# Improving Victims' Experiences of the Justice System: Consultation Analysis

## Final Report

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Riaghaltas na h-Alba

# Improving Victims' Experiences of the Justice System: Consultation Analysis

## Final Report

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# Executive Summary

## Background

In May 2022 the Scottish Government launched a public consultation[1] to seek views on potential legislative reforms aimed at improving victims' experiences of the criminal justice system, with a particular reference to the victims of sexual crime.

The consultation set out a number of proposals for legislative and system change under eight key areas, these being:

- establishing a Victims' Commissioner for Scotland
- options to underpin a trauma-informed and person-centred approach
- special measures to assist vulnerable parties involved in civil cases
- review of the requirement for people accused of crimes to provide details of their proposed defence in a statement provided to the court
- new statutory underpinning for anonymity for complainers in sexual offence cases
- independent legal representation for sexual offence complainers where a request is made to lead evidence in court which relates to their sexual history and/or bad character
- the potential establishment of a new specialist criminal court dealing with serious sexual offences
- consideration of issues relating to single judge trials for serious sexual offence cases.

A number of Impact Assessment questions exploring the potential impacts of the proposals were also included.

The consultation ran for 14 weeks between 12 May and 19 August 2022, and an independent research organisation was commissioned to carry out an analysis of the responses received. This report presents the findings from that analysis.

## Respondent Profiles

A total of 69[2] responses were received - 24 (35%) from individuals and 45 (65%) from organisations. There was a reasonable spread of different types of organisations that engaged with the consultation, including local authorities and public bodies, law enforcement and legal organisations. Almost a third of organisational responses (29%) came from victim and witness support organisations.

[1] Available at: Improving victims' experiences of the justice system: consultation - gov.scot (www.gov.scot)
[2] A total of 71 unique submissions were received, however, two respondents submitted two responses each. These were both merged to create a composite response.

## Consultation Structure and Analysis

The majority of responses were submitted via Citizen Space, the Scottish Government's online consultation platform, and were automatically collated into a database, downloadable to Excel for analysis.

The consultation contained 40 closed questions and 28 closed questions with multiple choice options (all with a free text box where respondents could give reasons for their answer and provide further details if it was asked for in the question). A further 16 open questions were included, with no limit to the length of response that could be given.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal or question statement is reported below.

Comments given at each open question were examined and, where questions elicited a positive or negative response, they were categorised as such. The main reasons presented by respondents both for and against the content included in the consultation were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments.

## Research Caveats

Given the relatively small number of responses received overall, the views presented in the report should not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. They simply reflect the views of those individuals and organisations who chose to respond. Crucially, while there was a reasonably broad range of different organisations represented among respondents, there was a dominant presence of victim and witness support organisations within the sample, especially those that worked exclusively with women and girls. This provides important context when considering some of the data presented below.

It should also be noted that, while the terms 'victim', 'survivor' and 'complainer' are used interchangeably across the report, this reflects the words that were used by respondents themselves and may not always be the correct legal terms that should have been used in response to the questions that were asked.

## Main Findings

Across the consultation responses, there were strong levels of support for almost all of the proposals posited. While some attracted a more neutral response than others, very few proposals were met with a negative response.

### Establishing a Victims' Commissioner

There was considerable support for the establishment of a Victims' Commissioner including:

- agreement (across different sectors) that this role should be statutory and independent of the Scottish Government. Having such a footing would give victims and witnesses confidence in the Commissioner, it was felt, as being a neutral party
- using a combination of different reporting mechanisms was welcomed as a way of ensuring that the Commissioner remained accountable
- there was consensus across respondents that this appointment would help to amplify the voices, views and experiences of those affected by crime, as well as play an important role in working with relevant justice and support partners to influence decision making. Respondents also viewed that the Commissioner would play a crucial role in promoting best practice by criminal justice agencies and those providing services to victims, including championing a trauma-informed approach
- there was very strong support for the Victims' Commissioner to have accountability to, and engagement with, those with lived experience - the notion of focussed consultations with victims was particularly welcomed to help understand people's nuanced views and experiences, as well as making engagement accessible to all (including the most vulnerable)
- the main reservations were around the functions, powers, and remit of the new Commissioner, with several organisations stressing that the appointment must not duplicate the work already being done by others, but add to it. In particular, there was only moderate support for the Commissioner having the power to require persons to give evidence in the course of an investigation, and this was mainly resisted on the grounds of victim safeguarding
- there was also agreement with proposals not to give the Commissioner power to champion or intervene in individual cases, with views that, if they did so, it should only be in the interests of victims as a whole, or to drive institutional change in the wider public interest.

**Options to underpin a trauma-informed and person-centred approach**

Again, there was considerable support for the introduction of legislative and other changes to bring about trauma-informed practice and person-centred approaches with the proposals being viewed collectively as helping to make the justice system fairer, more accessible and less challenging for those required to participate in it. In particular:

- having a specific legislative reference to 'trauma-informed practice' as an additional general principle was welcomed, alongside specific reference to trauma-informed practice within the current legislative framework for the Standards of Service. A legislative basis for the production of guidance on taking a trauma-informed approach was also seen as useful for providing clear direction to justice organisations as well as helping to ensure consistency in practice and what victims could expect from the system
- the need for a clear definition of what constituted 'trauma-informed practice' was stressed, and the Scottish Government was encouraged to build on

existing resources and work already being done, including the work of the NHS Education for Scotland (NES) National Trauma Training Programme

- there were some mixed views in relation to virtual summary trials. Their benefits were widely acknowledged (including reducing trauma associated with appearing at court, increasing accessibility and keeping victims physically separate from perpetrators), and they were seen as particularly valuable for victims of sexual assault, rape and domestic abuse (as well as for children and young people). Any attempt to 'force' the use of such measures on individuals was resisted, however, and respondents instead argued for a flexible system, which offered choice and empowered victims, to ensure that the system was victim led. Some legal organisations also questioned the impact of remote and digital alternatives to appearing in person, suggesting it may undermine the solemnity of the justice process, and some individuals also argued that such technologies may deny them their 'day in court'
- the extension of Ground Rules Hearings to all child and vulnerable witnesses was supported
- there were mixed views around whether the current legislative basis for court scheduling, as managed through the existing powers of the Lord President, was sufficient to guide trauma-informed practice. While some felt that existing powers were insufficient (as was evidenced by negative victim experiences linked to churn), legal organisations suggested that the complexity and unpredictability of cases going through the justice system meant that it would be difficult to adopt any system that totally eradicated the potential for court scheduling related trauma by those going through the system
- few specific suggestions were made for legislative changes which would assist in addressing the issues discussed around information sharing, although issues of consent for sharing information were stressed. It was also acknowledged that there was scope to improve information sharing between justice agencies.

The main reservations were linked to the need for the system to be 'trauma responsive' rather than simply 'trauma informed', i.e. there must be direct application of the principles of trauma-informed approaches into practice. There were also some doubts around how training, implementation and the adoption of trauma-informed practice within relevant organisations would be monitored. Questions were also raised around how non-compliance with trauma-informed practice would be addressed.

### Special measures to assist vulnerable parties involved in civil cases

Again, proposals linked to special measures to assist vulnerable parties involved in civil cases were very well supported, including that:

- the courts having the power to prohibit personal cross-examination in civil proceedings would be particularly beneficial for victims of domestic abuse and in sexual assault cases, for whom cross-examination by the perpetrator can be particularly harrowing and retraumatising

- such measures would bring parity with criminal courts, and would allow victims in each domain to participate more effectively
- it may be helpful to extend the scope even further in relation to who is deemed a 'vulnerable witness'
- barriers to extending special measures may exist in terms of lack of equipment with insufficient resourcing and capacity to meet demand.

**Review of defence statements**

Respondents supported the need for a review of the requirement for people accused of crimes to provide details of their proposed defence in a statement provided to the court. It was generally agreed that:

- existing legislation did not work in this regard, often to the detriment of victims, who did not know what to expect in court. This could lead to or compound negative experiences for victims appearing at court
- the current legislation allowed legal representatives acting for the accused to use defence statements as a means of stalling or delaying case progress and this should be challenged
- the introduction of a system or framework whereby victims could access details of defence statements in advance would form part of a trauma-informed approach to justice.

**Anonymity for complainers in sexual offence cases**

The introduction of a statutory right to anonymity for complainers in sexual offence cases was welcomed across the board, with views that:

- the right to anonymity should take effect when an allegation of sexual offence is made to ensure anonymity at the earliest opportunity, and reduce risks of inadvertent disclosures
- anonymity, and the right to waive anonymity, should always be an individual's choice and should never be forced. Decisions over when it should end should be made on a case-by-case basis considering the views and needs of all parties involved
- automatic right of anonymity should apply to the very widest range of offences, as well as apply to children and young people. However, additional protections should be in place to make sure that all decisions made in relation to setting aside anonymity are fully informed (and taking into account the age, stage and capacity of any child/young person or other individual needs of the victim in question)
- another issue raised, although only noted by a minority of respondents, was that decisions made to set aside anonymity also need to carefully consider any risks or unintended negative impacts for the anonymity of other parties
- the main proposals that split opinion were whether the court should have a power to override any right of anonymity in individual cases and whether the

right of anonymity should expire upon conviction of the complainer for an offence against public justice

- there was little consensus around suitable penalties for breach of anonymity. However, comments generally reflected that this would be a positive step, and that penalties should be serious enough to act as a deterrent but also be proportionate and tailored to the particular case in hand (while also considering the intent behind the breach).

**Independent legal representation for sexual offence complainers**

There was very strong support for an automatic right to independent legal representation (ILR). This was seen to be a way of considerably improving understanding among complainers, achieving fairness for complainers, and ensuring that their rights and interests were better represented in court. In addition:

- respondents stressed that complainers should have the same right of appeal as the Crown and defence, and this proposal would allow for that
- respondents viewed that proposals in relation to ILR would lead to greater equality and parity between complainers and the accused, and that access to justice would be widened if ILR was legal aid funded
- the majority of respondents strongly agreed that a right to independent legal representation for complainers should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made) and at all stages of the justice journey
- there were some concerns around how these provisions may impact on court processes and the time taken for cases to progress through court, however, the main view was that ILR would improve complainer/victim satisfaction with the criminal justice process overall.

**New specialist criminal court dealing with serious sexual offences**

There was support (albeit not as strong as for some of the other consultation proposals) for a specialist sexual offences court to deal with serious sexual offences, including rape and attempted rape. There was less clear feedback in relation to whether this should be a new court for Scotland, separate from the High Court or the Sheriff Court, or where it should sit. Other main feedback included:

- strong agreement that, if such a court is created, it should have jurisdiction to hear cases involving charges of serious sexual offences, including rape, as well as non-sexual offences which appear on the same indictment
- views that there should not be a separation of the offences on the same indictment, and that there should be no duplication of the process for complainers, witnesses or the accused (to minimise trauma associated with the court process)
- consensus that the court should have access to the full range of sentencing powers required by the types of cases being heard, with no sentencing limits

- support (albeit not unanimous) for such courts to be presided over by sheriffs and High Court judges, however, relevant training for the judiciary overseeing cases was viewed as more important than their jurisdiction. Similarly, trauma-informed training for legal professionals and others working in such courts was seen as essential.

The main caveat for support was around the potential for the downgrading of cases, both for serious sexual offences being heard in the new court if this is perceived as lesser than the High Court (where serious sexual offence cases such as rape are currently heard), and for those involving serious sexual harm but where a sexual offence was not charged (which would not be eligible to be heard in such a new court). Lack of resources to ensure smooth and effective operation of such a court was also posited as a potential risk.

### Single judge trials for serious sexual offence cases

There were more mixed views in response to questions in this part of the consultation compared to those in other sections. While some felt that the current jury system contained too many biases and was potentially very traumatic for complainers, others felt that the current system already struck an appropriate balance with only marginal potential for greater efficiency of court process if a new approach was adopted. There was also very mixed feedback on whether trials before a single judge, without a jury, would be suitable for the prosecution of serious sexual offences, including rape and attempted rape, and only moderate support for a time limited pilot of single judge trials for offences of rape, which it was felt could be challenging to operate. Where respondents did agree was around the need for eradicating unconscious bias, achieving greater diversity in the pool of decision makers, and addressing lack of specialist training, knowledge and experience in working with victims of sexual assault and trauma.

## Differences in views by respondent type

Due to the relatively low numbers of overall responses, and with only 45 organisational responses overall, it was difficult to extract any notable differences in views by respondent 'type'. It is also worth stressing that there was a great deal of congruence between responses given from individuals and organisations (particularly victim and witness support organisations), as well as organisations representing different sectors, and support was noted for most proposals among all respondent groups. The only clear skew in views presented by different respondents were that:

- victim and witness support organisations stressed the need for proposals to be taken forward in close collaboration with those already offering support to victims, as well as directly with those with lived experience. A focus on women and girls was also often reflected in the feedback given by such organisations, with suggestions that some of the proposals could be strengthened further to safeguard the most vulnerable victims, including those involved in sexual offences cases and domestic abuse. Most notably in relation to the Victims'

Commissioner, but also in relation to other areas of proposed reform, those in this sector also stressed the need to avoid any duplication in functions and roles already being fulfilled by others when implementing changes

- children and young people's support and advocacy organisations, and those in the third sector suggested that more nuanced and detailed consideration of the needs of children and young people and those with learning or other disabilities could have featured more prominently in the consultation (and should be kept in mind when taking forward the proposals). Again, the need to avoid any overlap with existing operation/functions of the Children's Hearings System and the Children and Young People's Commissioner was encouraged and, indeed, they stressed the need to work closely with such bodies in any 'next steps'. This cohort also specifically encouraged greater detail on how the proposals to underpin a trauma-informed approach in legislation would complement the establishment of the Bairns' Hoose model[3]
- support among public bodies and local authorities was often caveated by the need for further thought and consideration being given to how changes would be resourced and how staff could access relevant training, as well as concerns around time and capacity to take on board changes and how changes would be monitored and enforced
- legal and law enforcement organisations were more likely to stress the need for any legislative change to take a balanced view that recognises the adversarial nature of the justice system. This would mean giving equal credence to the views, experiences and needs of those accused of crime, who were presumed innocent until proven guilty (especially their needs around trauma-informed approaches and processes required to ensure that justice remains accessible, fair and transparent for all). They were also more likely to encourage consideration of how the proposals may operate in practice and the implications the changes would have on legal systems and professionals operating across the system - whilst still being mindful of any benefits for complainers and victims.

## Conclusion

Almost all proposals were well supported as a means of helping to deliver a more trauma-informed and person-centred justice system for victims and survivors, while at the same time still ensuring fairness to the accused. Respondents encouraged ongoing further engagement with the Scottish Government, at both the front-line and strategic/governance levels, to ensure that there remained an opportunity for input from interested parties in taking the proposals forward.

[3] The Barnahus model brings together justice, health, social work and recovery support, to best meet the needs of child victims and witnesses. See: Bairns Hoose | Children 1st | Children 1st

# Introduction

## Background

In May 2022 the Scottish Government launched a public consultation[4] to seek views on potential legislative reforms aimed at improving victims' experiences of the criminal justice system, with a particular reference to the victims of sexual crime.

The consultation was part of a wide ranging programme of work to transform the justice system and deliver the Scottish Government's Vision for Justice in Scotland[5], which sets out priorities to bring about system-wide transformational change. The consultation had a particular focus on possible legislative reforms to help deliver a more trauma-informed and person-centred justice system for victims and survivors, while at the same time still ensuring fairness to the accused. The consultation was designed to support delivery of the Scottish Government's commitment to empower and protect victims of crime through improving justice services, as set out in the Programme for Government 2021-22[6]. It also included proposals to appoint a Victims' Commissioner for Scotland, protect the anonymity of all complainers of sexual crimes, and progress consideration of the recommendations in Lady Dorrian's review[7] of the management of sexual offence cases which require legislation to implement.

The consultation set out a number of proposals for legislative and system change under eight key areas, these being:

- establishing a Victims' Commissioner for Scotland
- options to underpin a trauma-informed and person-centred approach
- special measures to assist vulnerable parties involved in civil cases
- review of the requirement for people accused of crimes to provide details of their proposed defence in a statement provided to the court
- new statutory underpinning for anonymity for complainers in sexual offence cases
- independent legal representation for sexual offence complainers where a request is made to lead evidence in court which relates to their sexual history and/or bad character
- the potential establishment of a new specialist criminal court dealing with serious sexual offences
- consideration of issues relating to single judge trials for serious sexual offence cases.

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

[5] Available at: The Vision for Justice in Scotland 2022 (www.gov.scot)

[6] Available at: Supporting documents - A Fairer, Greener Scotland: Programme for Government 2021-22 - gov.scot (www.gov.scot)

[7] Available at: Improving-the-management-of-Sexual-Offence-Cases.pdf (scotcourts.gov.uk)

A number of Impact Assessment questions exploring the potential impacts of the proposals on human rights, equalities and protected characteristics, the United Nations Convention on the Rights of the Child (UNCRC), socio-economic equality, communities in the Scottish islands, privacy and data protection, businesses and the third sector and the environment were also included.

The consultation ran for 14 weeks between 12 May and 19 August 2022, and an independent research organisation was commissioned to carry out an analysis of the responses received. This report presents the findings from that analysis.

## Methodology

The majority of responses were submitted via Citizen Space, the Scottish Government's online consultation platform, and were automatically collated into a database, downloadable to Excel for analysis. A small number who submitted online responses also sent complementary emails containing further detail or supporting documents directly to the Scottish Government to supplement their online response. These were analysed alongside the main database.

All responses were screened to ensure that they were appropriate and valid. Although some responses to individual questions were not appropriate or did not directly address the questions being asked, all feedback was analysed and is presented under the appropriate sections below.

The consultation contained a mix of both open and closed questions, including:

- 40 closed questions using a Likert scale where the options were 'strongly agree', 'somewhat agree', 'neutral', 'somewhat disagree' and 'strongly disagree', all with a free text box where respondents could give reasons for their answer[8]
- 28 closed questions with multiple choice options of 'yes', 'no' and 'unsure' or lists containing between three and seven options, all with a free text box where respondents could give reasons for their answer and provide further details if it was asked for in the question
- 16 open questions, with no limit to the length of response that could be given.

All questions were optional, as were the free text boxes.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal or question statement is reported below.

[8] The Likert scale questions in the consultation which asked about independent legal representation for sexual offence complainers where a request is made to lead evidence in court which relates to their sexual history and/or bad character used a slightly different scale of ''strongly agree', 'slightly agree', 'neutral', 'slightly disagree' and 'strongly disagree'.

Comments given at each open question were examined and, where questions elicited a positive or negative response, they were categorised as such. The main reasons presented by respondents both for and against the content included in the consultation were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments. Verbatim quotes were extracted in some cases to highlight the main themes that emerged. Only extracts where the respondent indicated that they were content for their response to be published were used and a decision was made to anonymise all responses as part of the reporting process.

## Respondent Profiles

A total of 69[9] responses were received - 24 (35%) from individuals and 45 (65%) from organisations. The table below shows the breakdown of organisations by 'type'. There was a reasonable spread of different types of organisations that engaged with the consultation, including local authorities and public bodies, law enforcement and legal organisations. Almost a third of organisational responses (29%) came from victim and witness support organisations.

Breakdown of Organisation Responses by Type

| | Number of respondents | Percentage of respondents |
|---|---|---|
| Advocacy/support organisation (children and young people) | 3 | 7% |
| Law enforcement | 3 | 7% |
| Legal organisation | 4 | 9% |
| Local authority (including justice partnerships) | 6 | 13% |
| Other (academia) | 3 | 7% |
| Other (campaign) | 4 | 9% |
| Other (third sector) | 4 | 9% |
| Public body | 5 | 11% |
| Victim/witness support organisation | 13 | 29% |

*Base = 45*

All who contributed written responses were asked to submit a Respondent Information Form (RIF) alongside their consultation response, indicating if they were willing for their response to be published (or not), either with or without their name. Just under two thirds of respondents (n=43; 62%) indicated that they were content for their response to be published (without their name), a quarter (n=18; 26%) were content for their response to be published alongside their name and the

[9] A total of 71 unique submissions were received, however, two respondents submitted two responses each. These were both merged to create a composite response.

remainder (n=8; 12%) indicted that they did not wish their response to be published.

## Report Presentation and Research Caveats

All tables in the following chapters show both the number and proportion of respondents who concurred with the different response options presented. It is important to note, however, that in many cases, large numbers of 'non-responses' were observed. In all tables, therefore, the 'valid percent' has also been shown (i.e. the proportion who said 'yes' or 'no' once the non-responses were removed). This gives a more accurate account of the strength of feeling among those who did answer the set questions.

For qualitative data, as a guide, where reference is made in the report to 'few' respondents, this relates to five or less respondents. The term 'several' refers to more than five, but typically less than ten. Any views that were expressed by large numbers of respondents (i.e. ten or more) are highlighted throughout, however, given the relatively small number of responses received overall, there were few questions where very obvious or dominant themes arose that were shared by large numbers of respondents.

The views presented below should also not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. They simply reflect the views of those individuals and organisations who chose to respond. Crucially, while there was a reasonably broad range of different organisations represented among respondents, there was a dominant presence of victim and witness support organisations within the sample, especially those that worked exclusively with women and girls (accounting for a third of all organisations that took part). There was also very close similarity in responses provided by several of these organisations, suggesting an element of collaboration in preparation and submission of responses. This does mean that there is an inherent skew in the findings towards the interests of this sub-group and this provides important context when considering some of the data presented below.

As demographic data were not captured as part of the consultation, it is not possible to ascertain which or how many of the views presented by individuals came from those who had personal experience of victimisation or trauma. There was also no reliable way of disaggregating the feedback given by individuals to explore differences in views between, for example, those who had previously experienced the justice system as victims, witnesses or perpetrators (and, indeed, some may have had experience of the system in multiple capacities). Some victims and witnesses who responded to the consultation provided personal testimonies or accounts which did not directly answer the questions asked as part of the consultation. These were read and relevant sentiments as they related to the consultation topics were extracted.

While it was possible to carry out disaggregate analysis of the data based on whether the respondent was replying as an individual or on behalf of an organisation, the analysis suggested that there were no notable differences in the

main themes to emerge between the two respondent ‘types’. This may be, in part, due to the fact that many of the individual respondents may have been replying as victims or witnesses, who therefore shared similar views and experiences to the organisations that represented them. While there were sometimes differences between different organisation types, the very small numbers of respondents in each organisation category means it would be misleading to classify these as clear themes. Instead, where appropriate, the reporting below sets out where views came from a particular type of organisation only where this aids or provides useful context for the views that was given.

While responses varied considerably in their length and technical complexity, all were treated with the same weight. Many respondents did not directly answer the questions that had been asked. Indeed, several respondents used the consultation to loosely structure a response, but instead of addressing specific questions presented an overarching view which allowed them to cover their main interests/concerns.

There was also evidence of respondent fatigue with later questions attracting fewer responses (especially to open-ended questions) and several respondents simply cross-referenced their answers to earlier questions instead of providing new or tailored responses for individual questions. Others also repeated the same general comments in response to different questions instead of offering more nuanced feedback. Indeed, some general comments were made about the length and inaccessibility of the consultation paper, especially for lay victims and witnesses, and this may have accounted for some of the repetition and non-response.

Finally, but crucial to the presentation below, legal organisations that responded to the consultation highlighted a fundamental concern with the use of the term ‘victim’ as used throughout the consultation. They stressed that there was a tension between labelling people the ‘victims of crime’ and the fundamental legal concept of the presumption of innocence (and that while victimhood was in some cases unquestionable, in other cases, the courts would legally refer to an individual who alleged criminal treatment as a ‘complainer’ until a conviction was in place). For some components of the consultation, therefore, where the term ‘victim’ had been used, caution was raised that this terminology may not be legally accurate (and that ‘complainer’ may be more appropriate). Similarly, while the terms ‘victim’, ‘survivor’ and ‘complainer’ have all been used interchangeably at various points in this report, this reflects the words that were used by respondents themselves and may not always be the correct legal terms that should have been used in response to the questions that were asked.

The remainder of this report presents the findings from the analysis.

# Establishing a Victims' Commissioner

The Scottish Government committed to establishing a Victims' Commissioner in the 2021-22 Programme for Government. This is in line with the priority they place on hearing victims' voices and offering approaches to justice which place victims at the heart. The first part of the consultation sought views on the more detailed aspects of how this role should be established.

**Question 1: To what extent do you agree or disagree that the Victims' Commissioner should be independent of the Scottish Government?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 43 | 62% | 88% |
| Somewhat agree | - | - | - |
| Neutral | 2 | 3% | 4% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 4 | 6% | 8% |
| No response | 20 | 29% | - |

*Base = 69*

The majority of respondents (88%) strongly agreed that the Victims' Commissioner should be independent of the Scottish Government.

The main reasons given in support of independence (across all respondent types) were that political interference should be avoided to minimise risks that the role was subject to changing political tides, as well as to maintain impartiality/neutrality, fairness and transparency. Several victim and witness support organisations also indicated that independence would allow for a more credible system of handling complaints and reporting of potential failings within the justice system:

> "An independent Victims' Commissioner is crucial as it avoids any political influences that could interfere with the processes and outcomes of any work carried out. It also ensures that the victims lie at the heart of the commissioner's work, rather than being swayed by any political opinions and pressures of the time." (Individual)

Linked to this, however, was some cynicism that the Commissioner would ever be able to achieve complete independence from Government, given that reporting of non-compliance by justice agencies would always result in some degree of self-regulation by public bodies. Particular concern was raised in relation to police practice, and how any complaints overseen by the Commissioner would ultimately be dealt with, as well as the lack of the separation of power between the Crown

Office and Procurator Fiscal Service (COPFS) and the Scottish Government (with a perception that there was limited accountability and independence of COPFS). The general sentiment was that the Commissioner should be able to hold the Scottish Government and partners to account to ensure that victims' experiences are at the centre of the justice process:

> "The role should be focused on the interests, needs and welfare of those who have been harmed by crime. As such, [organisation] strongly agrees that the Victims' Commissioner should be independent of the Scottish Government. This will enable the Commissioner to remain politically neutral and ensure they are able to challenge any policies, processes, and practices as needed." (Other (third sector))

Another reason given in support (by individuals and support organisations) was that independence would generate greater trust and confidence in the role in the eyes of victims and the wider public. In particular, it was felt that victims/survivors often found criminal justice structures and processes challenging and that independence would enable the Commissioner to challenge structural barriers to justice:

> "Many victims feel a sense of distrust towards the justice system and thus the Government, so I think its independence is essential to better establish a rapport with victims." (Individual)

One children and young people's advocacy/support organisation similarly expressed that independence would also afford greater freedom to the Commissioner themselves in speaking freely on issues affecting victims and witnesses, without feeling compromised.

Other organisations argued that independence would provide parity with the Children and Young People's Commissioner Scotland, and that this was key given that both were likely to work closely alongside one another going forwards:

> "As with the Children's Commissioner, the Victims' Commissioner should be independent to the Scottish Government. This will promote independent functions to ensure the views and experiences of child (and all) victims are heard and acted upon, allowing them to independently carry out the functions of the role, investigate and prepare reports, and make recommendations to Scottish Government and other agencies/organisations. There is likely to be an overlap with the role of the Children's Commissioner." (Other (academia))

All four who strongly disagreed with this proposal were victim and witness organisations who disagreed with the concept of a Commissioner entirely, and as such did not answer the question directly. Among them (and some who did not answer the closed question) the main view was that the creation of a Victims' Commissioner for Scotland would not add any value to the work already being carried out across Scotland to support victims of crime, particularly those currently offering support to tackle violence against women. Views were expressed that the

creation of such a role may, in fact, duplicate work already being done and/or reduce the resources available for this work to be continued by others (such as existing national and regional victim and witness support agencies). The implementation of changes may also take time, with knock on negative impacts on services currently being delivered/received by victims during the setting up period.

