/media/kwilejb4/da-trauma-companion-pack.pdf>

² <https://safeandtogetherinstitute.com/4-ways-the-concept-of-trauma-bonding-works-against-survivors/>

³ <https://vimeo.com/126501517>- Trauma and the Brain: Understanding abuse survivors responses

⁴ <https://safeandtogetherinstitute.com/4-ways-the-concept-of-trauma-bonding-works-against-survivors/> and <https://safeandtogetherinstitute.com/season-2-episode-10-trauma-informed-is-not-the-same-as-domestic-violence-informed-a-conversation-about-the-intersection-of-domestic-violence-perpetration-mental-health-addiction/>

However, we would like to see this go further. The existing duty in section 1 of the 2014 Act provides that “(1) *Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings...*”

We would like this duty increased to the more stringent and stronger duty to “**have due regard.**” Given that ‘have due regard’ means that in carrying out all functions and day to day activities, the statutory organisations must consciously consider the needs of victims. This is in line with the Scottish Government’s ambition to protect and realise human rights in Scotland⁵. This would, in turn, strengthen implementation duties but closer scrutiny and monitoring by Scottish Ministers and the Parliament, along with meaningful sanctions available for non-compliance. These will be crucial in ensuring this works, as unfortunately, the existing regime is deficient in any meaningful way of ensuring that the Standards of Service are fit for purpose and that the Victims’ Code is adhered to

Section 25 - Criminal Courts: Conduct of Proceedings

We note, and support that this section amends the main power of the High Court and gives the ability to regulate, through Act of Adjournal, criminal procedure in the various levels of criminal court for the purpose of ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice. This approach is particularly welcome, since the amendment to section 24 above will not apply to the judiciary and persons who work in the courts, including defence lawyers, as noted by the Policy Memorandum – “155. *This is significant, because the way in which a defence is conducted is often highlighted by victims as one of the most distressing aspects of the justice process, and can contribute to their re-traumatisation*⁵⁶...*Consultation respondents raised suggestions of specific ways in which court rules might support trauma-informed practice, like codifying a requirement for the respectful questioning of witnesses, or prescribing more regular and consistent use of special measures and pre-recorded evidence.*” -

However, it should also be noted that this is a power, not a duty and we would hope that in the development of procedure and practice guidance, consultation with victims and the organisations supporting them underpins the content and that the rules contain clear sanction for any failure to adhere to them.

Section 26 - Civil Courts: Conduct of Proceedings

Section 26 contains a corresponding power for the Court of Session to regulate procedure in relation to all levels of civil courts through Act of Sederunt. Again, this is positive in the potential coverage of such an Act of Sederunt across those working in the courts will include civil lawyers, but again, subject to the caveat we have mentioned above around attitude and system change. Giving the court such a power will, hopefully, encourage practitioners to achieve a better understanding of gender-based abuse and respond respectfully to vulnerable victims and witnesses. Predicated, of course, on the Courts themselves having the appropriate understanding of these matters and responding appropriately. SWA looks forward to engaging with, and supporting the work of the judiciary, SCTS and legal profession in progressing these important reforms in line with relevant legislation and best practice.

Sections 27- Scheduling of business in Scottish Courts

Section 28- Scheduling of business in sheriff courts and the Sheriff Appeal Court

Section 29- Scheduling of business in justice of the peace courts

⁵ <https://www.scottishhumanrights.com/news/commission-calls-for-due-regard-duty-to-advance-right-to-social-security/>.

These sections place a duty on the Lord President, and under section 28, the Lord President and also Sheriffs Principal to have regard to trauma-based practice when programming civil and criminal court business -

While it is noted that the primary consideration of the court will still be the efficient disposal of business, these are positive reforms that could be used by the judiciary to minimise the use of floating trial dates for sexual offence cases, last minute adjournments, delays to the progress of trials; all of which will be positive for complainers and witnesses, especially around reducing the COVID backlog of cases. We would hope for a collegiate approach by the respective Sheriffs Principal in their approach to this responsibility and in the production of any Practice Notes, in order to secure a consistent approach across Sheriffdoms and their constituent Sheriff Courts. Again, SWA looks forward to engaging with, and supporting the work of the judiciary and SCTS in taking forward these important reforms.

