Improving victims' experiences of the justice system

Consultation

May 2022

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Ministerial foreword

Earlier this year I launched the Scottish Government's Vision for Justice in Scotland. The Vision is a wide-ranging and progressive strategy which details our priorities to deliver a transformed justice system that is fit for purpose in the 21st century and at the heart of a just, safe and resilient Scotland.

The Vision sets out our aim for a justice system that is trusted, modern, smart and effective. A system with trauma-informed practice and person-centred approaches embedded within it so that - no matter how a person comes into contact with it - they are treated as individuals, listened to, their needs met and their rights respected.

We must be bold and ambitious in our plans to deliver the transformational change necessary to achieve our Vision for Justice. Our Programme for Government sets out the range and extent of the action we will take over the parliamentary session.

We are already making progress. Earlier this year we consulted on proposals to change the way we use custody, with a view to reducing Scotland's prison population by providing more opportunities for rehabilitation and improved support for those who offend, while keeping public safety and protection for victims at the centre of any reforms.

We are also acting to ensure faster, fairer and more effective justice by modernising the system. A consultation on potential reforms to Scotland's three verdict system - which also considered the issue of corroboration - concluded in March, and we are committed to a review of court structures including sentencing powers.

This consultation is a key part of this far-reaching programme of work. It focuses specifically on proposed legislative reforms to improve victims' experiences of the justice system, with particular reference to victims of sexual offences. It takes forward our Programme for Government commitments to introduce a statutory right to anonymity for complainers in sexual offence cases, establish a Victims' Commissioner and carefully consider the recommendations from Lady Dorrian's review into the management of sexual offence cases that require a legislative basis to deliver.

We know that victims of crime should be heard and be provided with information in an accessible and timely manner; that they should feel safe and have confidence in the structures that are designed to protect them; and that they should be treated with compassion, at every stage of their journey through the justice process and beyond.

We recognise, however, that there are times when the person can be lost among the system's formalities and technical processes. We also know that the justice system can be particularly challenging and disempowering for victims and survivors of sexual violence.

The Scottish Government is committed to improving victims' experiences of the justice system by putting them at its centre. To do this we will work collaboratively and innovatively with Scotland's justice agencies. And we will listen to people with lived experience - victims, survivors, families, support services, practitioners – in order to learn what we can do better and inform how this can be done.

This consultation provides you with a valuable opportunity to help shape how important changes - which are part of a wider programme of reform - can be delivered in order to ensure that we have a truly person-centred and trauma-informed justice system that the people of Scotland can have confidence in.

Keith Brown
Cabinet Secretary for Justice and Veterans

Responding to this consultation

We are inviting responses to this consultation by Friday 19 August 2022.

You are not required to answer every question in the consultation. The consultation is set out in chapters to help you identify matters in which you may have a particular interest.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space. Access and respond to this consultation online at the improving victims' experiences of the justice system consultation page of the gov.scot website.

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 19 August 2022.

If you are unable to respond using our consultation hub, please send your response along with a completed Respondent Information Form, which can found at the end of this document, to:

By email: victimsconsultation@gov.scot

Or by post:

Victims Consultation
Criminal Law, Practice and Licensing Unit
Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at Citizen Space. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at victimsconsultation@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online at Citizen Space. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Introduction

The Scottish Government's new Vision for Justice in Scotland, published in February 2022, sets out our clear and compelling vision for a just, safe and resilient Scotland.

We are committed to a transformational approach to justice reform to ensure the system meets the needs and values of today's society, and the society we want to see in the future. This means putting people at its heart, redesigning historical processes where they no longer meet our needs and reforming in the interests of better outcomes for those who come into contact with the system.

The Vision sets out the route to a transformed system. Our priorities are focused on delivering person-centred and trauma-informed practices across the justice sector, including taking greater action, in particular, to improve the experiences of women and children and to hear victims' voices. These issues are particularly relevant to the victims of sexual crime. The Scottish Government is resolute in its commitment to deliver a justice system in which all victims of crime, including the survivors of sexual abuse, can have confidence.

The principles of person-centred and trauma-informed practice underpin our Vision and are central to this consultation, which is part of the extensive programme of work we are progressing to modernise our justice system. The consultation focuses on proposed legislative reforms which aim to strengthen the rights and improve the experiences of victims of crime as they engage with the process of justice. Some proposals apply to the victims of any type of crime while others relate specifically to sexual offence cases. The consultation supports delivery of our commitment to empower and protect victims of crime through improving justice services, as set out in the Programme for Government 2021-22. It includes 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 of the management of sexual offence cases which require legislation to implement.

It is our intention that any reforms taken forward as a result of this consultation will be a priority for action, including proposed legislation, over the parliamentary session and that these will represent part of a programme of strategic, managed transformation of the justice system.

The Scottish criminal justice system is complex and inter-related. Any reforms need to be considered alongside other key aspects, including a separate recent public consultation on the not proven verdict and related issues which closed in March 2022. The outcomes of both consultations will be considered together when decisions are made by Ministers on what legislative proposals should be introduced to the Scottish Parliament for consideration. We are committed to taking a holistic approach to reform, recognising the interconnectedness of the issues and the importance of ensuring fairness and balance.

Over the last 15 years the Scottish Government has promoted and delivered progressive legislative reform on victims' rights and sexual offences including:

- Sexual Offences (Scotland) Act 2009 - which transformed the law relating to sexual offences including providing a statutory definition of consent

- Victims and Witnesses (Scotland) Act 2014 - which improved the support and information available to victims and witnesses of crime; introduced a range of rights for victims, ensuring these are encapsulated in the Victims' Code for Scotland; and requires justice agencies to publish and report against Standards of Service

- Abusive Behaviour and Sexual Harm (Scotland) Act 2016 - which introduced statutory jury directions in certain cases to address concerns that juries had preconceived views about the nature of sexual offences or the way that victims responded to these crimes

- Domestic Abuse (Scotland) Act 2018 - which criminalised psychological domestic abuse and coercive and controlling behaviour

- Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 - which created a new rule for child witnesses under 18 to ensure that, where they are due to give evidence in the most serious cases, it will usually be pre-recorded in advance of the trial. The Act includes powers to extend the rule to adult witnesses deemed to be vulnerable which includes complainers of sexual offences

- Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 - which commenced on 1 April 2022 and established a legal framework for consistent access to "self-referral" whereby a victim can access healthcare and request a forensic examination without first having to make a report to the police - self-referral is available to anyone aged 16 or over, subject to professional judgement

- Domestic Abuse (Protection) (Scotland) Act 2021 - which will improve the protections available to people at risk of domestic abuse, particularly where they live with the perpetrator of the abuse

These legislative changes have been taken forward against the backdrop of the Government's long-term purpose and outcomes for Scotland's wellbeing, the National Performance Framework. Examples of wider strategic work which have driven reform include action to tackle violence against women and girls (underpinned by the joint Scottish Government and COSLA strategy Equally Safe), the work of the Chief Medical Officers' Rape and Sexual Assault Taskforce, and our national approach to improving outcomes for children and young people: Getting It Right for Every Child. Further information about the strategic context for justice reform is set out in Annex A of the Vision for Justice.

These progressive reforms, alongside linked non-legislative work by the Scottish Government and its partner justice organisations, have strengthened and modernised the system. They have been largely based on pre-existing approaches and have delivered incremental improvements. But we know more needs to be done

and that transformation is required to deliver a system which is fully person centred, trauma informed and built around the needs of the people it serves.

The proposals in this paper are informed by the experiences of victims and the views of our justice partners and stakeholders. Successful transformation will only be achieved through partnership working and utilising a whole system approach.

These proposals should also be seen against a background of the backlog of cases as a result of the pandemic, and the impacts this has had on all justice agencies and - most importantly - on those going through the system. We have seen significant developments in how the justice system has operated and adapted to changes in working practices as it has responded to public health guidance. This context of a system which is still in recovery but has simultaneously adapted and modernised at rapid pace in some respects should continue to be borne in mind, as should the impacts on delivery partners, including third sector organisations, and on victims, witnesses and accused.

The Victims Taskforce

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

Based on direct feedback from victims and witnesses, the key areas identified for improvement are:

- **being heard** - this relates both to particular stages of the criminal justice process where victims feel they struggle to be heard but also more generally in that victims often perceive they do not have a place in the system

- **accessing information** - victims and witnesses consistently report difficulties in accessing basic information about their rights and what is happening in their case, and the way in which information is communicated is also often described as unfeeling and potentially re-traumatising

- **feeling safe** - victims and witnesses need to feel safe in their interactions with the justice system and that the system prioritises keeping them safe in terms of the outcomes sought

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

In response, we must build public confidence in the culture and processes of the justice system to ensure victims' rights are respected and their needs met without compromising fairness. We must ensure that victims are not deterred from reporting crime because of a justice system characterised by delay, insensitivity and trauma or because of a lack of faith in the system. Victims must have their experience and voices fully recognised and heard, and be supported to give their best evidence. We must strive to ensure that justice is served and that those who commit offences are

held to account. This ambition applies to the system as a whole and victims of any crime, but we are also clear that additional targeted action is needed to tackle issues specifically relevant to those experiencing crimes of a sexual nature.

The Scottish Government is committed to developing a justice system that is person centred and trauma informed. Victims should not be seen as passive bystanders compelled to engage in a process which risks causing further harm to them. Without the courage and confidence of victims to come forward, the justice system fails and we are all less safe. The system requires a great deal from victims and witnesses and, while it is right that their evidence is tested and scrutinised, that should not be at the costs of their rights and dignity or at the risk of re-traumatisation.

The Taskforce has also adopted a vision for how the system responds to the needs of victims of crime:

> "Our vision is that victims and witnesses will be treated with fairness, compassion and in a trauma-informed manner in which their safety and well-being is a priority. They will have access to consistent, appropriate and timely information and support. They will be able to understand their rights, have confidence that these rights will be upheld and be able to participate effectively."

This consultation provides an opportunity to provide your insights and perspectives on how this vision can be realised as we deliver the wider Vision for Justice in Scotland and take forward our legislative programme.

Sexual Offences and Lady Dorrian's Review

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

The criminal justice process itself can present particular challenges in dealing with these cases with victims reporting that many of the features of the existing system do not support them to give their best evidence and can in fact cause them further trauma.

These issues have become all the more acute given that the number of serious sexual offence cases in our courts has increased substantially in the last 10 years, reflecting the steps already taken to increase confidence in the reporting of such offences to the police.

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

In line with Equally Safe, we must advance a criminal justice system which ensures that the rights of women and girls are protected and one in which the survivors of sexual crime can have confidence. We must act to transform the justice system so it is gender responsive, meets the needs of victims of gender-based violence and effectively challenges men's offending behaviour.

Criminal Proceedings in Scotland statistics also show that juries continue to return verdicts of acquittal at a significantly higher rate for sexual offences cases than for other crimes. The overall conviction rate in Scotland for all crimes and offences in 2019-2020 was 88%, however for rape and attempted rape it was 43%.

The substantially lower conviction rate in these cases, when compared to other crime types, risks undermining public confidence in the justice system.

As already discussed, public confidence in a compassionate and fair system is fundamental to ensuring crimes are reported and those responsible are held to account in our criminal courts.

In early 2019, against the backdrop of an increased volume of cases and ongoing concerns over the experiences of victims of sexual crimes in the justice process, the Lord President, Lord Carloway, commissioned the Lord Justice Clerk, Lady Dorrian, to carry out an independent review to develop proposals for an improved system to deal with serious sexual offence cases. The aim of the review was:

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

Lady Dorrian established a cross-justice Review Group with wide representation from stakeholders and justice partners. Membership included: members of the judiciary, Scottish Courts and Tribunals Service, Police Scotland, the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, Scottish Children's Reporter Administration, Scottish Government, Scottish Legal Aid Board, Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland.

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

The Review Group published its final report in March 2021. For ease of reference the report is referred to throughout this consultation paper as 'Lady Dorrian's Review'.

Lady Dorrian's Review is wide ranging and makes proposals to modernise the existing court and judicial framework as well as procedures and practice.

The Scottish Government welcomes Lady Dorrian's Review and the opportunity for transformational change that it presents. The themes of the report have wider applicability across the justice system, beyond the consideration of serious sexual offences, and the principles endorsed (pre-recording of evidence, better communication, trauma-informed practice) can be applied to whole system change for the broader benefit of all users.

Just as a cross-sector group was essential to ensure a holistic review of the existing system, a cross-sector response is required. The effective delivery of justice relies upon a number of independent and interlinked bodies working together. No single institution holds the key to delivering meaningful change for victims of serious sexual offences and it is imperative that collaborative, partnership working, as illustrated by the work of the Review Group, continues.

The Scottish Government has established a Governance Group comprising key stakeholder interests. This Group will enable progress and detailed consideration of the individual and collective recommendations within Lady Dorrian's Review.

There is cross-sector consensus around many of the recommendations. Many of the report's themes align with ongoing work to improve the experience of those involved with the criminal justice system, to make sure it is person centred and trauma informed. Some of the recommendations can be, and are being, progressed now through changes to policy, practice and culture. Others require further consideration and development before operational changes can be made.

Whilst that work continues through the Governance Group, it is clear that a number of the recommendations will require primary legislation if they are to be implemented. This consultation seeks to gather wider views on those recommendations as they relate to changes to the criminal justice system. This consultation does not address the changes suggested to the Children's Hearing System. Those are being considered elsewhere – they are acknowledged in the consultation on the Children's Care and Justice Bill and are also being progressed via ongoing partner improvement activity under the Children's Hearings Improvement Partnership. Other changes are also likely to be considered via the redesign work led by the Promise Scotland's Hearings System Working Group, which will report in 2023.