Similarly, one public body raised concerns that the Victims' Commissioner may overlap with the work already carried out by those such as the Children and Young People's Commissioner, Equality and Human Rights Commission and the Scottish Human Rights Commission. In particular, they pointed out that one of the proposed functions of the Victims' Commissioner would be raising awareness and promotion of victims' interests and rights and that there would be significant scope for overlaps in this regard with the Children and Young People's Commissioner:

> "…we consider that the proposed role should be established by legislation, which clearly sets out the Victims' Commissioner's functions and powers. Any legislation should be drafted to avoid, as far as possible, any cross-over in remit and responsibilities already held by any other organisation in Scotland. We consider that addressing any potential overlaps in remit and responsibilities through legislation is preferable to proceeding by way of Memorandum of Understandings between bodies." (Public body)

Other neutral respondents observed that they would simply support the Commissioner, if the post was created. However, one commented that further consideration would be needed around how the proposed Commissioner's function to include monitoring compliance with the Standards of Service for Victims and Witnesses would interact with the current legislative provisions under the Vulnerable Witnesses (Scotland) Act 2014.

One children and young people's advocacy/support organisation responded here, and throughout the remainder of the consultation, by expressing disappointment that the current consultation made no reference to the Scottish Government's clear commitment to embed Bairns' Hoose[10] across Scotland:

> "Although we can see that the document states that the 'improving victims experiences' work is part of an "extensive programme of work (being progressed) to modernise our justice system," we are extremely concerned that there is no specific acknowledgement of the significant transformation that Bairns' Hoose will mean for child victims and witnesses. The consultation document fails to take into account the role of the Bairns' Hoose in improving victims' experiences of the justice system, the importance of Bairns' Hoose as a transformational change for child victims and witnesses, the potential link between a Victims' Commissioner and a Bairns' Hoose and the way in which a Bairns' Hoose would interact with the

[10] The Barnahus model brings together justice, health, social work and recovery support, to best meet the needs of child victims and witnesses. See: Bairns Hoose | Children 1st | Children 1st

changes contained within these proposals." (Advocacy/support organisation (Children and Young People))

This view was endorsed by one public body who also welcomed further clarity on how the proposals to underpin a trauma-informed approach in legislation would complement the establishment of the Bairns' Hoose, as well as how the Victims' Commissioner and Bairns' Hoose would interact.

Other more general comments included that:

- these new proposals must have a clear implementation plan, allocated resources, and sit firmly alongside all the other progressive reforms that have been passed and legislated for
- the resulting Bill must be compatible with the UNCRC, given the commitment made by the Scottish Government to incorporate the UNCRC into Scots Law (including ensuring that a 'child' is as defined in Article 1 of the UNCRC as anyone under the age of 18).

**Question 2: To what extent do you agree or disagree that the Victims' Commissioner should be a statutory role?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 39 | 57% | 81% |
| Somewhat agree | 5 | 7% | 11% |
| Neutral | 2 | 3% | 4% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 2 | 3% | 4% |
| No response | 21 | 30% | - |

*Base = 69*

Again, the large majority of respondents (81%) who answered this question strongly agreed that the Victims' Commissioner should be a statutory role.

The main reasons given in support (across all respondent types) were that making the role statutory would ensure transparency with regard to the remit of the role and powers of the office holder, bringing with it clear lines of responsibility and accountability, and making clear the scrutiny, reporting and review mechanisms.

Making the role statutory was again seen as being necessary to give victims confidence in the person representing them, as well as providing stability:

> "…a statutory role will provide the status necessary to instil trust and confidence in the process. It also provides longevity to the role and cannot simply be ended." (Victim/witness support organisation)

Among support organisations in particular, the statutory status was also seen as giving the Commissioner "gravitas", the power to hold authorities to account, and to foster and enhance collaborative working/financial relationships within the sector, giving victims their rightful voice:

> "For the Victims' Commissioner to be effective and legitimate, the role must be on a statutory footing. This gives the Commissioner's office the power to compel the resources and information needed to ensure all victim's voices are heard and represented, to challenge, and to create meaningful, lasting change." (Victim/witness support organisation)

Again, it was felt that making the role statutory would provide parity with the role of the Children and Young People's Commissioner Scotland.

While there was strong support, comments were also made (by just one or two respondents each) that:

- it would be important for there to be a clear remit and explanation of how the Victims' Commissioner's role would overlap with the role of the Children and Young People's Commissioner for Scotland, to manage the expectations of victims and witnesses and other stakeholders
- there should be a guarantee regarding the timescales around passing of the legislation and the role coming into place.

Three respondents noted that making the role statutory may mean that it would take longer to implement (which could again be disadvantageous to victims and cause disruptions to existing support services), with one questioning if a non-statutory role would be possible in the interim. Others stressed that while it may take time, it was important that the role was conceived in the right way, and for the long-term.

The two respondents who disagreed that the role should be statutory (both victim/witness support organisations) did so on the basis that they did not support the role as a whole as it was seen to potentially duplicate and detract from the role of existing victim and witness support organisations operating across Scotland.

**Question 3: To what extent do you agree or disagree that the Victims' Commissioner should be accountable to the Scottish Parliament?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 32 | 47% | 70% |
| Somewhat agree | 5 | 7% | 11% |
| Neutral | 3 | 4% | 6% |
| Somewhat disagree | 2 | 3% | 4% |
| Strongly disagree | 4 | 6% | 9% |
| No response | 23 | 33% | - |

*Base = 69*

Most respondents who answered this question (70%) strongly agreed that the Victims' Commissioner should be accountable to the Scottish Parliament. Views echoed those made in response to earlier questions, i.e. that accountability to Parliament would ensure transparency and garner trust.

A common theme among those who either 'strongly' or 'somewhat' agreed was that the Commissioner should be accountable first and foremost to victims, witnesses, their families/supporters and the general public as a whole. Accountability to Parliament was seen as important, but secondary to public accountability.

Comments from organisations not working directly with victims and witnesses included that the definition and process of accountability would need to be clearly set out to give victims trust in the role:

> "It is necessary that there is a clear accountability mechanism for the post of the Victims' Commissioner. This is particularly essential from [a] victims' perspective, especially if the post holder's performance in the role falls short of the required standards." (Other (academia))

A small number of organisations again cautioned that accountability to Parliament had the potential to put the role at risk of being politically influenced or driven. However, others emphasised that accountability to a cross-party Parliament, instead of the Scottish Government, should ease this concern:

> "The Scottish Parliament is the democratic voice of the Scottish people. There is no other forum or body who could hold the Commissioner accountable in the same way." (Public body)

One academic respondent highlighted that accountability to the Scottish Parliament would allow victims to voice any concerns about the role holder via their MSP.

Again, comments were made that making the Victims' Commissioner accountable to Parliament would be consistent with position for the Children and Young People's Commissioner, as well as the Scottish Human Rights Commission.

**Question 4: How do you think the Victims' Commissioner should be held accountable?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Annual year report | 32 | 46% | 76% |
| Multi-year strategic plan to be published and laid in the Scottish Parliament | 33 | 48% | 79% |
| Other | 21 | 30% | 50% |
| No response | 27 | 39% | - |

*Base = 69*

Both the options of annual reports and multi-year strategic plans received strong support from respondents (76% and 79% respectively). There was also strong support for using a combination of annual yearly reports and a multi-year strategic plan (67%). Just under a third of those who answered the question (31%) ticked all three options, and there were no obvious differences in the preferences expressed between individuals and organisations or organisations of different types.

Both annual reports and multi-year strategic plans were welcomed on the basis that they would assist with transparency and accountability, raise awareness of the role, allow any shortcomings to be regularly identified and challenged, and allow victims and others represented by the Commissioner to keep abreast of activity, progress and plans:

> "The production of frameworks, strategic action plans, annual reports, made publicly available also enhances accountability of the role. These mechanisms will provide clarity of the role, a clear strategy and programme of activity will support robust accountability." (Local authority (including justice partnerships))

Combining the two was seen as providing short term transparency and up-to-date information alongside setting out longer term vision and outcomes which would give partners confidence in the Commissioner's strategic approach. Regular reporting in the first instance was seen as especially important given the backlog of cases in the courts and victims' desires to see what was being done in the immediate term. Both of these options were also seen as commensurate with reporting procedures for other similar public positions.

Several who indicated 'other' again stressed the need for the Commissioner to be accountable to victims directly, as well as those who work with victims, witnesses and their families/supporters (e.g. Victim Support Scotland, Rape Crisis, Women's

Aid) to allow scrutiny by such partners. Indeed, the main 'other' reporting suggestions included:

- reporting to a panel of individuals with lived experience (e.g. victims and witnesses)
- that the multi-year strategic plan should be developed in partnership with victims/survivors
- that the role should have an involvement in relevant group structures in order to work together with other relevant parties (including Victim Support Scotland).

One organisation suggested an Independent Scrutiny Panel with victims with lived experience engaged from the outset as part of systems design to define the role.

More general comments included that:

- all reporting should be done in such a way that it is accessible to victims, including children and young people (with suggestions for a publicly accessible website, to assist with transparency, similar to the model operated by the Children and Young People's Commissioner)
- plans should be reviewed regularly to make sure that they remain current
- more nuanced reporting procedures could be developed once the role was more clearly established.

One legal organisation noted that, while the Scottish Parliament was the correct forum in which the Commissioner should be held accountable, the decision on the manner in which the Commissioner was to be held accountable was something which should be for the legislature to make (i.e. the validity and credibility of the appointment required annual scrutiny by the country's legislature).

A small number of respondents (including academics) also urged that the Commissioner use an evidence-based approach to developing plans, including scrutinising national and local data, highlighting any necessary improvements required nationally by organisations, highlighting any gaps, current research and examples of good practice.

**Question 5: In your view, what should the main functions of the Victims' Commissioner be?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Raising awareness/promotion of victims' interests and rights | 38 | 55% | 79% |
| Monitoring compliance with the Victims' Code for Scotland, the Standards of Service for Victims and Witnesses and any relevant legislation | 36 | 52% | 75% |
| Promoting best practice by the criminal justice agencies and those providing services to victims, including championing a trauma-informed approach | 39 | 57% | 81% |
| Undertaking and/or commissioning research, in order to produce reports and make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims | 35 | 51% | 73% |
| Other | 20 | 29% | 42% |
| No response | 21 | 30% | - |

*Base = 69*

All of the functions suggested in the consultation paper were supported by around three quarters of those who answered this question. Further, most who gave a valid response either ticked all options or ticked a combination of different options (rather than just one). Several open-ended comments were also made that all of the above functions carried equal weight and they would combine to produce an effective role:

> "All of the above hold merit in their own right, however they will tell the complete story when looked at in tandem." Victim/witness support organisation)

Overall, comments made in response to this question stressed the need for a strong and clear definition of what the role was expected to deliver.

Some victim and witness support organisations raised concern about the complexity of the role and the experience that would be required to effectively deliver it. They again highlighted that such experience had already been built up across existing services, and that such services may remain best to deliver any future support:

> "'Crime' is not a homogenous phenomenon and designing and delivering services for 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 cannot imagine a Commissioner or Commission that would be better placed to advise strategic leadership regarding best practice than the survivor-led grass-roots services that have emerged over the last 5 decades." (Victim/witness support organisation)

Others (especially victim and witness support organisations) suggested the need for a formal mechanism that would allow small and specialist services to have equal voice as well as the need for the Commissioner to work with non-nationwide victim support organisations in a collaborative way. It was again stressed (especially by those in the support sector) that there was already much knowledge, skills and experience in local front line and grass roots organisations, which should not be ignored.

In relation to **'raising awareness/promotion of victims' interests and rights'**, the need for the Commissioner to include a strategic focus on specific forms of victimisation was stressed (including, for example, at least one strand of work focusing on and developing expertise in domestic abuse or dedicated work for victims of sexual crimes).

Three respondents suggested a function of actively seeking contributions from lived and learned experience groups:

> "One of the Commissioner's key functions should be listening to and engaging with people who have been affected by crime to ensure that their experiences and voices drive positive changes for future victims." (Other (third sector))

In relation to **'undertaking and/or commissioning research'**, views were offered that this was essential for identifying good practice as well as issues, gaps and where the current system was failing. One public body indicated that a research function would help to ensure that the Commissioner was up to date with the changing needs and emerging issues affecting victims. It would also help them to monitor the impact that any change in practice would have. One local authority/justice partnership also suggested, however, that there was a need to ensure that undertaking research did not take away from the other aspects of the Victims' Commissioner role (and that commissioning research rather than undertaking it may be more appropriate). One academic organisation argued that the function of the Victims' Commissioner should be not only reactive but also proactively pursue evidence-based and research-based solutions to the problems encountered by victims in the criminal justice system in Scotland.

Other suggested powers or functions (from just one or two respondents each) included:

- raising awareness and speaking out about victims' rights, needs and interests (including mental health challenges and needs)
- powers of investigation

- being able to hold other agencies to account if they are found not to be complying with the Victims' Code etc., and to ensure that appropriate mechanisms are in place to address lack of compliance
- a specific function to protect child victims
- a role in monitoring compliance with the Bairns' Hoose standards
- a more proactive role in undertaking impact assessments in advance of any changes in practice being implemented, as this would enable mitigation of any potential negative impacts
- overseeing, mapping and monitoring provision of victims' services, including domestic abuse services
- overseeing, mapping and monitoring provision of perpetrator interventions and disposals.

One respondent suggested a role in ensuring that all court officials are properly trained when dealing with victims of domestic abuse, and others felt that powers to ensure that justice partners adopted a trauma-informed approach (especially in their interactions with victims) would be appropriate:

> "Promoting best practice by the criminal justice agencies and those providing services to victims, including championing a trauma-informed approach, and to these agencies. This might include through providing or contracting to provide training and guidance to agencies on delivering high-quality services structured by a set of standards, and best practice in commissioning services." (Victim/witness support organisation)

Finally, one respondent again urged that the role and functions of the Commissioner not be developed or treated in isolation from those they would be working alongside (i.e. the role needed to be determined alongside considerations of the other current Commissioner roles in place in Scotland).

**Question 6: What do you think should be within the remit of a Victims' Commissioner for Scotland?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| The experience of victims in the criminal justice system | 38 | 55% | 84% |
| The experience of victims in the civil justice system | 33 | 48% | 73% |
| The experience of victims in relation to the Children's Hearings system | 34 | 49% | 76% |
| The experience of victims resident in Scotland, but where the crime has taken place outwith Scotland | 30 | 43% | 67% |
| Other | 15 | 22% | 33% |
| No response | 24 | 35% | - |

*Base = 69*

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

Several respondents again simply indicated that they believed 'all of the above' would be appropriate and argued for an inclusive approach, with everyone who has been harmed by crime being included within the remit of the Victims' Commissioner. Including all within the Commissioner's remit was seen as providing consistency, parity and equal and fair treatment for all types of victims:

> "Irrespective of whether the victim is part of criminal [or] civil justice system, they will generally require support. This will be most evident in cases of trauma. We should ensure all people living in Scotland have access to the best possible experiences in the Justice System." (Other (campaign))

Victims in the criminal justice system, especially victims of violent and sexual crime, were described by one legal organisation as likely to have endured the greatest hardship and upset and so prioritising their experience was suggested.

Including civil cases and those in the Children's Hearings System was seen to be particularly important in providing cross-over/continuity for victims who are currently required to navigate multiple systems (especially child victims and domestic abuse survivors):

> "In our experience, victims may concurrently experience processes within each of these systems and it is important that the Victims' Commissioner views the system as a whole, in the same way that victims do." (Advocacy/support organisation (Children and Young People))

Several also commented on the importance of including children and the Children's Hearings System as children can be subject to the proceedings of the Children's Hearings System and/or can be the victim of harm by a young person who is the subject of the proceedings. In the latter case, it was suggested that there are often difficulties experienced in obtaining justice within the proceedings and understanding the complexities of the system.

This support was not, however, unanimous, with some respondents stressing that children's experiences of victimisation should not be subsumed under those of adults (and vice versa) and that a different specialised body to oversee cases involving children may be more appropriate, for example, the Children and Young People's Commissioner Scotland. One public body indicated that it was not clear from the consultation if the proposal here related to children and adults who had been the victim of an offence committed by a child subject to a referral to the Children's Reporter and invited clarity from the Scottish Government on this point.

Several used the open-ended comments to again support inclusion of people who are resident in Scotland but have been victimised outside of Scotland within the Commissioners' remit. One respondent, however, noted that this should not be prioritised over the other areas suggested:

> "The experiences of victims who are resident in Scotland, but where the crime has taken place outside of Scotland, should only be included within the remit of the Victim[s'] Commissioner if the office is adequately resourced to carry out this work. Navigating foreign justice systems and diplomatic relations is inevitably more complex than domestic cases and would require a specialist role within the office of the Victims' Commissioner. If it is considered beyond the means of the Victims' Commissioner, there must be clear accountability for welfare abroad - with a named Minister held responsible." (Victim/witness support organisation)

The main 'other' responsibilities cited by just one or two respondents each included:

- witnesses of crime
- family members of victims and witnesses
- family members of those accused of a crime

- children who have engaged in offending behaviour and have themselves also been victims of crime
- foreign spouses of victims
- victims who have not reported their experience and are not part of the Criminal Justice System, for example, due to lack of trust or challenges with communication (so as to understand the reasons for this and to consider any of the points raised).

As well as offering suggestions for which types of victims should be included within the remit, several respondents made suggestions for more strategic duties which they felt would be appropriate to the role, including:

- remit over the entire victim's journey
- having a clear oversight of the various different pieces of legislation that have been enacted relating to victims
- being able to review processes regarding Police Complaints and Victims Right to Review against decisions made by COPFS
- highlighting and addressing incompatibilities with the UNCRC in advance of, or following, its incorporation
- adopting and promoting a trauma-informed approach.

One more general observation was made by a third sector respondent that the term 'victims of crime' may not be liked by many to whom it is applied, and that "people affected by crime" may be a more suitable title for this group (in line with the Victim Support Scotland Language Guide[11]).

Other comments included that it would be helpful to have clarity on how the role of the Victims' Commissioner would link to the operationalisation of the Bairns' Hoose model and also how it would work in practice with the Children's Hearings System, given that the review of Hearings was still ongoing. Clarity was also sought on how additional training and resources arising from the role of the new Commissioner would work in practice, as well as clarity around how the Commissioner would work with the Lord Advocate and other justice and political partners.

[11] Available at: Launch of Mind My Experience - the VSS Language Guide - Victim Support Scotland

**Question 7: What powers do you think the Victims' Commissioner should have?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| The power to carry out investigations into systemic issues affecting victims of crime | 35 | 51% | 85% |
| The power to require persons to give evidence in the course of an investigation | 25 | 36% | 61% |
| The power to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims | 35 | 51% | 85% |
| The power to require persons to respond to any recommendations made to them (by the Victims' Commissioner) | 32 | 46% | 78% |
| Other | 11 | 16% | 27% |
| No response | 28 | 41% | - |

*Base = 69*

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

Investigatory powers for systemic issues were seen by victim and witness support organisations as essential for enabling greater autonomy in determining the focus of the Commissioner's work, and in identifying problems and potential policy changes. Specific examples of systemic issues which might be in scope here included investigation of police practice in relation to victims of domestic crimes and cases involving children where systemic problems had occurred.

Again, clarity around powers was seen as necessary to ensure that the roles of the various scrutiny bodies did not overlap. Specific concern was raised around risks of overlap with the Children and Young People's Commissioner in this regard, and it was stressed that both organisations taking on similar powers of investigation may constrain the latter's ability to investigate issues relating to child victims and witnesses which are brought to their attention.

One very specific concern was also raised that such powers of investigation would also overlap with established mechanisms for accountability of the police service. This included the powers and functions of the Scottish Police Authority, the Police Investigation and Review Commissioner, HM Inspectorate of Constabulary in Scotland, and the Crown Office:

> "Any perceived shortcomings in how the police deal with complainers/victims are more than capable of being addressed through these bodies. The potential addition of yet a further layer is therefore wholly unnecessary." (Law enforcement)

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

Some of the doubts raised in relation to requiring persons to give evidence in the course of an investigation included concerns that no-one should be compelled to do so, especially not victims (for whom doing so could be traumatising and compound the original trauma):

> "It would be useful to clarify whether the 'requirement' would be professionals or individual victims. Choice needs to be at the forefront for victims and we need to be careful of unintended consequences to victims." (Local authority (including justice partnerships))

The power to 'require persons to give evidence' could be replaced with the power to 'require (or support) persons to co-operate' it was suggested, as that was more conciliatory and collaborative.

The power to make recommendations to the Scottish Government, local government, criminal justice agencies, those providing services to victims, and other public bodies was seen as key to giving investigations and research the level of robustness required. One respondent suggested that these recommendations may include possible law change and practice change. The same respondent said that lessons could be learned from England and Wales about the importance of ensuring that Commissioners were given the power to report and make recommendations.

The power to require persons to respond to any recommendations made to them (by the Victims' Commissioner) and receive a response within an agreed timeframe was welcomed on the basis that it would again ensure the Scottish Government and other relevant agencies were accountable to any recommendations made. Clarity was sought on whom the term 'person' might refer to in this question.

Other possible powers, mentioned by just one or two respondents each, included the power to:

- review complaints from victims where there is some question as to whether their rights under the Victims' Code has been complied with or not
- challenge individual cases in regards to automatic early release in which offenders have been on licence
- convene meetings with the Parole Board and Scottish Prison Service (SPS)
- impose timelines from reporting to the police to attending court (i.e. within 12 months)
- allocate resources to determine/address key gaps and failures (at national levels and in line with the agreed multi-year strategy)
- undertake effective review of the operation of the Victims' Code and any relevant standards and legislation
- require changes to and expand the Victims' Code and any relevant standards and legislation if it is found to be inadequate
- ensure compliance with the Victims' Code and any relevant standards and legislation
- bring appropriate legal proceedings against bodies that are found not to be complying with the Code and any relevant standards and legislation
- hold the Government to account in relation to its Equally Safe strategy, including any new guidance and standards developed as part of the independent strategic review of funding and commissioning of violence against women's and girls' services
- undertake effective review and quality assurance of approaches to those who commit crime, in particular how it impacts on the Victims' Code and victims' experiences of justice, and any potential system-generated risks
- require changes to approaches to those who commit crime if such approaches are found to be inadequate and harmful to victims and survivors - including compromising their safety, wellbeing and sense of justice.

A final and more general point raised by one third sector respondent was that unless the Commissioner had additional powers (such as being able to identify or develop appropriate funding models to support systemic change), there was a risk that the role would not be able to bring about meaningful changes on the ground.

**Question 8: To what extent do you agree or disagree that the Victims' Commissioner should be required to consult with victims on the work to be undertaken by the Commissioner?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 37 | 54% | 81% |
| Somewhat agree | 7 | 10% | 15% |
| Neutral | 1 | 1.5% | 2% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 1 | 1.5% | 2% |
| No response | 23 | 33% | - |

*Base = 69*

There was strong agreement (81%) with the proposal that the Victims' Commissioner should be required to consult with victims on the work to be undertaken by the Commissioner (and views were consistent across all types of respondents). Indeed, many suggested this was a central tenet of the role and assumed that anyone appointed to the post would wish to place victims "front and centre" of any planning and operations in order to succeed:

> "We believe that direct engagement with victims is fundamental, as it is their voices that the commissioner should champion." (Victim/witness support organisation)

In particular, it was felt that:

- any consultation must be inclusive and open to ensure that victims from a wide range of backgrounds have a chance to get involved
- consultation must include both those who are already engaged with support and those who are not (i.e. identifying gaps where people feel that they cannot engage, and capturing hidden or seldom heard voices)
- children and young people must be appropriately involved in any consultation or engagement
- useful learning could be achieved from consulting with victim support organisations and others who advocate on behalf of victims
- the consultation must take into account any questions that victims would wish the Commissioner to ask of specific agencies on their behalf
- engagement should go beyond consultation to include things such as collaboration and co-production, whereby victims are directly involved in informing policy and practice change

- engagement with victims needs to be done in a safe, managed and trauma-informed way, appropriate to the stage the victim may be at in their journey:

> "Engagement with victims needs to be trauma-informed, safe and managed with due care and attention being paid to the point in the process for the victim, for example using authentic voice panels/ survivor reference groups that support the victim to engage." (Local authority (including justice partnerships))

One respondent suggested that consultation should not be restricted to 'new' direct engagement, but that the Commissioner should also learn from the views and experiences of victims expressed over the years via earlier consultations or previous research, to ensure that duplication of effort does not occur. In contrast, another respondent suggested that engagement must be ongoing and be continually embedded and acted upon, recognising that needs and experiences may change over time.

One organisation suggested that consideration should be given to resourcing a specific role in the Victims' Commissioner's office to take responsibility for appropriate consultation and engagement, in reflection of the distinct skills and expertise required for engaging victims and survivors in this way.

The one organisation that strongly disagreed with this proposal was a victim and witness support organisation who, again, expressed a view that there was no need for a Victims' Commissioner at all.

**Question 9: How do you think that engagement with victims should take place?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Advisory board, including victim representatives | 31 | 45% | 74% |
| Victims' reference group | 29 | 42% | 69% |
| Focussed consultations with victims | 34 | 49% | 81% |
| Ad hoc engagement with victims | 27 | 39% | 64% |
| Other | 18 | 26% | 43% |
| No response | 27 | 39% | - |

*Base = 69*

Again, the majority of respondents who answered this question selected multiple responses, rather than one alone, the most popular being focussed consultations with victims (81%) and an advisory board, including victim representatives (74%). The least favoured option was ad hoc engagement with victims (64%) and open-

ended comments suggest that this may be because direct ongoing engagement with victims was seen as essential in order to promote confidence.

Open ended comments also reiterated that a combination of different engagement methods was the preferred approach, and/or that a menu of options would allow a greater number of different victims to be heard.

Again, organisational respondents stressed that whichever approach or approaches were adopted, they must be trauma-informed, be flexible and appropriate to individual victims' needs and circumstances. The Commissioner must be given scope to adopt bespoke solutions to engagement where needed (i.e. each occasion should drive the choice of engagement methods used and this should be a victim led decision):

> "Methods of engagement with victims need to be as flexible as possible to support everyone to have a voice. Not everyone will wish to have the same level of engagement: some will want to provide input in the longer-term, whereas others may feel more comfortable contributing on specific subject areas. Being a survivor of crime is traumatic, and trauma-informed practice requires choice, control, and trust to empower participation." (Other (third sector))

Supports to facilitate safe engagement were also seen as necessary, including use of different modes (face-to-face, online or telephone) and different environments (that provide security, comfort, privacy and anonymity) as required.

It was felt that the purpose of any engagement activities would also need to be clearly specified, and one respondent suggested that the applicability of the various posited options would largely depend on the issue that was being consulted upon. Similar to responses given to earlier questions, some organisations emphasised that there would also be value in engaging with victim support organisations, and/or working alongside such organisations to facilitate engagement with victims themselves.

In relation to children and young people, it was suggested (by one academic organisation) that they should be consulted individually and through organisations who support them regarding the work of the Victims' Commissioner as this was a different role to that of the Children's Commissioner (albeit with significant overlaps). Special consideration should also be given to those children and young people who do not have the means to share their views and experience. Again, a mix of different ways of engaging children and young people was suggested:

> "Participation of children and young people who have experience of being victims can be by individual, groups, consultation responses - all of which could be led by children and young people themselves. Engagement could also take place by having children and young people being represented on an advisory board for victims, allowing general consultations on an ongoing basis with the option to then consult on specific issues with wider groups." (Other (academia))

Only one individual raised concerns specifically regarding the establishment of a formal advisory group that included victim representatives in case this entrenched the views of particularly vocal groups and individuals about victims' experiences and their expectations of the system.

Other more general comments included that valuable lessons could be learned by looking at the experiences of other Victims' Commissioners in this regard.

**Question 10: Are there any specific groups of victims who you think the Victims' Commissioner should have a specific duty to engage with? If so, who are they and how should that engagement take place?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Yes | 33 | 48% | 82.5% |
| No | 6 | 9% | 15% |
| Unsure | 1 | 1% | 2.5% |
| No response | 29 | 42% | - |

*Base = 69*

The majority of those who answered this question (82.5%) indicated that there were specific groups of victims who they thought the Victims' Commissioner should have a specific duty to engage with.