3. What are your views on Part 3 of the Bill which deals with special measures in civil cases? (Sections 30- 33)

Meaningful Extension of the Provisions of the Vulnerable Witnesses (Scotland) Act 2004

SWA has consistently called for the meaningful extension of the provisions of the Vulnerable Witnesses (Scotland) Act 2004 and subsequent Victims and Witnesses (Scotland) Act 2014 to be automatically available to vulnerable parties and witnesses in civil proceedings involving domestic abuse, specifically the cross-posting into civil proceedings of the “deemed vulnerable witness” standard special measures automatically available to witnesses in domestic abuse cases under section 6 of the 2014 Act. It does not make sense that women experiencing domestic abuse should be allowed automatic access to this protection in criminal proceedings but then denied it in civil proceedings when faced with the same abuser. Complainers and vulnerable witnesses in criminal proceedings are not a stand-alone, discreet group. It must be understood that women, children and young people experiencing domestic abuse who are vulnerable in criminal proceedings will also be subject to the same procedural risks, safety fears, intimidation and coercion by perpetrators in civil cases, even more so as highlighted in recent research⁶ and their human rights and right to participate in court proceedings must be equally protected.

Increasing the Protective Function

The Children (Scotland) Act 2020 (“the 2020 Act”) reformed the position to afford a slighter greater degree of protection to women experiencing domestic abuse participating in section 11 cases under the 1995 Act and in non-evidential hearings such as Child Welfare Hearings. However, the protective function of these provisions is limited, firstly, in that they do not go far enough in conferring automatic rights to standard special measures in any section 11 evidential hearing or child welfare hearing or in fact, any civil court evidential or non-evidential proceedings where domestic abuse is an issue.

Vulnerable Witness Proceedings

Section 4(3) of the 2020 Act inserts sections 11A and 11B into the 2004 Act and specifies circumstances where the court is to deem a person to be a vulnerable witness, irrespective of

⁶ <https://www.sccjr.ac.uk/project/domestic-abuse-and-child-contact-the-interface-between-criminal-and-civil-proceedings/>

whether the person satisfies the definition of “vulnerable witness” in section 11(1) of the 2004 Act. In proceedings arising out of a children’s hearing (covered by the new section 11A of the 2004 Act), a person will be deemed to be a vulnerable witness where it is alleged in the statement of grounds that the person is the victim of specified conduct. Domestic abuse is qualified simply by the fact that the statement of grounds alleges that the person is the victim of domestic abuse

However, in proceedings where the court is considering making an order under section 11(1) of the 1995 Act (covered by the new section 11B of the 2004 Act), a person will be deemed to be a vulnerable witness **only** if the person is protected by a civil protection order from conduct by a party to the proceedings, or where the person is the victim or complainer in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings.

Similar provision exists under section 8 of the Act to protect vulnerable parties in Child Welfare Hearings if they would be “deemed vulnerable” in terms of the test in section 11B above.

If a party does not qualify to be a “deemed vulnerable witness” they can only access standard special measures by applying to the court and satisfying the court that it is likely that they will suffer distress, that the special measure will reduce that distress and that there is no significant risk to the interests of justice.

Therefore, a woman experiencing domestic abuse only be considered automatically eligible to use standard special measures, firstly, in section 11 cases and then within those, only where she met the qualification of possessing a civil protection order or the perpetrator has been convicted of a specified criminal offence or is being prosecuted for such an offence. This excludes women who, for whatever reason, have not reported the abuse to the police or where there have been no criminal proceedings taken against the perpetrator, possibly due to issues around corroboration or a conviction made.

It should be noted that this was in contrast to the position taken in the 2020 Act in relation to Children’s Hearing sheriff court proceedings (known as “relevant proceedings”), but not cases before Children’s Hearings themselves, arising out of a children’s hearing as provided by the new section 11A of the 2004 Act. A person will be deemed to be a vulnerable witness in these court proceedings where it is alleged in the statement of grounds that the person is the victim of specified conduct. Domestic abuse is qualified simply by the fact that the statement of grounds alleges that the person is the victim of domestic abuse and there is no need to evidence this via the possession of a protective order or a prosecution/conviction for one of the specified criminal offences.

The second limitation is that even if women achieve “deemed vulnerable witness” status under 11A, they still do not have an absolute right to special measures; a Vulnerable Witness Application is needed but the court can decide that no special measures are needed. The court can also unilaterally order the use of special measures in the absence of such an application, but the court still carries out an assessment as to whether or not the vulnerable witness requires the use of special measures.