The proposals

This consultation paper covers multiple inter-related topics and you do not have to answer every question. Efforts have been made to structure the paper to make it accessible to the reader, acknowledging that some will have an interest in all the proposals while others will wish to focus on those of greatest interest or relevance to them. Some proposals relate specifically to sexual offence cases; others are relevant to cases of any type.

The paper is structured as follows:

Chapter	Subject	Questions
One	Establishing a Victims' Commissioner for Scotland	1 to 14
Two	Options to underpin trauma-informed practice and person-centred approaches	15 to 27
Three	Special measures to help vulnerable parties in civil cases	28 to 30
Four	Review of defence statements	31 to 33
Five	New statutory underpinning for anonymity for complainers in sexual offence cases	34 to 47
Six	The introduction of publicly funded 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	48 to 55
Seven	Creation of a specialist court for serious sexual offences	56 to 66
Eight	Consideration of issues related to single judge trials for serious sexual offences cases	67 to 76
Nine	Impact Assessments	77 to 84

You are encouraged to set out your views on the proposals in the paper and we recognise that your personal experience may have contributed to shaping your views, including as a victim of crime, a family member or friend of a victim of crime or through serving on a jury.

If you have been affected by any of the issues discussed in this consultation, information, advice and assistance can be provided by Victim Support Scotland and other organisations that provide general and specialist support.

Some of the proposals in the paper relate to technical criminal procedure. We have sought to present the issues and the questions in an accessible way so that they are understood by a range of audiences. A glossary is provided to explain specific terms.

Where reference is made to other legal jurisdictions, this is not intended to be a detailed description of the law in other countries but a summary of how it is understood to work.

Finally, a word about terminology. We acknowledge that there are different words to describe those who have experienced crime and views on which terms are used can be strongly held. Lady Dorrian's Review used the word 'complainer' in its report, this term is used when describing a person in a legal setting as the person making the allegation of crime. Others use the words 'victim' or 'survivor', and these are more

commonly used when referring to the person in a broader context not restricted to the legal system. All of these terms are used in this consultation paper and the choice of term depends on the context; no inference should be drawn in relation to specific uses.

Chapter One: A Victims' Commissioner for Scotland

Background

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

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

The concept of a Scottish Victims' Commissioner has been raised several times since devolution. David Stewart MSP introduced a Member's Bill on this issue in 2010. There has also been a petition and campaign for the creation of a Commissioner role, led by a family bereaved by crime.

The Victims Taskforce considered the advantages and disadvantages of introducing such a role in Scotland at its meetings of September 2019, December 2020 and March 2021. Despite differing views amongst members, it was agreed that there was an appetite for a Scottish Victims' Commissioner. Perhaps most importantly, there was a clear mandate from victims – which was subsequently reflected in the VSS paper.

The Scottish Government committed to establishing a Victims' Commissioner in the most recent Programme for Government. This is in line with the priority we place on hearing victims' voices and offering approaches to justice which place victims at the heart. This consultation therefore seeks views on the more detailed aspects of how this role should be established.

Victims' Commissioners, or similar roles, already operate in a number of jurisdictions, though with varying remits and powers. These roles tend to rest on a statutory underpinning, with, for example, legislation prescribing the functions to be carried out by the post-holder and often containing reporting obligations, governance structures and a requirement to consult with victims and survivors. However, there are other examples where the appointment is more loosely defined, for example, as a mayoral appointment in London.

Such commissioners elsewhere tend to have a role that is heavily focussed on engagement with victims and witnesses, their representative organisations, government and criminal justice agencies and taking forward reviews and reports on matters of interest. The role of many commissioners is dedicated to identifying and addressing issues that are of general application and affect a number of victims, and

do not involve the commissioner providing support or advice in relation to individual cases. Further information on similar roles in England and Wales, London, Northern Ireland, and the Australian states of Victoria and South Australia can be found in the annex to the Victims' Commissioner Discussion Paper for the Victims Taskforce meeting of December 2020.

There are also other existing commissioner roles in Scotland that may provide guidance, for example the Children and Young People's Commissioner Scotland (CYPCS) whose role is to promote and protect the rights of children.

With this background and the existing expertise within Scotland, across the UK and beyond, Scotland is in the favourable position of being able to draw from domestic and international practice whilst at the same time being able to design the role to meet the unique needs of victims in Scotland. Through this chapter of the consultation, the Scottish Government is keen to gather views on how this can best be achieved.

Independence of role and accountability

We propose that one of the core tenets of the Victims' Commissioner role should be its independence from the Scottish Government and criminal justice agencies, and that the role be established in legislation. We have come to this conclusion based on input from victim support organisations, people with lived experience and research into how similar roles operate.

However, there is a range of options for establishing the role and we would welcome views on our proposals around the independence of, and legal basis for, a Victims' Commissioner.

There are a number of existing commissioner roles that are both statutory and independent from the Scottish Government. For example, the CYPCS, established under the Commissioner for Children and Young People (Scotland) Act 2003, and the Scottish Biometrics Commissioner, established under the Scottish Biometrics Commissioner Act 2020. Both commissioners are nominated by the Scottish Parliament, appointed by the Queen and funded via the Scottish Parliamentary Corporate Body.

The advantage of such an approach would be both a clear legislative underpinning for the role and a transparent relationship with the Scottish Ministers and criminal justice agencies, making provision for co-operation, collaboration and challenge where required. It would help to foster a sense of trust in the commissioner's ability to act impartially and, where necessary, hold the Scottish Ministers, criminal justice agencies and those providing services to victims to account using the powers assigned to the role in statute (see the 'powers and recourse' section, below). A disadvantage of such an approach would be the time taken for the legislation needed to establish the role to proceed through Parliament.

An alternative option would be to establish an independent but non-statutory role, such as that of the Scottish Veterans' Commissioner (SVC). The SVC is non-statutory, appointed by Scottish Ministers but not established in legislation. The

office of SVC has no statutory functions, powers or duties, with objectives determined administratively by Scottish Ministers and set out in terms and conditions of appointment. These state that the SVC must act within and in accordance with the expectations placed on the office by Scottish Ministers and that the SVC is accountable to Scottish Ministers for their actions and decisions of office.

The primary role of the SVC is to improve outcomes for veterans in Scotland, by engaging with, listening to, and acting on the experience of veterans, individually and collectively, and to be an ambassador for veterans in Scotland, helping public services focus on veterans' experiences of their service provision. This approach has worked successfully for the SVC, without challenge, since 2014. Although SVC recommendations are not enforceable by law, delivery partners have worked collaboratively to deliver on them and this has resulted in significant improvement (with progress reported openly on the SVC website). With respect to a Victims' Commissioner, this approach would have the advantage of being able to progress the establishment and appointment of an independent commissioner (albeit appointed by the Scottish Ministers) without being tied to a legislative timetable. The main disadvantages would be the potential for the role to be removed without any Parliamentary involvement and the lack of statutory powers to hold relevant authorities to account.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

The model for establishing and appointing the Commissioner will determine who they are accountable to. An option is for them to be accountable to the Scottish Parliament, and thereby the people of Scotland, as is the case with the CYPCS and the Scottish Biometrics Commissioner. Such a model could see the Commissioner required to publish and lay annual reports before Parliament detailing their work in the preceding 12 months, including issues identified and recommendations made.

The Commissioner could also be required to publish and lay a multi-year strategic plan before Parliament.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Question 4: How do you think the Victims' Commissioner should be held accountable? Please select all that apply.

a) annual report to be published and laid in the Scottish Parliament
b) multi-year strategic plan to be published and laid in the Scottish Parliament
c) other – please provide details

Please give reasons for your answer.

Functions and remit

As is noted above, victims have stated that the key areas for improvement should be around being heard, accessing information, feeling safe and compassion. It is essential that the functions and remit of a Victims' Commissioner for Scotland are shaped around this feedback and enable the commissioner to raise awareness of and make recommendations on the needs and issues identified by people affected by crime in Scotland.

Taking this into consideration, and looking at how the role operates elsewhere, possible functions could include:

- raising awareness/promotion of victims' interests and rights
- monitoring compliance with the Victims' Code for Scotland, the Standards of Service for Victims and Witnesses and any other relevant legislative requirements
- promoting best practice by the criminal justice agencies and organisations that provide services to victims, including championing a trauma-informed approach

- undertaking and/or commissioning research, in order to produce reports and make recommendations to the Scottish Government, criminal justice agencies and organisations that provide services to victims

Question 5: In your view, what should the main functions of the Victims' Commissioner be? Please select all that apply.

a) raising awareness/promotion of victims' interests and rights

b) monitoring compliance with the Victims' Code for Scotland, the Standards of Service for Victims and Witnesses and any relevant legislation

c) promoting best practice by the criminal justice agencies and those providing services to victims, including championing a trauma-informed approach

d) 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

e) other – please provide details

Please give reasons for your answer.

Consideration needs to be given as to how far the Victims' Commissioner's remit should extend. For example, their focus could be on victims in the criminal justice system, or it could look beyond that and incorporate victims' experiences of the civil justice system or cases referred to the Children's Hearings System.

Consideration also needs to be given to situations where residents of Scotland are victims of crime outwith Scotland. For example, the Foreign, Commonwealth and Development Office (FCDO) is included in the remit of the Victims' Commissioner for England and Wales by virtue of the Domestic Violence, Crime and Victims Act 2004. In October 2019 the Commissioner published Struggling for Justice: Entitlements and Experiences of Bereaved Families Following Homicide Abroad, which included recommendations directed at the FCDO, Ministry of Justice, police and others. Further work would be required to understand how such a remit could operate in a Scottish context.

Question 6: What do you think should be within the remit of a Victims' Commissioner for Scotland? Please select all that apply.

a) the experience of victims in the criminal justice system

b) the experience of victims in the civil justice system

c) the experience of victims in relation to the Children's Hearings system

d) the experience of victims resident in Scotland, but where the crime has taken place outwith Scotland

e) other – please provide details

Please give reasons for your answer.

Powers and recourse

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

Looking to other commissioner roles, there are a number of different approaches. The CYPCS has the power to carry out what are referred to as 'general investigations' and 'individual investigations' into whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people (or a specific child or young person for individual investigations). In conducting an investigation, the CYPCS may require any person to give evidence or to produce certain documents - but only where the Parliament could require that person, under section 23 of the Scotland Act 1998, to attend its proceedings for the purpose of giving evidence or producing documents. The Victims of Crime Commissioner in Victoria, Australia, has the power to carry out an inquiry on any systemic victim of crime matter, at the request of any person or at the Commissioner's own behest.

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

In designing the role of a Victims' Commissioner for Scotland, it may be that a combination of these powers is the most appropriate option. This could see the Commissioner with a power to carry out investigations into systemic issues affecting victims of crime, to report on these issues and to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims in Scotland. This could include a power to require persons to cooperate with the investigation. Further powers could provide for the commissioner to require those persons to which the recommendations are addressed to respond to the recommendations within a specified timescale.

Question 7: What powers do you think the Victims' Commissioner should have? Please select all that apply.

a) the power to carry out investigations into systemic issues affecting victims of crime

b) the power to require persons to give evidence in the course of an investigation

c) the power to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims

d) the power to require persons to respond to any recommendations made to them (by the Victims' Commissioner)

e) other – please provide details

Please give reasons for your answer.

Engagement

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

There are currently a number of victim and survivor reference groups operating in Scotland, facilitated by victim support organisations. These reference groups, in addition to other important functions, feed into the work of the Victims Taskforce to directly inform members of their experience and advise on what needs to change. The Commissioner, once appointed, may wish to consider how they engage with these established groups to learn from their collective experience.

Looking to other commissioner models, the legislation establishing the CYPCS requires that the CYPCS takes reasonable steps to consult with children and young people, and organisations working with and for children and young people, on the work to be undertaken by the commissioner. There is a further stipulation that the CYPCS must pay particular attention to groups of children and young people who do not have other adequate means by which they can make their views known. The

legislation establishing the Domestic Abuse Commissioner for England and Wales takes a different approach in that it requires the commissioner to establish an advisory board. The membership of this Board must include at least one person representing the interests of victims of domestic abuse and at least one person representing charities/other voluntary organisations working with victims of domestic abuse.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Question 9: How do you think that engagement with victims should take place? Please select all that apply.

a) advisory board, including victim representatives
b) victims' reference group
c) focussed consultations with victims
d) ad hoc engagement with victims
e) other – please provide details

Please give reasons for your answer.

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?

Yes – please provide details
No
Unsure

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

It is also worth considering whether there are other bodies or organisations that the Victims' Commissioner should have a duty to consult or work with. For example, the CYPCS may have an interest in matters relating to young victims of crime and the Scottish Human Rights Commission an interest in any human rights issues. It may not be necessary to list such organisations in primary legislation, but rather allow for the Commissioner to determine how and with whom such consultation takes place in order to fulfil their statutory functions.

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?

What the Commissioner can't do

It will be essential to clearly set out the role and remit of the Victims' Commissioner, including any limitations, to ensure transparency and manage the expectations of those the commissioner will represent. As detailed in the sections above, it is proposed that the commissioner has a key role in the protection and promotion of victims' rights, advancing the voices of victims, influencing change and ensuring criminal justice agencies meet their responsibilities under the Victims' Code.

To inform the work of the Victims' Commissioner, it will be essential for them to engage directly with people affected by crime. However, to allow the commissioner the independence and resources to focus on identifying common issues and influencing systems-level change, there will need to be some limitations on their remit. We do not propose that the commissioner will champion or intervene in individual cases. This view acknowledges that the criminal justice agencies have established complaints procedures which they are required, under section 2 of the Victims and Witnesses (Scotland) Act 2014, to set out in their Standards of Service for Victims and Witnesses. Furthermore, if someone does not feel their complaint has been dealt with satisfactorily, they can ask the Scottish Public Services Ombudsman to adjudicate - with the exception of complaints about Police Scotland, which can be referred to the Police Investigations & Review Commissioner. This approach would not preclude the commissioner from considering individual cases in order to understand the national picture.