The specific groups listed (in no particular order) were:

- women and girls (although this may reflect the fact that several responses came from organisations representing women and girls)
- children and young people
- those with protected characteristics (especially those from minority ethnic backgrounds)
- care experienced victims
- people with physical and learning disabilities and victims with additional support needs
- hard to reach and seldom heard groups
- refugees, asylum seekers and immigrants (both male and female)
- victims of historic as well as current crimes (including victims of historic child abuse)
- people who have been witnesses of crime
- family members of individuals accused of a crime
- police officers and others exposed to violence and victimisation

- victims of the most serious crimes (including sexual crimes and domestic abuse)
- victims from LGBTQI+ communities
- victims with experience of sex work
- victims of abuse in religious environments/victims of so called 'honour based' crimes
- victims living in Scotland who have been victimised outside of Scotland
- organisations that specialise in victim support (including Children's Panels).

One children and young people's organisation expressed a view that there should be no limit to the 'type' of victim (criminal justice or civil justice) that are deemed worthy of support and advocacy. Others simply reiterated that the Commissioner should treat all victims fairly and with equal weight, so as not to diminish public trust in the Commissioner (which may occur if one or more special interest groups attained dominant status).

**Question 11: To what extent do you agree or disagree that the Victims' Commissioner should be required to consult with organisations that work with victims, on the work to be undertaken by the Commissioner?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 35 | 51% | 76% |
| Somewhat agree | 6 | 9% | 13% |
| Neutral | 2 | 3% | 4.5% |
| Somewhat disagree | 1 | 1% | 2% |
| Strongly disagree | 2 | 3% | 4.5% |
| No response | 23 | 33% | - |

*Base = 69*

Just over three quarters of respondents (76%) who answered this question strongly agreed that the Victims' Commissioner should be required to consult with organisations that work with victims, on the work to be undertaken by the Commissioner. A further 13% somewhat agreed.

Several respondents (from different sectors) again stressed that they saw this as a fundamental requirement of the Commissioner. While some felt there was no need to make this a 'formal' requirement (given its inevitability), others felt the requirement should be strengthened further:

> "…a legislative requirement to consult with the third sector is not sufficient to ensure strong engagement in practice. We would therefore be keen for structures and processes to be put in place

> alongside legislative requirements, to support the Victims' Commissioner to engage with as broad a range of third sector organisations working with people affected by crime as possible." (Other (third sector))

Respondents were keen to stress that they wanted the Commissioner, if established, to work closely with support organisations to ensure that the role complements and amplifies rather than duplicates existing specialist voices.

The strengths of engaging with such organisations were that:

- they already had an awareness of the complexity of victimisation and the different forms it could take
- they were already known to victims and trusted by them, and would be a reliable conduit for information sharing
- such organisations were already well versed in how to engage with victims in a trauma-informed way.

Others stressed how they perceived that partnership working, which would build on the experience already held within existing victim support services over a number of years would deliver the best results for victims, with all organisations and agencies learning from one another. This would involve agencies engaging in robust communication and possibly joint training.

A specific comment was made that this kind of engagement must include organisations representing children and young people, who may be best placed to share their experiences of service delivery and feedback from the children and their families, ensuring a wider coverage of voices, especially those not in a position to provide their opinions without this support.

It was also stressed that this type of engagement must include not only large/national organisations, but that there should also be representation of smaller, specialist services. Some respondents suggested that the consultation document was unclear as to how the Commissioner would represent, promote and engage equally with all victims' organisations across Scotland.

Another specific caution was raised (by a legal organisation) that not all organisations working with victims will be marketed as such. For example, organisations working with people convicted of crimes will also be supporting victims, as people who commit offences are often victims of crime themselves. Equally, organisations working with the families of people who offend will also be supporting victims, such as those who themselves are the target of their family member's offending.

Overall, by engaging such organisations alongside victims directly, it was felt that the crucial blend between learned and lived experience would be achieved.

**Question 12: Are there any other relevant bodies or organisations that may have an interest in the work to be undertaken by the Victims' Commissioner?**

A large number of other relevant bodies and organisations were cited by respondents including (in no particular order):

- Victim Support Scotland (VSS)
- Victim Information and Advice Service (VIA) (part of COPFS)
- Independent victim support groups (included those that are self-funded)
- Rape Crisis Scotland
- Women's Aid (including Shakti Women's Aid and regional offices)
- Victim and Witness Partnerships (VAW Partnerships)
- The Victims Taskforce
- National Network of Violence Against Women & Girls Partnerships
- Police Scotland Domestic Abuse Forum
- Scottish Commission for People with Learning Disabilities
- Scottish Women's Rights Centre
- Victims Organisations Collaboration Forum (VOCFS)
- People First (Scotland)
- Engender
- Equality Network
- Wellbeing Scotland
- Scottish Trans Alliance
- Trafficking Awareness Raising Alliance (TARA)
- AMINA Muslim Women's Resource Centre
- Say Women
- SCOT-PEP
- National Ugly Mugs
- Sport Scotland
- Scottish Refugee Council
- Disability Charities
- Edinburgh Domestic Abuse Court (EDACS)
- Women's Equality Party
- Scottish Children's Reporter Administration (SCRA)
- Children's Hearings Scotland (CHS)
- Children and Young People's Commissioner

- Youth Link Scotland
- Mental Welfare Commission
- Care Inspectorate
- HM Inspectorate of Prisons
- Scottish Human Rights Commission (SHRC)
- Restorative Justice Service providers.

Engaging with key criminal justice agencies was also seen as key, including the Judiciary, COPFS, Police Scotland, Scottish Prison Service (SPS), Parole Board and the Scottish Courts and Tribunal Service (SCTS), as well as Community Justice Scotland and Criminal Justice Social Work (CJSW).

In the wider public sector, Public Protection Partnerships, Violence Against Women Partnerships, Community Justice Partnerships and Alcohol and Drug Partnerships were seen as key. In addition, other partnerships and providers who support victims and their children were considered to have a potential interest in the work of the Victims' Commissioner. This included, for example, Housing, Education (including Child Protection co-ordinators and Named Persons), Further and Higher Education Providers, Children and Families Social Work, secure care and residential care providers, Health and Social Care Partnerships (HSCPs), Education Scotland, Health Services and COSLA (including the COSLA Equally Safe Coordinator).

One children and young people's advocacy/support organisation again stressed that it would be vital to engage with the Scottish Government's National Governance Group on Bairns' Hoose and the statutory agencies and third sector organisations, including Children 1st, involved in piloting Bairns' Hoose and developing a national approach to this.

Identifying key stakeholders (possibly through a scoping exercise) was suggested as a key task for the Commissioner, on appointment. It was also recognised that the list of relevant organisations whom the Commissioner should engage with would change over time, and as such would need to be reviewed and refreshed on an ongoing basis.

**Question 13: To what extent do you agree or disagree that the Victims' Commissioner should not have the power to champion or intervene in individual cases?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 10 | 15% | 24% |
| Somewhat agree | 12 | 17% | 29% |
| Neutral | 4 | 6% | 9% |
| Somewhat disagree | 4 | 6% | 9% |
| Strongly disagree | 12 | 17% | 29% |
| No response | 27 | 39% | - |

*Base = 69*

This question attracted the most disparity in responses of all questions linked to the Victims' Commissioner. Just over a half of those who answered the question either strongly agreed (24%) or somewhat agreed (29%) and just over a third either strongly disagreed (29%) or somewhat disagreed (9%).

Those who agreed felt that the overall focus should be on population-wide, systemic change, however, the power to champion or intervene in individual cases may be appropriate (depending on the level and extent of the 'interventions' and/ or 'championing' required). One respondent suggested that, where it was appropriate and proportionate for the Commissioner to champion or intervene in individual cases, this should only be in such cases where there was potential to drive institutional change in the public interest.

Other respondents stressed the need to maintain independence, focus on systemic change and protect resources for the wider public interests instead of personal gains.

Comments from neutral respondents included concerns about 'capacity' and how much the Commissioner would reasonably be able to take on board in their role (i.e. the role could potentially become too large and too resource intensive if it also included this power and, therefore, a focus on systemic change should be prioritised). One respondent also felt that the role of the Commissioner could bring an understanding and important information to individual cases, even if case specific intervention was not possible. Two respondents flagged that the consultation stated that the Commissioner would not be expected to intervene on behalf of any one individual and felt that this may conflict with victims' expectations of the purpose of the Commissioner.

There was consensus that the independence of the Commissioner should never be compromised:

> "…attention should be given to the independence of the Victims' Commissioner - championing some cases over others may lead to allegations of setting a 'hierarchy of victims / victimhood' which could in turn undermine the role of the Victims' Commissioner. The cost/ benefit analysis concerning any championing activities should be carefully considered on a case-by-case basis." (Other (academia))

One individual also suggested that, if the Victims' Commissioner did not have the power to champion or intervene in individual cases, there needed to be somebody else in the system who would have that power and role.

**Question 14: Are there any other matters relating to the proposal to create a Victims' Commissioner for Scotland you would like to offer your views on?**

Most respondents used this question to reiterate points already raised in response to earlier questions, although the following few 'new' issues were raised.

A small number commented that the consultation perhaps did not clearly discuss or set out the additionality that the role could bring, i.e. the importance of ensuring that the Victims' Commissioner adds value to an already complex landscape for victims, rather than adding an additional layer of complexity or duplicating the work already being done by others.

Organisations working with adults with learning disabilities also stressed the intersectional experience of women with learning disabilities which places them at significantly greater risk of Gender-Based Violence, and argued that the Commissioner should be established in law with responsibility for monitoring, data collection, and accountability to ensure that access to justice is fair and equitable for women with learning disabilities

One respondent felt that clarity over the role the Commissioner would have in 'prevention' may also be helpful, and another that the appointment of a Victims' Commissioner may present an opportunity to raise public awareness of the legal difference between the terms 'victim' and 'complainer'. Others simply reiterated that they would welcome the introduction of a Victims' Commissioner subject to the role being transparent, fair and representing all victims' voices.

# Options to underpin trauma-informed practice and person-centred approaches

The Vision for Justice in Scotland sets out the importance of delivering person-centred and trauma-informed practices across the justice sector, including taking greater action to hear victims' voices. The consultation sought views on particular legislative changes which could assist in supporting this shift towards a trauma-informed justice system for victims and witnesses.

**Question 15: Bearing in mind the general principles which are already set out in the 2014 Act, to what extent do you agree or disagree that a specific legislative reference to 'trauma-informed practice' as an additional general principle would be helpful and meaningful?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 39 | 57% | 76% |
| Somewhat agree | 8 | 12% | 16% |
| Neutral | 2 | 3% | 4% |
| Somewhat disagree | 1 | 1% | 2% |
| Strongly disagree | 1 | 1% | 2% |
| No response | 18 | 26% | - |

*Base = 69*

Almost all who answered this question either strongly agreed (76%) or somewhat agreed (16%) that a specific legislative reference to 'trauma-informed practice' as an additional general principle would be helpful and meaningful.

Supportive comments included that any measures to underpin trauma-informed practice and person-centred approaches were welcomed if they made the justice process fairer, more accessible and less challenging for those who take part in it. Again, embedding trauma-informed practice was seen as especially beneficial for female survivors of sexual assault and domestic abuse, as well as children and young people who were among those considered to be most likely to find the justice experience itself to be traumatising or retraumatising. The explicit inclusion of 'trauma-informed practice' in the Victims and Witnesses (Scotland) Act 2014 was described as also signalling the Scottish Government's commitment to being trauma informed, as well as instigating and compelling justice organisations to embed trauma-informed practice.

Comments from those who were neutral or only partially supportive included that they had received trauma-informed training, but were "no wiser for it" and that the theory was useful only if put into practice (and this would require additional

resources to make sure that any legislative change was implemented meaningfully):

> "…we wish to highlight the importance of not just legislating for things but also ensuring that there is adequate resource allocated to implementation. Simply adding in some additional text to policy or legislation does not mean that this will happen in practice and we would be keen to see a full implementation plan to ensure that the ambition for this change will match the reality." (Advocacy/support organisation (Children and Young People))

One organisation also commented that being trauma informed was not enough and that significant cultural change to systems and processes to make them trauma sensitive was also needed (and this may involve working closely with those with lived experience to better understand what changes were required and how systems should respond).

The need to be 'trauma responsive' rather than just 'trauma informed' was cited by several respondents and comments were also made in relation to the need to very carefully define and operationalise the term 'trauma-informed practice' to ensure that there was a common understanding of what this entailed (and a consistent application in practice, as a result). Linked to this, comments were made by some support organisations that there was a very clear difference between 'trauma informed' and being 'domestic abuse informed' and that this difference must be made clear to all relevant parties going forwards:

> "…we would strongly emphasise that the system being trauma informed is not the same as being domestic abuse informed. This is a crucial difference to bear in mind 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." (Victim/witness support organisation)

Several respondents welcomed the ongoing development of the NHS Education for Scotland (NES) Trauma-Informed Justice Knowledge and Skills Framework for identifying the knowledge and skills necessary across the workforce. One public body that had no question-specific comments to make also stressed that they were committed to embedding trauma-informed practice and training for staff within their establishment. Another legal organisation commented that relevant training for staff was essential and that (if the legislation changed) consideration would be needed around which cases staff could/would be able to get involved with if they lacked relevant trauma-informed training. Questions were asked around how training, implementation and the adoption of trauma-informed practice within relevant organisations would be monitored and enforced:

> "Regardless of whether this is a legislative requirement, it may also be helpful to have clear quality indicators that allow organisations to practically evaluate themselves against these aims and monitor progress over time, as well as support the governance structures of implementation across multi agency systems." (Public body)

Similarly, comments were made that commitments by organisations (including financial commitments) would be necessary to ensure that training was adopted and implemented as planned:

> "…it takes substantial time, leadership engagement, and resource to prioritise and bring into practice such change across complex multiagency systems with multiple competing demands." (Public body)

Other more general comments included that:

- trauma-informed principles and practice must apply equally to victims, witnesses and those accused of crimes, as the latter can also experience secondary trauma from contact with the justice system
- any such legislative change must be considered alongside other ongoing work relating to trauma and Adverse Childhood Experiences (ACEs) (including the ACEs Strategy, trauma training, the development of Mental Health and Self-Harm Strategies etc.) to ensure a cohesive and streamlined approach.

**Question 16: To what extent do you agree or disagree that a specific reference to trauma-informed practice within the current legislative framework for the Standards of Service would be useful and meaningful?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 36 | 52% | 75% |
| Somewhat agree | 9 | 13% | 19% |
| Neutral | 2 | 3% | 4% |
| Somewhat disagree | 1 | 2% | 2% |
| Strongly disagree | - | - | - |
| No response | 21 | 30% | - |

*Base = 69*

The majority of respondents (75%) strongly agreed with this proposal and a further 19% indicated that they somewhat agreed.

Several respondents simply referenced their answer to Question 15 and welcomed this as a positive move to give victims confidence in the responses they might

receive from justice partners, and to achieve consistency in what victims could expect:

> "…reference to trauma-informed practice within the current legislative framework for the standards of service would be useful and meaningful especially for victims and witnesses. This would empower them to know that the legal professionals and justice system had standards which would be thoughtful, kind and compassionate towards them and could help them discuss their trauma in a safer way knowing that there were standards which would make them feel safer." (Victim/witness support organisation)

It was also suggested (by respondents of various affiliations) that this addition may act as a motivator to organisations, give them clearer direction and facilitate the sharing of good practice across Scotland. Several also emphasised again that, while they supported the move, any legislative change would require clear action to ensure that changes were properly understood, implemented into practice and enforced (with organisations being held to account).

Victim and witness support organisations commented that in order to make a specific reference to trauma-informed practice within the current legislative framework for the Standards of Service meaningful, more would first be needed to raise awareness of the Standards and Victims' Code among both the public and authorities (with meaningful consequence for authorities that do not adhere to them including, for example, the police). Importantly, there was scope to make victims themselves more aware of the Standards:

> "Action must be taken by the Scottish Government to, not only, raise awareness of the existence of the Standards and the Victims' Code, but also actively promote the Standards and importantly, the Victims' Code, making the latter widely available, including in hard copy, across all areas where victims will engage with statutory and third sector agencies." (Victim/witness support organisation)

One justice partnership stressed that specific reference to trauma-informed practice within the current legislative framework would only be useful and meaningful if those going through the justice system had a mechanism to feed back on their experiences and improvements were made when issues were identified.

Overall, despite some reservations around awareness of the Standards, comments generally reflected the view that adding this reference would strengthen the existing obligation on justice agencies and would be welcomed by victims and their representatives as a way of recognising the importance of a trauma-informed approach.

**Question 17: To what extent do you agree or disagree that a legislative basis for the production of guidance on taking a trauma-informed approach would be useful and meaningful?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 35 | 51% | 75% |
| Somewhat agree | 7 | 10% | 15% |
| Neutral | 3 | 4% | 6% |
| Somewhat disagree | 1 | 1.5% | 2% |
| Strongly disagree | 1 | 1.5% | 2% |
| No response | 22 | 32% | - |

*Base = 69*

Again, almost all who answered this question either strongly agreed (75%) or somewhat agreed (15%) that having a legislative basis for the production of guidance on taking a trauma-informed approach would be useful and meaningful, with many again arguing that it would emphasise the importance of a trauma-informed approach in the justice system and offer organisations clear direction:

> "…having a legislative basis…would clearly define the process [for] victims and witnesses…as well as keeping legal professionals to a duty of standards to ensure that this trauma-informed approach was being delivered…" (Other (third sector))

Other comments included that:

- having a legislative basis for the production of guidance should not delay the promulgation of practical guidance, which could be made available in the meantime
- any legal basis for the production of guidance should be accompanied by a requirement to engage with victims, witnesses and perpetrators and any guidance developed must be informed by people's lived experience and evidence of what works
- any guidance must be accessible to all those to whom it applies.

One third sector organisation indicated that they would be keen to assist with the development of guidance on taking a trauma-informed approach and one victim and witness support organisation suggested that the Victims' Commissioner (if appointed) could work with agencies to create such guidance (as well as being responsible for holding agencies to account in adhering to the guidance). A different victim and witness organisation also stressed that, in the development of new statutory guidance on trauma-informed practice in the justice system, the Scottish Government should build on and bring together important work done in this area to

date (including the work of the NHS Education for Scotland (NES) National Trauma Training Programme).

**Question 18: To what extent do you agree or disagree that the Court should have a duty to take such measures as it considers appropriate to direct legal professionals to consider a trauma-informed approach in respect of clients and witnesses?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 39 | 56% | 80% |
| Somewhat agree | 8 | 12% | 16% |
| Neutral | 2 | 3% | 4% |
| Somewhat disagree | - | - | - |
| Strongly disagree | - | - | - |
| No response | 20 | 29% | - |

*Base = 69*

No respondent who answered this question disagreed with the proposal, and only two offered neutral responses (one legal organisation and one law enforcement organisation).

Most respondents who supported the court having an obligation to prevent harmful conduct, viewed it as particularly important for the court to direct the behaviour of accused and defence solicitors in this way, to prevent distressing cross-examination of witnesses (although it was also noted that the Law Society of Scotland already currently provides trauma-informed training programmes for court practitioners):

> "This would ensure that witnesses and clients would be treated in [a] fairer and more compassionate way whilst ensuring the re-traumatisation of a witness or victim would be kept to a minimum. It would also lessen the negative impact on being in the criminal justice system." (Other (campaign))

One public body suggested that the wording of this proposal be carefully developed since only asking legal professionals to "consider" a trauma-informed approach may leave room for various interpretations and allow for the approach not to be used at all:

> "It would allow those who do not agree the approach to continue without using it and could perpetuate differences in practice which have a real impact on people who have experienced harm." (Public body)

In contrast, one legal organisation suggested that having a statutory footing for this direction was superfluous, since a common law power for every judge to regulate the conduct of matters in their court already exists. This proposal was described by this organisation as "more an evolution of courts' existing attention to the wellbeing of witnesses and accused people" rather than a new duty:

> "The judiciary can be trusted to modify and improve practitioners' approaches as required." (Legal organisation)

One individual also noted that such consideration may be difficult to achieve in practice, and difficult to reconcile with the adversarial nature of the system:

> "…if a defence advocate's strategy is to undermine a jury's confidence in a victim's truthfulness or reliability, he or she is almost certain to pursue lines of questioning that traumatise the victim. If a judge were to curtail such questioning, there might be a risk that this action could give grounds for appeal. I believe this may be why judges often do not intervene in this situation at present." (Individual)

Other more general comments included that it would be helpful to have more detail about how this would work in practice and what the expectations would be on legal professionals. One third sector organisation encouraged links being put in place with existing trauma training programmes, including the Trauma-Informed Lawyer Certification course, run by the Law Society of Scotland, and the National Trauma Training Programme, run by NHS Education for Scotland (NES).

It was also suggested that it would be useful to have more detail on methods envisaged for redress or complaints mechanisms and procedures available to victims and witnesses, including children, if these new proposals were not followed up on and their experiences are not trauma informed.

One individual expressed a view that establishing statutory requirements for a trauma-informed approach would only be effective if it was implemented alongside the other reforms suggested in Lady Dorrian's Review.

**Question 19: Should virtual summary trials be a permanent feature of the criminal justice system?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Yes | 28 | 41% | 61% |
| No | 3 | 4% | 7% |
| Unsure | 15 | 22% | 32% |
| No response | 23 | 33% | - |

*Base = 69*

Just under two thirds of respondents (61%) said that they felt that virtual summary trials should be a permanent feature of the criminal justice system, while a further third (32%) were unsure. Only three respondents (two individuals and one legal organisation) did not agree.

Those who agreed with virtual trials being a permanent feature did so mainly on the basis that it would make the process less formal, with less potential for retraumatisation (especially in cases involving sexual offences and domestic violence offences and for children).

One public body offered strong support for virtual summary and hybrid trials (where some participants appear in person and some virtually) as part of a modern justice system, especially in terms of the benefits that they offer to complainers and witnesses. This same body cited evidence from previous pilots that had shown how virtual trials could be effective, especially for summary domestic abuse trials (with others suggesting that if it removed the need for victims to face perpetrators in such cases, this would be particularly welcomed).

For those who offered partial support, this was mainly because they viewed that a flexible system, which offered tailored approaches to different cases, was required to ensure that the system was victim led:

> "…we do not advocate a blanket approach as there are several factors which must be assessed on a case-by-case basis in order to make sure that a fair trial takes place, otherwise a miscarriage of justice may result." (Legal organisation)

Others who were unsure indicated that choice and empowerment were the most important factors in determining how cases should be heard, and felt that virtual trials should not become so commonplace that they become the default selected by criminal justice agencies and staff, especially if not the preferred choice of the victim or witness.

Indeed, some who were unsure indicated that while there may be value in virtual trials, some victims and witnesses welcomed the opportunity to "have their day in court" as they equated this with a greater sense of justice being enacted and felt it could also form part of the healing process:

> "Such experiences are often…the one chance that a victim gets to really see justice in action, to feel as though someone, somewhere is fighting your corner for what is right. To merely offer virtual courtrooms, would, I believe, take away from the deeply personal and important process that many survivors experience and need from such processes. Closure and a sense of justice being delivered to the right person is crucial and if the victim wishes to do this in person, this option must be available." (Individual)

Other reasons given in support included that it could result in a speedier and more efficient summary system, increasing accessibility for trial participants and reducing many of the barriers such as travel and costs that can negatively impact on

people's experience of an in-person trial. One respondent, however, noted that efficiency and cost savings should never be prioritised over fairness and sound justice:

> "All people involved in the trial must agree to a summary trial being held virtually, balancing the need for fairness to the defendant and the need for safety, comfort, and convenience for the [complainer]. Cost- and time-savings for the courts, while beneficial, should not be the overarching consideration." (Other (third sector))

The one legal organisation that did not agree did so on the basis that virtual trials had the potential to diminish the solemnity and seriousness of the case for those involved, compared to an in-person appearance at court. They also suggested that remote hearings had the potential to lead to participants being less honest or less compliant compared to appearing in person. This view was endorsed by a second legal organisation:

> "There can be an unacceptable level of informality and lack of dignity; difficulty in evaluating credibility and poor quality interactions between the court and the lawyers. Whilst there may be benefits in terms of convenience and associated cost savings for witnesses in giving evidence remotely, these need to be balanced against the deficiencies identified." (Legal organisation)

This same respondent also expressed that there may be mixed experiences in relation to the effectiveness of virtual trials among the judiciary and so, on this basis, suggested that it would be prudent to retain judicial control over whether it features in a particular case.

An individual who disagreed suggested that virtual summary trials should be used discerningly while the other did not agree with summary trials as a means of achieving justice at all.

Other comments included that:

- it was necessary to ensure that all parties had the IT required to support participation
- any system which is implemented must provide for the effective participation of the accused and allow confidential communications between the accused and their solicitor
- authorities must recognise the additional responsibility placed on defence solicitors, in terms of investment in resources, additional preparation and the dedicated time required for the trial itself
- virtual trials can create additional demands (and costs) for participants
- additional payment may be required for solicitors working on virtual trials and additional legal aid provided to participants as a result

- the use of virtual summary trials should be further tested before wider roll out, should be based on emerging evidence, needs assessment and be kept under review (including consideration of hybrid models).

One other observation was made that research was currently ongoing into the use of technology in the Children's Hearings System to explore how effective the approach is in that setting.

**Question 20: If you answered yes to the previous question, in what types of criminal cases do you think virtual summary trials should be used?**

The main types of criminal cases that were cited as being suitable for the use of virtual summary trials were domestic abuse cases, rape cases as well as sexual assault cases or those involving violence against women and girls. Again, this was because it was perceived that complainers in these cases were among the most vulnerable and likely to be in need of protection from the traumatising impacts of presenting evidence in the presence of the perpetrator (a view shared by support organisations, local authorities/justice partnerships, public bodies and others):

> "There is clear rationale for the recommendation relating to domestic abuse cases in particular. Amongst the advantages are that the complainer and vulnerable witnesses will not need to be in the same physical space as the accused. Additionally, in cases of domestic abuse, where it is commonly understood coercive control is a common factor, there is a risk that the court process itself may be used as a coercive control tactic and increase feelings of vulnerability. Innovative court models and approaches, which include the use of remote links, have the potential to be an important feature within the justice sector's response to this." (Public body)

Although mentioned less frequently, cases involving children/child witnesses were also cited, as well as hate crimes (including disability hate crimes), stalking and harassment cases and cases involving anti-social behaviour. One public body and one legal organisation also suggested that virtual trials may be particularly appropriate for use in proceedings for road traffic offences, given that they often have few or mainly police officers as witnesses (i.e. to reduce burdens and resource implications of staff having to attend in person).

A few respondents made more general comments that victims' and witnesses' own particular circumstances and barriers should be the main determinant, instead of the 'type' of case. In this vein, individuals facing communication barriers were cited as potentially benefitting from virtual trials, as well as individuals living with addictions or mental health challenges. Again, those living in rural and remote communities and those required to travel long distances to court were also seen to benefit from the greater accessibility afforded by remote trials.

Some individuals and organisations said 'all' cases (although one third sector organisation and one legal organisation again stressed that use of virtual trials must always strike a balance and only be used if all parties agree):

> "It is preferable in all cases, therefore, that the respective parties agree that the relevant evidence and/or trial can be conducted effectively in that manner. As long as there is no blanket approach, there seems to be good reason to continue to use the virtual system where it is appropriate to do so." (Legal organisation)

Some organisations also suggested that the complexity and nature of the evidence being led would be the best determinant of when such trials should be used. One legal organisation suggested that cases where there were few witnesses and little legal complexity may be particularly well suited to virtual trials.

**Question 21: To what extent do you agree or disagree with the recommendation of the Virtual Trials National Project Board that there should be a presumption in favour of virtual trials for all domestic abuse cases in the Scottish summary courts?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 20 | 29% | 47% |
| Somewhat agree | 7 | 10% | 17% |
| Neutral | 7 | 10% | 17% |
| Somewhat disagree | 7 | 10% | 17% |
| Strongly disagree | 1 | 2% | 2% |
| No response | 27 | 39% | - |

*Base = 69*

This question attracted one of the most mixed responses across the whole consultation. While just under half (47%) of those who answered the question strongly agreed, the remainder gave less positive or neutral responses.