This qualification and assessment are not in the interests of justice. A woman experiencing domestic abuse engaging in any civil proceedings, evidential or otherwise (be this, for example, an application for a protective order, a section 11 application or participation in

applications by the police for a DAPO), should automatically be deemed vulnerable and therefore automatically eligible for use of a supporter, screen and/or CCTV as appropriate.

This should be in addition to the further prohibitions and protections in the 2020 Act against cross-examination by a perpetrator, prohibitions and protections which we agree should also be expanded to cover *any* civil proceedings involving domestic abuse.

We would also support RCS' call for these reforms to include protection for sexual offence complainers involved in civil proceedings relating to their experiences of sexual violence.

Section 30 - Vulnerable Witnesses

Section 30 will amend section 11B of the 2020 Act, which is explained above, widening the pool of civil proceedings, apart from children's hearings court proceedings, where a witness can be considered a "deemed vulnerable witness" but this is subject to the same eligibility criteria and assessment by the court as previously -

The amendments will not further protect litigants who neither possess a protective order or where the other party has not been prosecuted or convicted for one of the specified offences. Crucially, therefore, despite the best intentions of the section, it will not specifically improve the position for women experiencing domestic abuse who are involved in civil actions generally and will not improve the existing situation for women involved in section 11 child contact proceedings.

The thresholds determining vulnerability and the continuing need for assessment will remain as a barrier to women seeking access to justice through the civil courts and protection from the further trauma of having to engage in the civil process and face their abuser.

The only way to remedy this is to ensure that section 30 provides that in, not only section 11 proceedings but in any civil proceedings, women experiencing domestic abuse are given the same protection as they would be in criminal proceedings.

We are seeking the provisions of section 10 of the 2014 Act to be replicated for civil proceedings, so that in any civil case where domestic abuse is raised in the proceedings, the party raising these allegations and seeking protection, would be automatically deemed a vulnerable witness, with an automatic right to use standard special measures.

This should mirror the section also to cover rape and sexual assault, human trafficking, with the addition of honour-based abuse and forced marriage.

Section 31 - Prohibition on Personal Conduct of the Case

Similarly, the 2020 Act introduced a new special measure for vulnerable witnesses in s 11 cases and "relevant proceedings" that prevented a party to the proceedings from personally conducting the case so that they could not cross examine witnesses.

Section 31 will apply this to child and vulnerable witnesses in all civil proceedings, and the presumption in favour of applying this special measure applies in a wider range of proceedings. While this, on the face of it, appears positive, access to this special measure will still, nonetheless, be subject to thresholds determining vulnerability, and the continuing need for assessment on the need for special measures, mentioned above. These will continue to act as barriers to women experiencing domestic abuse and gender-based violence, along with

vulnerable witnesses generally, from accessing protection. Therefore, we are asking for the provisions of section 10 of the 2014 Act to be replicated for this section also.

Section 32 – Register of Solicitors for Section 22B of the Vulnerable Witnesses (Scotland) Act 2004

The 2020 Act required that Ministers establish and maintain a register of solicitors who may be appointed by a court where the court orders that the special measure of prohibiting a party to certain proceedings from conducting the case personally is to be taken; if that party doesn't have a solicitor and doesn't look to appoint one, the court is under a duty to appoint a solicitor to represent that party.

This means the special measure of prohibiting a party from personally conducting the case will now be available in all civil proceedings and not just those relating to children. Our concern is that the appointment of such a solicitor depends on the party triggering the thresholds for vulnerability as discussed above. We wish this matter to be rectified by putting the necessary parameters in place.

Section 33 - Vulnerable Parties

This section expands another provision of the 2020 Act relating to vulnerable witnesses that requires the court **to consider** the use of special measures to reduce distress in relation to certain vulnerable parties where distress may be caused by attending or participating in hearings in certain non-evidential court proceedings.

This was primarily intended under the 2020 to cover non-evidential hearings such as Child Welfare Hearings and the Bill amends the existing statutory provisions so that special measures for vulnerable parties will be available, in all non-evidential civil proceedings not just proceedings relating to children. Again, reiterating the comments made above, the existing provisions under the 2020 Act do not go far enough to protect women experiencing domestic abuse and gender-based violence and this expansion of the coverage will not improve the current deficiencies in the procedure.