In the examples we have considered of commissioners in other jurisdictions, those commissioners do not provide direct support to victims (though they can signpost or refer to services), offer legal advice, influence or interfere in criminal investigations or proceedings, or become involved in decisions around compensation for victims. They do not champion individual cases, rather they listen to victims in order to identify common issues and advocate for victims' rights within the justice system.

Some roles do take on more of an ombudsman function. For example, the Canadian Office of the Federal Ombudsman for Victims of Crime has a role in reviewing complaints about federal government departments, agencies, laws or policies. However, they do not advocate on behalf of individual victims or provide legal advice.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Chapter Two: Options to underpin trauma-informed practice and person-centred approaches

Background

Our Vision for Justice in Scotland confirms that our priorities are focused on delivering person-centred and trauma-informed practices across the justice sector, including taking greater action to hear victims' voices.

The work of the Victims Taskforce has emphasised the key importance to victims and witnesses of being heard, accessing information, feeling safe and experiencing compassion.

Existing legal position

The Victims and Witnesses (Scotland) Act 2014 ('the 2014 Act') sets out a range of general principles and rights. The general principles set out in Section 1 and 1A (see Annex A for details), which criminal justice agencies must have regard to, clearly map across to the key issues identified by victims and witnesses.

The 2014 Act also sets out: what a Victims' Code must contain; the requirement for published Standards of Service; and the need for complaints procedures which set the framework for ensuring victims have information about their rights and the standards to expect, and how to complain if these are not met. Existing rights are well summarised in the Victims' Code. The current version of the Standards of Service and annual reports against them can be found in the Standards of Service for Victims and Witnesses - Annual Report.

Trauma-informed practice

Our new Vision for a just, safe and resilient Scotland sets out that justice services must be person centred and trauma informed.

It is recognised that victims and witnesses in the criminal justice system can be affected by psychological trauma in many different ways, and that the system itself can be re-traumatising.

In line with other public services in Scotland, there is a need for the criminal justice system to respond to those who come into contact with it in ways that understand and adapt to the impact of that trauma and support recovery. The National Trauma Training Programme sets out further information on the national approach.

The core principles of a trauma-informed approach are **safety, choice, collaboration, trustworthiness** and **empowerment**.

In relation to victims of crime, this is in order to ensure that people are treated compassionately and in a way which does as much as possible to avoid re-traumatisation and further harm and which supports recovery. It is also vital to recognise and understand the potential impact of trauma on evidence provided - how evidence is perceived, how it is collected and presented, and how it is responded to and decided upon.

Without this understanding, there is potential that responses to trauma could be misunderstood in a way which does not allow best evidence to be achieved. There is also significant potential that opportunities to minimise trauma and to aid recovery will be missed.

Lady Dorrian's Review states that "the adoption of trauma-informed practices is a central way in which the experience of complainers can be improved" and recommends that a specialist court for sexual offences should use trauma-informed practices and procedure (see Chapter Seven for further discussion on a specialist sexual offences court). It is our view that the benefits of a trauma-informed approach are universal and we are clear that the system as a whole must operate to minimise further trauma or re-traumatisation and aid recovery.

A study into Transforming Services for Victims and Witnesses recommended:

> "trauma-informed approaches as standard practice. Recognise and prioritise the person-to-person interactions between victims and witnesses and staff across the criminal justice system. Instil kindness as a practice and develop awareness and application of trauma-informed approaches at all levels."

The Scottish Government, in consultation with the Victims Taskforce, has commissioned NHS Education for Scotland to create a 'Knowledge and Skills' framework specifically to support the development of a trauma-informed workforce in the justice sector.

However, training and the development of a trauma-informed workforce is only one part of what is required to achieve a trauma-informed system. It is key that each of the criminal justice agencies, third sector support organisations and the legal profession consider their operational processes and procedures from a trauma-informed perspective. Action can also be taken on a system-wide basis, for example in relation to communication with victims, access to information and referral to support organisations.

Many within the justice system are already acting to ensure they take account of trauma in their practice, and the development of the 'Knowledge and Skills' framework will advance that approach. For the purposes of this consultation, your views on particular legislative changes which could assist in supporting this necessary shift towards a trauma-informed justice system for victims and witnesses would be welcome.

A number of possible approaches are set out below but further views are also welcome.

Trauma-informed practice: a general principle

One approach could be to introduce the requirement to operate in a trauma-informed manner as a general principle within the relevant legislation. There is a precedent for a legislative reference to trauma-informed care introduced by the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 in the context of health care.

The most obvious way to take this forward could be to add a reference to trauma-informed practice within the general principles set out in the 2014 Act (see Annex A). There may also be benefit in referring specifically to trauma-informed practice in the requirements to set Standards of Service and report against these.

The 2014 Act applies to the criminal justice agencies, but not to other parties who may have a direct bearing on victims and witnesses' experiences of the justice system. In particular, the way in which a defence is conducted is sometimes highlighted as a traumatising aspect of the process. This consultation seeks views on whether the court should have a duty to take such measures as it thinks appropriate to direct legal professionals to consider a trauma-informed approach in respect of all witnesses, including their clients.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Trauma-informed practice: specific provisions

Another way to consider how legislative change can help to drive trauma-informed practice in relation to victims and witnesses may be to focus on particular elements of current practice which are recognised as being potentially traumatising, and consider legislative change specific to those elements. Some examples are given below, alongside some contextual material which sets out current action being taken to address these issues.

Trauma-informed practice: physical presence in court

Physically appearing in court to give evidence is often one of the most stressful and traumatic stages of the criminal justice system for victims and other vulnerable witnesses. The prospect of being in the same physical environment as the accused and their family members can be overwhelming and create safety concerns. The Transforming Services for Victims and Witnesses report identified the following 'pain points':

- the process of giving evidence is not the opportunity to 'tell their story' that victims often expect
- the process of giving evidence is traumatic and contributes to feelings of being out of control, with victims reporting that this feeling of lack of control is particularly acute at the trial
- the questioning is not as expected in that it often doesn't follow a linear, chronological sequence, which is confusing and can be upsetting
- the length of time that has passed, and the impact of the trauma that victim/survivors have experienced, means that they cannot always recall details
- lack of understanding of the process disempowers those giving evidence
- mistaken expectations that the prosecutor is the 'victim's lawyer' can add to the upset and feeling of being unsupported and marginalised through the process
- the adversarial nature of the process, and the stress experienced by victims and witnesses make it difficult to give 'best evidence'
- the impact of giving evidence can be traumatic, harmful and have long lasting negative effects

A number of legislative provisions and associated changes to practice have been put in place to allow evidence to be given without having to be physically present in court at the same time as the accused. The Scottish Government is now looking to gather views about any further changes that would help develop a more trauma-informed and person-centred way for victims and vulnerable witnesses.

Giving evidence remotely

Child witnesses or witnesses who are 'deemed vulnerable' in law are entitled to give their evidence with the benefit of one or more 'standard special measures'. This includes giving evidence by live TV link either within or outwith the court building. Other witnesses do not have an automatic right to use special measures but prosecutors or the defence can make an application for the court to grant their use on a case by case basis, or the court can do so of its own motion, all where certain criteria are met.

As discussed later in this chapter, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 ('the 2019 Act') makes further provision in relation to a presumption in favour of the pre-recording of child witnesses' evidence in certain circumstances. The 2019 Act also allows for the extension of this provision to some or all "deemed vulnerable witnesses" so as to allow the pre-recording of a witnesses' evidence in certain circumstances. Legislation sets out the categories of witnesses that are 'deemed vulnerable' which includes complainers in domestic abuse, stalking and sexual offences cases.

Giving evidence remotely by TV link means evidence is given in live time during the trial but the witness does not have to be in the courtroom. This helps to mitigate the anxiety of being in the same physical environment as the accused. Often this is done in another room within the same court building but can also done from another building, which can allow for a more comfortable and supportive experience.

In response to public health guidance during the Covid pandemic, legislative changes were introduced to create more flexibility in court proceedings, including allowing parties who would otherwise have to appear in person at court to 'appear by electronic means'. This has been mainly used for procedural hearings where evidence is not led, as the default presumption within the legislation is that where the hearing is one at which evidence is to be led - such as a criminal trial - attendance in person is required unless otherwise directed by the court.

In May 2021, the Scottish Courts and Tribunals Service (SCTS) initiated a pilot project to test the viability of 'virtual' trials for the delivery of summary business. After the first virtual criminal trials took place in June 2020 to prove the concept, a Virtual Trials National Project Board was established to enable all interested groups to share views and experiences. It includes members of the judiciary, SCTS, Crown Office and Procurator Fiscal Service (COPFS), Law Society of Scotland, Scottish Legal Aid Board and Victim Support Scotland. This led to a continuance of the pilot in June 2021 focusing on domestic abuse cases. This part of the pilot enabled witnesses to give evidence from specifically acquired premises, supported on site by third sector support organisations. This aspect of the pilot has been particularly well

received by support organisations in terms of removing victims from the court environment (where many existing remote link provisions are sited) and its re-traumatising impact, and allowing for the direct provision of support on site in more bespoke facilities.

The Project Board's Report on the pilot recommended that virtual trials should be considered as a default position for all domestic abuse cases in the Scottish summary courts with the creation of new designated courts within each sheriffdom to enable this. This was seen as having the dual benefits of improving the experience of victims and witnesses and helping to make greater progress in addressing the backlog of summary trials.

Assumptions regarding the impact on the backlog depend on operational decisions and require further exploration. At this stage anticipated benefits of the recommendation and the wider introduction of the concept are: that - drawing from international experience - virtual models may improve attendance levels; that domestic abuse cases are readily identifiable, therefore, a presumption could apply in a consistent and predictable manner if it were to be introduced; and that creating a dedicated model, as recommended by the Project Board, would have a positive impact on focusing effort both within the court programme and in the community justice response, and provide opportunity for greater specialism and the introduction of trauma-informed training and practices.

The Report suggests that to make the model effective a legislative change is required which would introduce a presumption that physical attendance in domestic abuse cases would no longer be required.

During its Stage 1 scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Bill, the Criminal Justice Committee of the Scottish Parliament heard mixed views on the effectiveness and appropriateness of virtual trials and the attendance by virtual means more generally. As noted above, third sector organisations endorsed the practice for summary domestic abuse cases whilst those in the legal profession raised concerns about the longer term retention of any provisions that supported the use of virtual trials and virtual proceedings more generally. In its Stage 1 report, the Committee recommended that a greater evidence base be developed on the benefits, drawbacks and outcomes of virtual hearings, to inform decisions on a longer-term approach.

The Project Board plans to continue its pilot of the use of virtual summary trials for domestic abuse cases in Aberdeen, while also considering how the model could be developed (through procedural and technological improvements) to further improve the process and the experiences of people taking part in these cases.

The Scottish Government welcomes the extension of the pilot, which will allow more evidence to be gathered on the operation and outcomes of virtual trials. We recognise benefits of the pilot’s approach, including reducing the traumatising impact of the court environment, and the enhanced system resilience and flexibility offered by a virtual trial capability, for example where remote geography of parties is an obstacle to timely scheduling.

We are aware that there are differing of views on making virtual trials a permanent feature of our criminal justice system and this consultation seeks to gather further evidence of those views as part of developing a fuller understanding of the potential and challenges of virtual trials.

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

Yes
No
Unsure

Please give reasons for your answer.

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?

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Pre-recording of evidence - use of a prior statement and evidence by commissioner

Currently, as noted above, legislation provides that ‘deemed vulnerable witnesses’, which includes adult complainers of serious sexual offences, are entitled to give their evidence with the use of ‘standard special measures’. These are the use of a supporter, giving evidence with the benefit of a screen in court so that the witness cannot see the accused, or giving evidence remotely by live TV link either from another room within the court building or from elsewhere.

The prosecution or defence may also apply for the court to grant the use of non-standard special measures. These include using a prior statement as evidence-in-chief, or giving evidence to a commissioner which is pre-recorded and later played at the trial, which is referred to in this paper as ‘giving evidence by commissioner’. These measures can be used separately or together and provide an opportunity to reduce the number of times a witness has to repeat their account, allows their evidence to be captured at an earlier opportunity and prevents the witness from having to attend court.

The use of a prior statement includes an interview or a statement which was taken beforehand, for example: a digitally recorded interview between the witness and the police; a visually recorded interview of a child by a police officer and social worker as part of a child protection investigation (referred to as a ‘Joint Investigative Interview‘); or a written statement that is read out. The witness‘s evidence-in-chief can consist entirely of the prior statement, but they would still need to be available for cross-examination.

When giving evidence by commissioner, this happens in advance of the trial and the court will appoint someone to act as the commissioner (the person who will hear the evidence). This will either be a judge or sheriff. The witness will be asked questions in the usual way, including any cross-examination. The evidence is recorded and this is then played to the court.

For adult complainers of serious sexual offences in the High Court, these special measures are not automatic and applications must be made on a case by case basis for a decision by the judge who may require to hear evidence in support of that application.

The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (‘the 2019 Act’) created a new rule for child witnesses under 18 to ensure that, where they are due to give evidence in the most serious cases, they will be entitled to have it pre-recorded in advance of the trial (unless an exception applies) usually by the following special measures: giving evidence-in-chief in the form of a ‘prior statement’ and evidence by commissioner.

In some areas of Scotland, bespoke witness suites are already available which provide a non-court environment for both evidence by commissioner and remote evidence giving and may also allow for support services to be co-located.