Most who supported the presumption did so for the same reasons cited in response to earlier questions (i.e. due to benefits that could be achieved in system efficiency and victim/witness safeguarding). Some individuals felt that making this the default position may reduce anxieties for victims in the justice process.

Many who agreed somewhat, disagreed somewhat or were neutral (including individuals and organisations representing various sectors) shared a common view that decisions on how trials should proceed must always be victim led, with choice built in (and that this was more important than an automatic presumption in favour):

> "…there is a need for people who have been harmed by crime to have a degree of choice, as part of a trauma-informed approach, with the option of a virtual trial available for those who wish to make use of that model." (Other (third sector))

While some felt that choice could be maintained even where virtual trials were the default, others suggested that introducing a presumption may undermine that choice. One legal organisation urged that the use of virtual trials should be seen as an additional resource, rather than a replacement for existing traditional summary courts.

Organisations (again from a mix of different sectors) also reiterated that, regardless of whether a virtual or in-person model is used, they were keen to ensure that people have access to independent advocacy and appropriate support throughout the process.

One organisation expressed a view that the presumption should definitely not operate where the person responsible for domestic abuse and the person who has experienced the abuse are resident at the same address.

Others again cautioned against the use of virtual trials per se (and the presumption) unless sufficient resources were put in place to support them (including equipment, funding and facilities for solicitors involved in such trials).

**Question 22: While removing vulnerable victims from the physical court setting is beneficial in the vast majority of cases, to what extent do you agree or disagree that virtual trials offer additional benefits to the ability to give evidence remotely by live TV link?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 23 | 33% | 52% |
| Somewhat agree | 8 | 12% | 18% |
| Neutral | 9 | 13% | 20% |
| Somewhat disagree | 2 | 3% | 5% |
| Strongly disagree | 2 | 3% | 5% |
| No response | 25 | 36% | - |

*Base = 69*

Again, there were mixed responses to this question, with just over half (52%) of those who answered the question indicating that they strongly agreed, and the remainder giving less positive or neutral responses. Many who provided open-ended comments also did not directly answer the specific question asked, and instead focussed more generally on the use of virtual trials and IT solutions in the justice system as being positive for victims as a whole.

Those who strongly agreed (which included some individuals and organisations from across a range of sectors) put forward views that there were benefits in using a wide range of options/having flexibility in the system, and that virtual trials would

again remove the need to risk coming into contact with perpetrators at court (i.e. it would increase the distance even further than TV links). This would make giving evidence more accessible, comfortable and affordable for many (in contrast to TV links from court buildings):

> "…the court process can be traumatising especially when having to be in the same building as the accused and their families. Giving evidence behind a screen can be helpful but women have advised us that they still do not feel safe as they know the accused is still in the same area. This disempowers them and makes them feel unsafe…Therefore we believe there are benefits to virtual trials as it can significantly reduce the anxiety and trauma of the victim and witnesses and they may be able to talk more freely because they are able to deal with the trauma in a more positive way as they would feel safer." (Other (campaign))

More neutral or caveated responses again stressed that all cases should be considered individually, taking into consideration the needs and preferences of victims, witnesses and the accused. Some victims could, for example, find such measures even more challenging and daunting than appearing in person. Among this cohort, it was considered that virtual trials may offer some additional benefits to the ability to give evidence remotely by live TV link in some, but not all, cases.

One local authority/justice partnership also noted that emotional wellbeing was much less likely to be impacted by frustrations in cases held remotely, where trials do not go ahead at the last minute (i.e. less wasted time in travelling to court buildings to give evidence in person or via TV link).

Comments were also made that digital literacy could lead to exclusions in some cases (i.e. not everyone would be able to access the necessary technology and advocacy/support or information) and could also introduce bias into proceedings:

> "A number of factors need to be considered for virtual trials, including witnesses' familiarity with and support for the IT being used so as not to cause added stress; the functionality of the IT being used / bandwidth to ensure good image and sound quality; and prevention of discrimination / advance judgement if a person is connecting to the IT from a prison or wearing a prison uniform." (Other (third sector))

Some very specific concerns were also raised about the potentially dehumanising effects of evidence given via TV link and in virtual trials. One third sector organisation pointed to research which had shown that TV links risk 'dehumanising' the person on screen, resulting in judgments different to what may have been reached when people appear in person. One legal organisation (that strongly disagreed that there were any additional benefits to be achieved) also noted that removing people from the presence of the decision maker (whether judge or jury) tended to diminish the impact of their evidence:

> "A sense of unreality can creep in, as if we are watching a program about something, rather than feeling the power of live testimony. That tends to reduce impact, and logically must affect outcomes. Whether in the round the reduced stress of the witnesses yields more effective evidence, when set against the dilution of impact that remoteness brings is open to debate." (Legal organisation)

One other third sector organisation cited emerging research evidence which suggests that, in some circumstances, the use of virtual courts can be associated with human rights violations.

**Question 23: The existing powers in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 can be used to expand the categories of witnesses who are eligible under the Act to benefit from the presumption that their evidence be pre-recorded in advance of the trial. This includes evidence by commission and the use of a prior statement as evidence-in-chief, such as a Visually Recorded Interview. To what extent do you agree or disagree that these existing powers are sufficient to expand the use the pre-recording of evidence of complainers of serious sexual offences?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 17 | 25% | 40% |
| Somewhat agree | 7 | 10% | 17% |
| Neutral | 9 | 13% | 21% |
| Somewhat disagree | 7 | 10% | 17% |
| Strongly disagree | 2 | 3% | 5% |
| No response | 27 | 39% | - |

*Base = 69*

Several of those who strongly agreed did not answer the question directly, but instead offered support for Visually Recorded Interviews (VRI) more generally. As with virtual trials, VRI was seen as providing complainers and other witnesses a chance to give evidence in a more comfortable and non-traumatic way, thus maximising quality of evidence. Again, use of pre-recording of evidence was seen as particularly valuable for complainers of serious sexual offences.

VRI was again seen to be useful as one tool in a suite of options available to victims, and should be something offered routinely, especially to vulnerable witnesses:

> "Whilst we believe that these options should be the default position, we also believe that the choice whether to use them should be in the hands of the victim of crime and they should be empowered to

> choose whichever option best suits them." (Victim/witness support organisation)

Two legal organisations strongly agreed on the basis that the existing legislation was clear and existing powers worked well.

While most feedback was positive, one public body noted that they were not convinced that the powers on their own would encourage the necessary changes to occur quickly. Another local authority/justice partnership suggested that the prosecution and defence would need to be satisfied that evidence could be led and tested in a way that gave the process credibility. One campaign organisation also warned that expert training should be implemented (alongside any roll out) for all those involved in carrying out the interviews, and that this should be monitored and updated regularly.

Those who somewhat disagreed mainly did so because they felt that the legislation could be clearer or more explicit. This cohort also commented that while legislation allows for pre-recorded evidence in summary cases, this is either rarely or inconsistently applied (with discretion resting with justice partners in individual cases). The benefits of VRI was widely accepted and so making its use available to more complainers was seen as a positive move.

Others who strongly agreed caveated their response by stressing the need to properly support and finance any widening out of the use of such measures:

> "It is essential that the increased use of VRI is done when the necessary resources are in place, namely, training, ICT equipment and suitable locations for such interviews to take place. All three of these facets are vital to achieve the policy intent behind the legislation; however, it must be recognised that they each carry a significant resource demand. It will be vital to consider the funding and availability of these resources to support [our organisation] and delivery partners in moving fully to the envisaged VRI model in the future." (Law enforcement)

One victim and witness organisation and one individual strongly disagreed, with the former suggesting simply that current provisions did not go far enough.

**Question 24: To what extent do you agree or disagree that Ground Rules Hearings should be extended to all child and vulnerable witnesses required to give evidence in the High Court, irrespective of the method in which their evidence is to be provided to the court?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 32 | 46% | 75% |
| Somewhat agree | 6 | 9% | 14% |
| Neutral | 4 | 6% | 9% |
| Somewhat disagree | 1 | 1% | 2% |
| Strongly disagree | - | - | - |
| No response | 26 | 38% | - |

*Base = 69*

Three quarters of respondents (75%) who answered the question agreed with the proposed extension to Ground Rules Hearings to all child and vulnerable witnesses required to give evidence in the High Court.

Individuals, victim and witness support organisations and one public body who supported the proposal noted that there was substantial evidence to support that this method was effective in supporting vulnerable witnesses/complainers (especially those involved in sexual offence cases):

> "We would agree that Ground Rules Hearings should be extended to all child and vulnerable witnesses required to give evidence in the High Court. It is our opinion that children and vulnerable witnesses should be dealt with in a trauma-informed manner. As identified in the consultation paper this has, in other jurisdictions, been shown to improve the experiences of victims and witnesses when providing evidence." (Victim and witness support organisation)

The same victim and witness support organisation suggested that the proposal could go further and that the default position should be that the location of the Ground Rules Hearing should be in a non-court trauma-informed environment. One public body indicated that they would also welcome their use within Children's Hearings proceedings.

Particular benefits of extending Ground Rules Hearings for all child and vulnerable witnesses included:

- removing the need for the survivor to be in court (with associated accessibility benefits)

- reducing anxiety and stress caused by the prospect of having to give evidence in court
- helping to reduce delays in proceedings
- increased scrutiny over the style of questioning used in cross examination
- giving clarity in advance to the approach to be taken at court
- increasing complainers' confidence in the system
- minimising trauma

One legal organisation noted that this extension would be relatively easy to adopt, and one law enforcement organisation noted that this flexibility would allow the court to determine what is appropriate for the witness in a particular case, and for it to be tailored to what was required.

One advocacy/support organisation working with children and young people also observed that this change would be consistent with the Scottish Government's broader ambitions relating to children not attending Court and the transformational change that a Bairns' Hoose would bring.

One individual, while supportive of the extension, suggested that at a minimum, the principles of Ground Rules Hearings should be clearly explained to victims and they should understand how they fit within the overall system. The concept of Ground Rules Hearings could, they suggested, otherwise be very difficult for victims to navigate and understand:

> "This question prompts me to point out how impenetrable and intimidating the legal system - and its accompanying terminology - are to victims…[I had no] idea what was meant by terms such as '(pre)-petition', 'precognition', 'libelled', 'production' or 'diet' in this context. The information booklets provided to her were woefully incomplete and inadequate. The terms 'Ground Rules Hearings' and 'commissioner' and 'on commission' could easily be added to the list of incomprehensible terms unless clearly explained for lay people." (Individual)

One other individual urged further consideration in relation to the depth of training and expertise which is required to understand and support vulnerable witnesses with adequate resources. One legal organisation also observed that the effective conduct of Ground Rules Hearings, whether extended or not, may depend upon the extent to which defence statements provide meaningful information to the court.

**Question 25: To what extent do you agree or disagree that the current legislative basis for court scheduling, as managed through the existing powers of the Lord President, is sufficient to inform trauma-informed practice?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 8 | 11% | 19% |
| Somewhat agree | 2 | 3% | 5% |
| Neutral | 9 | 13% | 21% |
| Somewhat disagree | 11 | 16% | 25% |
| Strongly disagree | 13 | 19% | 30% |
| No response | 26 | 38% | - |

*Base = 69*

This question attracted the lowest agreement of all questions in the consultation linked to trauma-informed practice. Less than a quarter (24%) of those who answered the question agreed and over half said that they either somewhat disagreed (25%) or strongly disagreed (30%).

The main sentiment expressed by individuals and organisations representing a variety of different sectors was that the current system of court scheduling was not adequate, with significant delays which impacted negatively on all parties involved in cases. Consistent with responses to earlier questions, respondents stressed that unpredictability, both around what cases would be heard and what they would entail, was a significant existing source of trauma for victims and witnesses:

> "In general, one key element of a trauma-informed approach is predictability, transparency and safety. Knowing what is going to happen, and when, is of critical importance for a range of reasons, most of which are outlined in the consultation. However, this extends further than simply scheduling and dates. It is also important to make sure that as well as court proceedings going ahead on the planned date, what happens on that date is also predictable in terms of ensuring the safety of the witness - that they will not have contact with the accused, that the process feels safe for example." (Public body)

It was noted that the COVID-19 pandemic had exacerbated the backlog in cases that was in existence prior to the pandemic and so respondents were pessimistic of any improvements in the speed with which cases would progress through court in the short to medium term.

Victim and witness organisations expressed particular concerns regarding floating trials and adjournments, suggesting that the trauma and stress associated with these in particular was not acceptable to victims, "living day to day not knowing when their case will eventually be called." (Victim and witness support organisation)

Neutral respondents either did not give open-ended comments or indicated that they did not know enough about the powers of the Lord President.

Two legal organisations noted that trials were very difficult to schedule and court delays were, to some extent, inevitable (due to a variety of factors such as failure to appear, solicitors not being present/prepared, unexpected turns in cases, etc.). They noted that all parties, but particularly complainers, would want cases to be progressed expeditiously but this was not always possible. Similarly, one public body noted that the development of court programmes was already designed to be flexible taking into account the impact on witnesses and other justice parties, but that a significant number of factors could affect the ability of individual cases to proceed on a given day. These organisations noted that there was potential for the system to be further improved as the justice sector becomes more trauma aware, but also cautioned that an ideal solution for all parties might be hard to achieve.

One advocacy and support organisation and one public body noted that they were also aware of significant delays and scheduling problems impacting children and families and on that basis they supported all measures to reduce the impact of these delays as quickly as possible. The public body noted that they would have particular concern if measures were introduced which expedited the scheduling of criminal cases to the detriment of Children's Hearings court proceedings, for example.

One academic response argued that a more trauma-informed approach should be in place in terms of scheduling in order for children and young people (and their families/carers) to prepare and speak to court staff about processes and procedures, regardless of whether they would be attending a virtual court or being recorded.

Other general comments included that training across the justice sector would hopefully assist with improvements in the current management and scheduling of cases, and one respondent pointed towards the Summary Criminal Case Management pilots as an example of good practice.

**Question 26: Are you aware of any specific legislative changes which would assist in addressing the issues discussed around information sharing? If so, please detail these.**

A number of specific suggestions were made for legislative changes which would assist in addressing the issues discussed around information sharing, as set out in the consultation paper. The main broad suggestions were:

- appropriate application of the existing legislative provisions under the Victims and Witnesses (Scotland) Act 2014 enabling victims to obtain information

- support for Lady Dorrian's recommendations for information sharing in the Children's Hearings System, including broader information for complainers addressing how the system works and why information is restricted
- support for reforms within the Bail and Release from Custody (Scotland) Bill, specifically those of the Victim Notification Scheme relating to information on the release of prisoners (which will enable the appropriate and timely provision of information about prisoner release to victims' organisations, to inform the support they provide to, and safety planning for, vulnerable victims)
- a requirement for each agency in the criminal justice process to have responsibility for liaising with victims and others harmed by an offence (e.g. the families of the accused)
- legislative requirements on the court and COPFS to provide survivors with information regarding their case in a timely fashion
- increase in advocacy services for survivors/the right to independent advocacy
- the importance of a single point of contact for complainers and witnesses
- the introduction of independent legal advice (to assist survivors throughout a range of processes involved in the criminal justice system, giving legal advice on the complexities of this in a trauma-informed manner which supports them through the legal process)
- updating and extending the Victim Notification Scheme (including making it 'opt out', removing the onus being on the victim to sign up to the scheme post-conviction when a custodial sentence is imposed)
- legislative changes around victim notification and victims' ability to speak at parole hearings outwith specific sentencing
- legislation implemented regarding those committing solemn offences whilst on licence
- bringing an end to 'not proven' verdicts.

More general comments included that:

- access to clear information at all stages of a case was particularly important for female victims, and complainers in sexual assault, domestic abuse and rape cases
- access to clear information at all stages of a case was particularly important for children and young people (in both criminal cases and in the Children's Hearings System)
- specific legislative changes which have impacted on information sharing can be seen in the implementation of Articles 6 and 9 GDPR and Part 2 of Schedule 1, Section 17 Data Protection Act 2018, which have caused a change in the legal basis for which the police share information on vulnerable individuals with Third Sector Organisations (TSO) and Advocacy Services. Previously police would only share information where the data subject had given consent. Police Scotland have now moved to a Public Task approach to the sharing of data to broaden opportunities for assessment of risk,

vulnerability and for early intervention. This approach applies in circumstances where there is a TSO or Advocacy Service in the area that can support the individual.

One law enforcement organisation also commented elsewhere in the consultation that expectations around information could be further explored going forwards:

> "In relation to the trauma-informed approach, we would note that whilst we agree with the principle that 'a victim or witness should be able to obtain information about what is happening in the investigation or proceedings', this can sometimes make it difficult to manage expectations about the amount of detail that we can disclose to a victim (or their representative) about an accused/offender or other witnesses. This can be due to investigation and/or legal process constraints, or the need to balance the rights of all individuals. The role of the Commissioner and statutory guidance may provide assistance in highlighting good practice in this area." (Law enforcement)

**Question 27: Are there any other matters relating to the options to underpin trauma-informed practice and person-centred approaches in the justice system you would like to offer your views on?**

Very few respondents gave new information or views in response to this question, and many reiterated points made in response to earlier questions.

One public body again highlighted the need for shared and agreed definitions and aims of what is meant by 'trauma informed' across all organisations and commitment at the national level for all justice agencies to engage in appropriate training and allocation of resources to embed trauma-informed practice. Others supported calls for trauma training across the justice sector in ensuring that the policy proposals had the intended outcomes:

> "[Organisation] are keen for all parts of the justice system to use trauma-informed practice when working with individuals and families. This will require training and support to ensure that the workforce understands trauma-informed practices and are able to strengthen and improve their own practice where necessary." (Other (third sector))

One respondent argued for better training in trauma-informed practice from the police, in particular.

One legal organisation also cautioned that no matter what training is given to legal professionals, juries would not have had the benefit of training and so consideration would also have to be given as to how they might be better informed as to the possible results of trauma, without sacrificing the rights of accused persons.

A few respondents used this question to focus on children and young people. Again, advocacy/support organisations working with children and young people expressed disappointment that there appeared to be no reference in the consultation document to the Scottish Government's clear commitment to embed Bairns' Hoose across Scotland:

> "While there is a general recognition of the need for a Whole Systems Approach, at no point in the consultation document is there a reference to current work underway in the development of 'Bairns' Hoose'… With the view of preventing retraumatisation of children and plans to reduce the number of times they have to recount their experiences; we call on greater clarity in how their accounts in Bairns' Hoose will be used and considered in courts." (Advocacy/support organisation (Children and Young People))

Indeed, victim support organisations also argued that a trauma-informed response would include Bairns' Hoose being available to all children and young victims in domestic abuse cases. Greater clarity was seen as being needed on how the proposals would align with the Scottish Child Interview Model, currently being rolled out. One other organisation suggested that consideration should be given to children and young people providing opinions/feedback about trauma-informed approaches, to better help understand and respond to their unique needs as victims and witnesses.

A small number of organisations again encouraged the greater use of/access to independent advocacy workers for those appearing in court, as well as intermediaries, to help reduce trauma:

> "Survivors who choose to have their advocacy worker as their trusted supporter in court with them as a special measure, should not have this denied. At present, this is often refused, with a worker from victim services provided instead. This trusted relationship with a specialist advocate must be respected by the justice system routinely, and not inconsistently." (Victim/witness support organisation)

One other respondent reiterated the need for more funding to provide specialist units within law enforcement agencies and separate courts to hear criminal proceedings that relate to sexual and domestic violence offences. General comments were again made about the fundamental need to distance victims from perpetrators in the course of giving evidence to minimise trauma. One organisation again urged the introduction and consistent use of VRI as a priority.

Individuals (and some organisations) who provided additional comments generally focussed on the need for greater support for victims and witnesses per se, including clearer communication with victims and witnesses throughout the justice process (such as making the language in court and in all communications more user friendly and removing unnecessary jargon). This was seen as especially important for the most vulnerable victims and witnesses, including children and young people and those with learning disabilities or facing literacy challenges.

Making the court experience less formal and removing some of the tradition and drama traditionally associated with attendance at court was also seen as helping to increase accessibility and reduce trauma overall (i.e. cultural change).

One third sector organisation again urged that in taking forward trauma-informed approaches, it was essential to consider not only victims, witnesses and complainers, but also the accused and their families/supporters:

> "Trauma-informed practice and person-centred approaches in the justice system should also apply to family members of the individual who is accused of a crime…Supporting the vicarious impact of the offence and justice process on the family members of the accused and ensuring necessary support is available to children and families affected by the justice system will be key." (Other (third sector))

A second (legal organisation) endorsed this view and asserted that crucial to making any changes was the need to respect the rule of law and not to compromise the fairness of trials or the rights of the accused, in accordance with Article 6 of the European Convention on Human Rights. Another (also a legal organisation) stressed that the presumption of innocence also meant that the purpose of many trials was to ascertain if the complainer had in fact been made subject to a traumatic event and so it may not be possible to eliminate potential for retraumatisation entirely.

Concerns were again voiced by a minority about the additional time and resources that would be required to bring about the desired transformational change in relation to trauma-informed practice.

# Special Measures in Civil Cases

Existing provisions in the Vulnerable Witnesses (Scotland) Act 2004 allow special measures (such as use of a live TV link, use of a screen and supporters) in civil proceedings. The provisions, however, rely on there being 'witnesses' and 'evidence' and a number of civil court hearings are non-evidential and so there are no 'witnesses' or 'evidence'. The consultation sought views on possible extension of the use of special measures in civil cases.

It also included options for the courts to have the power to prohibit personal cross-examination in civil proceedings when the circumstances in a particular case require this measure to be taken.

**Question 28: To what extent do you agree or disagree that the courts should have the power to prohibit personal cross-examination in civil proceedings when the circumstances in a particular case require this measure to be taken?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 29 | 42% | 74% |
| Somewhat agree | 6 | 9% | 15% |
| Neutral | 3 | 4% | 8% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 1 | 1% | 3% |
| No response | 30 | 44% | - |

*Base = 69*

Most who answered this question (74%) strongly agreed that the courts should have the power to prohibit personal cross-examination in civil proceedings in certain cases.

Several respondents expressed that this change would be particularly important for domestic abuse and sexual assault cases in civil courts (for whom cross-examination by the perpetrator can be particularly harrowing and retraumatising), and would bring parity with criminal courts (where this approach was already seen to be working well):

> "The courts should have the power to prohibit personal cross-examination in civil proceedings and this should be utilised to protect survivors of rape and sexual offences from being cross-examined by their abuser. Rape and sexual assault survivors are frequently engaged with the civil courts in circumstances relating to their experiences of those crimes. This is no less traumatising and

> difficult a process than engaging with the criminal justice system and by comparison we frequently find that survivors are not afforded the same level of protection." (Victim/witness support organisation)

The need for those accessing civil justice systems to be afforded similar protections to those in criminal courts was seen as necessary to ensure that they can effectively participate. Several commented specifically that there should be no circumstances where the accused in either civil or criminal trials for rape, sexual assault and domestic abuse should be able to cross-examine the survivor and that they should be required to instruct a solicitor for this purpose (or the court appoint one for them from an approved list):

> "The vulnerability of the witness should be taken into account in any cross examination, regarding their ability to manage the stress and trauma of such proceedings. The current adversarial court system permits the vulnerability of witnesses to be exploited and for them to be discredited." (Individual)

Other comments included that greater clarity may be required around which proceedings would be covered by the legislation (with a suggestion that the examples listed in the consultation paper were not exhaustive).

A number of respondents noted that all cases were different and that there should be flexibility in the system to allow them to be treated as such.

**Question 29: To what extent to do you agree or disagree that special measures should be available when required for all civil court hearings in Scotland, whether the hearings are evidential or not?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 30 | 44% | 77% |
| Somewhat agree | 4 | 6% | 10% |
| Neutral | 4 | 6% | 10% |
| Somewhat disagree | 1 | 1% | 3% |
| Strongly disagree | - | - | - |
| No response | 30 | 43% | - |

*Base = 69*

Just over three quarters of respondents who answered this question (77%) agreed that special measures should be available when required for all civil court hearings in Scotland, whether the hearings are evidential or not.

General views were given that all victims and witnesses should be afforded access to whichever protective measures are available to support them, i.e. a "right to feel safe":

> "…the type of court where a case is held would be irrelevant when it comes to deciding upon whether special measures were required or not. The deciding factors should be the people involved in giving evidence and whether their experience could be improved by the introduction of a particular special measure." (Victim/witness support organisation)

Many of the reasons given in support also focussed on the vulnerability of those likely to appear in a full range of cases in civil courts, with views that vulnerability (especially in domestic abuse and sexual assault cases) was no less than would be the case for those involved in the criminal justice system. This was seen as especially true in cases where civil proceedings have taken place in a case in relation to rape, sexual assault or domestic abuse when there has not been a conviction in the criminal courts.

Some consultees supported the proposals and also went further to suggest that special measures should be automatic when a party to a civil case has been subjected to domestic abuse or sexual assault:

> "They should be automatic in the civil court for the same reasons as they became automatic in criminal court - they are vulnerable as a result of the abuse they have experienced. This should not need to be led in evidence to be agreed." (Local authority (including justice partnerships))

Again, survivors of sexual violence and domestic abuse were seen to potentially benefit in particular from extension of measures, and including special measures in all hearings was also seen as being needed to achieve a fully trauma-informed approach:

> "A person-centred, trauma approach should be taken to all civil court hearings in Scotland. As such, special measures should be available when required, to reduce the risk of re-traumatisation." (Other (third sector))

The main reservation was that it may not be proportionately practical to do so (in terms of resources/equipment). It was suggested that civil cases are often lengthy and prolonged and additional demand would be compounded by recent changes to allow introduction of similar measures as a result of the Children (Scotland) Act 2020. Increased demand for relevant specialist equipment, especially at short notice, or for cases heard in settings outside of a normal court room, could be difficult to manage, for example. Any lack of availability in equipment (due to increased demand) could then impact on case progress and cause delays (unless additional funding for equipment was put in place).

One other caveat raised was that, unless a party was representing themselves, they may not always attend a procedural hearing and so the demand for such measures may not always be required.

**Question 30: Are there any other matters relating to special measures in civil cases that you would like to offer your views on?**

The other main comments made in relation to special measures in civil cases focused on the need for widening the scope of who is deemed 'vulnerable'. General views were given that special measures should be made available to all parties and witnesses engaging in any civil hearings, evidential or otherwise, where special measures would assist them in participating in proceedings while reducing the risks of retraumatisation.

In particular, several respondents advocating on behalf of women argued for the extension of the provisions of the Vulnerable Witness (Scotland) Act 2004 and the Vulnerable Witnesses (Scotland) Act 2014, so special measures are automatically available to vulnerable parties and witnesses in civil proceedings involving domestic abuse and sexual assault. Comments reflected views that all such women should automatically be deemed vulnerable and, therefore, automatically eligible for use of special measures such as a supporter, screen and/or a live TV link, as appropriate.

Other groups who were specifically cited as potentially benefitting from changes to make special measures more available in civil hearings included those living with physical and learning disabilities, children, people who do not have English as their first language, male abuse survivors and trauma survivors:

> "There are many groups in our society who would benefit from having these types of methods to assist them in providing their lived experiences." (Other (campaign))

One more general comment was made that barriers for vulnerable groups (especially women experiencing abuse) when it came to securing a solicitor through legal aid must be addressed, owing to the low number of solicitors willing to take this work on:

> "…we must establish a better legal aid so that it is not a 'luxury' to utilise the civil justice system but a basic human right." (Individual)

Another organisation suggested that there may be merit in consideration being given to bespoke special measures to provide suitable protection of the identities of victims and/or vulnerable persons in civil cases.

Finally, one public body recommended that any child taking part in any proceedings be afforded the same protections and special measures across all settings (including in non-evidential civil hearings). This would, they suggested, ensure that anything which may inhibit them expressing their views, including their presence or the presence of others, can be addressed.

# Review of Defence Statements

Section 70A of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') places a duty on an accused person charged on indictment to lodge a 'defence statement' 14 days prior to the first diet or preliminary hearing. Lady Dorrian's Review recommended that "there should be a review of the utility of section 70A of the 1995 Act with a view to strengthening the requirement therein to lodge a meaningful defence statement." The consultation sought views on if and how this should be achieved.