- 4. What are your views on the proposal in Part 4 of the Bill to abolish the not proven verdict and move to either a guilty or not guilty verdict? (Section 35 and 36)**
- 5. What are your views on the changes in Part 4 of the Bill to the size of criminal juries and the majority required for conviction?**

Section 34 - Jury Size and Quorum

SWA do not support the reduction in jury size from 15 to 12, with the attendant change in majority required for conviction. The Not Proven consultation analysis noted that, in relation to jury size, 58% of respondents supported retention of 15-person juries⁷ and there has been no reported problem with a 15-person jury. This proposal appears to be tied into the removal of the not proven verdict which should not have an impact on the jury size and there are several other safeguards already in place against wrongful conviction including the presumption of innocence and the burden of proof on the Crown to prove guilt beyond reasonable doubt. All reforms must be considered in light of the Scottish Government's human rights obligations to ensure access to justice for victims of crime and the right to a fair

⁷ Scottish Government. (2022, July 12). *The Not Proven Verdict and Related Reforms: Analysis of Responses to Consultation*. <https://www.gov.scot/publications/not-proven-verdict-related-reforms-consultation-analysis/>

trial for those accused of a crime. It is important that changes made to the system do not, deliberately or inadvertently, maintain the barriers to justice for victims of crime, especially for survivors of rape and sexual abuse, that exist in the current system. In this regard, it is worth noting the following: -

- As stated above, there has been no reported problem with a 15-person jury and, indeed, the Senators of the College of Justice⁸ noted in their response to the above Scottish Government consultation on not proven and jury sizes *“In this section of the consultation paper the issue raised is whether there is any reason to consider reducing the present jury size of 15 to 12 jurors. As pointed out in the response by the judges to the Scottish Government’s 2008 consultation document The Modern Scottish Jury in Criminal Trials, juries comprising 15 members had for a very long time enjoyed, and continued to enjoy, the confidence of the public and all those who work in our criminal courts, including judges and sheriffs. Nothing which was drawn attention to in the current consultation paper causes us to depart from that view. No persuasive reason to alter the current size of a Scottish jury has been identified. A larger number permits a wider representation of the community and ought to reduce the risk of biased, irrational, capricious or eccentric reasoning having undue influence. A larger number may allow more flexibility when a juror or jurors become unavailable.”*
- Rape Crisis Scotland⁹ also commented *“It is difficult to understand why removing the not proven verdict on its own would trigger a change in the jury majority. Unlike the corroboration requirement, the not proven verdict is not a safeguard but a historical accident (*). Lord Bonomy’s review group gave extensive consideration to what safeguards would need to be put in place should the requirement for corroboration be removed, including changes to the jury majority, and it is in this context that any changes to the jury majority should be considered, not in relation to the removal of the not proven verdict.... Given the existing evidence about the reluctance of juries to convict in rape cases, even in the face of considerable evidence, we have grave concerns that increasing the jury majority will increase the barriers to justice for rape survivors in Scotland and result in even fewer rape convictions.”*

Section 35 - Verdict of Guilty or Not Guilty and Majority Required for Guilty Verdict

This section provides that the only verdicts available to a jury in solemn proceedings are guilty or not guilty. A verdict of not proven will no longer be possible -

SWA supports the removal of the not-proven verdict in solemn criminal trials and that Scotland should change to a two- verdict system. There is no definition of not proven and no guidance is given to juries on when a not proven, as opposed to a not guilty, verdict would be appropriate¹⁰. In relation to crimes of gender-based violence which mainly affect women, this verdict appears to be used disproportionately in sexual crime cases, particularly in rape and attempted rape cases. In relation to domestic abuse offending and not proven, the Scottish Government commissioned research using mock juries to examine a variety of issues, including potential jurors’ understanding of the not proven verdict. The research found inconsistent views from jurors on what the verdict meant and they were unclear as to how a not proven verdict differed from a not guilty verdict and the effect of the not proven verdict,

⁸ Senators of the College of Justice https://consult.gov.scot/justice/not-proven-verdict/consultation/view_respondent?sort=excerpt&order=ascending& b index=120&uuld=7564373

⁹ RCS https://consult.gov.scot/justice/not-proven-verdict/consultation/view_respondent?sort=excerpt&order=ascending& b index=120&uuld=103363474

¹⁰ <http://eprints.gla.ac.uk/227149/2/227149.pdf>

endorsing the findings of the Carloway Review and the Academic Paper accompanying Lord Bonomy's Post Corroboration Safeguards Review ¹¹.