Section 3 of the 2019 Act includes powers to extend the rule to deemed vulnerable witnesses, i.e. certain adult witnesses, including complainers of sexual offences. If exercised, this would introduce a statutory presumption in favour of pre-recording

evidence of these witnesses. Other categories of witnesses would remain able to apply to have their evidence taken in this way, subject to agreement by the court.

The phased implementation of the 2019 Act is currently predicated on ensuring access for all children first and then extended to include adult vulnerable witnesses, with built in periods of evaluation and analysis. Changes to that approach would have broader implications for the justice system, including the location and current availability of suitable evidence suites, and overall capacity and resourcing.

Pre-recording of evidence - Visual Recorded Interviews (VRIs)

Visually recorded witness statements of adult complainers of rape or attempted rape have been piloted by Police Scotland in three areas across Scotland (Highland and Islands, Dumfries and Galloway, and Edinburgh). These types of statements are known as Visual Recorded Interviews (VRIs).

The Scottish Government has worked closely to support this VRI pilot with partners: Police Scotland, COPFS and Rape Crisis Scotland. Within the pilot areas, Police Scotland visually record the witness statements of adult and 16 and 17 year-old complainers involving allegations of rape and attempted rape.

The aim is that applications are made to the court to have these VRIs admitted in evidence at any subsequent trial as evidence-in-chief and are combined with applications to pre-record any further evidence by commissioner (including the cross-examination). The combination of these measures - VRI and evidence by commissioner - assists in capturing evidence as early as possible and reduces or removes the physical requirement to give evidence at trial.

Since the start of the pilot in November 2019, 302 VRIs have been carried out in respect of 258 cases. Of these cases, 74 have been reported to COPFS and, at the time of publication of this paper, four have proceeded to trial.

Longer time frames involved in investigations and scheduling of solemn proceedings for rape and attempted rape cases have meant that there is an expected time lag between a VRI, proceedings being commenced and a case going to court for trial. This was expected at the start of the pilot and follows the same pattern as such cases where written statements are taken. However, despite the prioritisation of cases of this nature by SCTS, the impact of Covid has been significant, delaying these cases further. It is therefore currently too early to undertake a comprehensive evaluation of the pilot. However, an interim review has indicated very positive feedback from the VRI pilot partners and complainers, albeit limited as it does not yet extend to the completion of these cases under the criminal justice process.

Building on this pilot, Lady Dorrian's Review recommended "that police interviews with complainers in serious sexual offences should be video recorded to capture the evidence of the witness at the earliest possible opportunity and it is noted that this recommendation should be acted upon as soon as possible."

There is therefore consensus that visually recorded police statements of complainers in serious sexual offences (rape or attempted rape) should be available across Scotland. Work is underway to develop implementation plans to scale up the VRI process beyond the pilot areas with particular consideration given to training,

infrastructure and capacity to enable the justice system to deliver this. These steps must be taken to ensure that partners can deliver without compromising the integrity of this process.

The scaling up of the VRI process will also require to take into consideration pre-recording of evidence in advance of trial to enable a holistic process for the complainer and to realise the aim of removing or reducing the need to attend court. We are therefore mindful that any changes to the implementation plan for the 2019 Act to extend the categories of witnesses who are eligible under the Act to have their evidence pre-recorded in advance of the trial, should have equal read across to the plans for the VRI process. As part of implementation plans, careful consideration is being given to the evaluation of the level of change that the system can simultaneously accommodate and the necessary investment, alongside the timetabling of when this will be extended to deemed vulnerable adult witnesses in solemn sexual offence cases.

Our view is that the current legislative framework set out in the 2019 Act is sufficient to extend the presumption in favour of pre-recording of evidence through evidence by commission and the use of a prior statement as evidence-in-chief, such as a VRI. The draft implementation plan supports the extension to adult complainers in serious sexual offence cases. There is a recognised need to phase the commencement of the legislation to ensure that the appropriate capacity, facilities and training are in place to ensure outcomes which minimise trauma as much as possible, and to ensure that the intended benefits are delivered, particularly to those involved in the most serious cases, or who are otherwise vulnerable.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer, including, if you disagree, what legislative change you consider is necessary.

Trauma-informed practice: Ground Rules Hearings for evidence given in court

The direction of travel set out above highlights the importance of ensuring that evidence can be gathered quickly without waiting for a trial to come to court, with the pre-recording of evidence where this will help to avoid the potential for further traumatisation. As already discussed, where evidence has not been pre-recorded the choice to give evidence in locations outwith the courtroom can also assist in improving the experience for witnesses.

Another aspect that is worthy of further consideration is the use of Ground Rules Hearings (GRHs) in cases where evidence is being given during the trial.

Since 2017, GRHs have been conducted where evidence is sought to be taken on commission from witnesses considered to be vulnerable in accordance with the stipulations set out in High Court of Justiciary Practice Note 1 of 2017; Practice Note 1 of 2019; and section 5 of the 2019 Act which amended the Criminal Procedure (Scotland) Act. One key intention of GRHs is to improve the experience of vulnerable witnesses when giving evidence by commission and thereby reduce the likelihood of re-traumatisation arising from the proceedings.

GRHs bring together the court/commissioner, prosecutors and defence to agree key aspects of how the evidence at commission will be taken including: length of examination-in-chief and, as applicable, cross-examination; scope of the questions asked; and other considerations that may need to be taken into account related to the specific circumstances of the complainer. As the Review notes, experience to date has shown that GRHs have been successful in improving the experience of vulnerable complainers and are working effectively. This confirms the experience in other jurisdictions which has shown them to be effective in improving the experience of vulnerable witnesses by ensuring that cross-examinations are “more witness-friendly, focused, relevant and pared down than in conventional trials”, as detailed in the Evidence and Procedure Review: Child and Vulnerable Witnesses Project, Pre-Recorded Further Evidence Work-stream Project Report.

Lady Dorrian’s Review recommended that there should be a presumption in favour of the pre-recording of evidence of sexual offence complainers, and that the taking of evidence by commission should be the default approach when conducting a cross-examination of all sexual offence complainers, and used for the whole evidence where police statements have not been recorded in a manner which would allow their use as evidence-in-chief.

However, the Review also recognised that there may be instances in which sexual offence complainers would be required to give evidence in court, and that GRHs should be used in these instances too. This referenced and built upon the earlier work of the judicially-led Evidence and Procedure Review, which recognised the benefits of using GRHs for all children and vulnerable witnesses (not just in sexual offence cases) in the High Court, irrespective of the method in which the evidence is to be provided to the court, and recommended a phased roll out.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Trauma-informed practice: court scheduling

Court scheduling and churn - which is when cases do not proceed as planned resulting in repeated hearings before they move on to the next stage - can have a traumatic impact on the experience of those called to give evidence in a case. Court scheduling is complex and there are a range of factors that can cause delay and churn in the progress of criminal cases, not all of which are within the direct control of the courts.

Any delay or uncertainty can have an adverse effect, particularly where the person is due to give evidence physically in court, but also more generally in terms of being unable to move forward with recovery from trauma, as well as the inconvenience and expense associated with multiple rescheduling.

The Transforming Services for Victims and Witness Report noted:

> "Cancellation of trial dates is a significant concern. It causes anxiety, feelings of loss of control and loss of confidence in the process."
>
> "Travel arrangements and expenses, getting time off work, waiting in court only to be told that the trial is cancelled, all add to the inconvenience and upset caused by the court process. This experience is reported across all crime types."

Justice Journeys research stated:

> "Delays in scheduling court cases, over a period of several months, were cited as a common occurrence and as an especially frustrating and anxiety producing aspect of the process."

HM Inspectorate of Prosecution in Scotland's Thematic Review of the Investigation and Prosecution of Sexual Crimes contains particular feedback on the use of 'floating trials', which are High Court cases where the date and location of the trial can vary depending on court availability.

The current legal position is that the time and place of sittings of the High Court are determined by the Lord Justice General or Lord Justice Clerk in consultation with the Lord Advocate. For summary business the sheriff principal is responsible for

ensuring the ‘efficient disposal of business’ within their sheriffdom. Each is subject to the over-arching responsibility of the Lord President for ‘making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts’.

As well as the need to schedule criminal justice business, the courts also need to schedule civil business. In relation to family law, the Family Law Committee of the Scottish Civil Justice Council has been considering proposals on case management in the family court system: see, for example, the discussion in the minute of the meeting of the Family Law Committee on 27 September 2021 (paragraphs 9 to 12).

The independent Advisory Group to the Criminal Justice Board, consisting of stakeholders representing the views of end-users of the system, highlighted the desirability of set staggered time slots (for example 10 am, 12 noon, 2 pm) for witnesses to be adopted across all summary courts and consistency to be ensured. The Group considered that the element of certainty afforded by such a measure was likely to result in a safer and less traumatic experience for witnesses, others attending court and those awaiting the outcome of the trial, and that this outweighed the impact of potentially longer waits introduced by the lack of flexibility.

This example is directly related to the effects of the pandemic and scheduling in that context but highlights the importance of taking the views of those most affected by proposed operational practices into account as part of a trauma-informed, collaborative approach. It also demonstrates that the benefits of efficiency - i.e. greater flexibility allowing more trials to take place - can lead to improved outcomes but can also run counter to providing more certainty and improving the confidence of victims and witnesses in the system.

We recognise and respect the importance of the independence of the Courts and acknowledge that these operational decisions are soundly based and often arrived at in consultation with other justice partners to take account of operational realities elsewhere in the system. The Transforming Services for Victims and Witnesses Report highlighted the need for a multi-agency approach to addressing the ongoing concerns around churn (see page 89 of the Report).

We also recognise, however, that issues around court scheduling highlight how operational practices may require to be reconsidered in terms of achieving an optimum balance between efficiency and flexibility, which remain crucial if the backlog of criminal cases is to be effectively addressed, whilst also preventing re-traumatisation.

While ultimately we recognise that operational matters are a matter for the Courts, we believe it is important that to apply a trauma-informed approach which takes account of the feedback from those most affected. We would be interested in your views as to how this might best be achieved, whether this is through change to the legislative basis for current decision making, or by changes to operating practice and consultative mechanisms, or otherwise.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you disagree, what legislative provision would you like to see?

Trauma-informed practice: information sharing

Difficulties in accessing both general information on rights and case-specific information are frequently cited as contributing to victims and witnesses' poor experiences of the criminal justice system. The way in which information is communicated can also add to distress – whether this is due to dispassionate and complex language, the timing of communication (for example, around a significant anniversary), or too much or too little information which does not take account of the state of mind of the recipient.

The 2014 Act sets out the general principles that "a victim or witness should be able to obtain information about what is happening in the investigation or proceedings" and that "victims should, as far as is reasonably practicable, be able to understand information they are given" (see Annex A for more information on the general principles).

The following sections of the Act also set out specific rights and duties in relation to information:

- 3C – right to request a copy of the Victims' Code and information relating to victims' rights
- 3D – a duty to inform victims that they can request referral to a victim support organisation, or self-refer, and duty to respond to such a request by referring the victim to appropriate providers of victim support services or giving the victim appropriate providers' contact details
- 3E – right to understand and be understood (including ensuring communications are clear and easy to understand, taking account of any personal characteristic which may affect understanding, and allowing assistance to communicate where required)
- 3F – right to interpretation and translation

- 6 – right to information about criminal proceedings (about a decision not to proceed with, or end, a criminal investigation; a decision not to prosecute; the nature of any charges; the arrangements for court hearings, the final decision of a court in a trial or any appeal)

Victims also have the right to information in relation to the release, escape or death of an offender in prison or hospital and can make representations regarding release in certain cases. Further information is available at Victim Notification Schemes - mygov.scot.

Work is being undertaken to revise the approach to communication across the criminal justice system, based on a communications audit and independent research with people who have been affected by crime. Service design approaches have also helped to inform the development of specific third sector support services such as the Support for Families Bereaved by Crime service provided by Victim Support Scotland.

Some specific aspects of information sharing are also being considered in more depth. For example the information available to victim support organisations to enable them to support victims when a prisoner is released is being considered as part of the consultation on bail and release from custody arrangements. An independent review of the Victim Notification Scheme is also underway.

A research project is currently being undertaken on the issues around the management and sharing of data across the criminal justice sector. From the initial research, key problems that impact victims and witnesses have been identified which will be considered further. Part of this work will be user research with victims and witnesses to understand what types of information they need in order to plan a way forward.

The key problems are identified as:

- lack of digital access to information for victims and witnesses about their case, including progress updates, confirming attendance in court, claiming expenses and viewing the statement they gave at the time of the offence

- lack of digital access for organisations supporting victims and witnesses to the full information set needed to allow them to provide the requisite support

- evaluation of how data sharing can be made more flexible and less labour intensive going forward, and to support data sharing happening more widely within the justice partners and with third parties

- the web presence of the sector is confusing and disjointed and leads people to doubt the information and its validity

- organisations acting in isolation in terms of how they engage and present information to victims and witnesses rather than presenting themselves as a unified justice sector

We would be interested to hear your views about any specific legislative changes that could help to address these issues, or other issues you may have experienced in terms of accessing relevant information. We would also be interested in perspectives that would feed into and support the ongoing work described above.

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.

Trauma-informed practice: civil justice

The focus of our work in relation to victims and witnesses is on the criminal justice system. However, the courts also need to work with vulnerable witnesses and parties in the civil justice system. The Vulnerable Witnesses (Scotland) Act 2004 makes provision in relation to civil cases.

The Children (Scotland) Act 2020 introduced special measures to be used to assist vulnerable witnesses and parties in civil proceedings arising out of children's hearings or where the court is considering making an order under section 11 of the Children (Scotland) Act 1995. These provisions are not yet in force. The Family Law Committee of the Scottish Civil Justice Council is currently setting up a sub-committee on implementing the vulnerable witnesses and parties aspects of the 2020 Act.