**Question 31: Do you support undertaking a review of the use of defence statements?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Yes | 35 | 51% | 83% |
| No | 1 | 1% | 3% |
| Unsure | 6 | 9% | 14% |
| No response | 27 | 39% | - |

*Base = 69*

The large majority of those who answered this question (83%) supported a review of the use of defence statements.

An error in the consultation process meant that, although respondents were asked to give reasons for their answer to this question, there was no facility for them to do so here. In answer to subsequent questions, however, several general comments were made that the existing legislation did not work in practice, with observations that:

- the lodging of defence statements rarely happened in practice
- there was insufficient time and resources provided to defence legal representatives to provide such statements
- the current legislation allowed legal representatives acting for the accused to use defence statements as a means of stalling or delaying case progress and that this should be challenged.

For all of these reasons, a review of the status quo was seen as necessary (while also protecting the accused's right to a fair trial):

> "Effective case-management, and in particular reducing the need for witnesses to attend at court and take up time in trials giving evidence about matters which are not in dispute, would be enhanced by a more exacting requirement for defence statements." (Legal organisation)

**Question 32: If you answered yes to the previous question, how do you think this should be progressed to address the issues identified by Lady Dorrian's Review?**

In taking forward any such review, several respondents stressed it would be important to work closely with those involved across the justice system to ensure that their views and experiences were reflected:

> "In order to progress the review, we would encourage strong engagement with people with lived experience of the justice system (both complainers and defendants) as well as those working with them (including legal professionals and third sector organisations), to help inform any future improvements." (Other (third sector))

Others again encouraged greater dialogue with organisations representing victims who have had experience of defence statements ahead of taking forward any changes in this regard.

Other comments included that:

- the review should be carried out in the full context of all pre-trial preparation by the court, the Crown and the defence
- a review of defence statement requirements should be part of a wider review of the operation of disclosure in criminal cases, including seeking greater clarity on the stage at which disclosure schedules should be intimated
- any review would need to consider the interaction with the timescales for the lodging of an application under section 275 of the 1995 Act currently, and how those timescales may need to be changed to support implementation of the separate proposal in the consultation in order to provide the complainer with the option of independent legal representation (this issue is discussed in more detail at Question 54 below).

One respondent suggested that more exacting requirements on the defence would only be meaningful if a similar exacting standard was applied to the Crown, i.e. that Crown submissions were timely and allowed the defence a full and proper opportunity to respond. The same respondent suggested that any changes must be flexible and not overly restrictive to make allowances for minor matters which may arise unexpectedly at trial.

An observation was made that it did not appear possible to go as far as the similar procedure in England and Wales due to procedural differences and indeed, one respondent stressed that they would not support application of the English rules on defence statements in Scotland, since they allowed for "adverse inferences" to be drawn where a defendant lodged a late statement or led a defence that was different from the statement prepared.

A common concern was that shortcomings of the current system meant that victims, in particular, often did not know what to expect in court and that the

introduction of a system or framework whereby victims could access details of defence statements in advance, could form part of a trauma-informed approach to justice.

Other comments made by just one respondent each included that:

- victims should also be able to provide statements to the court
- preliminary hearing judges could be more exacting in their expectations of those appearing before them/what was expected of a compliant defence statement
- a programme of empirical research should be funded to allow the Government to understand practice in this area, before legislative or other change is considered.

Overall, it was suggested that a review of, and changes to the requirements and timescales for, the lodging of defence statements had the potential to lead to more efficient disposal of business due to better preparation and more certainty of the defence position prior to trial, reducing 'churn' of cases (and potentially providing more certainty for complainers and witnesses that a trial will proceed on a given date). Improvement in the amount of detail included in defence statements, specifically in sexual offence/consent defence cases would also be beneficial to assist efficient case management by the courts it was felt.

A small number of respondents stated explicitly that they did not feel sufficiently qualified to answer this question or had no experience on which to base a fair response.

**Question 33: Are there any other matters relating to a review of defence statements that you would like to offer your views on?**

There were very few additional comments made in relation to the possible review of defence statements, with the main comments again reiterating that defence statements should never be used as a tool to humiliate victims, and that access to statements for victims should be routine (to help them prepare for court).

One respondent suggested that an example of good practice might be found in Australia's defence statement legislation. Another respondent suggested that additional measures brought in should also apply to Children's Hearings proceedings which relate to offences committed by a referred child, including extending the approach to evidential matters relating to other 'non-offence' grounds for referral.

A comment was also made that there may be scope for defence statements to raise issues, other than evidential ones, which may require to be addressed in advance of trial and as part of the general case management in order to focus the real issues in dispute (e.g. the appropriateness or otherwise of remarks being made to the jury about false assumptions in rape cases).

# Anonymity for complainers in sexual offence cases

This part of the consultation focussed on the recommendation within Lady Dorrian's Review in the area of anonymity of complainers in sexual offence cases. It sought views on how to bring forward legislation to protect the anonymity of all complainers of sexual crimes under Scots law, which was a Scottish Government commitment in its 2021-22 Programme for Government.

**Question 34: Which one of the following best describes your view on the point in the criminal justice process when any automatic right to anonymity should take effect?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| When an allegation of a sexual offence is made | 31 | 45% | 60% |
| When a person reports an alleged sexual offence to a police constable | 7 | 10% | 14% |
| When an accused person is formally charged by the police with a sexual offence | 3 | 4.5% | 6% |
| When criminal proceedings for a sexual offence first call in court | 3 | 4.5% | 6% |
| Other - please provide details in the box below | 7 | 10% | 14% |
| No response | 18 | 26% | - |

*Base = 69*

### Option a) when an allegation of a sexual offence is made

Most respondents who answered this question (60%) indicated that they felt that an automatic right to anonymity should take effect when an allegation or disclosure of sexual offence is made.

Almost all victim/witness support organisations and most local authorities (including justice partnerships) agreed with this option. Many argued that anonymity for the complainer (and any children) should be provided from the earliest opportunity, with several indicating that anonymity could not then be provided at a later stage if names, etc. had been released earlier in the process. This was considered to be particularly acute given the use of social media:

> "Anonymity should be provided automatically at the earliest point to reduce stress and trauma. Anonymity can't be given at a later date; this is particularly important due to the increased use of social media." (Local authority (including justice partnerships))

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

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

> "We believe victims should be anonymous from the very beginning - victims need to feel safe. Not having a right to anonymity will make victims even less likely to come forward. You would be terrified to report then go to court, knowing people would know who you are. It can feel like the victim is under attack and there would be a lot of stress being known publicly." (Other (third sector))

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

> "We submit that the right to anonymity should take effect from the moment an allegation is made. This should not be reliant on the disclosure being made within the context of the criminal justice system alone. There is suggestion that the right could begin when the survivor reports to a police officer, but we would suggest that we need to recognise that survivors, who choose to disclose, will do this in a number of different ways and for some, the criminal justice system is not the most appropriate forum for this." (Victim/witness support organisation)

A few also commented that option a) was the most trauma-informed approach.

One legal organisation also preferred this option as it was in line with the provision for England, Wales and Northern Ireland, as well as the Lord Justice Clerk's Review Group (Lady Dorrian's Review) recommendations.

However, a few sought further clarity on the definitions and practicalities of anonymity within the criminal justice process from the time that an allegation is made. Specifically, respondents questioned at which point an 'allegation' would be considered to have been made when a victim first makes disclosures to a victim support organisation (and not the police or criminal justice sector).

**At other stages (Options b) to e))**

Those who favoured **option b)** (i.e. when a person reports an alleged sexual offence to a police constable) largely did so due to the practicalities around providing anonymity. It was felt that this provided a sensible and deliverable point when anonymity could be provided within the formal process, with one respondent

noting that disclosures made to any other bodies previously would most likely be covered by confidentiality and anonymity agreements in any case:

> "We are of the view that a right of anonymity in the criminal justice process can't take effect until an alleged offence is part of a criminal justice process. That doesn't happen until an alleged offence is reported to a police constable. Any contact with health services prior to reporting to the Police would already be private and anonymous." (Public body)

None of those who selected **option c)** (i.e. when an accused person is formally charged by the police with a sexual offence) provided any qualitative comments to explain their reasoning, and only one respondent who selected **option d)** (i.e. when criminal proceedings for a sexual offence first call in court) provided further comment. This respondent noted the practicable nature of this stage in the proceedings, highlighting it as a definable point in time and a matter of public record which provides a safety check for publicists.

All seven of those who selected **option e)** (i.e. 'other') provided qualitative comments, however, these were all unique with no key themes or issues being identified. Two individuals felt that anonymity should be provided for all involved, at least until conviction, and a few repeated issues above, such as victims preferring to make disclosures to a support organisation (or the use of Third Party Reporting).

**Question 35: Which of the following options describes the offences that you consider any automatic right of anonymity should apply to?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Offences contained at section 288C of the Criminal Procedure (Scotland) Act 1995 | 34 | 49% | 85% |
| Intimate images offence contained at section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 | 34 | 49% | 85% |
| Offences contained in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 | 36 | 52% | 90% |
| Other | 9 | 13% | 23% |
| No response | 29 | 42% | - |

*Base = 69*

Of the 41 respondents who provided an answer at this question, 33 (80%) selected all of the first three options.

Organisations largely argued that all complainers of any type of sexual offending should be afforded the same protections, regardless of the specific category of the offence:

> "Sexual offending encompasses a wide range of crimes. We contend that all complainers of sexual offending should be afforded the same protection. In our view it would seem nonsensical to afford anonymity to only one category of persons when the issue it is seeking to address affects complainers across the sexual offences spectrum." (Legal Organisation)

It was felt that automatic right to anonymity should apply to all of options a) to c) in order to capture a range of highly sensitive offences beyond the 'sexual offence' category:

> "This would extend protection beyond purely 'sexual offences' and additionally provide protection in cases where the nature of the offence is similarly highly sensitive e.g. disclosure of intimate images." (Other (academia))

While they generally supported the inclusion of all three elements provided as options at this question, around half of the victim/witness support organisations (and most of those who commented at this question) suggested that there was also a need for a "catch all" provision to ensure automatic anonymity could be applied in all relevant cases with a sexual element, regardless of whether they were specifically named in the legislation. They (and others) also suggested a few other additions, including offences contained within:

- Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 in order to recognise image based sexual abuse
- the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005
- Section 52 of the Civic Government (Scotland) Act 1982.

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

**Question 36: Which one of the following best reflects your view on when any automatic right of complainer anonymity should end?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Upon the death of the complainer | 15 | 22% | 36% |
| No automatic end point | 18 | 26% | 43% |
| Other | 9 | 13% | 21% |
| No response | 27 | 39% | - |

*Base = 69*

Responses to this question were somewhat mixed, with 43% of those who answered the question favouring no automatic end point, 36% supporting the point of death of the complainer and 21% supporting other options.

**Option a) upon the death of the complainer**

While 10 respondents provided a comment in support of maintaining the automatic right of complainer anonymity until the death of the complainer, only six explained their reasons for supporting this. These reasons were disparate, as follows:

- it upholds anonymity for the complainer in order to protect the victim, but defaults to the important principle of open justice upon the complainer's death
- it would be consistent with other privacy and personal data protection laws
- it honours the important movement to make visible the potential legacy of sexual violence
- it is an easily ascertainable point in time and represents a natural end point
- one respondent supported the reasons outlined in the consultation document.

Two respondents argued that to maintain anonymity indefinitely could create several unintended consequences, including difficulties in certain cases, and for surviving family members who may wish to discuss the case. Three respondents also noted that the removal of automatic anonymity upon the complainer's death was required for historians and recording history.

**Option b) no automatic end point**

Those who supported there being no automatic end point (and who gave reasons why) generally felt that anonymity could and should continue indefinitely. It was felt that removal of anonymity after death might be against the complainer's wishes and/or could negatively impact surviving family members. Rather, most argued that anonymity should be complainer led:

> "We would be keen to see a person-centred, trauma-informed approach being taken to this issue. As such, complainer's should be offered a choice about when any automatic right of complainer anonymity should end. The decision about any automatic end point should be made by the complainer themselves." (Other (third sector))

One organisation suggested that the need to name complainers after their death could be managed by the court, and therefore implementing a fixed date to end automatic anonymity was not required.

**Option c) Other**

Several of those who selected option c) also felt that the ending of anonymity should be complainer led and/or handled on a case-by-case basis.

Other timings suggested included “upon conviction” and “one year after the death of the complainer”, with flexibility for this to be shortened or extended based on the family’s wishes. Indeed, two respondents suggested that the court should determine if and when to end anonymity for complainers to ensure the needs of all parties were balanced. However, one respondent indicated that, where similar arrangements were prevalent in other areas, this had caused financial and emotional difficulties for families when trying to remove the anonymity requirement.

**Question 37: To what extent do you agree or disagree that the complainer should be able to set their anonymity aside?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 34 | 49% | 71% |
| Somewhat agree | 10 | 15% | 21% |
| Neutral | 1 | 1.5% | 2% |
| Somewhat disagree | 1 | 1.5% | 2% |
| Strongly disagree | 2 | 3% | 4% |
| No response | 21 | 30% | - |

*Base = 69*

Overall, most who answered this question either strongly agreed (71%) or somewhat agreed (21%) that the complainer should be able to set their anonymity aside.

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

> “To retain or waive anonymity should be the right of every complainer. That is not a decision to be taken by anyone else.” (Other (campaign))

While still advocating for the complainer’s ability to choose, two organisations did stress the need for informed consent in such situations to ensure that complainers were fully aware of the possible impacts/consequences of setting aside their anonymity. Another two indicated that the timing allowed for complainers to set aside their anonymity, the processes for doing so, and the safeguards that may need to be put in place would need to be explored.

A few organisations also felt that complainers should be able to set aside their anonymity without the need for judicial interventions or authority, which they argued added an unnecessary administrative, financial and emotional burden on the complainer.

A few additional caveats were highlighted, including that:

- this should only apply to adult complainers, and those with capacity to make such decisions
- complainers needed to fully understand the possible implications of setting aside their anonymity
- it should not affect any dependents/vulnerable individuals or other complainers also attached to the case.

Only two respondents (both individuals) provided comments indicating disagreement with this proposal. One felt there was the “basic right” for complainers to be challenged, while the other argued that “complainers have used this to prejudice the justice system” (Individual).

**Question 38: If complainers are to be given the power to set their anonymity aside, which one of the following best reflects your view on how they should be able to do this?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Unilaterally by consent of the complainer | 30 | 44% | 65% |
| Following an application to the court by the complainer | 10 | 15% | 22% |
| Other | 6 | 8% | 13% |
| Not Answered | 23 | 33% | - |

*Base = 69*

Two thirds (65%) of those who answered the question felt that, if complainers were to be given the power to set their anonymity aside, this should be unilaterally by consent of the complainer.

### Option a) unilaterally by consent of the complainer

As with the preceding question, several respondents suggested that the complainer should be able to waive their anonymity without having to apply to the court, with one suggesting that if an acceptable time is set out in legislation (e.g. at the close of the court case), then an application to the court would be unnecessary. Others felt that including a requirement to apply via the courts for this would be cumbersome, placing administrative and/or financial burdens on complainers, and would not be in keeping with the process for other complainers:

> "We consider that an application to the court to waive anonymity would be an unduly cumbersome process which complainers for non-sexual offending are not subject to." (Legal organisation)

A few also suggested that making survivors of sexual assault request permission from the court to talk publicly about their experiences would further undermine victims' autonomy (especially women), and could result in women being sanctioned:

> "It could be considered as further undermining women's autonomy if they were required to go to the court and ask permission before saying in public that they experienced sexual violence and this also suggests that where such a requirement was introduced, then women who discussed their experiences online, or through any other medium would face some form of sanction from the court and possibly prosecution, which would be unacceptable." (Victim/witness support organisation)

Other comments made by just one or two respondents each included:

- that they are old enough and competent enough (presumably in the case of adult complainers) to make an informed decision on the matter
- that only complainers should have the power to set their anonymity aside, and they should be empowered to do so if they wish
- complainers should be free to identify themselves through their own social media, without restriction
- written consent should be obtained by any publisher, for example, the media, and ample time should be provided for the complainer to consider the consequences
- complainers should have control over what information they release, media companies should not then seek to uncover additional details.

**Option b) following an application to the court by the complainer**

The main reason respondents gave for supporting option b) was to provide necessary and unbiased checks and safeguards, both for the individual complainer and for anyone else involved in the case:

> "Some limited oversight by the court would allow any issues of the complainer's capacity to be assessed. This would also allow the court to consider the impact of setting aside a complainer's right to anonymity on the privacy of any other complainers involved in the same or associated case(s). Oversight by the court would also provide some safeguards to protect complainers from exploitation or undue pressure when considering setting their anonymity aside." (Other (academia))

One respondent also noted that this approach would be in line with other jurisdictions, namely New Zealand.

**Option c) other**

Two respondents suggested that another body/organisation, other than the court, could support complainers when considering whether to set aside their anonymity. One felt that an advisory type service could be used to ensure that complainers were able to discuss their decisions and understand possible consequences, while another suggested that the complainer should discuss the issue with the police or procurator fiscal in order to ensure there was no risk of inadvertently identifying other victims/complainers in the case.

One individual felt that the court and medical professionals should be required to undertake "due diligence" to ensure that the complainer was "deemed fit to proceed" with the decision to set aside their anonymity and so that no vulnerable individual made an uninformed decision which they may later regret.

**Question 39: To what extent do you agree or disagree that children should be able to set any right to anonymity aside?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 5 | 7% | 11% |
| Somewhat agree | 12 | 18% | 27% |
| Neutral | 3 | 4% | 7% |
| Somewhat disagree | 15 | 22% | 34% |
| Strongly disagree | 9 | 13% | 21% |
| No response | 25 | 36% | - |

*Base = 69*

There were very mixed responses to both the closed and open elements of this question.

The dominant view was that such decisions should be dealt with on a case-by-case basis, taking into account the age, stage and capacity of the child/young person, while also ensuring they were supported in making such a decision:

> "If children wish to waive their right to anonymity, consideration should be given to their age and support that they may need to make an informed choice." (Victim/witness support organisation)

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

> "Children do not have the capacity of foresight or maturity to be able to fully understand the potential harm such disclosure could have on themselves and their families for the remainder of their lives. This would leave them open to serious re-exploitation by tabloid / sensationalist media platforms. The potential for harm far outweighs the benefits." (Individual)

Several victim/witness support organisations also argued that this would depend on the best interests of the child, however, expressed doubts that this could ever be considered to be in their best interests:

> "…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." (Victim/witness support organisation)

One academic organisation was also concerned that allowing children to waive their own anonymity could have implications and consequences for others which needed to be considered and protected, including the accused/victim who might also be a child, their families, etc. whose anonymity may also be compromised with such disclosures.

One public body, however, noted that while they were against allowing children (which they considered to be anyone under the age of 18) to set aside their anonymity, they did feel that, after a person turned 18 and was considered an adult, they should be allowed to discuss their experiences as a child should they wish to.

Several respondents among both those who agreed and disagreed felt that discretion may be required for those in older age brackets (typically those aged 16-18), and that they should perhaps be able to make their own decisions. Such respondents included individuals, legal organisations, academic organisations, and an advocacy/support organisation for children and young people. One legal organisation noted that this aligned with the age of consent, while an academic organisation similarly argued that those aged 16 and over were treated as adults in other aspects and so the same should hold true here.

**Question 40: If children are to be given a power to set any right of anonymity aside, to what extent do you agree or disagree that additional protections should be required prior to doing so, for example an application to the court to ensure there is judicial oversight?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 23 | 33% | 59% |
| Somewhat agree | 7 | 10% | 18% |
| Neutral | 6 | 9% | 15% |
| Somewhat disagree | 2 | 3% | 5% |
| Strongly disagree | 1 | 1% | 3% |
| No response | 30 | 44% | - |

*Base = 69*

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

Generally it was felt important that, if such provision was to be made, then there should be judicial oversight of the process to ensure the child understood the implications and potential consequences, that they were making a fully informed decision, and to be able to provide safeguards against coercion and exploitation. One respondent (from law enforcement) and another (from a local authority/justice partnership) also felt that some measure was required (such as judicial input) to ensure that the rights of all those involved were considered.

A range of different suggestions were made by respondents regarding what elements may be required, including:

- an application to a judge
- having diverse and multi-agency input to consider the application
- the court should apply a welfare checklist and a best-interests approach when making decision on this
- a safeguarder should be appointed for the child and any necessary social work assessments completed
- the decision should only be supported following in-depth assessments from professionals such as psychologists
- the child should have access to independent advocacy and advice

- a legal guardian should be required.

One legal organisation, while supportive of the need to have additional protections in place, such as an application to the court, did highlight the practical difficulties in enforcing such a situation and the limitations this would have. They noted that young people could publish information which identified themselves via social media and that it would be unlikely that the court or COPFS would bring criminal proceedings against a child where there had not been a court application made in advance:

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

Again, several respondents reiterated that they did not think that children should be able to set aside their right to anonymity, while a few argued that those in older age groups, i.e. age 16 and over should be able to unilaterally waive their right to anonymity without the need for judicial oversight.

Only two of the three respondents who disagreed with this proposal provided further comment, with one suggesting that if the child had suitable support in place then judicial oversight should not be necessary, and the other felt that "no one should be held back against their will by a judge" (Individual).

**Question 41: If children are to be given a power to set any right of anonymity aside, to what extent do you agree or disagree that there should be minimum age below which a child cannot set their anonymity aside?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 13 | 19% | 33% |
| Somewhat agree | 7 | 10% | 18% |
| Neutral | 14 | 20% | 35% |
| Somewhat disagree | 5 | 7% | 12% |
| Strongly disagree | 1 | 2% | 2% |
| No response | 29 | 42% | - |

*Base = 69*

Mixed responses were provided not only to the closed question but also the open question, with some indication that there may have been different interpretation of what was being asked. Some understood this to mean where no judicial oversight or safeguards would apply, while others caveated their responses or assumed that such safeguards would apply, particularly for younger age groups.

Where specific age limits were offered, these included:

- two respondents who felt the age limit should be set to 12, in line with criminal responsibility (albeit with safeguards in place to ensure the child is fully informed, supported and not being coerced into the decision)
- six respondents who felt the age limit should be set to 16, in line with the age of consent
- seven respondents who felt the age limit should be set to 18, in line with the UNCRC (although a few did suggest that if it was to be set to 16 or 17 or there was to be any consideration below age 18, this would require judicial oversight and safeguards).

Seven respondents argued that setting an arbitrary age limit was less appropriate than considering the child/young person's stage of development, maturity and capacity to make such decision and understand the consequences.

A few (mostly from victim/witness support organisations) felt this needed to be given more thought, with views sought from those experienced in the field of child development.

Again, a few respondents indicated that they did not think this should happen.

**Question 42: To what extent do you agree or disagree that the court should have a power to override any right of anonymity in individual cases?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 5 | 7% | 12% |
| Somewhat agree | 11 | 16% | 25% |
| Neutral | 4 | 6% | 9% |
| Somewhat disagree | 5 | 7% | 12% |
| Strongly disagree | 18 | 26% | 42% |
| No response | 26 | 38% | - |

*Base = 69*

This question attracted an organisational split in opinion with all legal and law enforcement organisations who provided a response agreeing with this proposal, while all victim/witness organisations who answered the question disagreeing.

Again, there appeared to be different interpretations of this question, with some respondents understanding this to mean the court would be able to publicly identify people, while others interpreted this as the court refusing to allow an individual to identify themselves.

A range of circumstances where respondents felt it might be suitable for the court to override any right of anonymity were outlined. Three respondents felt this should be possible when one person's decision would impact negatively on someone else - it was felt important for the court to balance the rights of all those involved. Three other respondents felt a court should be able to override the right of anonymity where it was felt that an individual lacked capacity to take such a decision and fully understand the implications. Three respondents also felt that this would be important either for public protection, where it would be in the public interest, or to intervene when disclosures would not be not in the public interest or could present a threat to national security.

Other scenarios mentioned by one respondent each, included where:

- it is needed to get other victims to come forward for corroboration
- a complainer is subsequently convicted of an offence against justice itself and where there is public interest in making their identity known to allow people affected to consider remedies available to them
- a complainer has made a false allegation
- it would serve justice
- those involved "who were given anonymity no longer 'qualify'"
- where there are strong grounds demonstrating specific reasons that the applicant's defence or appeal is highly likely to be substantially prejudiced.

One respondent also suggested that a potential model for this could be found in section three of the Sexual Offences (Amendment) Act 1992, while another suggested that the approach to ending complainer anonymity should be in line with that in England and Wales.

One legal organisation felt that such provision for the court to override any right of anonymity was unlikely to be required and would undermine the benefit of the provision of anonymity, although they suggested that it might be useful to obtain information on the frequency with which the English courts have been asked to (or have) overridden the right to anonymity:

> "We would find it difficult to envisage circumstances in which an application of the sort mentioned might be granted. We find it equally difficult to envisage circumstances in which the court might give effect to the general right given to it. We therefore doubt whether there is a need for a dispensing provision, the presence of

> which would inevitably undermine, to some extent, the benefit of a prohibition." (Legal organisation)

Nine victim/witness support organisations (who disagreed with the proposal), plus one third sector organisation argued that this should in no way be possible to build defence evidence, or where there was a not proven or not guilty verdict. They argued that no one should have the right to remove anonymity from victims, and that allowing this would undermine victims' trust and confidence in the justice system, make them less likely to come forward, and would increase the trauma and fear experienced during the court process. It was also stressed that these individuals were likely to be vulnerable or could be deemed to be 'at risk':

> "Anonymity should not be set aside by the court to secure defence evidence, nor should it be set aside if the survivor withdraws from proceedings or there is a not guilty/ proven verdict. The court should be hesitant about removing anonymity even in the rare cases of offences of perverting the course of justice as they may involve women deemed to be at risk in any event." (Other (third sector))

Other organisation types (including a children and young people's advocacy/support organisation, and a local authority/justice partnership) concurred with the victim/witness support organisation views above. Meanwhile, one campaign organisation argued that adult complainers should be solely responsible for deciding whether to waive their anonymity and one advocacy/support organisation suggested that removing a victim's/complainer's anonymity could do significant harm to the individual.

One individual also agreed with the victim/witness support organisation views above, arguing that such disclosures are often used to undermine the credibility of the victim/witness. Another individual also argued that victims do not have their own legal representation in court to protect their interests.

**Question 43: To what extent do you agree or disagree that any right of anonymity should expire upon conviction of the complainer for an offence against public justice?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 2 | 3% | 5% |
| Somewhat agree | 8 | 11% | 19% |
| Neutral | 13 | 19% | 31% |
| Somewhat disagree | 6 | 9% | 14% |
| Strongly disagree | 13 | 19% | 31% |
| No response | 27 | 39% | - |

*Base = 69*

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

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

Others who were neutral either requested more information about how this might work in practice and where such conditions might apply.

A few victim/witness support organisations, individuals and other organisations cautioned that 'false allegations' in rape cases are extremely rare and that often such complainers are vulnerable people. A few also argued that complainers could be coerced into changing their statements or dropping charges, and that removing anonymity would act as a punishment towards victims. One individual also argued that publicly disclosing the information would perpetuate the image that women bringing false allegations is common when, in reality, it is not. Another individual argued that such disclosures would make it harder for other victims/complainers:

> "I think naming them would fit in to a narrative where they would be "blamed" for false allegations and this could have a negative impact on those of us giving truthful accounts." (Individual)

One local authority/justice partnership also raised concerns that the threat of removing anonymity may act as barrier to complainers coming forwards.

**Question 44: Which one of the following best reflects your view of the level of maximum penalty that should apply to a breach of any right of anonymity?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Up to 2 years' imprisonment and/or an unlimited fine | 14 | 20% | 44% |
| An unlimited fine | 1 | 1% | 3% |
| Up to 12 months' imprisonment and/or a fine of up to £10,000 | 7 | 10% | 22% |
| Other | 10 | 15% | 31% |
| No response | 37 | 54% | - |

*Base = 69*

Again, this question attracted a mixed response.