Further, the arguments in favour of retaining the not proven verdict particularly that it "acts as a safeguard against wrongful conviction" are not convincing and it may, in fact, work to deny justice to complainers. The Scottish criminal justice system still retains numerous other safeguards against miscarriages of justice, these include the presumption of innocence and the burden of proof on the Crown to prove guilt beyond reasonable doubt. We do not consider that the removal of the not proven verdict will impact on these, or indeed, any of the other safeguards.

In relation to the provisions in this section amending the jury majority needed for a guilty verdict that would apply to the reduced size of jury of 12 persons, as provided for in section 34, we opposed the reduction of the jury size from 15 to 12 and therefore any change to the majority.

Section 36-Verdict of guilty or not guilty

That new section provides that the only verdicts available to a judge in summary proceedings are guilty or not guilty. A verdict of not proven will no longer be possible. SWA again supports this proposal reiterating the points made in relation to section 35.

6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court? (Sections 37- 62)
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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 Briefing¹² 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*

¹¹ <https://www.gov.scot/publications/scottish-jury-research-findings-large-mock-jury-study-2/> ; <https://www.gov.scot/publications/scottish-jury-research-findings-large-mock-jury-study/documents> ; ADD

¹² <https://www.rapecrisisscotland.org.uk/resources/Specialist-Sexual-Offences-Court---Briefing.pdf>

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 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, 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 this 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.

Sections 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.

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.*
- (Our emphasis) 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(c) of the 1995 Act but would welcome the Scottish Government’s reassurance of this.

There is the further issue that complainers in cases out with 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

7. 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. As previously discussed, Scotland differs from the remainder of the United Kingdom (and many countries around the world) in that there is no automatic legal right to anonymity for complainers in sexual offence cases in Scots law, an obvious anomaly addressed by recommendation in Lady Dorrian's Review.

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).

(Q from Louise below - Did Marsha have a view on whether we should be pushing for DA to be included? If no view, then I will remove this).

****Note- the Policy Memorandum discusses at paragraphs 407 to 411 why domestic abuse and stalking are not included in this list of offences - <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/policy-memorandum.pdf> Are we happy with this or should we be pushing for DA and stalking to be included?

- 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.
- This is discussed in the Explanatory Notes at paragraph 168 *"The sheriff can grant the order sought (a) if satisfied that the child victim understands the nature of the order sought, appreciates what the effect of making the order will be, and consents to the publication of the identifying information, and (b) if satisfied that there is no good reason why the order should not be made."*

- Also, in the Policy Memorandum at paragraphs 425 and 426 *“In particular, the Bill provides that any third-party publisher wishing to tell a child victim’s story on their behalf must apply to the sheriff court for an order to dispense with the anonymity restrictions... This judicial oversight role seeks to serve a protective function, specifically where a third-party publisher wishes to publish a child survivor’s story. This is on the basis a child may be particularly vulnerable and lack the maturity to fully understand what they are consenting to if they are approached by a third party wishing to tell their story, irrespective of whether the child has already self-published some details or not. This approach also recognises that the situation is different where a third-party publisher is involved, which has the potential to lead to undue influence over a vulnerable child. As such, the Bill operates an additional safeguard that self-publishing by a child does not amount to an absolute waiver of anonymity.”*

If this was to happen, it would have to be in line with UNCRC principles, namely that setting aside anonymity was in the 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 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 it is 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)
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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.¹³

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,

¹³ https://www.rapecrisisscotland.org.uk/resources/1666867844_Beyond-Independent-Legal-Representation.pdf

- (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 issue¹⁴ which has been expanded upon and clarified in their most recent position statement¹⁵

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
- 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 research¹⁶

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

¹⁴ [https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/20200420_VictimsOrganisationstoMSPs\(1\).pdf](https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/20200420_VictimsOrganisationstoMSPs(1).pdf)
¹⁸ <https://www.rapecrisisScotland.org.uk/resources/Briefing---Jury-trials---2020.pdf>

<https://www.rapecrisisScotland.org.uk/resources/Briefing---single-judge-trials---2023.pdf>

¹⁵ <https://www.rapecrisisScotland.org.uk/news/blog/why-we-support-single-judge-trials/>

¹⁶ <https://www.gov.scot/publications/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/documents/>

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