An issue with the current victims and witnesses legislation is that existing provisions about special measures in the 2004 Act rely on there being 'witnesses' and 'evidence', and a number of civil court hearings are non-evidential, so there are no 'witnesses' or 'evidence'. This consultation is also seeking views on whether changes should be made to victims and witnesses legislation to reflect civil court procedures, which is the topic of Chapter Three.

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?

Chapter Three: Special measures in civil cases

Background

The Vision for Justice in Scotland says that "many of the issues that bring people to the justice system are very traumatic. It is our duty to ensure that we minimise further trauma or re-traumatisation".

This can apply to a number of civil cases as well as criminal cases. For example, civil cases, like criminal cases, can involve people who have suffered domestic abuse.

However, the existing provisions in the Vulnerable Witnesses (Scotland) Act 2004 ('the 2004 Act') for special measures in the civil courts rely on there being 'witnesses' and 'evidence'. A number of civil court hearings are non-evidential and so there are no 'witnesses' or 'evidence'.

Over the years, there have been representations suggesting that people who have suffered trauma, such as domestic abuse, may be less protected in the civil court system than in the criminal justice system. As a consequence, the Children (Scotland) Act 2020 ('the 2020 Act') contains provisions, not yet commenced, on special measures in the family courts.

The analysis of the responses to the consultation which led to the 2020 Act noted that many consultees supported bringing special measures in civil cases closer to the protections available in criminal cases. The 2020 Act just covers family cases, while the proposals below would cover civil cases generally.

Existing provisions

Part 2 of the 2004 Act contains provisions on special measures (such as use of a live television link, use of a screen and supporters) in civil proceedings. In particular, the Act contains provisions to protect a person who is a 'vulnerable witness' 'who is giving or is to give evidence in or for the purposes of any civil proceedings'. The term 'vulnerable witness' includes persons under 18 on the date of commencement of proceedings.

Changes (not yet commenced) introduced by the Children (Scotland) Act 2020

Sections 4 to 7 of the 2020 Act introduce special measures to be used to assist vulnerable witnesses and parties in civil proceedings arising out of children's hearings or where the court is considering making an order under section 11 of the Children (Scotland) Act 1995 ('the 1995 Act'). These provisions are not yet in force. The Family Law Committee of the Scottish Civil Justice Council has set up a sub-committee on implementing the vulnerable witness and parties aspects of the 2020 Act. Further information on the set up of the sub-committee on the vulnerable witnesses and parties aspects of the 2020 Act can be found at paragraphs 13 to 15 of the Family Law Committee minutes of 27 September 2021.

Prohibition on personal cross-examination

One of the special measures envisaged by the 2020 Act would be to allow the court to prohibit a party to the proceedings from personally conducting their own case and cross-examining witnesses in certain circumstances, such as when there has been domestic abuse. A solicitor would be appointed to the party who has been prohibited from personally conducting their own case. Under the 2020 Act, this special measure is to be available only in court proceedings arising out of children's hearings or where the court is considering making an order under section 11(1) of the 1995 Act (on matters such as child contact and residence).

Special measures in non-evidential family hearings

Section 8 of the 2020 Act, once commenced, will amend the 1995 Act to require the court to consider the use of special measures to reduce distress in relation to vulnerable parties which may be caused by attending or participating in hearings.

Section 8 relates to proceedings in which the court is considering, or has considered, whether to make an order under section 11(1) of the 1995 Act. This provision is specifically aimed at Child Welfare Hearings in family cases which are generally non-evidential.

Other civil cases?

The measures included in the 2020 Act, which cover some family cases such as child contact and residence, raise the question of whether provision should be made so that:

- personal cross-examination could be prohibited in evidential hearings in civil cases generally when the circumstances require this measure to be taken

- special measures could be available when required for all civil court hearings whether the hearings are evidential or not

Extending provisions in these areas could cover a wide range of civil cases. The benefit of extending these protection measures to civil cases generally is because vulnerable witnesses and parties may be involved in a range of civil cases and not just in family cases.

Prohibition of personal cross-examination in civil cases, when required?

On prohibiting personal cross-examination in civil evidential hearings generally it may be more likely that circumstances will arise in child contact and residence cases where personal cross-examination may need to be prohibited. However, it is possible to imagine, for example, other civil cases where one of the parties has carried out domestic abuse on one of the other parties.

If there should be a need to prohibit personal cross examination in a specific case because of the circumstances in that case, the party involved would need legal representation. This might require a register of solicitors similar to that proposed (and not yet in force) for family cases in section 7 of the 2020 Act. Solicitors on this register could be appointed to act on behalf of a party for these purposes. There would be resource implications.

If there should be primary legislation in this area, there might be a need for rules of court as well. If that should be the case, the Scottish Government would prepare a policy paper to go to the Scottish Civil Justice Council, in line with usual practice. Information about how court rules are made can be accessed on the Scottish Civil Justice Council's website.

Special measures in non-evidential civil hearings, when required?

On special measures in non-evidential civil hearings, these could potentially be required in a wide range of hearings such as:

- family cases (as discussed above, the 2020 Act makes specific provision for some family cases)

- applications for a civil protection order, such as an interdict or a non-harassment order or a forced marriage protection order, to protect against domestic abuse or other forms of abuse

- applications by the police for court orders under the Age of Criminal Responsibility (Scotland) Act 2019 (although these applications are by the Police, they are under civil procedures)

- applications by the police for domestic abuse protection orders under the Domestic Abuse (Protection) (Scotland) Act 2021 (again, although these applications are by the police, they will be under civil procedures)

The Scottish Government's understanding is that, other than family options hearings and child welfare hearings, a party would usually only attend procedural hearings if they were not legally represented.

Extending provisions on special measures would have resource implications. If there should be primary legislation in this area, there might be a need for rules of court as well.

The position in England and Wales

In England and Wales, part 5 of the Domestic Abuse Act 2021 ('the 2021 Act') makes provision on special measures in family and civil proceedings. In England and Wales, a distinction tends to be drawn between family and civil proceedings. This distinction is not normally drawn in Scotland. The 2021 Act includes provision on:

- special measures in family proceedings for victims of domestic abuse
- special measures in civil proceedings for victims of domestic abuse and of specified offences
- prohibition of personal cross examination in certain circumstances in family and civil proceedings

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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

Chapter Four: Review of defence statements

Background

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.

The defence statement must set out:

- the nature of the accused's defence, including any particular defences on which the accused intends to rely
- any matters of fact on which the accused takes issue with the prosecution and the reason for doing so
- particulars of the matters of fact on which the accused intends to rely for the purposes of their defence
- any point of law which they wish to take and any authority on which they intend to rely for that purpose
- by reference to their defence, any information that they require the prosecutor to disclose
- the reasons why they consider disclosure by the prosecutor of any such information is necessary

Having lodged such a statement, the accused is required, not later than seven days prior to the trial diet, to either lodge a statement confirming that there has been no material change in circumstances relating to the accused's defence since the last defence statement was lodged, or, where there has been a material change in circumstances in relation to their defence since the last defence statement was lodged, to lodge a fresh statement setting this out. If at any stage there is a further material change in circumstances in relation to the accused's defence, the accused must lodge a fresh defence statement.

The primary purpose of the defence statement is to assist the Crown in discharging their duty to disclose information relevant to the defence. However, as noted in the policy memorandum for the Criminal Justice and Licensing (Scotland) Bill, the requirement for the accused to lodge a defence statement may also be relevant in assisting the court in identifying the real issues in dispute in a case and therefore, to assist the court in managing the progression of the case.

Lady Dorrian's Review

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 Scottish Government is committed to considering how such a review might operate and is pursuing this both through the work of the Governance Group and by using this consultation to seek views on key aspects of what issues such a review should consider and what form it should take.

The Review expressed the view that, "defence statements tend to be vague, anodyne and often lodged late. In addition, the timescale for the provision of defence statements is such that even were any detail to be provided, any beneficial effect on advancing disclosure is likely to be minimal". In particular, the Review noted that the statutory duty to lodge a defence statement could be met by a plain denial or call upon the Crown to prove its case (see Barclay v. HMA) as there is no statutory onus created by the provision for the accused to advance a positive defence.

The Review notes that while it appears that one of the reasons for introducing a requirement for the accused to lodge a defence statement was to assist the court in identifying the real issues in dispute, "the fact that the requirement to lodge a defence statement is not being operated in this way simply puts a heavier burden on Preliminary Hearing judges who have to manage cases as they progress, and one of whose tasks is to ascertain the extent to which there is a dispute between the Crown and the defence on matters of fact."

In Scotland, the only purpose that it is expressly stated that a defence statement can be used for is facilitating the Crown's disclosure duty. Notwithstanding the mention noted above that is made in the policy memorandum for the Criminal Justice and Licensing (Scotland) Bill as to the provision assisting judicial case management, there is nothing in the legislation itself which provides that it can be used by the court to assist in managing the case and identifying the core factual matters in dispute.

The Review states that "a more exacting requirement on the accused to provide a meaningful defence specifying for example the respects on which the defence takes issue with the Crown case would enhance the court's current case management powers, and those of any specialist court." This issue affects all cases tried on indictment though, in view of the fact that sexual offence cases are disproportionately likely to proceed to trial following a 'not guilty' plea, any changes made to the law concerning defence statements may be of particular relevance to sexual offence cases.

The Review contrasts the provision at section 70A of the 1995 Act with the statutory position in England and Wales. There, the position as set out at Part 1 of the Criminal Procedure and Investigations Act 1996 Part 1 of the Criminal Procedure and Investigations Act 1996 is that a court is entitled to make comment on, and the jury is entitled to draw inference from, the fact that an accused either does not lodge a defence statement timeously or changes their position at trial from that given in any defence statement lodged prior to the trial. This is seen as providing an incentive for the accused to make reference in their defence statement to any key matters which they intend will form a part of their defence in court as if they do not, the court would be entitled to comment on, and the jury would be entitled to draw inference from, the fact that the matter was not referred to in the accused's defence statement.

The Review notes that this approach is consistent with the different nature of the caution administered in England by the police when arresting a person on suspicion of having committed a criminal offence, and the provisions of section 34 of the Criminal Justice and Public Order Act 1994 section 34 of the Criminal Justice and Public Order Act 1994, which enables juries to draw inferences adverse to the accused's case if at trial the accused relies on facts which they could reasonably have been expected to mention when questioned or charged, but did not mention. The Review acknowledges that "it may not be necessary to go so far in Scotland, but there would be considerable benefit in strengthening the requirement to lodge a meaningful defence statement".

As noted above, the Review also expressed concerns about the timescales within which defence statements require to be lodged. Any reform to the timescales prescribed at section 70A of the 1995 Act for the lodging of defence statements by the accused would need to be considered in the light of other statutory timescales operating in the criminal justice process. Most significantly, section 66 of the 1995 Act sets out that the indictment must be served on the accused at least 29 clear days prior to the preliminary hearing in a High Court case and at least 29 clear days before the first diet in a Sheriff Court case. Consideration would need to be given as to whether any change to the timescale for lodging a defence statement required these time limits to be revisited in order to provide the accused's defence team with sufficient time to consider the terms of the indictment against the accused.

Any review would also have to consider how any revised time frame for the lodging of a defence statement would interact with the timescales for the lodging by the accused of any application under section 275 of the 1995 Act to lead evidence that they would otherwise be prohibited from leading in court, taking account of the complainer's right to object to the introduction of such evidence.

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

Yes
No
Unsure

Please give reasons for your answer.

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?

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

Chapter Five: Anonymity for complainers in sexual offence cases

Background

This part of the consultation explores one of the recommendations within Lady Dorrian's Review in the area of anonymity of complainers in sexual offence cases.

The issues discussed in this chapter include:

- enshrining into Scots law an automatic right to anonymity for complainers in sexual offence cases
- the offences an automatic right to anonymity should apply to
- when such a right might start and end
- what circumstances may lead to the right being set aside
- what the available defences and penalties would be if someone breached a complainer's anonymity

The proposals in this consultation are being considered in the context of seeking to improve the experience of complainers in sexual offence cases and reflect the commitment in the Programme for Government 2021-22 to bring forward legislation in this session of Parliament to protect the anonymity of all complainers of sexual crimes under Scots law.

Current legal framework in Scotland – is there a gap in the law?

Scotland's courts have a long tradition of hearing cases in public which is sometimes referred to as the principle of 'open justice' or 'justice being seen to be done.' The right to a public hearing also forms part of the right to a fair trial under article 6 of the European Convention on Human Rights. The Scottish Government recognises that the transparency of our courts is a fundamental element of enabling public confidence in court proceedings and the administration of justice.

There are also occasions, however, when it is appropriate that certain information relating to court proceedings is not published. This chapter explores the issue of complainer anonymity in sexual offence cases.

At present Scotland differs from the remainder of the United Kingdom in that there is no automatic legal right to anonymity for complainers in sexual offence cases in Scots law.

In practice, complainers in cases of rape and other sexual offences usually give evidence under 'closed court' conditions, which means that the public is excluded from the court during the giving of their evidence (see sections 92(3) and 271HB of the Criminal Procedure (Scotland) Act 1995). This exclusion does not apply to

members of the press whose presence is permitted in accordance with the principle of open justice.

While a court can prohibit the publication of details of complainers in sexual offence cases, this does not happen automatically: it requires a court in any given case to make such an order.

The existing legal tools available to Scottish courts in this regard are found in the Contempt of Court Act 1981 ('the 1981 Act'). Under section 11 of the 1981 Act, where a court allows a name or other matter to be withheld from the public during the proceedings, for example further identifying information such as a person's address, photograph or place of work, "the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld".