**Option a) up to 2 years' imprisonment and/or an unlimited fine**

Those who supported a penalty of 'up to 2 years' imprisonment and/or an unlimited fine' argued that such a breach was a serious issue with potentially far reaching and long lasting consequences and, as such, there should be a serious penalty. This was seen as needed to send a message about how important maintaining anonymity should be, to act as a sufficient deterrent and a punishment:

> "A deliberate breach of the right of anonymity can amount to a serious attack on the administration of justice. It may also have a far reaching impact on a complainer, and the victims of crime more generally. In such circumstances, prosecution on indictment may be appropriate. The court should have the ability to mark the seriousness of such conduct with a meaningful custodial sentence." (Legal Organisation)

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

**Option b) an unlimited fine**

Only one respondent (a victim/witness support organisation) preferred that the penalty should be 'an unlimited fine'. They felt that unlimited fines would be important in providing a deterrent and tackling breaches perpetrated by large media firms or others with significant financial means. However, they felt that any harm that might occur from the breach could likely be dealt with by a custodial sentence via other charges:

> "The fine should primarily deter and prevent breaches, however in terms of a punitive measure imprisonment is a significant cost to society whereas fines could be reinvested in improving services - so it makes sense from a practical perspective." (Victim/witness support organisation)

**Option c) up to 12 months' imprisonment and/or a fine of up to £10,000**

Those who preferred a penalty of 'up to 12 months' imprisonment and/or a fine of up to £10,000' provided mixed reasons for this. One individual felt that breaches of anonymity should be treated as seriously as contempt of court or breach of a court order. Another individual felt that the fine should be proportionate to the amount that the individual could afford to pay, with the proceeds of such fines being distributed across all organisations that support and advocate for victims of sexual abuse/offences. One academic organisation who supported this option argued that the most important aspect would be the statutory underpinning of anonymity, and again argued that alternative sentences could be sought if the breach was part of a wider campaign of harassment, etc.

### Option d) Other

Views were also mixed among those who identified 'other' penalties as their preferred option. Four victim/witness support organisations felt that the extent of the penalty would depend on whether the breach was prosecuted under summary or solemn procedures, with three suggesting that options a) and b) should apply in solemn proceedings and c) in summary proceedings. A campaign organisation also indicated that breaches should be dealt with via summary criminal proceedings or contempt of court, meaning that either options a) or c) could be used.

A few respondents (from a mix of profile groups) felt the penalty would need to depend on the nature of the case, the nature of the breach, and the impact the breach had on the individual. One individual was undecided, while another wanted to see "imprisonment of 6 months to 3 years and a fine not exceeding 50% of total wealth" (Individual). One campaign organisation felt the penalty needed to be proportionate to the nature of the person who committed the breach.

**Question 45: To what extent do you agree or disagree that there should be statutory defence(s) to breaches of anonymity?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 10 | 15% | 29% |
| Somewhat agree | 8 | 12% | 23% |
| Neutral | 12 | 17% | 34% |
| Somewhat disagree | 3 | 4% | 9% |
| Strongly disagree | 2 | 3% | 5% |
| No response | 34 | 49% | - |

*Base = 69*

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

Of those who agreed with this proposal, 10 provided qualitative comments. A few felt that the creation of statutory defences to breaches of anonymity provided a pragmatic response, and argued that this was necessary to deal with real life situations and the realities of modern life. One legal organisation also suggested that strict liability should only be created in the most exceptional circumstances.

A few organisations (mostly legal and law enforcement organisations) agreed this would be a positive step, providing clear guidelines for what would and would not

be a suitable defence of such breaches. Although, one did argue that breaches would still need to be dealt with on a case-by-case basis:

> "We consider that placing the defence(s) on a statutory basis would provide clarity regarding the situations in which a defence can be proffered. For example, in cases where the complainer had waived their right to anonymity." (Legal organisation)

While agreeing that statutory defences should be allowed, one victim/witness support organisation also suggested that a zero tolerance approach should be taken where breaches occur in order to provide a deterrent in future:

> "We would also argue that there should be a zero-tolerance policy adopted where the law regarding breaches of anonymity has been broken. The only way to curb such practices, especially on social media platforms is to pursue breaches rigorously." (Victim/witness support organisation)

Two organisations (a local authority/justice partnership and a victim/witness support organisation) who were neutral about the proposal focused their response on published materials, suggesting that clear written consent should be needed:

> "Clear written consent should be given before any publisher produces material that may identify the complainer. This consent should contain detail of what is permitted to be shared in the public domain." (Local authority (including justice partnerships))

One individual felt that further consideration would be needed to ensure that all relevant parties could be protected, while another argued that more information was required around what an 'acceptable breach' would look like.

Those who disagreed mainly argued that there should not be any excuses for breaching anonymity. One individual acknowledged that some people would unknowingly commit a breach, however, they still felt that there should be consequences for this. One advocacy/support organisation raised concerns that allowing/accepting defence of such actions could result in an increase in breaches.

**Question 46: If you agree that there should be statutory defence(s) to breaches of anonymity, which of the following best reflects your view of the defence(s)s that should operate?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Adopt the model of the Sexual Offences (Amendment) Act 1992 in England, Wales and Northern Ireland | 10 | 14% | 45% |
| A 'reasonable belief' defence | 11 | 16% | 50% |
| Other | 4 | 6% | 18% |
| No response | 47 | 68% | - |

*Base = 69*

Of those who agreed with option '**a) adopt the model of the Sexual Offences (Amendment) Act 1992 in England, Wales and Northern Ireland**', two felt that this was more consistent with their belief that complainers/victims should be able to waive their right to anonymity. One of these respondents felt this struck a good balance between the need to protect anonymity and not over-criminalising others, while the other felt that the complainer's right to waive their anonymity also meant that written consent ahead of publication should not be required.

One law enforcement organisation stated that existing case law should exist for this option, which would be useful in providing clarity in establishing such a defence, while a legal organisation concurred that the 1992 Act provided a 'tried and tested' approach. Another legal organisation argued that this would provide consistency across the UK and it provided a greater degree of certainty and simplicity of understanding compared to a 'reasonable belief' defence.

One victim/witness support organisation also felt that the 1992 Act was more robust that the alternative option of 'a reasonable belief defence':

> "We do not agree with a general defence of reasonable belief in a defence to a charge that the person believed the victim of crime had consented to publication. Whilst it would be more onerous for social media/online applications to identify whether the victim of crime had consented to waive their right to anonymity, we believe that the importance of factual accuracy of these matters is extremely important and the relevant legislation in the 1992 Act is more robust." (Victim/witness support organisation)

One respondent who preferred option '**b) a reasonable belief defence**', argued that the 1992 Act could unfairly penalise publishers who repeat information, where they have relied in good faith on the appropriateness of the original publication:

> "The English approach, requiring written consent, appears overly narrow. It would seem to suggest, for example, that if a publisher

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

Three respondents indicated that they would prefer **c) an 'other' defence**. One individual indicated that they were neutral on this point, while the other two individuals repeated their response from Question 45 above. One felt that further consideration was required protect all relevant parties, while the other felt that all breaches should suffer a penalty, with the nature and severity of the penalty being dependent on the intent behind the breach.

Two respondents who did not provide a response at the closed element of this question did provide qualitative comments. The first argued that there should not be any statutory defences to breaches of anonymity, while the other felt there should be a common approach to this across the UK.

**Question 47: Are there any other matters relating to anonymity for complainers in sexual offence cases that you would like to offer your views on?**

Eleven respondents provided additional comments/views in relation to anonymity for complainers in sexual offence cases.

Just one key area was discussed by a few respondents (two victim/witness support organisations and a local authority/justice partnership) namely that provisions for anonymity must be strong enough that identification is not possible via a 'jigsaw' process, i.e. where enough is published to put together their identity.

Other issues discussed by one respondent each included:

- the need for guidance for news publications, for example, that they should not pressure victims/complainers to waive their anonymity
- anonymity should be provided for all parties, not just the complainer
- to stress the importance of enshrining this right in law and not relying on convention
- highlighting the long-term impact that the sharing of personal details in court can have on a victim, when the perpetrator may not have known this information (for example where they are a stranger)
- highlighting that even abbreviated information (such as the use of initials or details of their area of residence) can make someone identifiable
- that there should be no process to override anonymity for those under 18.

One respondent also expressed a view that, as victims gained confidence in the justice process, more people would come forward to report crimes.

One final respondent discussed the issue of complainer anonymity at length, suggesting that this was needed to protect privacy rights. They argued that the current system whereby a complainer needs to seek a court order to protect their anonymity causes delays in the provision being granted and financial burdens for complainers:

> “Making complainers responsible for seeking such an order creates two problems. First, there is a potential window in which a complainer could be identified. Second, it imposes unnecessary economic and social costs on complainers, requiring them to instruct lawyers, potentially secure legal aid, and carry the administrative burden and emotional uncertainty associated with that process.” (Other (campaign))

# Introduction of independent legal representation for complainers in sexual offence cases

This section of the consultation explored the recommendations within Lady Dorrian's Review to introduce the right to independent legal representation (ILR) for complainers in sexual offence cases, in connection with applications to lead evidence of their sexual history or character in court.

Lady Dorrian's Review recommended that ILR should be made available to complainers, with appropriate public funding, in connection with applications made under section 275 of the Criminal Procedure (Scotland) Act 1995 and any appeals therefrom.

**Question 48: To what extent do you agree or disagree that there should be an automatic right to independent legal representation for complainers when applications under section 275 to lead sexual history or character evidence are made in sexual offence cases?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 41 | 60% | 89% |
| Somewhat agree | 3 | 4% | 7% |
| Neutral | - | - | - |
| Somewhat disagree | 2 | 3% | 4% |
| Strongly disagree | - | - | - |
| No response | 23 | 33% | - |

*Base = 69*

The majority who answered this question (96%) agreed with an automatic right to independent legal representation as outlined in the consultation.

Those who agreed tended to feel that the provision of ILR for complainers was a positive step. It was argued that this would help to ensure the victims'/complainers' rights and interests would be upheld and protected (with eight citing Article 8 of the European Convention on Human Rights: the right to private life, in particular). It was also felt that this would ensure that complainers were fully informed, independently and accurately, of what section 274 and the 275 applications entail, their rights within this, and advice on the potential outcomes. Further, it was felt this was needed to ensure their voices were truly heard and represented within the process. Respondents indicated that the Procurator Fiscal represented the public interest

rather than the best interests of the complainer, and that this could, on occasion, lead to conflicts of interest for COPFS, whereas ILR would alleviate this problem. Indeed, individuals indicated that complainers felt that they remained unrepresented in the system, and therefore dedicated legal representation in such circumstances was required:

> "Complainers' interests are significantly impacted when the defence seek to lead sexual history or character evidence in sexual offence cases. Those interests are not adequately protected by the prosecution, who act on behalf of the state rather than individual complainers. To provide complainers in these situations with free independent legal representation would better protect the complainer's interests and promote greater procedural fairness. This could alleviate secondary victimisation and improve complainer satisfaction because they would feel better supported through what can be a lonely and hostile experience." (Other (academia))

It was also felt that ILR was important to provide greater fairness between the accused and the complainer. It was felt that, if the accused had independent legal representation and advice, then so too should the complainer, particularly where applications under section 275 to lead sexual history or character evidence are made.

A few respondents, (including one individual, one local authority/justice partnership, and a victim/witness support organisation) argued that by not allowing such representation for victims/complainers in these circumstances it could result in them not reporting sexual offences or withdrawing from the process after making their complaint. Conversely, others argued that allowing the provision of ILR may result in increased confidence in the system and encourage reporting:

> "The provision of ILR is likely to improve survivor experience of the criminal justice system, increase confidence in its functioning and encourage more survivors to report what has happened to them." (Victim/witness support organisation)

Several respondents were keen to see ILR introduced for the complainer to ensure the system operated in a less traumatising, more trauma-informed, and more victim-centred way. It was also suggested that ILR for the complainer could help to tackle the adversarial, aggressive and inappropriate questioning of complainers.

One legal organisation and one academic organisation also argued that there was precedent and an existing model in operation in Scotland which could be followed when a complainer's medical or sensitive records are sought. As such, they felt that this provision could be extended to cover sexual history and character applications. While the legal organisation and academic organisation argued that the provision should be limited in nature and not a free standing right, three victim/witness organisations called for ILR to be granted to complainers throughout the criminal justice process, and for it to be extended to all victims of gender-based violence, including domestic abuse.

One respondent, who did not answer the closed element of this question, but appeared to indicate support for the proposal, highlighted that the implementation of such a change would likely have operational, resourcing and court programming implications, and potentially lead to longer hearings on such applications.

Only two respondents (both individuals) disagreed with the proposal, with just one providing additional comment. They felt that victims should be served by the Procurator Fiscal, and were concerned that such provision would set a precedent which may need to be replicated in other types of cases.

**Question 49: To what extent do you agree or disagree that the complainer should have the right to appeal a decision on a section 275 application?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 39 | 56% | 91% |
| Slightly agree | 1 | 1.5% | 3% |
| Neutral | 1 | 1.5% | 3% |
| Somewhat disagree | 1 | 1.5% | 3% |
| Slightly disagree | 1 | 1.5% | |
| No response | 26 | 38% | - |

*Base = 69*

Almost all who answered this question (94%) agreed with the right to appeal.

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

Another legal organisation and one academic organisation suggested that it would be logical, if ILR is granted for the complainer in the event of a section 275 application, that the relevant party should also be granted the right to appeal. While they argued that suitable processes could be established in solemn cases, they indicated that this might be less straightforward in summary cases. These two respondents, along with others, felt that complainers should have the same right of appeal as the prosecution and defence.

One victim/witness support organisation argued that evidence existed of judges applying the legal provision and tests incorrectly in such cases, therefore it was important for complainers to have the right to appeal. Again, it was suggested by a

few organisations that the right to appeal would be in line with a victim-centred approach which could help to mitigate trauma.

Only one respondent was neutral about the proposal, stating that victims should be served by the Procurator Fiscal.

As at Question 48, only two respondents disagreed with this proposal, with just one providing details on why:

> "[We] note that neither the accused nor the Crown have a right to appeal. They can apply for leave to appeal but that is commonly refused. [We] consider that the complainer should not be put in a preferred position, in a system where the accused is presumed to be innocent and has more at stake in the outcome than anyone else. If something appears to have gone awry at the Preliminary Hearing stage then the Crown can be trusted to seek permission to appeal." (Legal organisation)

**Question 50: To what extent do you agree or disagree that a right to independent legal representation for complainers should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made)?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 35 | 51% | 83% |
| Slightly agree | 4 | 6% | 10% |
| Neutral | 2 | 3% | 5% |
| Slightly disagree | - | - | - |
| Strongly disagree | 1 | 1% | 2% |
| No response | 27 | 39% | - |

*Base = 69*

Again, the majority of respondents who answered this question (83%) strongly agreed that a right to independent legal representation for complainers should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made). In open ended comments, a few respondents simply referred back to their responses at Questions 48 and 49 rather than providing new or unique feedback to this question.

Again, individuals and others argued that it should be the complainer's right to receive ILR, that it would be appropriate to help complainers navigate the justice system and not drop out, and that it was an emotive topic where complainers would need advice and support to ensure fairness.

Similarly, a range of organisations again felt that this would provide a more trauma-informed approach:

> "Rape complainers are particularly vulnerable to being retraumatised by criminal proceedings. They are also frequently subject to victim blaming and rape myths. Independent legal representation would go a long way towards protecting them from such pernicious practices." (Other (campaign))

A range of organisations felt that ILR for the complainer should apply at any stage in the proceedings in order to protect the complainer's interests, improve confidence during and with the proceedings, and improve satisfaction with the criminal justice process. Indeed, one public body argued that having only partial ILR would make little sense, be difficult to explain and difficult to manage:

> "This should apply at any stage in the proceedings, and they should also have the right to appeal the decision. The timeframes for the defence to lodge applications should be widened to allow time for a survivor to access legal representation." (Local authority (including justice partnerships))

Again, one victim/witness support organisation argued that ILR should apply more widely throughout the entire criminal justice process in order to ensure complainers are suitably supported and to provide parity between the complainer and the accused.

While one legal organisation agreed with the proposal (based on improving the complainer's understanding of what was happening and why, as well as improving confidence in the system and satisfaction with outcomes), another caveated that, while they were supportive of ILR for appeals pre-trial, they were not in favour of this for post-trial appeals. Similarly, one academic organisation supported the provision of ILR for complainers at the hearing to determine a section 275 application (both pre-trial and where this is considered after a jury has been empanelled) and where the decision in relation to the section 275 application is appealed, but were not supportive of ILR for post-conviction appeals, or the concept of ILR for complainers during the leading of evidence at trial in respect of which the section 275 application has been granted. It was argued by both organisations that there was a less compelling argument for the complainer to be represented in post-conviction appeals, while the academic organisation outlined the following argument against ILR for complainers during the leading of evidence:

> "[this] would serve to unnecessarily complicate the dynamics of trial in a way which is problematic given Scotland's adversarial system of proof… the court should be trusted to act to ensure both that the terms of the s.275 application granted are adhered to, and ensure that the complainer, as a witness, is treated fairly." (Other (academia))

One respondent who was neutral about this proposal indicated that they were not familiar enough with the legislation.

Only one respondent disagreed with this proposal, again stating that they felt victims should be served by the Procurator Fiscal.

**Question 51: In exceptional cases, section 275B(2) provides that an application may be dealt with after the start of the trial. To what extent do you agree that independent legal representation should apply during this aspect of the proceedings?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 35 | 51% | 83% |
| Slightly agree | 1 | 1% | 2% |
| Neutral | 4 | 6% | 10% |
| Slightly disagree | 1 | 1.5% | 2.5% |
| Strongly disagree | 1 | 1.5% | 2.5% |
| No response | 27 | 39% | - |

*Base = 69*

This proposal was also widely supported among those who answered the question, with 83% offering strong agreement.

Individuals that provided a response argued that ILR for complainers might be even more important where an application is made/dealt with after the start of the trial, as the prosecution and complainer would not have been made aware of this in advance, and it could be used as a tactic to stop the complainer from being able to access ILR:

> "It is, if anything, more important that ILR should apply at this stage, especially if there is a possibility that defence teams may use such late applications as a way of circumventing the complainer's right to legal representation against the application at an earlier stage." (Individual)

Two victim/witness support organisations agreed that ILR was required where applications were dealt with after the start of a trial as this could be more distressing for the complainer to deal with if they had already attended court or started giving their evidence. As such, they argued that the "situation would require more oversight and protections from an independent legal representative" (Victim/witness support organisation).

Organisations again argued that representation was necessary in such circumstances to ensure the interests and rights of the complainer were upheld, to ensure they were suitably informed and supported, and to improve

complainer/victim satisfaction with the criminal justice process. This was also, again, seen to provide a more trauma-informed approach. Similarly, one argued that ILR should be available to the complainer at each stage of the court process, not restricted to section 275 applications only.

Two legal organisations and an academic organisation felt there was no rational argument against allowing ILR where a section 275 application was dealt with after the start of the trial. While two of these organisations acknowledged that this might introduce delays, they felt this was not an acceptable reason to deny ILR, however the other felt that the judge should be allowed to exercise discretion to whether to allow ILR in such circumstances in order to avoid significant delays:

> "Whilst we suspect such instances are limited, there is no rational basis to argue against introducing ILR in this context. All of the above arguments re the introduction of the right generally apply to late applications after the start of the trial. Thought would require to be given as to how representation could be expeditiously organised in this context, and it is true that the introduction of a right here may somewhat delay the progression of trials. However, that is not a sufficient reason to curtail the right, in our view." (Legal organisation)

Conversely, another legal organisation who disagreed with the proposal explained this was due to pragmatism and the delays that would likely be introduced to the progression of the trial. Both the immediate availability of legal representatives, along with the time required for them to be 'brought up to speed' with the case, it was felt, would incur additional delays. Rather, they argued that trust must be placed in the judge to deliver justice. The other respondent who disagreed did not provide any reasons.

One respondent who was neutral about the proposal argued that more information was needed about what such 'exceptional circumstances' might be and the process that would be enacted.

**Question 52: To what extent do you agree that independent legal representation for complainers in respect of the applications under section 275 should be funded by legal aid?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 40 | 58% | 89% |
| Slightly agree | - | - | - |
| Neutral | 5 | 7% | 11% |
| Slightly disagree | - | - | - |
| Strongly disagree | - | - | - |
| No response | 24 | 35% | - |

*Base = 69*

While almost all respondents who answered the question (89%) agreed with the provision of legal aid to facilitate ILR for complainers, the qualitative responses were varied.

Individuals and organisations from all sectors argued that financial barriers should be removed, and that legal aid was needed to ensure that a complainer's financial situation did not limit their ability to access justice. It was felt that either a two-tier system or inequalities within the justice system would be created if complainers were not granted access to legal aid:

> "Public funding would provide equitable access to ILR which would reduce the risk of inequalities arising in complainers experience of the justice system. This would mitigate against the vulnerabilities experienced by victims of certain crimes, which is one of the key factors in the inequitable treatment of victim/survivors. In particular, crimes of sexual violence, where perpetrators are more likely to target people who are more vulnerable and marginalised." (Public Body)

Some also expanded on this to argue that it should be non-means tested provision (including most of the victim/witness support organisations who provided a response, along with others):

> "This should be available via legal aid which is not means tested. Morally and ethically, victims of sexual violence and abuse should not have to pay for their representation, the cost would be a barrier for many victims." (Local authority (including justice partnerships))

Similarly, one individual and a few victim/witness support organisations wanted to see section 275 applications brought into line with requests for medical or other sensitive information - i.e. where there should be no means testing or requirement to pay a contribution towards the fee. They argued that:

> "The complainer is being brought into these proceedings by the Crown as a witness and is under a public duty to attend court. As such, it would be inappropriate that they be charged in any way for this." (Victim/witness support organisation)

However, one also argued that the current approach to ILR for medical or other sensitive records, where there is a need to demonstrate that the individual cannot represent themselves, should not apply for section 275 applications. Rather, they felt that ILR should be an automatic right.

One individual did highlight the cuts to legal aid and the difficulties faced by the legal aid budget. They were concerned that this might negatively impact complainers and their ability to access ILR, essentially setting the system up to fail.

Three respondents who were neutral about this proposal provided qualitative responses. One argued that legal aid should not be available where a complainer

was able to pay for ILR, while another argued that legal aid should be available for those who needed it. The final respondent did not answer the question directly, but again stated that victims should be served by the Procurator Fiscal.

No respondents disagreed with this proposal.

**Question 53: If you agree that independent legal representation for complainers in respect of the applications under section 275 should be funded by legal aid, how should this be provided?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Under civil ABWOR | 2 | 3% | 7% |
| Under criminal ABWOR | 8 | 12% | 27% |
| Other | 19 | 27% | 66% |
| No response | 40 | 58% | - |

*Base = 69*

More than 50% of respondents opted not to answer this question as they felt they did not have the required information or experience to comment. With these comments excluded, less than 35% of respondents provided a substantive response to the qualitative element of this question.

**Option a) under civil ABWOR**

Only two respondents indicated that ILR should be funded under civil ABWOR, with just one of these providing a comment:

> "It feels correct as the complainer is not asking for the representation from the position of being an accused person." (Advocacy/support organisation (Children and Young People))

One respondent who noted they were unsure how this should be funded did indicate, however, that if it was difficult to access "it will be useless to most complainers" (Individual).

**Option b) under criminal ABWOR**

Just three respondents who felt ILR should be funded under criminal ABWOR provided further comments about why. They generally argued that the criminal ABWOR route was more suitable than the civil fund as they were likely to be involved in a criminal process:

> "We believe that ILR for complainers should be funded under criminal ABWOR. This would place the arrangements within the existing criminal funding system and avoids misrepresenting the complainer as a civil party to proceedings which could be the

> impression given if civil ABWOR arrangements were used." (Other (academia))

**Option c) other**

While this was the most popular option selected, respondents were typically split between:

- those who thought that ILR should be provided through either civil or criminal ABWOR, or made available via both routes, depending upon the nature of the case (n=7)
- those who did not know which route would be more suitable (n=9), although a few did express the need for this to be "provided in the simplest and most expeditious fashion" (Victim/witness support organisation).

One organisation did not outline a preference but did suggest that ILR should be provided by criminal law solicitors.

One respondent was again concerned about the difficulties currently facing the provision of legal aid, i.e. cuts to budgets, the loss of solicitors providing civil legal aid and the strikes in the criminal legal aid sector due to the lack of financial viability, etc. They stressed that these problems needed to be resolved to ensure that complainers in sexual offence cases could expect good quality advice and representation to be available.

One legal organisation suggested that the best route for legal aid to be provided was as Criminal Legal Assistance (although they noted that this would require legislative change as it is normally only available to accused persons) or through a bespoke scheme created specifically for this situation:

> "This is a complex area; we consider that complainers would not be able to adequately understand the legal framework governing the grant or refusal of a section 275 application without legal assistance." (Legal organisation)

One academic organisation, whilst not identifying a preferred route, did highlight difficulties with the criminal ABWOR option - including the requirement to seek multiple increases in fees. They also felt that the need to argue an individual would not be able to represent their own interests without a solicitor should not be necessary in the case of section 275 applications.

**Question 54: To what extent do you agree or disagree that these time periods should be adjusted to provide additional time for the complainer to consider the application and effectively implement their right to independent legal representation prior to trial?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly Agree | 30 | 44% | 73% |
| Slightly agree | 1 | 1% | 2% |
| Neutral | 6 | 8% | 15% |
| Slightly disagree | 2 | 3% | 5% |
| Strongly disagree | 2 | 3% | 5% |
| No response | 28 | 41% | - |

*Base = 69*

Three quarters of those who provided an answer (73%) strongly agreed with this proposal.

Individuals argued that this was needed to preserve victims' rights, and that they should not be rushed:

> "Seven days is not sufficient to enable appointment of an ILR and for him/her to have discussions with the complainer and prepare an argument against the application." (Individual)

Several organisations (across a range of sectors) argued that victims are often traumatised and may need extra time to consider their options and make a decision. It was also suggested that they may change their views about their needs during the course of proceedings, which needed to be taken into account in any timescales set:

> "In our experience, survivors often feel rushed and under immense time pressure when a s275 application is made and have not had sufficient time to consider what this means for their case or how it will affect them to have these things come up in court. More time would better prepare them for court and hopefully minimise the re-traumatisation of such questioning being brought up during the trial." (Victim/witness support organisation)

Several other unique comments were provided by those who agreed, including:

- that it would be important that it works alongside the Evidence by Commissioner processes/special measures
- that this would be linked to the availability of legal aid lawyers and so enough time to seek representation would be needed

- that applications should be made a minimum of 14 clear days ahead of all trials to allow time for a complainer to obtain legal advice
- that the timescales need to be increased as the complainer would not already have access to legal advice (like the accused), and so time needed to be factored in to allow them to consider the application and then source ILR.

One public body noted that providing insufficient time for the submission of applications and preparation time for the required hearing would result in the continuation of hearings and "churn", ultimately impacting on court programming. They also suggested, however, that changes to timings would require changes to court rules and the SCTS criminal case management system, and they proposed aligning any changes with the review of section 70A, although only if this did not generate additional delays.

Another highlighted concerns in relation to possible impacts on the Children's Hearing's court proceedings:

> "We do not have a view on timescales… We would, however, want to be clear that additional applications within a Children's Hearing Court proceeding could deflect from the focus of the Court on the matters in hand and delay proceedings for a child, which may not be in their best interest." (Public body)

Of those who disagreed that statutory time periods should be adjusted, two legal organisations argued that there was little possibility to advance lodging section 275 applications, while one academic organisation felt that the time available should be sufficient for the complainer to appoint suitable legal representation. Two of these respondents did caveat, however, that this would require/benefit from making available a pool of suitable solicitors, although one noted that this would be difficult given the current wider structural issues impacting the legal aid sector. One legal organisation suggested that, should postponements be required, these could be sought by the complainer's representative, while the academic organisation suggested it may be appropriate to test the process first and then adjust timescales if required.

Only two respondents who were neutral about this proposal provided a qualitative comment. One felt that they did not have the expertise or understanding to answer the question, while the other felt the emphasis needed to be on clearing court delays.

**Question 55: Are there any other matters relating to independent legal representation for complainers in sexual offence cases that you would like to offer your views on?**

Thirteen respondents provided a response when asked if they had any other comments related to ILR, with a further four respondents who provided a non-standard response also providing comments on this topic. The main other issue that was discussed by respondents was that complainers should have ILR throughout the entire criminal justice process. This was mentioned by just under

half of these respondents, including individuals, victim/witness support organisations, a third sector organisation, an advocacy/support organisation for children and young people, and an academic organisation. It was emphasised that it would help to mitigate the stress and perceived injustice of the current system if ILR could be provided at the earliest stages of reporting, throughout the investigation phase, and then across the entire court process. It was also suggested that this may help to reduce attrition rates and withdrawal of complaints:

> "Thought should be given to the further provision and funding of legal advice for all complainers who make a complaint relating to sexual abuse to police at the stage of reporting. It appears to us that legal advice at this stage from an independent legal professional could assist complainers in understanding the various stages of the criminal process and potentially aid with attrition rates. The criminal legal process in relation to the prosecution of sexual offences is complicated and distressing for complainers, and Scotland shouldn't rely on either the Crown Office, or third-party charitable organisations, to inform complainers of the various procedural and legal steps involved." (Other (academia))

One victim/witness support organisation provided a lengthy response at this question, again stressing the importance of providing ILR throughout the entire criminal justice process. They also indicated that they had found universal support for ILR from survivors, and outlined a range of international examples where additional support was provided for complainers, including in Canada, India, Ireland, Sweden and Denmark.

Other unique comments provided by separate respondents included:

- that all parties must spend the same amount
- that this would increase the conviction rate
- for there to be appropriate safeguards in law to protect vulnerable complainers against possible exploitation when seeking independent legal advice
- that ILR should be an option from the initial case being petitioned and automatic where medical history need to be shared
- that legal representatives must be suitably trained and held to account in order to provide a trauma-informed approach
- having the right to an independent advocate would further enhance the ILR provision
- one respondent continued to indicate that, while they understood the sentiment behind the proposals for ILR, they felt that victims should be served by the Procurator Fiscal.

Finally, one law enforcement agency, which was in favour of the provision of publicly funded ILR for complainers suggested that, if this could not be provided,

then the Crown needed to be responsible for ensuring the complainer was informed and represented.

Similarly, one legal organisation suggested that either COPFS or SCTS could/should take responsibility for the intimation of information to complainers in relation to section 275 applications:

> "We are of the view that thought requires to be given in respect of the introduction of a system which ensures that section 275 applications are appropriately intimated upon complainers along with information informing them of their right to assistance. In our view, either COPFS or SCTS needs to have clear responsibility for the intimation of such information to complainers. We consider that SCTS could perhaps take the lead here as they have done in sensitive records cases." (Legal organisation)

# Specialist court for sexual offences

A key recommendation of Lady Dorrian's Review was the creation of a national, specialist sexual offences court underpinned by increased pre-recording of evidence; improved judicial case management and a requirement for specialist training for all personnel. The Review suggested that a specialist court with these features could make a significant contribution towards better management of sexual offences cases and improving the experience of complainers. Using the model of sexual offences court suggested within the Review as a guide, this chapter of the consultation sought views on how a specialist court might be implemented so as to optimise improvements in the management of sexual offence cases.

**Question 56: To what extent do you agree or disagree that a specialist sexual offences court should be created to deal with serious sexual offences including rape and attempted rape?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 33 | 48% | 69% |
| Somewhat agree | 6 | 9% | 13% |
| Neutral | 4 | 6% | 8% |
| Somewhat disagree | 3 | 4% | 6% |
| Strongly disagree | 2 | 3% | 4% |
| No response | 21 | 30% | - |

*Base = 69*

Just over two thirds of respondents who answered this question (69%) strongly agreed with this proposal and a further 13% somewhat agreed.

Those who supported the creation of a specialist court indicated that this would allow those involved in hearing sexual offence cases, including court staff, judges and legal representatives, to be supported by those with specialist training in sexual offences and trauma. It was felt this would provide expertise to deal with such cases, whilst also instituting more sensitive approaches that could contribute to a less traumatic experience for victims. Respondents hoped that this would lead to increased conviction rates for sexual offences and could encourage more victims to come forward and pursue cases. Furthermore, respondents noted that specialist courts had worked well for other case types, in particular, the domestic abuse courts.

A few also felt that some of the other proposals considered as part of the consultation, such as video recorded evidence and trauma-informed practice, would be best suited to a specialist court setting.

A few were hopeful that a specialist court would mean that cases could be dealt with quicker and more efficiently, however, others were sceptical that this outcome would materialise. They argued that the delays were typically caused by a lack of facilities, availability of the judiciary, etc. and that without an increase in such tangible resources, cases would not be processed any faster.

Of those who disagreed with the creation of a specialist court, a few (including an academic organisation and a local authority/justice partnerships) argued that efficient disposal of business and trauma-informed practice should be standard across all courts, and felt that there were challenges in separating sexual offences from other related/connected crimes (for example, domestic abuse). Concerns were also raised around the potential for such courts to detract resources from other cases, resulting in negative impacts elsewhere, including those cases involving serious sexual harm but where a sexual offence did not appear on the indictment.

One advocacy/support organisation for children and young people also discussed concerns about the impact a specialist court might have on making some sexual offences seem 'less serious' where they did not qualify to be heard in the specialist court. Similarly, another common concern discussed by a few respondents throughout this section of the consultation, was that moving serious sexual offence cases out of the High Court could be seen as 'downgrading', however, one legal organisation disagreed that this would be the case:

> "We do not agree with the arguments that this would lead to a downgrading of sexual offences. On the contrary, they would be treated in a court which was able to give them specialised attention which would demonstrate the seriousness with which they are treated." (Legal organisation)

A few other respondents who were neither for or against a specialist court expressed concern about the impact it could have on equity of provision for sexual offence victims. They argued that any approach to centralise these courts could make them less accessible for some, with one suggesting a solution would be to move the specialist court around the country rather than asking accused and victims to travel. One law enforcement agency felt that the current shortcomings could be addressed with better resourcing and funding, rather than necessitating a new court to be established. They were also sceptical about the scale of any funding available to create a new court. While they agreed that a specialist court would improve the experience of complainers, they argued that the rationale for establishing a specialist court in order to improve the experience of complainers could equally be applied to other offence types.

**Question 57: To what extent do you agree or disagree that, if a new specialist sexual offences court is created, it should be - as recommended by Lady Dorrian's Review - a new court for Scotland, separate from the High Court or the Sheriff Court?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 28 | 40% | 60% |
| Somewhat agree | 4 | 6% | 8.3% |
| Neutral | 4 | 6% | 8.3% |
| Somewhat disagree | 7 | 10% | 15% |
| Strongly disagree | 4 | 6% | 8.3% |
| No response | 22 | 32% | - |

*Base = 69*

Just over two thirds of respondents who answered this question (68%) either agreed or strongly agreed with creating a specialist sexual offences court as a new court for Scotland, separate from the High Court or the Sheriff Court.

Many of those who agreed with this proposal simply indicated that the current system did not work, and reiterated their support for a specialist sexual offences court (as detailed above) without expanding on why they felt it should be separate from the High Court and/or Sheriff Court. Others expressed their support for the rationale provided in Lady Dorrian's Review or the arguments set out in the consultation document, again without further elaborating on these.

One victim and witness support organisation felt that having the specialist court sit apart from the High Court or Sheriff Court would be beneficial as it would allow for a structure to be created that is designed around trauma-informed, specialist approaches:

> "Having it sit separately would allow more a purposeful trauma-informed structure, particularly as the other courts will not have been built around these principles." (Victim/witness support organisation)

Another felt that having a new court would allow for training that is better tailored to the needs of sexual offence complainers as well as a greater depth of knowledge and experience to be accrued by those working within:

> "A stand-alone court would also support the training in trauma-based approaches, the cultivation of specific skills and expertise required for the management of these cases, encourage better efficiency in managing cases, therefore improving the experience of complainers." (Victim/witness support organisation)

Others felt that, as awareness of the specialist court and the safeguards it could provide grew (such as protection from journalists outside the court, trauma-informed services, etc.), this would reduce fears around attending court and could encourage increased reporting of such crimes. It was argued that having a new court would send a strong message that the specialist court was differentiating itself from past approaches to the management of sexual offence cases (which, as noted above, was commonly seen as failing).

A few respondents caveated, however, that those presiding over cases in the specialist court must not have lesser sentencing powers than those in the High Court.

Another caveat was provided by an academic organisation:

> "Careful attention will require to be given in the primary legislation creating the court and related changes to the Criminal Procedure (Scotland) Act 1995, to ensure that the new court's jurisdiction is clearly outlined, and issues relating to…what happens to indictments that contain sexual and non-sexual charges…will require to be considered." (Other (academia))

Those who disagreed, tended to feel that the specialist court could or should be incorporated within the existing structure of the High Court and Sheriff Court. This was seen as necessary to:

- ensure the court had sentencing powers that were commensurate with the severity of the cases it would be hearing including the ability to impose an Order for Lifelong Restriction (OLR)
- avoid any perception that sexual offences were being 'downgraded' or treated as 'less important'
- allow cases with both sexual and non-sexual offences to continue to be indicted together
- ensure sharing of expertise related to the management of cases which involved sexual offences
- avoid adding complexity and bureaucracy to the system which could make dealing with cases that include both sexual and non-sexual offences more challenging.

One legal organisation also felt that it would be necessary for the judiciary and legal practitioners to be able to move in and out of the specialist court, and to mix this with other business, in order to both attract applicants, and to avoid practitioners leaving the system entirely. It was highlighted that sexual offence cases were among the most "gruelling", and if this was the only case type practitioners worked on, it would likely result in them not applying or in them leaving after a period of time.

**Question 58: If you disagree that the specialist court should be a new separate court for Scotland, where do you consider it should sit?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Within the High Court | 5 | 7% | 22% |
| Within both the High Court and the Sheriff and Jury Court | 10 | 14% | 43% |
| Other | 8 | 12% | 35% |
| No response | 46 | 67% | - |

*Base = 69*

Those who indicated that the specialist court should sit within the High Court did so on the basis that it already hears the most serious sexual offences and would retain the most experienced members of the judiciary and legal profession in hearing/acting in these cases. It was also felt that having the specialist court as a division of the High Court would ensure that sexual offences continued to be treated among the most serious crimes.

Those who felt the specialist court should sit within both the High Court and the Sheriff Court felt that it was important to retain two tiers for managing these cases. It was argued that this approach provided flexibility to prosecute based on the seriousness of the case, with the ability to refer cases up or down as required for sentencing. It was further suggested that this would also allow personnel to switch between the court as necessary to avoid burnout (as discussed above). This High Court and Sheriff Court model was the preferred model among those who felt that it should not be separate from existing structures.

One local authority/justice partnership also argued that housing the specialist court exclusively within the High Court could exacerbate existing delays to sexual offence cases coming to trial.

Most of those who responded ‘other’ to this question and who provided additional commentary to their answer, indicated that they felt it should be a distinct court. Two other respondents (including an individual and an academic organisation) indicated that they did think a specialist court should be created at all.

**Question 59: To what extent do you agree or disagree that, if a specialist court is to be created, it should have jurisdiction to hear cases involving charges of serious sexual offences including rape as well as non-sexual offences which appear on the same indictment (for example, assault)?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 29 | 42% | 64% |
| Somewhat agree | 10 | 15% | 22% |
| Neutral | 3 | 4% | 7% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 3 | 4% | 7% |
| No Response | 24 | 35% | - |

*Base = 69*

Most respondents who answered this question either strongly agreed (64%) or agreed (22%) that the court should have jurisdiction to hear non-sexual offences which appear on the same indictment as a sexual offence, although a few qualified their responses by specifying that these offences should be linked and involve the same complainer. Both individuals and organisations stressed that to split sexual and non-sexual offences over separate indictments would not be trauma-informed, and would add further distress to all involved. On a practical level it was also argued that splitting offences would be inefficient and inappropriate as it would increase costs, uncertainty, complexity and delay, as well as creating the potential risk of there being different outcomes from the same evidence given in different settings. It was also felt that the full picture needed to be taken into consideration when arriving at a verdict, particularly as the circumstances in which the offences, both sexual and non-sexual occurred, would likely be linked:

> "If there were also charges of assault for instance, it would be disadvantageous for the complainer to have to attend in different court systems and repeat evidence, this would increase distress rather than decrease it. It would also impose restrictions on what a complainer could talk about at a particular trial." (Victim/witness support organisation)

Two respondents felt that legal professionals involved in the trial would benefit from additional training on domestic abuse and coercive control should the court be given jurisdiction to hear sexual and non-sexual offences on the same indictment.

A few respondents did, however, highlight challenges with the specialist court hearing cases which involve both sexual and non-sexual offences. One noted that cross-examination for the non-sexual offences may also be subject to a Ground Rules Hearing (as deemed necessary for the sexual offences elements), while another was concerned that "decisions to charge or not charge sexual offences

alongside other serious offences could be overly influenced by preferred venue for trial" (Other (academia)). One respondent felt that cases involving numerous offences on the same indictment could be dealt with more easily if the specialist court sat within the existing High Court/Sheriff Court structure, building on existing models of specialist court already in operation with the Court system such as as the domestic abuse and commercial Courts. They felt that housing the a specialist sexual offences court outwith this structure could, however, create complications.

Others gave views that reflected support for the most serious cases to continue to be heard in the High Court.

**Question 60: If a specialist sexual offences court distinct from the High Court or the Sheriff Court were to be created, to what extent do you agree or disagree with Lady Dorrian's Review that it should have a maximum sentencing power of 10 years' imprisonment and the ability to remit cases to the High Court for consideration of sentences longer than 10 years?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 6 | 9% | 14% |
| Somewhat agree | 5 | 7% | 12% |
| Neutral | 5 | 7% | 12% |
| Somewhat disagree | 10 | 14% | 23% |
| Strongly disagree | 17 | 25% | 39% |
| No response | 26 | 38% | - |

*Base = 69*

Almost two thirds of those who provided a response (62%) disagreed that the court should have maximum sentencing powers of 10 years imprisonment. This was because they felt that the court should have access to the full range of sentencing powers that might be appropriate in the context of the cases that the court would hear. It was suggested that a 'two-tier' system similar to that which already exists in the High Court and Sheriff Court would be necessary to ensure the court had the full range of sentencing powers required to hear serious sexual offences:

> "We propose that the specialist sexual offences court should have two tiers to it - one at Sheriff and Jury level and one at High Court level. The Sheriff and Jury level would continue [to] deal with cases marked to be dealt with at that level and be presided over by Sheriffs who would have the same sentencing powers as they currently do in those cases. In the High Court, the most serious cases of rape and sexual abuse would continue to be dealt with and there should be no sentencing limit there, even when Sheriffs sit in that capacity." (Victim/witness support organisation)

Several victim and witness support organisations were concerned that only allowing the specialist court to impose sentences of up to 10 years for rape would be seen as 'downgrading' such offences, minimising the complainer's experience, and increasing trauma for victims.

A few, whilst in general agreement with the proposal to limit the court's custodial sentencing powers to ten years, were concerned that it would introduce complexity to the process, and increase time required for cases to reach a conclusion.

Several respondents felt that it was counterintuitive to create a specialist court, with specially trained professionals, only for it not to be prevented from hearing all serious sexual offences, and having to refer some of the most serious cases to a non-specialist court. It was argued that this undermined the credibility of such a court.

One respondent stressed that, should cases need to be referred to the High Court, the same protections would need to be put in place as those in the specialist court:

> "…victims may feel disempowered in this court setting knowing sentence lengths would be within a certain window. If there is a need for sentencing to take place at the high court in certain circumstances, this would need to have the same protections in place that the specialist court has in order to reduce the impact on victims." (Local authority (including justice partnerships))

Those who agreed with the proposal generally felt that 10 year custodial sentencing powers, with the ability to refer cases which might require longer sentences to the High Court, seemed appropriate. One legal organisation was "not in favour of creating a system where two courts with equal jurisdiction sit in parallel".

One respondent felt that a stand-alone specialist court would/should not be allocated the same powers as the High Court as it would not be presided over by Senators (of the College of Justice), but expressed concern this would send a message that serious sexual offences and rape were being downgraded.

**Question 61: If you disagree that a specialist court should have a sentencing limit of 10 years' imprisonment, what do you consider the limit should be?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Unlimited | 29 | 42% | 94% |
| Other | 2 | 3% | 6% |
| No response | 38 | 55% | - |

*Base = 69*

Those respondents who supported 'unlimited' sentencing powers for the specialist court (accounting for 94% of those who answered the question) largely repeated their responses as given at Question 60 above. Again, it was argued that the court should have the power to impose sentences which fit the nature and seriousness of the offence with respondents noting that unlimited sentencing powers may be necessary to deal with cases which feature multiple charges on the same indictment. It was also seen as important not to downgrade rape or serious sexual assault cases by limiting sentencing powers within the specialist court, and that such serious cases should continue to be heard in a setting which can continue to impose the current maximum available sentences. A few suggested that High Court sentencing powers should apply to the specialist court, with one respondent indicating that housing the specialist court within the structure of the High Court would ensure the specialist court had these powers.

**Question 62: If a specialist sexual offences court distinct from the High Court or the Sheriff Court were to be created, to what extent do you agree or disagree that it should be presided over by sheriffs and High Court judges?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 16 | 23% | 42% |
| Somewhat agree | 6 | 9% | 16% |
| Neutral | 10 | 14% | 26% |
| Somewhat disagree | 2 | 3% | 5% |
| Strongly disagree | 4 | 6% | 11% |
| No response | 31 | 45% | - |

*Base = 69*

Just over half of the respondents who answered this question agreed to some extent (58%) that both sheriffs and High Court judges should be able to preside in the Court although responses were mixed with a large proportion (26%) indicating that they were neutral on this question.

Those who agreed with the proposal to have sheriffs and High Court judges preside over cases in the specialist court felt this was important to emphasise the seriousness of sexual offences, and to provide the range of sentencing powers necessary. A few also felt that the current distribution of cases between High Court and Sheriff Court, as well as a sheriff's ability to preside over cases in the High Court when appointed to the role of temporary judge where appropriate, should be mirrored in the new specialist court.

Several respondents caveated, however, that any judges and sheriffs sitting in the specialist court should first have received specialist training.

A few respondents, despite indicating support for the proposal overall, expressed a preference for High Court judges to preside over all cases in the specialist court:

> "It should operate at the highest possible level which will be the one of the HC [High Court]. Summary Sheriffs may not have suitable knowledge or experience to preside in such cases." (Advocacy/support organisation (Children and Young People))

Of the six respondents who disagreed, four explained their reasons. Two preferred High Court judges to preside over all cases; while one wanted to see juries being used (although did not say why). The final respondent wanted specialist judges to be used, and expressed concerns that sheriffs might impose lower sentences due to the sentencing options available to them.

A few who either did not respond to the closed element of the question or who were neutral about the proposal indicated they were more concerned with the training of those presiding over the case than the level of the judge or sheriff involved. One respondent also preferred a trained judge/sheriff over a jury where members had not received any training. One legal organisation stressed that "this proposal should not lead to a de facto increase in the sentencing powers of Sheriffs" (Legal Organisation), while another was concerned that public confidence could be negatively impacted by the appointment of judges/sheriffs to the specialist court by just one person:

> "Concentrating the power of appointment in a single person would render the appointment process open to public scepticism." (Legal Organisation)

**Question 63: If you answered disagree to the previous question, who do you think should preside over the court?**

Of the six who disagreed with the proposal at Question 62, five indicated that the court should be presided over by High Court judges only and one said 'other'. Among those who gave neutral responses to Question 62, three indicated High Court judges only and two said 'other'.

Only three respondents who thought the court should be presided over by 'High Court judges only' provided further comments to support their answer. Two felt that the seriousness of the cases would require High Court judges and their sentencing powers, while the other was again concerned that anything less than a High Court judge presiding over such cases would be seen as 'downgrading' sexual offences:

> "…populating the Bench of any such new court with High Court judges would diminish the negative effects of any such new court structure, by proclaiming that those who need that court will encounter only the most able of our society's legal minds, in the person of full Senators of College of Justice." (Legal Organisation)

Of those who indicated 'other', three respondents felt that both sheriffs and High Court judges would be necessary in order to deal effectively with the different

severity of cases, one called for specialist judges, and another stressed that "the Lord President should appoint only those who have been trained" (Other (campaign)). One individual disagreed with the creation of such a specialist court.

**Question 64: If a specialist sexual offences court distinct from the High Court and Sheriff Court were to be created, to what extent do you agree or disagree that the requirements on legal practitioners involved in the specialist court should match those of the High Court?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 29 | 42% | 69% |
| Somewhat agree | 4 | 6% | 9% |
| Neutral | 7 | 10% | 17% |
| Somewhat disagree | - | - | - |
| Strongly disagree | 2 | 3% | 5% |
| No response | 27 | 39% | - |

*Base = 69*

Most who answered this question either strongly agreed (69%) or somewhat agreed (9%). Just under a fifth gave (17%) gave a neutral response.

Those who agreed that the requirements on legal practitioners involved in the specialist court should match those of the High Court felt it was important for the new court to maintain consistency with existing structures. It was felt this would help to ensure confidence in the new court. It was also argued that sexual offences were among the most serious types of offences and should be treated as such, i.e. at the High Court level or following a High Court approach.

Again, several respondents also stressed the need for trauma-informed training and practice across all those involved with the specialist court, and one respondent felt that anything less than operating at High Court level would be seen as downgrading sexual offences.

A few who were neutral about the proposal felt it should depend on the court's jurisdiction:

> "The rights of audience should continue to match the structure of the existing court system. In Sheriff and Jury level cases solicitors and Procurator Fiscals would have rights of audience but in High Court cases only Ads [Advocate Deputes], Advocates and solicitor advocates could conduct the cases." (Victim/witness support organisation)

Only four respondents disagreed with this proposal, with one indicating that this could have significant impacts on the legal profession and requesting further details on how this would work.

**Question 65: To what extent do you consider that legislation should require that legal professionals working in a specialist court should be specially trained and trauma-informed?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 35 | 51% | 74% |
| Somewhat agree | 4 | 6% | 9% |
| Neutral | 3 | 4% | 6% |
| Somewhat disagree | 2 | 3% | 5% |
| Strongly disagree | 3 | 4% | 6% |
| No response | 22 | 32% | - |

*Base = 69*

Just under three quarters of those who answered the question (74%) strongly agreed with this proposal. A further 9% somewhat agreed.

Many of those who agreed that legal professionals working in a specialist court should be specially trained and trauma informed, felt this was a necessary requirement. It was felt this would help to provide a trauma-informed approach throughout the trial process, and mean that legal professionals could be held accountable for their treatment of complainers:

> "Being specially trained and trauma-informed would mean more understanding of what had happened to the individual and would help them understand what needs to be done to support the individuals through the process. This would enable the individual to feel safe and know that they mattered." (Other (academia))

Several also argued that all staff in the court should undergo such training, not just legal professionals:

> "Specialist trauma-informed training should be mandatory for legal personnel and for all personnel involved in the court process including VIA and SCTS personnel." (Victim/witness support organisation)

A few respondents had practical suggestions about how such training should be implemented and managed, with one suggesting a need for both formal training and continuing on-the-job support and feedback, while another argued that an accreditation should be required, which can also be revoked in certain

circumstances. One individual felt that training should go beyond being trauma informed and include a range of other areas as well:

> "Such training is essential and should go beyond 'trauma-informed' to understanding the impact of Adverse Childhood Experiences, Mental Health, the impact of poverty, deprivation and stigma on peoples' lives… Jurors should also undergo such awareness training to better understand why some witnesses may present or behave." (Individual)

One organisation stressed that it would be important to ensure enough staff received training to avoid delays being created due to a shortage of qualified staff. This was also of concern to one organisation who disagreed with the proposal. They argued that imposing such training requirements on the legal profession, which was already facing significant resource challenges, would result in few applications to practice in a new specialist court.

Of those who disagreed with the proposal, one preferred to see all professionals trained within the current court structure (a few who had agreed with the proposal also requested this). Another felt that training for the legal profession was a matter for the Law Society of Scotland and that this requirement was straying from the policy area in question.

**Question 66: Are there any other matters relating to the potential creation of a specialist court for serious sexual offences you would like to offer your views on?**

While most responses to this question were unique, a few recurring themes did emerge. A few respondents indicated a desire for greater multi-agency working to ensure that specialist and critical agencies are involved at an earlier stage/across all stages of the justice process, and so that the victim can be provided with support from specialist service providers throughout.

There was also support expressed for certain elements of Lady Dorrian's Review, particularly the pre-recording of evidence from all complainers and specialist trauma-informed training for all personnel. Some additional proposals were also suggested by a few respondents, including:

- provision of advocacy services for the complainer/victim/survivor
- dedicated areas for the complainer and their family, such as entrances/exits, waiting areas, and places where they can watch proceedings
- avoiding floating trial diets.

One final respondent also suggested that sentencing needed to be considered in order to address barriers to reporting and low conviction rates, although they did not comment on what they felt appropriate sentences should be.

# Single judge trials

Lady Dorrian's Review considered the role of juries in serious sexual offence cases and, in doing so, considered the evidence that has been gathered in Scotland, and elsewhere, about the impact of rape myths and preconceptions on jury decision-making in these cases. The Review explored different ways of mitigating the impact of rape myths on verdicts which included looking at alternatives to jury trials for cases of rape drawing on models from other jurisdictions in which verdicts were delivered by a single judge, a panel of judges or a judge sitting along with lay jurors. The Review subsequently recommended that further consideration be given to a time-limited pilot of single judge trials for rape cases, views on which were sought.

**Question 67: To what extent do you agree or disagree that the existing procedure of trial by jury continues to be suitable for the prosecution of serious sexual offences including rape and attempted rape?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 6 | 9% | 13% |
| Somewhat agree | 6 | 9% | 13% |
| Neutral | 6 | 9% | 13% |
| Somewhat disagree | 11 | 16% | 25% |
| Strongly disagree | 16 | 23% | 36% |
| No response | 24 | 34% | - |

*Base = 69*

There were mixed views in response to this proposal. All victim/witness support organisations who answered the question disagreed that juries continued to be suitable for the prosecution of serious sexual offences, while all legal organisations who answered the question agreed. Among individuals, there was also split in opinion.

Those who felt that jury involvement in the prosecution of serious sexual offences was no longer suitable, generally argued that the current system was not working, resulted in low conviction rates and represented a traumatic experience for complainers. Several support organisations and others argued that jury members held too many unconscious biases and were likely to be influenced by rape myths. Concerns about jury members' ability to understand and grasp the legal process, points of law, legal principals that needed to be applied, etc. were also common:

> "Research has shown that juries often believe rape myths which can lead them to judge or blame the victim unfairly. In addition, they do not always understand important legal concepts like corroboration

> and the appropriate use of the not proven verdict." (Other (campaign))

A few also discussed the lack of any explanation over the outcome of a case in jury trials, which was noted to be particularly difficult for complainers in sexual offence cases. It was felt that judge only trials, where an explanation would be given regarding how they arrived at their verdict, would be helpful:

> "Some survivors felt that if a judge was to preside alone then they would at least have some explanation as to the outcome. A judge would be required to give them reasons for a decision. Some survivors describe the lack of any explanation for a jury's decision as distressing because it means they are never able to understand what happened." (Victim/witness support organisation)

Several individuals and organisations were also uncomfortable with so many individuals hearing the details of the offence, further traumatising victims.

While some respondents were also wary of issues around a lack of diversity and potential bias in a single judge trial, it was felt that specialist training for the judiciary could help to minimise this risk. It was noted that similarly robust training was not possible for juries, with one indicating that the current 10 minute video for jurors to tackle rape myths ahead of trials was insufficient to remove potentially deep-rooted or unconscious views.

A few respondents also felt that judge only trials would result in both time and cost savings.

The creation of a single judge trial pilot being introduced was suggested and supported by a few respondents.