A person who breaches such an order can be prosecuted for contempt of court and, if found guilty, could be sentenced to imprisonment for up to two years, made subject to a fine, or both.

It is important to recognise the making of a section 11 order is not done automatically by a court, and in most cases reliance is instead placed on a long-standing, non-statutory convention against naming complainers in sexual cases by the media, as discussed further below.

Indeed, research set out by Dr Andrew Tickell in his 2020 paper for Glasgow Caledonian University 'Why don't sexual offence complainers have a right to anonymity in Scotland?', found that in 2018/19, while 1,762 people were proceeded against in Scotland's criminal courts for sexual offences, including 324 people charged with rape, only 8 orders were made under section 11 of the 1981 Act in criminal cases.

This indicates that, while the courts have a power to protect the anonymity of complainers in individual cases, in practice, such power is not often used. Instead, reliance is placed on a long-standing, non-statutory convention, as operated by major media outlets, which provides that complainers in sexual offence cases will not be named without their consent.

This chapter will go on to illustrate why the current position – relying to a significant extent on voluntary self-regulation by the media - does not provide adequate protection for complainers in sexual offence cases and that in the absence of an automatic legislative right to anonymity, there is a gap in the existing legal framework in Scotland.

Existing non-statutory protections for complainer anonymity

As touched on above, the media have a longstanding practice of keeping the names of complainers confidential in news reports. There is a recognised convention that the identity of complainers is withheld from publication by the media (see Sweeney v X | [1982] ScotHC HCJAC).

The Independent Press Standards Organisation ('IPSO') published an Editors' Code of Practice ('the Code') which places restrictions on the reporting of sexual offences to protect the identity of victims. The Code is enshrined in the contractual agreement between IPSO and newspaper, magazine and electronic news publishers.
The Code is self-described as, "the cornerstone of the system of voluntary self-regulation", which "balances both the rights of the individual and the public's right to know."

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

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

Other clauses to consider include Clause 1 (Accuracy), Clause 2 (Privacy) and Clause 6 (Children).

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of their publications. Therefore, this method of voluntary self-regulation can be said to rely to a significant extent on what could be termed the more traditional forms of media and publishing structures, where there is a governing editor and/or publisher with oversight and control over what is ultimately published, and who will have regard to the Code.

The Code relies on the continued discretion and voluntary self-regulation of a governing editor or publisher as, in the absence of a section 11 order made by the court, there is no legal prohibition in Scotland to publish identifying information of a complainer in a sexual offence case. Therefore, in terms of the Code, it falls to consider whether there is 'adequate justification' for such disclosure.

The increased use of social media platforms on the internet in the last twenty years, whereby any member of the public can become a de facto publisher with potential global reach, calls into question whether it remains sustainable to rely on media self-regulation to prevent the identity of complainers in sexual offence cases from being made public without their consent. If the court has not made an order under section 11 of the 1981 Act, any person, including, for example, the accused or their friends or acquaintances, can lawfully post information publically about the identity of a complainer in a sexual offence case.

While there have been a small number of cases where complainers have been identified in the press without their consent, it is not thought to be a widespread issue and there is little evidence to suggest that this has occurred in Scotland any more than is the case in England and Wales, where it is a criminal offence to do so. However, the existence of statutory automatic protection in England and Wales and in many countries throughout the world is likely providing additional reassurance to

those involved as complainers in sexual offence cases in that jurisdiction and may serve to address the inherent risk that 'new media' poses to vulnerable complainers.

The possible repercussions of the rise of social media within our culture when it comes to sensitive cases involving sexual offending has been explicitly recognised by Lady Dorrian's Review which provides:

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

Progression of technology and the internet has had undoubted benefits for the empowerment of the individual to express themselves and share views and information. However, the relative ease and speed by which information can now be published online to the public has exponentially increased the risk of causing lasting damage to a victim of sexual violence by either naming them or posting information publically which may lead to their identification, whilst at the same time safeguarding the publisher's own anonymity.

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

Therefore, an underlying question which this consultation must explore is whether the current position in Scotland, relying on convention and the voluntary self-regulation of the press, bolstered where necessary by orders of the court, provides adequate protection.

The Review's ultimate conclusion on this question was that it did not:

> "Given the cumbersome nature of the steps which must be taken to secure anonymity, and the risk of inadvertent disclosure which exists in a system which relies on convention rather than regulation, the conclusion must be that it does not. There may generally be little risk of publication of inappropriate matter in the main stream press, although it has occurred from time to time, but there is now a proliferation of sources of reporting and blogging which are not part of that main stream, and are not regulated by IPSO. The rise of "new" or "citizen" journalists, and the vast increase in the use of social media, suggest that the tools hitherto relied upon in Scotland are no longer adequate and that legislation is required to ensure the adequate protection of the identities of complainers making allegations of rape and sexual assault. The introduction of legislation providing anonymity to such individuals is accordingly recommended."

The Scottish Government welcomes the Review's recommendation in this area and committed in its Programme for Government 2021-22 to introduce legislation to protect the anonymity of all complainers of sexual crimes.

Rationale for complainer anonymity

The Helibron report (1975) has been cited as leading to the first legislation in the area of complainer anonymity in England and Wales. As to the underlying rationale for complainer anonymity in sexual cases, the report recognised the detrimental impact of the publicity of sexual offences in particular, both directly upon the complainer and more generally upon its impact on the willingness of victims to come forward and report sexual crimes. The report observed:

> "153. …public knowledge of the indignity which [a complainer] has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bring proceedings……..
>
> 154. We are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as [complainers] would be less unwilling to come forward if they knew that there was hardly any risk that the judge would allow their name to be disclosed."

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

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

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

It can be said the same considerations apply to the question of providing for an automatic statutory right to complainer anonymity, in sexual offence cases, in Scots law.

There appears to be broad consensus amongst legal practitioners, academics and stakeholders that legislating for complainer anonymity in sexual offence cases is a positive step with positive impacts on the confidence of victims to enter the criminal justice process, knowing that the matter will be handed sensitively. The Scottish Government recognises the bravery of complainers of sexual offences who come forward and report sexual crime and enshrining a right of anonymity into Scots law may serve to limit the fear of unwanted publicity and the associated worry and anxiety that this may cause, providing welcome legal certainty to complainers that identifying information will not be disclosed. No person should ever feel deterred

from reporting a sexual offence to the police through fear, shame or embarrassment at the possibility of the matter then becoming public knowledge as a result, whether that be amongst friends, colleagues, the local community, strangers, or even family members, when it has not been the complainer's choice to confide in others or 'tell their story' more publically. Depending on how such a right is legislated for, a statutory right to anonymity may serve the dual purpose of increasing the protection and confidence of complainers in sexual offence cases while at the same time recognising and preserving their autonomy and 'right to be heard', should survivors wish to speak publically about their lived experiences.

It is clear that at present Scotland differs from the remainder of the United Kingdom, and many countries around the world, in that there is no automatic legal right to anonymity for complainers in sexual offence cases in Scots law. Instead, the position in Scotland relies on voluntary self-regulation by the media and orders of the court. This position can be said to be unsatisfactory for complainers in sexual offence cases, particularly in light of the increased use of social media, which enables anybody to become a 'publisher' who can make information available to anyone with access to the internet. This lack of legal protection of complainer anonymity may in turn erode confidence in reporting sexual offences.

The pertinent question surrounding complainer anonymity therefore appears to be not should such a legislative right be enshrined into Scots law, but how such a legislative right should be enshrined into Scots law. This part of the consultation goes onto explore how existing protections for complainer anonymity have been implemented throughout the United Kingdom and internationally and the underlying rationale in support of such protections.

Approach in other jurisdictions

The regulation of the media to provide anonymity for complainers in sexual offence cases is practised in many countries, either through legislation (for example, England, Wales and Northern Ireland; Australia, Canada, India and New Zealand) or through policy (for example, most of the United States).

It is clear that, with the exception of the USA, Scotland is unusual in that complainers in sexual offence cases currently have no automatic legal right to anonymity.

In order to help assess how policy could be developed for Scotland, it is helpful to consider how other countries operate policy in this area. A more detailed exploration of the different approaches both across the United Kingdom and internationally is set out at Annex B.

Broadly speaking, it is understood a large majority of those countries which provide complainers in sexual offence cases with a right to anonymity, provide that this right is automatic –there is no requirement for the complainer (or the prosecutor) to apply to the court for an order to be put in place. This avoids any requirement for the complainer to initiate any court action to obtain such an order. One advantage of this is that a complainer cannot lose their right to anonymity either because of an oversight or, if they were required to initiate a court process themselves, because they lacked the resources to do so. Providing for an automatic statutory right to

anonymity would bring Scotland into line with the remainder of the United Kingdom and international practice in this area.

If sexual offence complainers had an automatic right to anonymity in Scots law, they might still wish to waive this. To do so, such a complainer (or, strictly speaking, any publisher wishing to assist them in doing so) may have to go through some form of legal process. On balance it appears that it would be appropriate for the 'default' starting position to be that the complainer has an automatic right to anonymity which they can waive, rather than their being required to make some form of application in order to obtain that right in the first place.

Accordingly, the Scottish Government proposes that reform of the law in this area should centre on the provision of a statutory right of anonymity which is automatic and this chapter goes onto explore how such a right may be legislated for.

When an automatic right of anonymity should take effect

If there is to be an automatic right to anonymity for complainers in sexual offence cases, a key question is the point at which this automatic right should take effect. Different jurisdictions have taken different approaches to this. In England, Wales and Northern Ireland, it takes effect from the point at which an "allegation" of a qualifying sexual offence is made.

As set out in 'How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LETHERSPEAK' by Dr Andrew Tickell – a forthcoming piece in the Edinburgh Law Review - a similar approach is adopted in Victoria, India, Hong Kong and New Zealand, which requires the allegation to be made to a police constable. Dr Tickell also notes that in other jurisdictions, restrictions on identifying a complainer take effect when an accused person is formally charged (for example, Singapore and the Republic of Ireland) or when the case first calls in court (for example, Australia's Northern Territory) and that some jurisdictions rely on court orders to prohibit identifying information.

A system where the complainer must apply for their own court order may place an unnecessary burden - administrative and/or financially - on them, and potentially discourage applications from being made.

If the right to anonymity only takes effect at the point at which an accused person is formally charged by police or when their case first calls in court, there is a risk, perhaps especially in a high profile case, that the anonymity of the complainer could be compromised before this point. However, there may be a case for requiring something more formal than an 'allegation being made' for a complainer to gain the right to anonymity. The New Zealand/India/Hong Kong approach of requiring the allegation to be made to a police officer would have the advantage of tying the right to anonymity clearly to the earliest stage of the criminal justice process and providing the complainer with certainty of this right, without having to go through the burden and cost of a court process, proving protection at the earliest stage. Though it would mean that the protection would not be available to someone claiming to be a victim of a sexual offence if neither they nor any other person reports the matter to the police.

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?

a) when an allegation of a sexual offence is made
b) when a person reports an alleged sexual offence to a police constable
c) when an accused person is formally charged by the police with a sexual offence
d) when criminal proceedings for a sexual offence first call in court
e) other – please provide details

Please give reasons for your answer.

Offences to be covered by an automatic right of anonymity

It is helpful to consider the approaches in other jurisdictions as to the scope of offences which should be covered by a statutory right to anonymity. In the overwhelming majority of the jurisdictions we have considered that provide for an automatic right to anonymity, that right is restricted to what may be termed 'sexual offences'.

Lady Dorrian's Review recommended, "legislation should be introduced granting anonymity to those complaining of rape or other sexual offences along the lines of the Sexual Offences (Amendment) Act 1992."

The Sexual Offences (Amendment) Act 1992 ('the 1992 Act') is the legislation that provides lifetime anonymity for complainants of sexual offences in England, Wales and Northern Ireland. In light of the recommendation in Lady Dorrian's Review, it is considered the sensible starting point for the prescribed offences over which a right to anonymity should apply in Scots law is the sexual offences as set out in section 288C of the Criminal Procedure (Scotland) Act 1995. The list of offences at section 288C captures what may generally be categorised as sexual offences in Scots law. It includes the offences contained in the Sexual Offences (Scotland) Act 2009, which created a new statutory framework for certain sexual offences in Scots law, clarifying and modernising the previous mix of common law and statutory provision in this area.

There has, however, been some criticism that the 1992 Act contains some omissions in the offences which are covered by the right to anonymity. For example, it is understood that the right does not extend to the disclosure of intimate images. Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ('the 2016 Act') contains the offence of disclosing, or threatening to disclose, an intimate photograph or film. Under section 2 of the 2016 Act, it is an offence to disclose a photograph or film showing a person in an intimate situation and it is an offence to threaten to disclose a photograph or film showing a person in an intimate situation. The nature of the offending behaviour and, in particular, the impact that unwanted publicity may have on the complainer is such that there may be benefit in including this in any statutory provision for complainer anonymity.

Finally, further offences which may be of relevance in legislating for an automatic right of anonymity are those in the Protection of Children and Prevention of Sexual

Offences (Scotland) Act 2005 (‘the 2005 Act’). Section 1 of the 2005 Act provides for an offence of meeting a child following certain preliminary contact. The offence is intended to cover situations where an offender establishes contact with a child through, for example, meetings, telephone conversations or communications on the internet, and gains the child’s trust and confidence so that the offender can arrange to meet the child for the purpose of engaging in unlawful sexual activity involving, or in the presence of, him or her. Other offences of relevance in the 2005 Act include paying for sexual services of a child (Section 9); causing or inciting and arranging or facilitating provision by a child of sexual services or child pornography (section 10 section 12); and controlling a child providing sexual services or involved in pornography (section 11).

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

a) offences contained at section 288C of the Criminal Procedure (Scotland) Act 1995

b) intimate images offence contained at section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016

c) offences contained in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

d) other – please provide details

Please give reasons for your answer.

End point of a right to complainer anonymity

There are differing approaches internationally as to the point at which a complainer’s right to anonymity ceases to have effect. In some jurisdictions, most notably India, the right to anonymity not only extends throughout the complainer’s lifetime, but also following death. This approach has been criticised, as it prohibits next of kin or family members from sharing their loved one’s story and has resulted in family members seeking refuge in the international press in order to share the victim’s story.

Other jurisdictions, including England, Wales and Northern Ireland, adopt the approach that anonymity expires on the death of the complainer. This has the advantage of simplicity and certainty for the complainer during their life time while also representing a natural end point which is consistent with approaches in other areas of law when it comes to privacy and personal data protection.

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

a) upon the death of the complainer
b) no automatic end point
c) other - please provide details

Please give reasons for your answer.

Circumstances in which anonymity may be set aside

Sometimes victims of sexual offences choose to waive their anonymity in order to tell their story to the media and speak about their lived experiences. If anonymity is to be placed on a statutory basis, with publication of the details of a complainer in a sexual offence case a criminal offence, consideration requires to be given as to how victims can continue to exercise that right. There are a minority of jurisdictions where it is an offence for anybody, including the victim themselves, to publish information that could identify the victim of a sexual offence, but where such laws are in place, they have been criticised as amounting to 'gag laws'.

If it is accepted that complainers should have the right to set aside their anonymity, the key question to be determined is what role, if any, the court should play in setting aside the anonymity of complainers in sexual offence cases. There is a balance to be struck between, on the one hand, avoiding placing unnecessary administrative and cost burden on a victim of a sexual offence who wishes to tell their story and, on the other hand, ensuring that they have genuinely consented to waive their anonymity.

Different jurisdictions which allow a complainer to waive their anonymity have taken different approaches to this. Dr Tickell notes in his forthcoming piece on complainer anonymity that, in New Zealand, the complainer is required to make an application to the court to waive their anonymity and the court is required to grant the order if it, "is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order".

However, many jurisdictions permit complainers to waive their anonymity without first obtaining the permission of a court. This has the benefit of making the waiving of anonymity for those complainers who wish to do so easy and costless. In England, Wales and Northern Ireland this is achieved by providing that it is a defence to the offence of disclosing the identity of the complainer where the complainer consented to this disclosure. This ensures both that the complainer themselves can directly disclose their identity and that they can, if they prefer, do so by telling their story to a media outlet. In theory, there could be circumstances where it may be unclear whether a complainer has, in fact, consented to waive their right to anonymity (for example, where a third party discloses their identity after their identity has been disclosed by another publication and it is wrongly assumed that the complainer had consented to that first disclosure). However, in practice, this does not appear to have created significant difficulties in the various jurisdictions that have adopted this approach.

There will also be cases involving multiple complainers where, depending on the facts and circumstances of the particular case, the fact that one complainer elects to waive their anonymity could enable the identification of other complainers who have not chosen to do so. However, it may be possible to address this without making explicit provision in this area. If it is an offence to identify a complainer in a sexual offence case without their consent, anyone wishing to waive their anonymity in a case involving multiple complainers would be required to do so in a manner which did not identify other complainers without their consent, and any media organisation / third party publishing information about such a case would require to ensure that information that they publish about a case did not reveal the identity of anyone who had not given their consent.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

a) unilaterally by consent of the complainer
b) following an application to the court by the complainer
c) other – please provide details

Please give reasons for your answer.

Waiving anonymity in respect of children

If an approach is adopted whereby the consent of adult complainers is required before their details can be published without the need for judicial involvement, there may nonetheless be a case for adopting a different approach where the complainer is a child.

A child may lack the maturity to fully understand what they are consenting to and as such, it might reasonably be argued that additional protections are required before identifying information can be published in relation to a child complainer in a sexual offence case irrespective as to whether they have consented to do so or not. Court oversight may be helpful in this regard, by providing for the right of a child complainer to apply to the court for permission to waive their anonymity in connection with a case.

A secondary question would be the age threshold at which a person is deemed a child for these purposes and may not unilaterally by consent authorise the publishing of identifying information. As Dr Tickell sets out in his forthcoming piece on complainer anonymity, most jurisdictions establish the threshold of 18 years of age to make or authorise secondary publishers to disclose identifying information, including India, Tasmania, New Zealand, the Australian Northern Territory, Queensland, and South Australia.

A different approach is adopted in England, Wales and Northern Ireland, where section 5(3) of Sexual Offences (Amendment) Act 1992 states that complainants must be sixteen years of age to authorise publication. A younger still approach is adopted in New South Wales, which sets a threshold of fourteen years of age, as set out in section 578A(4)(c) of the Crimes Act 1900 No 40.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer, including (if you agree) what you think this age should be.

Powers of the court to set aside anonymity

Many jurisdictions do not provide the court with a power to override complainer anonymity in the course of criminal proceedings. In this regard, the approach in England, Wales and Northern Ireland under the 1992 Act can be described as unusual. This provides under section 3 that the court has the power in certain circumstances, to direct that the complainer's right to anonymity under section 1 shall not apply.

On one view, the ability of the court to override a complainer's anonymity, irrespective of the complainer's wishes, erodes the certainty that the relevant provisions in law are seeking to provide to victims of sexual offences.

However, there could be very exceptional circumstances where the court considers it is nonetheless in the interests of justice to override a complainer's right to anonymity. Examples of the circumstances in which the courts in England, Wales and Northern Ireland can override anonymity are set out at Annex B**.**

One possible alternative to leaving this entirely to judicial discretion could be that an automatic right of anonymity would expire or could be overturned by a court, if the complainer were charged or convicted of any subsequent crime against public justice in connection with the criminal allegation(s) and associated proceedings in question, for example, perjury, perverting the course of justice or wasting police time.

This would have the advantage of providing complainers with certainty about the operation of a statutory right to anonymity while acting a safeguard where an offence against public justice is committed.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer, including (if you agree) your view on the circumstances in which this power should be available.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Penalties

Criminal cases in Scotland are dealt with in different courts depending on how serious they are. They can either be 'summary' (decided by a judge sitting without a jury) or 'solemn' (more serious cases decided by a jury). It is usually up to the procurator fiscal (the prosecutor) to decide what court a case will be heard in although sometimes sets out what this should be, for example, trials for rape must be heard in the High Court. Some less serious offences must be prosecuted at summary level. Others can be prosecuted both ways. Maximum penalties are set by law for each court a case can be heard in.

The Scottish Sentencing Council website provides further information about the maximum sentencing powers of each court, which is set out in the following table:

	Justice of the Peace Court	Sheriff Court (summary)	Sheriff Court (solemn)	High Court
Who decides the verdict?	Justice of the peace	Sheriff	Jury	Jury
Who sets the sentence?	Justice of the peace	Sheriff	Sheriff	Judge
Maximum fine	Up to £2,500	Up to £10,000	Unlimited	Unlimited
Maximum length of imprisonment	Up to 60 days	Up to 1 year	Up to 5 years	Up to life

Statutory offences usually specify the maximum fine available to the court on conviction. Often, this is with reference to the 'standard scale', which is a scale setting out five levels of fine up to a maximum of £5,000.

The standard scale applies to statutory offences which may only be prosecuted at summary level. For solemn level statutory offences, the maximum financial penalty is an unlimited fine.

Where a statutory offence can be prosecuted at both solemn or summary level, and the accused is convicted of it at summary level, the maximum fine tends to be the 'prescribed sum' (currently £10,000).

Turning to the current penalties for contempt of court, where a person is convicted for breaching a section 11 order in Scotland under the Contempt of Court Act 1981 and that order relates to a solemn sexual offence case, the maximum sentence that can be imposed is two years' imprisonment and/or an unlimited fine. Where a person is convicted for breaching a section 11 order and that order relates to a summary sexual offence case, the maximum sentence that can be imposed is three months' imprisonment and/or a fine not exceeding level 4 on the standard scale (£2,500).

It is not clear why publishing the details of a complainer in a summary case should necessarily attract a lower penalty than publishing the details of a complainer in a solemn case, though the sentencing judge will take into account the particular facts and circumstances when determining the appropriate sentence in any given case.

In England, Wales and Northern Ireland the maximum penalty on conviction for the offence of publishing without consent the details of a complainer in a sexual offence case under section 5 of the 1992 Act is an unlimited fine. England, Wales and Northern Ireland is unusual amongst the jurisdictions that provide for a statutory right to anonymity in that imprisonment is not a possible penalty.

It may be argued that this is a more appropriate comparison than the offence in the 1981 Act, which covers a wide range of different circumstances in which a person may be found guilty of contempt of court. There may, however, be a case for providing for maximum penalties more appropriate to offences committed by corporate bodies due to the financial resources available to large media outlets. For example, up to two years' imprisonment and/or an unlimited fine.

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?

a) up to 2 years' imprisonment and/or an unlimited fine
b) an unlimited fine
c) up to 12 months' imprisonment and/or a fine of up to £10,000
d) other - please provide details

Please give reasons for your answer.

Defence(s) to breaching anonymity

In England, Wales and Northern Ireland the ability of a complainer to waive their anonymity is framed as an offence. This gives complainers the ability to self-publish or publish their stories in mainstream media without requiring to make an application to the courts. This approach has the advantage of empowering survivors to share their story if they wish without the need to go through a cumbersome and costly court process.

For third party publishers, this means if an individual or member of the media publishes identifying information about a complainer in a sexual offence case, unless it can be established the publishing was carried out with the informed written consent of the complainer (per the criteria set out in the defence), an offence of breaching anonymity will have occurred and the defence will not be open to them.

To ensure that the ability to waive anonymity by the complainer is not abused, the 1992 Act restricts the operation of the defence so it does not apply where written consent was not freely given, i.e. if “any person interfered unreasonably with the peace or comfort of the person giving the consent to secure it”.

Sections 5(5) and 5(5A) of the 1992 Act also provide for more general defences where a person is charged with an offence of breaching anonymity where it can be proven they were not aware, nor did they suspect or have reason to suspect, that the publication included the matter in question; and separately where it can be proven that at the time of the alleged offence they were not aware, and neither suspected nor had reason to suspect, that the allegation in question had been made. The latter defence may reflect that the starting point for complainer anonymity under the 1992 Act, is ‘as soon as an allegation is made’, where there could be uncertainty as to if/when precisely this is deemed to have occurred, as opposed to a more definitive starting point such as report to a police constable.

In light of the social media age we are now living in and the ease by which information can be shared online, there may be situations where identifying information is published without the consent of the complainer and in contravention of the complainer’s right to anonymity, and the material in question is then shared/retweeted etc. by third parties who were not aware and had no basis to suspect that the original material was published in breach of the law. To guard against unfairly criminalising an individual or publisher for the sharing of information in these circumstances, there may be benefit in providing for a general defence of ‘reasonable belief,’ i.e. that it is a defence to a charge of breaching anonymity that the person reasonably believed the complainer had consented to publication.

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

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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? Please select all that apply.

a) adopt the model of the 1992 Act in England, Wales and Northern Ireland
b) a ‘reasonable belief’ defence
c) other – please provide details

Please give reasons for your answer.

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?

Chapter Six: Introduction of independent legal representation for complainers in sexual offence cases

Background

Our Vision for Justice in Scotland sets out our priorities which are focused on delivering person-centred and trauma-informed practices across the justice sector, including taking greater action to hear victims' voices.

This includes our commitment to making improvements to the justice system which will give complainers of sexual crime greater protection when engaging with the Scottish criminal justice system.

This chapter explores 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.

The proposals discussed in this chapter include:

- whether complainers in sexual offence cases should have the right to independent legal representation, and what it should cover
- rights of appeal against decisions to allow sexual history or character evidence
- whether ILR is publicly funded

For the purposes of this proposal, ILR means the right for a complainer in a sexual offence case to seek independent legal advice and to appoint an independent legal representative which includes the right for that representative to represent the complainer at any hearing relevant to the issues discussed in this section.

Current framework in Scotland

Under the current law in Scotland, there are restrictions on what evidence can be led in trials for certain sexual offences. For example, as set out in section 274 of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'), the court shall not admit any evidence which shows or tends to show particular behaviour and sexual history about the complainer. This includes that the complainer is not of good character (whether in relation to sexual matters or otherwise) or that they have at any time engaged in sexual behaviour that doesn't relate to the case. This rule also means that witnesses shouldn't be asked any questions which are designed to bring out such evidence.

The rule is designed to protect complainers in sexual offence trials from giving evidence about irrelevant sensitive and private matters, or being asked distressing questions, when this is not necessary. However, there are some exceptions to this rule and the court can allow such evidence where an application is made under

section 275 of the 1995 Act and the court is satisfied of certain things, including that the evidence is relevant to establishing whether the accused is guilty of the offence and that its value outweighs any risk of prejudice to the proper administration of justice which includes the protection of a complainer's dignity and privacy. If the court does not grant the application, the evidence cannot be discussed at trial. Where the court admits the evidence, it must state it's reasons for doing so, and at any time may review and limit the evidence permitted. Furthermore, the prosecution or defence for the accused have certain rights to appeal to the High Court against the court's decision on this matter for example, under section 74(2A)(b) of the 1995 Act.

There are fixed timescales to submit an application under section 275: it must be made no less than seven days prior to the preliminary hearing in the High Court and 14 days before the trial diet in Sheriff Court under section 275B(1)(b). An application can also be made in the course of the trial under s275B(2).