While most respondents who disagreed generally appeared to favour the removal of juries in serious sexual offence cases, a few disagreed because they perceived that more needed to be done to identify jury biases in individual jurors ahead of selection, and that greater education and the use of more robust case/courtroom management could be helpful:

> "…further steps must be taken to improve the ability of jurors - if they are to be retained - to perform their task more effectively. Amongst other things, we suggest this must include greater use of juror (and public) education, and robust regimes to regulate the admission of potentially misleading evidence and/or advocacy strategies." (Other (academia))

Those who agreed that using juries continued to be suitable for the prosecution of serious sexual offences felt this provided the fairest option. A few respondents argued that it was a fundamental basic right to have access to a jury trial for serious offences, which should not be removed. A few also argued that juries were necessary to increase diversity and ensure impartiality among decision makers, and reduce any potential bias or prejudice which could be held by individual jurors or a single decision maker. Respondents also highlighted that directions and

support can be given to juries to ensure the evidence is understood, with one legal organisation suggesting that such directions needed to be given time to bed in and for the effectiveness to be established before considering whether to remove juries. Another suggested that juries involved in such cases should be provided with specialist training.

Respondents also felt that introducing judge only hearings would result in further problems without tackling some of the issues around low conviction rates. It was stressed that low conviction rates were not symptomatic of the use of juries, but rather due to the subtlety and complexity of such cases, and a lack of certainty around the evidence.

Those who were neutral on this point (mainly individuals) generally felt there were pros and cons to the use of jury trials and to the introduction of single judge trials for these cases.

**Question 68: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?**

Four respondents provided a substantive response to this question (three individuals and one organisation), with the range of evidence, research or information which respondents would like outlined below:

- effectiveness of jury verdicts
- a more robust evidence base, using a combination of methods
- conviction rates/prejudices/rape myths
- a review of what works in other jurisdictions.

**Question 69: To what extent do you agree or disagree that trial before a single judge, without a jury, would be suitable for the prosecution of serious sexual offences including rape and attempted rape?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Strongly agree | 14 | 20% | 33% |
| Somewhat agree | 12 | 17% | 28% |
| Neutral | 5 | 7% | 11% |
| Somewhat disagree | 2 | 3% | 5% |
| Strongly disagree | 10 | 15% | 23% |
| No response | 26 | 38% | - |

*Base = 69*

Again, there were mixed responses to this question with a third of respondents strongly agreeing (33%) and just under a quarter strongly disagreeing (23%).

Many of those who agreed and disagreed referred back to their responses to Question 67 mirroring the arguments set out above.

Of those who agreed with this proposal, and provided a substantive response, issues again focused on the problems of using juries, such as unconscious bias, and a lack of training, knowledge and experience of either sexual assault, the impact of trauma on victims or legal concepts

One victim and witness support organisation indicated that jury-less trials were already a feature within the Scottish summary justice system, and that there was existing precedent for this in other parts of the UK. They noted that judge only trials had been used in Northern Ireland in the past (i.e. the 'Diplock courts' for political and terrorism-related cases), and that the Criminal Justice Act 2003, applicable throughout the UK, allowed jury-less trials in complex fraud cases and where there was a risk of jury tampering.

One suggested this would be appropriate, provided the correct training was provided, while a few (again) indicated they supported the development and use of a pilot in order to assess the appropriateness of judge only trials.

Among both those who agreed and disagreed, a few respondents preferred the option of a panel or tribunal of judges rather than a single judge:

> "…the option of a tribunal of judges may be a better option. This would reduce inconsistent individual responses." (Local authority (including justice partnerships))

Those who disagreed with the proposal argued that judge only trials were not the only way to address some of the problems in serious sexual offence cases. One noted that problems with the quality of verdicts and misunderstandings of the law could be addressed by using written routes to verdict, giving juries careful directions, and using expert evidence. This same respondent also noted that judges were not necessarily immune to unconscious bias. A few others stressed that judges operating alone may make mistakes, or could result in a higher level of appeals.

A few respondents were concerned over the impact such a change might have in potentially undermining public confidence in the credibility and reliability of the system:

> "High-profile sexual offences, particularly those with famous or 'unlikely' accused, are often subject to fierce debate in the media and social media. The trial process and verdict can have an important effect upon public perceptions, and the jury verdict has relatively high credibility. By contrast, a judge only trial can too easily be seen as producing a 'political' verdict or one uninformed by the realities of life among people who are, for example, significantly

> younger or from very different social backgrounds to the accused." (Other (academia))

Responses from those who were neutral about the proposal varied. One felt this would depend on the training of the judge. One was somewhat uncomfortable with the concept of there being no jury as they felt this increased the risk of miscarriages of justice. A third acknowledged there were pros and cons with each scenario, and while agreeing that something needed to be done to address the problems in the current system, they wondered if another option may be possible, for example, juries comprised of experts, as they were concerned about potential prejudices and the lack of diversity among the Scottish judiciary:

> "…this does in no way, guard against prejudices from judges, who tend to be predominantly white, male and middle class." (Individual)

**Question 70: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?**

Of the five respondents who gave a 'neutral' response at Question 69, three provided a response when asked what evidence, research or information would assist. Responses included:

- research into the composition of juries - "maybe the jurors could comprise of a host of experts rather than merely members of the public? Or half and half?" (Individual)
- considering what works in other jurisdictions
- "We would hope to see the outcomes of any trials before deciding." (Other (campaign))

One other academic respondent, who generally preferred a single judge approach over the use of juries in serious sexual offence cases, also advocated for additional research to understand the effects of any changes, and stressed that a range of alternative options should be assessed, not simply a judge only vs the status quo:

> "…there is a need for a robust evaluation of the effects of any such move. Clear criteria for what success looks like would need to be established and quantitative and qualitative data collected, bearing in mind the perspectives of key stakeholders… the 'as is' position on judicial decision-making need not be the only alternative, and so assessment should identify additional training needs, different means of providing reasons for judicial decisions, oversight mechanisms, etc." (Other (academia))

**Question 71: What do you consider to be the key potential benefits of single judge trials for serious sexual offences?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Removal of potential bias of the jury | 30 | 43% | 68% |
| Removal of concerns around rape myths | 32 | 46% | 73% |
| Greater efficiency of court process including reduced trial length | 33 | 48% | 75% |
| Improved court experience of the complainer | 33 | 48% | 75% |
| Greater public confidence in the decision making, including the application of legal principles | 24 | 35% | 55% |
| Other | 1 | 1% | 2% |
| I do not believe that single judge trials convey any benefits for serious sexual offences | 9 | 13% | 20% |
| No response | 25 | 36% | - |

*Base = 69*

Most respondents of all types noted at least one benefit of single judge trials for serious sexual offences, and several noted multiple benefits.

In open-ended comments, several noted that their reasons had already been outlined in the questions above.

Caveats provided by respondents included:

- this did not tackle or remove rape myths among the judge or other professional stakeholders
- it would depend on the judge and the training they have received, with those leading judge only trials to have received specialist training
- while there may be improvements in trial length and experiences in court for complainers, the New Zealand model (which still uses juries) indicates alternative methods for achieving both these outcomes.

Other benefits outlined included:

- that a judge can provide an explanation regarding the decision, which a jury cannot
- the case could be progressed quicker

- discomfort and embarrassment would be lessened for the complainer by not having to give evidence in front of a jury
- the addition of trauma-informed case management
- that it "may impact upon the styles and substantive content of trial advocacy where the jury are not a primary audience." (Other (academia))

Risks were also noted, however, including:

- rape myths and bias existing within the judge
- diminishing confidence in the process by reducing public participation and transparency
- relatively homogenous demographic profile of the Scottish judiciary
- speed and convenience should not be placed ahead of justice or a fair trial - potential for some judges/sheriffs to be more inclined to convict than others
- whether the accused would recognise the legitimacy of a single judge verdict.

Four respondents (two individuals and two organisations) who selected option g) 'I do not believe that single judge trials convey any benefits for serious sexual offences' generally argued that the jury provided a safeguard against bias from individuals, which would be lost in a single judge process:

> "We do not believe that judge only trials convey any benefits for serious sexual offences. A jury trial process is designed to diminish the risk of prejudice by increasing the number of persons involved in the decision making process. This is a strong argument against single judge trials in any serious case." (Legal Organisation)

**Question 72: What do you consider to be the key concerns and challenges of single judge trials for serious sexual offences?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Less public confidence in the justice system | 18 | 26% | 43% |
| Lack of diversity reflected in the pool of decision makers | 33 | 48% | 79% |
| Removal of civic participation in the criminal justice system | 17 | 25% | 40% |
| Undermining the use of juries for non-sexual offences | 13 | 19% | 31% |
| Other | 5 | 7% | 12% |
| I do not have any concerns | 4 | 6% | 10% |
| No response | 27 | 39% | - |

*Base = 69*

The main concern or challenge was seen to be lack of diversity reflected in the pool of decision makers (selected by 79% of those who answered the question).
In open-ended comments, several respondents again referred back to their earlier answers without providing any new information.

Several respondents outlined the following caveats against the concerns and challenges identified for single judge trials for serious sexual offences:

- any reductions in public confidence may be short lived if single judge trials are proven and communicated to be effective
- improved specialist training and recruiting greater diversity into the judicial profile could help to address some key concerns.

A few respondents were also concerned that using single judge trials could result in perceptions that serious sexual offences were being treated as less serious.

A range of other concerns were also identified, albeit typically by only one respondent each:

- members of the judiciary may feel pressure to increase conviction rates, thus influencing their decision
- members of the judiciary will not have anonymity and will face scrutiny from the media and special interest groups, which again might influence decisions
- must ensure that members of the judiciary do not believe in rape myths
- juries are more representative of Scottish society than the judiciary
- less engagement from potential jurors when they receive a citation to appear for jury duty
- increase in appeals if defendants found it unfair to not have been tried by a jury.

One victim and witness support organisation who did not have any concerns over the use of single judge trials outlined their reason for this. They felt that specially trained judges would be best placed to make decisions in serious sexual offence cases, and that the appeals process provided a safeguard should there by any feeling that a wrong decision had been made:

> “An experienced member of the judiciary, trained in dealing with trauma and the complexities of sexual crime, can be relied upon to make well-reasoned legal determinations about the guilt or innocence of an accused. Should there be cause to believe that an incorrect decision has been made, then there are relevant appeals processes in place.” (Victim/witness support organisation)

**Question 73: If you highlighted concerns and challenges in the previous question, which of the following safeguards do you think could be put in place to mitigate these?**

| | Number of respondents | Percentage of respondents | Valid % |
|---|---|---|---|
| Evaluation of requirement for written judgments to be prepared | 19 | 28% | 48% |
| Specific training for judges | 30 | 43% | 75% |
| Other | 7 | 10% | 18% |
| None, I don't think there are any safeguards that could be put in place | 5 | 7% | 13% |
| No response | 29 | 42% | - |

*Base = 69*

The safeguarding measure that attracted the greatest support among those who answered the question was specific training for judges (75%). Indeed, of those who provided qualitative comments, several simply outlined support for the provision of specific training for judges, in particular to tackle prejudices, bias and unconscious bias.

Most other comments, provided by just one or two respondents each, outlined other suggestions for safeguards or approaches which could be put in place to mitigate the risks of jury-less trials. These included:

- providing a panel of two or three judges, or a combined judge and lay panel configuration, to preside and rule over cases
- to run a pilot
- to review experiences in other countries
- greater diversity in recruitment of the judiciary
- to include a "second-opinion judge"
- specific training plus continued development training on an annual basis
- to provide an effective way for complainers to challenge or appeal decisions.

A few respondents suggested that the two options provided were the minimum requirements that would be needed, but they felt they did not address all the problems and issues that a single judge trial would bring (with these being outlined in earlier questions). They did not, however, provide any additional suggestions as to how other issues could be addressed.

The five respondents who indicated that they did not think there were any safeguards that could be put in place were wholly against the removal of juries in favour of single judge trials.

**Question 74: What additional evidence and information do you think would be useful to assess the question of the role of juries in the prosecution of serious sexual offence cases?**

In total, 17 respondents provided a substantive response to this question. Only two types of evidence and information which would be considered useful were identified by more than one respondent. This included making an allowance for research into real juries and conducting a pilot study (presumably for judge only trials, although this was not made explicit).

Most other respondents identified unique evidence and information which they thought would be useful. These are outlined below and were mentioned by one respondent each:

- consider studies on the profile of juries, e.g. values and backgrounds
- consultation with complainers that have gone through the current system and wider public consultation
- obtaining feedback from witnesses how they felt about the experience of giving evidence
- greater evidence to explain why juries should be removed from serious sexual offence cases and no other case types
- information on previous conviction rates, rates of appeal and successful appeal, and discursive analysis of news reports
- a detailed comparative study with other jurisdictions
- comparison of other countries rates of conviction
- evidence on the type and length of training judges will receive - it was felt important that this included: bias; unconscious bias; diversity and inclusion; mental health issues especially trauma, and that judges needed to be able to demonstrate progressive mindsets.

**Question 75: Lady Dorrian's Review recommended consideration of a time limited pilot of single judge trials for offences of rape, do you have any views on how such a pilot could operate?**

While 28 respondents provided a substantive comment at this question, seven simply stated that they supported such a pilot but did not offer suggestions or views on how this could operate. Most organisations in such a position typically offered their help in developing and operating such a pilot.

Fourteen respondents explicitly indicated support for a pilot of single judge trials, seven were either against such a pilot or expressed reservations, and the remainder provided comments around how such a pilot could operate without explicitly stating whether they supported a pilot or not.

Various views and suggestions were offered in relation to how a pilot might operate, as outlined below, although most were offered by just one respondent each:

- ensure all judges, other staff/personnel and other agencies involved have had the necessary training
- include specialist court advocacy
- the pilot should run over a reasonable time period, with two years given as the timescale
- it should be trialled in more than one jurisdiction
- utilise mock trials over a period of time as this would not impact on justice
- take additional measures to ensure that victims are not negatively affected by the process (although the respondent did not give any suggestions as to what these measures should be)
- the pilot should be independently evaluated
- compare guilty verdicts between judge only trials and jury trials
- a team of judges to shadow a set number of jury led trials over a period of time and a proper analysis and comparison carried out about the jury results versus the judge's decisions
- assess the level of variation in decision making between judges in single judge trials, i.e. how much variation would there be in the verdict reached if different judges were presented with the same information
- would need to take into account Bairns' Hoose
- focusing initially on single complainer rape and attempted rape cases was sensible, but the effects on other types of cases also need to be considered ahead of any expansion
- allowing victim-survivors to opt into the pilot would be important to allow a sense of agency in the process
- use the pilot to ascertain the effectiveness of single judge trials, as well as the perception by complainers, lawyers and judges
- conduct in-depth and comparative analysis with other jurisdictions who use this model.

As indicated above, seven respondents expressed that they were against, or had reservations about, such a pilot. Two were simply against all suggestions that juries should be removed and replaced by a single judge approach. Two were concerned that such an approach could result in accused who were convicted claiming a miscarriage of justice, while one felt that victim-survivors may feel they were disadvantaged by having their case heard in an untested system. Two respondents questioned whether the pilot would be workable and whether it could operate legitimately, with one suggesting it would need an opt-in approach and that defence solicitors would advise their clients against this, and that both those involved in the pilot and those still being tried with a jury could claim unfairness in the process, which may affect public perception:

> "We express significant concerns about whether it is ever proper to run a pilot in such circumstances. The point is surely to test whether

> such a system would be a fair and appropriate way to deal with criminal trials; yet by running real trials in this way fairness is assumed." (Legal Organisation)

These respondents were not all against the shift to single judge trials however, as one argued that legislation should be introduced/changed to mean that all rape trials should transfer over to a judge only approach immediately.

**Question 76: Are there any other matters relating to single judge trials that you would like to offer your views on?**

Most who answered this question reiterated previous responses, such as:

- that the current system of trial by jury was not working for complainers and was not successful in returning guilty verdicts, whereas single judge trials may help increase the conviction rate
- a preference for a judge only trial as this would result in reasons being given for their decision
- a desire to see a pilot implemented, while one questioned the legitimacy of a pilot if it could lead to appeals and the need for further hearings under a jury condition
- a need for mandatory specialist training for all judges taking part in single judge trials
- one person's strong objection to replacing jury trials with a judge only approach.

A few respondents outlined alternative options. Two suggested having either a panel of judges or for the judge to be supported by a lay panel, possibly of experts to help support the final decision. It was felt that this could alleviate some worries people might have about single judge trials, e.g. bias of just one person making the decision:

> "As an alternative or adjunct to single judge trials, perhaps a model might be considered in which a judge presided together with one or two specially trained and experienced lay people. Lay experts in psychology might be particularly helpful in aiding the judge's understanding, for example, of the effects of sexual offences on victims' memory and actions, or the effects of power imbalance on any apparent "consent" claimed by the defence. If it would not be practical for the lay expert(s) to have equal decision-making powers with the judge, they could at least act in an official advisory capacity and the judge could be formally required to take their advice into account." (Individual)

Another proposed that appeals could be lodged by the prosecution against acquittals in order to tackle "rogue decisions":

> "We submit that if there is a concern that juries are failing in their duties, a valid solution here would be for the COPFS to implement

> an appeal on the basis of a miscarriage of justice in that “no reasonable jury properly directed would have returned a verdict of acquittal.” The appeal would have to be lodged within the usual statutory time frame. The remedy would be the quashing of the acquittal and an order for a re-trial. There would be a restriction that the appeal could only be made once i.e., an acquittal at re-trial could not be appealed on this ground as effectively a second jury has confirmed the original verdict. We recognise this potentially prolongs the criminal justice process but note that this process could resolve the concerns over “rogue” jury decisions unless there is a basis to suggest that two juries in succession would likely return the same “rogue” verdict.” (Legal Organisation)

One felt that the consultation and the change proposed perhaps raised the need for a whole system review, rather than just a focus on serious sexual offences and the use of juries. Another was concerned that the concept would be extended and result in an erosion of liberties.

A final respondent stressed the need for judges and juries to be trained in learning disabilities in order to challenge any pre-existing beliefs and to better support them in court:

> “For example, they may be unaware of difficulties with communication like needing additional support or more time to speak and clarify understanding. Our voices should be heard and listened to. Jurors and judges should be trained around learning disabilities to help challenge their pre-existing beliefs.” (Other (third sector))

# Impact Assessments

Little feedback was given in response to Impact Assessment questions.

### Human Rights

Respondents generally felt that the proposals contained in the consultation would have a positive impact on human rights, especially those of women, children and young people. The main proposal which may negatively impact on human rights was the use of single judge trials if this meant that too much discretion was afforded to one presiding individual.

A few comments were also made (both in response to this question and elsewhere in the consultation) that some of the proposals may negatively impact on the human rights of the accused, unless an understanding of their needs (especially in relation to trauma) was not also considered going forwards.

### Equalities and Protected Characteristics

Very few comments were made in relation to equalities and protected characteristics which had not already been raised elsewhere, however, it was suggested that specific care and focus would be needed if taking forward the proposals of the inequalities experienced by victims/complainers/survivors of colour, those with disabilities and those in the LGBTQI+ community.

Consistent with comments made throughout the consultation was the need to make sure that any ongoing engagement with people with lived experience included individuals from a diverse range of personal backgrounds. This included any regular ongoing contact that the Victims' Commissioner may undertake. In addition, it was stressed that all future engagement needed to be accessible, especially for those facing communication barriers.

Further consideration of how various changes would impact on those living with complex mental health challenges or learning disabilities was also encouraged, as such individuals were seen to be more at risk of being treated unfairly and being more at risk of trauma.

In relation to specific proposals, a comment was made that use of virtual trials could be particularly beneficial for those with protected characteristics who were potentially most at risk of the negative impacts of appearing in court.

Again, there was slight concern around diversity in the use of single judge trials. A more general observation was made that there was also scope (and the need for) greater representation in all roles in the justice system and a suggestion that greater diversity across those employed in the system would give greater confidence to victims who interact with it.

Several respondents commented that the proposals would uphold the Public Sector Equality Duty (PSED) that requires public bodies to have due regard to the need to

eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities and therefore have a positive impact on the human rights of those who have experienced rape, sexual assault, and domestic abuse.

### United Nations Convention on the Rights of the Child (UNCRC)

While the proposals were seen (among victim and witness support organisations) as potentially having a positive impact on the human rights of children and young people experiencing rape and sexual assault, and domestic abuse, some other organisations (including advocacy/support organisations working with children and young people) felt that greater consideration could have been given throughout the consultation to impacts of the proposals on children and young people. A specific comment was made that more consideration needed to be given to child victims and children who have harmed people.

### Socio-economic equality

Again, there was little feedback received in relation to socio-economic impacts, except to note the barriers to justice which can exist due to poverty, including issues accessing legal aid, finding and paying for childcare and travel (for attendance at court) and homelessness. Women were seen as being more likely to face such barriers and so were more likely to be negatively impacted. It was felt that greater use of virtual trials and remote giving of evidence may assist with these concerns.

Comments were also made that the costs of independent legal representation for complainers in criminal proceedings was high and that complainers should not be expected to bear the costs of this.

Some victim and witness support organisations (here and elsewhere in the consultation) also noted that women's poverty and social exclusion as a consequence of domestic abuse was well documented, but hoped that some of the proposals may go some way to address this.

One individual noted that there could be inherent bias in the justice system more generally, with those of higher economic status presiding over cases of those with lower economic status.

### Communities on the Scottish islands

Respondents generally agreed that victims living in more remote communities, such as the Scottish islands, faced particular challenges with regard to accessing justice and there was agreement that support was needed for victims who live remotely. In particular, it was felt that assistance with costs of travel or reducing the need to travel for appearances at court through more frequent and consistent use of technological solutions would be helpful.

A specific concern was raised that people living in island communities may not benefit from anonymity clauses in the same way as people from more populous

areas, as such close-knit communities tend to be aware of what is happening within them. Overall, however, it was observed that many of the proposals would have a positive impact on accessibility and access to support.

**Privacy and Data Protection**

Comments in this respect generally focused on the need for clear responsibility within each agency in the criminal justice system to inform and involve victims, witnesses, accused and families of the accused at each stage of a case with better sharing of information (with permission) between agencies to prevent retraumatisation from people continually having to repeat their stories.

Consent (from both complainers and accused) to share information was seen as key, as well as making sure that all parties involved in cases were aware of their rights under Data Protection and Human Rights legislation.

**Businesses and the third sector**

The main perceived impact for businesses and the third sector was a potential increase in demand for support and advocacy services as a result of some of the proposals being put forward, which may impact on existing services and require additional funding/resourcing as a result. Smaller organisations working with victims and witnesses (especially in rural and remote areas) may be particularly affected.

It was felt that the appointment of a Victims' Commissioner may also impact on the workloads of those already in the victim/witness support sector (in terms of engagement) and would also need to be resourced. Similarly, it was suggested (mainly by victim and witness support organisations) that clear structures and processes would need to be put in place to ensure that the Commissioner engages properly with third sector organisations working within the justice system.

Elsewhere in the consultation (and already covered above), comments were made about impacts of the proposals on court business scheduling and the speed with which cases could progress through court, and the need for more legal aid funding to support victims *per se*.

**Environmental impacts**

Very few respondents answered this question. The main view, however, was that digital trial provision would have a positive impact on the environment, creating an opportunity to reduce travel associated with court attendance, thus reducing carbon footprints.

**Other comments**

One law enforcement organisation commented that a detailed financial impact assessment would also be required in order to properly inform the implications of what the consultation aimed to deliver.

# Cross Cutting Themes and Other Observations

## Cross-cutting themes

The main cross-cutting theme throughout the consultation was the need for all proposals and legislative changes to be victim led. Victim choice and the need to retain flexibility in the system were also encouraged in relation to various proposals. Several respondents highlighted the complexity of the justice system and the various ways through which individuals may become involved with the system, and viewed that a 'one size fits all' approach would never be appropriate. Maintaining an open dialogue with those with lived experience, their representatives and advocates, in taking forward the consultation proposals was seen as key to a system that responded to victims' needs and led to the level of empowerment that was desired, instead of victims simply feeling that they were part of an evidence chain.

Increasing accessibility to the justice system for complainers (both physically through greater use of technology and legal aid, and figuratively through removal of jargon) was also stressed throughout. Again, this was seen as especially important for the most vulnerable victims and witnesses, including children and young people and those with learning disabilities. The strong support for many of the proposals linked to trauma-informed practice in particular was based on a belief that such changes would improve not only the victim experience, but also the quality of evidence given by victims (to the advantage of the justice system as a whole).

Another cross-cutting theme was the need for victims to receive additional support alongside the various system changes proposed, with specific suggestions that any legislation seeking to improve victim's experiences must include a right to mental health and wellbeing support at all stages of the journey. The right to independent advocacy and legal representation were both highlighted as key to assisting victims, and additional resourcing to allow access to such support was encouraged (including changes to legal aid funding).

While there was considerable support for legislative changes to be person centred and victim led, it is important to note that several organisations (including legal organisations) and some individuals (including those reporting personal victimisation) argued throughout the consultation that changes must not be exclusively victim focussed. Any legislative change must also consider the needs of accused and their families/supporters, in a system where people can often have multiple and co-existing experiences of being both victim and perpetrator. This was especially true for children and young people, and special attention should be given to this cohort to ensure the system is trauma informed and trauma responsive to their needs, regardless of how they come to be a part of the system.

Another common theme (especially among organisations in the public sector) was that any legislative change must be supported by adequate resource to allow for

robust implementation. A number of organisations (including law enforcement organisations, local authorities and others) noted that the consultation was lacking in its reference to what was described as “chronic underfunding and under-resourcing in almost all aspects of the justice system”. Specific concerns were related to the impact of court workloads (including a COVID-19 backlog), fewer physical courts, perceived insufficient funding of legal aid, staff shortages in various justice agencies (including the police), and lack of resources for adequate implementation of proposals. All of these were seen as potentially having a direct negative influence on complainer/victim experiences and some respondents felt they should have been given more consideration across the consultation.

Similarly, funding and plans to support training of all staff who may interact with victims in the justice system was encouraged. This included training primarily in trauma-informed practice, but also in such things as domestic abuse awareness, and training around mental ill health and learning disabilities and how these interact with the victim experience.

Finally, while almost all of the proposals across the consultation were welcomed and received strong support, there was also a general underlying concern that all changes would only result in meaningful change (and positive impacts for those involved in the justice system) if accompanied by significant cultural change in the justice system. This was seen as a more fundamental challenge, especially given the adversarial nature of the justice system, but one that was necessary to address if systems and processes were to become truly trauma sensitive and the desired transformation achieved.

## General Observations on the Consultation

Some more general observations on both the consultation process and consultation clarity were also raised.

On the process, respondents noted that the consultation had been challenging to respond to, i.e. the breadth of the consultation was “huge” and “the language used often complex and difficult to understand”, including lots of legal jargon. A number of respondents noted that it was not accessible to the general public or vulnerable groups and so was unlikely to capture lived experience. One organisation suggested that the consultation expected too much of respondents on the issue of impact assessments.

The consultation was also carried out over the summer holiday period, and a small number of respondents suggested that this may have resulted in a lower response rate than might have been expected if it had been run at a different time (and may also have precluded some who wanted to take part from doing so).

Comments were also made throughout various sections of the consultation in relation to children and young people with a sense from respondents that greater clarity could have been offered on the how the various proposals would directly impact on them. As above, these comments came mainly from organisations

already working with children and young people. In particular, there was seen to be a lack of reference to existing legislation and processes/supports already in place to protect the unique needs and interests of children and young people and consideration of how these would overlap with the new proposals.

On a related note, comments were made that several proposed reforms (while positive in their ambitions), could impact on existing legislation and system processes to their detriment, i.e. there was a danger of a ripple effect in a justice system that is complex and interconnected, and where one change might have consequences that are unintended or are greater than expected. One local authority/justice partnership organisation suggested that this was particularly so for local government, who play a crucial role in Scotland's justice system and would be affected by some of the proposals in the consultation. Any potential changes stemming from the consultation exercise with potential impacts on local government would require further engagement with them, as well as detailed consideration of possible resource implications for local authorities, it was suggested.

Finally, a number of organisations encouraged ongoing further engagement with the Scottish Government, at both the front-line and strategic/governance levels, to ensure that there remained an opportunity for input from interested parties in taking the proposals forward.




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