However, there is no statutory obligation on the courts under section 275 to notify the complainer of the application nor does a complainer have the right to tell the court they oppose the application or present their views on it to the court. Furthermore, should such an application be considered during the course of the trial, the statutory provisions under section 275B(2) provide that the complainer must not be present during its consideration. Scotland's adversarial system of criminal justice in which both the prosecutor and defence must state and argue their case in court may be perceived to clash with a person-centred approach. The Crown's role as a public prosecutor is to prosecute independently and in the public interest. The Crown does not act on behalf of the complainer and can't provide independent legal advice or assistance to them. The complainer's role in the process is as a witness and therefore they do not have independent legal representation during proceedings.

A number of recent high profile cases have called into question this general approach. Most recently, a full bench High Court appeal court judgment set out that "in order to respect a complainer's Article 8 rights, the court must be given information on the complainer's position on the facts and her attitude to, any section 275 application".

The judgment also set out that it was

> "the duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application. This will almost always mean that the complainer must: be told of the content of the application; invited to comment on the accuracy of any allegations within it; and be asked to state any objections which she might have to the granting of the application."

As a result of that case, the courts have taken steps to record if the complainer in such a case has been made aware of the application. When an application has been lodged in a case, new operational guidance requires the Crown Office and Procurator Fiscal Service (COPFS) to notify the complainer of the application, seek comments on its accuracy and ascertain whether she/he has any objection to it. The court will also be informed of whether the complainer's notification of the application,

their consideration and comments on the accuracy of any allegations within the application and any objections by the complainer to the granting of the application.

Rationale

The Scottish Government is clear that the justice system should always take a victim-centred perspective in addressing sexual crime, whilst balancing the rights of the accused. Improving the complainer's experience of the criminal justice system in respect of an especially intrusive aspect of criminal prosecution is in line with this aspiration, as set out in the Vision for Justice. Arising from the recommendation of Lady Dorrian's Review, we are consulting on whether further improvements are required to strengthen victims' rights through the criminal justice process relating to section 275 applications.

We are aware of a number of recent judicial decisions and research in the use of sexual history evidence or bad character evidence in sexual offences trials which have raised questions about whether complainers can effectively represent their position in relation to the use of previous sexual history evidence. This includes:

- RR v HMA [2021] HCJAC 21
- MacDonald v HMA [2020] HCJAC 21
- Dreghorn v HMA [2015] HCJAC 69
- Donegan v HMA [2019] HCJAC 10
- RN v HMA [2020] HCJAC3

- Cowan, S. (2020) - The use of sexual history and bad character evidence in Scottish sexual offences trials
- Keane, E., & Convery, T. (2020). Proposal for Independent Legal Representation in Scotland for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character

As set out in the research by Keane and Convery, in many cases the nature of the questioning proposed in such applications would "represent a particularly intimate, sensitive and important aspect of a complainer's private life" and engage a complainer's rights under Article 8 ECHR which provides that "everyone has the right to respect for his private and family life, his home and his correspondence."

The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 allows complainers to be notified of, provide views on and access public funded ILR when an application is made to recover their medical or other sensitive documents.

The case of F v Scottish Ministers (known as 'WF'), held that a complainer or witness whose records are being sought is entitled to be notified of an application to recover their medical or any other sensitive records and thereafter a right to be heard in opposition. It is therefore proposed that reform to bring in ILR for section 275 applications is needed to bring the law into line with the process in respect of applications for recovery of medical and sensitive data.

Currently legal aid provision is available for complainers to oppose recovery of medical and sensitive records by way of applications for civil 'ABWOR' (subject to relevant tests). ABWOR is 'assistance by way of representation'. It is a form of advice and assistance funding that allows for a solicitor to represent a client at a hearing. It is proposed by Lady Dorrian's Review that ILR in respect of section 275 applications is publically funded. This could be funded by legal aid under either civil or criminal ABWOR. However, current legislation would not allow for it to be funded under both.

The Scottish Government hosted a round table discussion in November 2020 on the safeguarding of privacy rights for sexual offence victims and perceived barriers to them coming forward to report crimes against them. Representatives attended from victims' organisations, justice partners, the Faculty of Advocates and firms of defence solicitors. A report of the discussion presented by the Chair of Rape Crisis Scotland was published indicating a building of consensus and recommendation for thorough consideration to the introduction of ILR for these limited purposes.

Fiona E. Raitt's research report for Rape Crisis Scotland - 'Independent legal representation for complainers in sexual offence trials' and Lady Dorrian's Review also indicate that there may be cases where there is tension between the Crown's position to prosecute in the public interest and the complainer's own position on their sexual history. The Crown's role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer as it cannot provide independent legal advice or assistance to a complainer and its role does not necessarily coincide with the private interests of a complainer.

Having regard to the importance of this complainers' rights issue, and the fact that there may be significant tension between the interests of a complainer and that of the prosecution, we have set out proposals for consideration of ILR to be made available to complainers in respect of section 275 applications. The provision of ILR would be in line with the trauma-informed principle of 'choice' and has the potential to engage several of the core values associated with trauma-informed practice including collaboration and empowerment. It would allow the prosecutor to focus on the application purely in terms of its significance for the prosecution; and it would ensure that complainers could be satisfied that their views in respect of the application were presented to the court as instructed by them, when the court is deciding the application. Lady Dorrian's Review noted that the court must be given sufficient information to make its determination, bearing in mind that the 'interests of justice' test specifically includes 'appropriate protection of a complainer's dignity and privacy'; and that the complainer's position in response to the application may assist in determining whether the evidence is admissible.

Data on the use of section 275 applications

As a number of researchers and organisations have noted there is a lack of recent data and information on the use of sexual history and character evidence in sexual offences trials in Scotland. As such, it is difficult to form a precise picture of the number of applications which might be made each year. However, Scottish Government funded research on the use of sexual history and character evidence in sexual offences trials is currently underway which may provide more of an insight.

The Justice Analytical Services grant funded project is being undertaken by Sharon Cowan and Eamon Keane (University of Edinburgh) and Vanessa Munro (University of Warwick). It will conduct empirical research, examining existing court processes and practices on use of this data in sexual offences trials and the impact these processes and practices have on sexual offences complainers' experiences of the criminal justice system. The project had been delayed due to the pandemic however this research is now progressing.

HM Inspectorate of Prosecution in Scotland is taking forward an inspection to assess the practice of COPFS in relation to sections 274 and 275 which is hoped will further increase transparency around the Crown's approach to this important issue.

Approach in other jurisdictions

Other jurisdictions have introduced or undertaken reviews and made recommendations regarding the potential for some form of ILR, however, each of these jurisdictions is unique, having differing legislation regarding the use of sexual history evidence generally.

It is our understanding that, in the Republic of Ireland, ILR with appropriate legal aid funding is currently available to complainers of rape and certain specified offences in connection with an application to question them about other sexual experiences, in terms of the Criminal Law (Rape) Act 1981. In their research, Keane and Convery found that in Ireland not all complainers oppose applications once they have had such advice. There is anecdotal evidence to suggest that the mere provision of such advice and assistance may have a positive impact on complainers.

The provision of publically funded ILR up to but not including trial has been recommended for Northern Ireland in Sir John Gillen's Review into the law and procedures in serious sexual offences there.

Matters for consultation

This consultation seeks views on proposals on publically funded ILR to enhance the privacy rights of complainers when applications to lead evidence of their sexual history or what is termed 'bad character' are made.

Whilst there appears to be a general consensus towards further exploration of the introduction of ILR, we consider that it is appropriate to consult on a number of specific issues relevant to the introduction of ILR which require further consideration.

The principle of the right to independent legal representation

Lady Dorrian's Review recommended that ILR should be made available to complainers, with appropriate public funding, in connection with section 275 applications 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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Right to appeal

Lady Dorrian's Review also recommended that complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the Criminal Procedure (Scotland) Act 1995 in circumstances where sexual history or other character evidence is sought under section 275 application.

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?

Strongly agree
Slightly agree
Neutral
Slightly disagree
Strongly disagree

Please give reasons for your answer.

Scope – when the right to independent legal representation should apply

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)?

Strongly agree
Slightly agree
Neutral
Slightly disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Slightly agree
Neutral
Slightly disagree
Strongly disagree

Please give reasons for your answer.

Legal aid

It is proposed by Lady Dorrian's Review that ILR in respect of section 275 applications is publically funded. This could be funded by legal aid under either civil or criminal 'assistance by way of representation' ('ABWOR'). However, current legislation would not allow for it to be funded under both.

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?

Strongly agree
Slightly agree
Neutral
Slightly disagree
Strongly disagree

Please give reasons for your answer.

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?

a) under civil ABWOR
b) under criminal ABWOR
c) other – please provide details

Please give reasons for your answer.

Timescales for hearings on applications

The current time limit to make a section 275 application is no less than seven days prior to the preliminary hearing in the High Court. The time limit to make this application in the Sheriff Court is 14 days before the trial diet.

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?

Strongly agree
Slightly agree
Neutral
Slightly disagree
Strongly disagree

Please give reasons for your answer.

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?

Chapter Seven: Specialist court for sexual offences

Background

Developing a criminal justice system that is person centred and trauma informed means striving to ensure that insofar as possible, the system itself, and the structures and processes within it, cause no further harm or trauma to witnesses. That requires a close examination of the significant and ongoing concerns regarding the experience of complainers in cases involving serious sexual offences.

In particular, concerns are regularly raised over the process of giving evidence in court for complainers, particularly the tone, content, duration and scope of the questioning, particularly during cross-examination.

This was illustrated in the case of McDonald v HM Advocate, where the Lord Justice General, Lord Carloway, Scotland's most senior judge noted:

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

Lady Dorrian's Review suggested it was important to consider the role of the judiciary in terms of delivering a better experience for complainers in sexual offences cases.

Recommendation of Lady Dorrian's Review

Lady Dorrian's Review considered the evidence in support of the creation of a new specialist court and made the following recommendation:

> "A national specialist sexual offences court should be created to deal with serious sexual offences including rape and attempted rape. The core features of the court should be:
>
> 1. pre-recording of the evidence of all complainers
> 2. judicial case management, including Ground Rules Hearings for any evidence to be taken from a complainer, either on commission or in court
> 3. specialist trauma-informed training for all personnel."

These core features of a specialist sexual offences court are of course all distinct and have the potential to be delivered within the existing court structure without the

need to create a separate specialist sexual offences court. Each has been considered within Chapter Two.

However, the question that arises is whether the delivery of these features, and the benefits they would bring, would be maximised through the operation of a specialist sexual offences court.

This consultation is seeking views on the potential development of a specialist sexual offences court in light of Lady Dorrian's Review making the recommendation. The recommendation, if implemented, would introduce a new court for Scotland with specific and bespoke jurisdiction and sentencing powers which would not sit within any existing level of court in Scotland.

The role of the Lord President

The Scottish Government recognises that under section 1 of the Judiciary and Courts (Scotland) Act 2008 ('the 2008 Act'), the Scottish Ministers have a duty to uphold the continued independence of the judiciary. Section 2 of the 2008 Act designates the Lord President as Head of the Scottish Judiciary. Amongst other things, the Lord President has a responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts.

Establishing a specialist court with bespoke jurisdiction and sentencing powers, as envisaged by the recommendation made by Lady Dorrian's Review, would however require primary legislation to be implemented. This consultation seeks to gather views on the recommendation to inform the development of any legislative proposals.

Specialist courts

It is worth noting that there are different models of specialist courts. For the purposes of this consultation, the specialist sexual offences court as recommended by the Review is a court where all those involved in the operation of the court – for example, the judiciary, prosecutors, defence lawyers - are specially trained for dealing with sexual offences cases in a trauma informed-manner and all the procedures are aligned with the specific needs that arise in dealing with serious sexual offences (including pre-recording of complainers' evidence and the right of complainers to independent legal representation as discussed previously). The recommended model of specialist court also has bespoke jurisdiction and sentencing powers.

An alternative model of a specialist court is that it is a court that only deals with one type of offending, but where there is not (necessarily) the type of specialist training and specialist procedural arrangements in place.

Specialist courts are not new to Scotland, for example a number of specialist Domestic Abuse Courts dealing with summary level offending have been established across the country following the successful pilot of the first specialist Domestic Abuse Court in Glasgow in 2004.

Whilst the particular arrangement of each specialist Domestic Abuse Court varies depending on the sheriffdom, each is constituted with regard to the local context and without the need for additional, specific legislation. As noted above, it is for the Lord President and sheriffs principal to determine how the courts operate including whether specialist courts should operate such as Domestic Abuse Courts. In order for specialist Domestic Abuse Courts to operate, no additional sentencing powers were needed and so no legislation was required. As discussed later on this in this chapter, specialist sexual offence courts may need legislation including to deliver new sentencing powers for certain members of the judiciary involved in the operation of a specialist sexual offences court.

These specialist courts are generally established through local court programming (the exception to this being the Virtual Summary Domestic Abuse pilot which is reliant upon provisions within the Coronavirus (Scotland) Act 2020). Given the volume of cases of serious sexual offences, particularly in the High Court, and the other problems it identified with the conduct of these cases in the course of its work, Lady Dorrian's Review concluded that specialism through court programming within the existing court structure, to fast track or cluster cases together, would not be sufficient.

Lady Dorrian's Review therefore considered the merits of the creation of a new specialist court to deal with the most serious sexual offences, including rape and attempted rape which currently must be prosecuted in the High Court. The model of specialist court proposed by the Review would introduce a new court for Scotland with specific and bespoke jurisdiction and sentencing powers which would not sit within any existing level of court in Scotland.

Alternatively, instead of creating an entirely new court for the purposes of hearing serious sexual offence cases, another option would be to establish a specialist sexual offences court as a branch of the High Court. Such a court could, in effect, operate the same way as the High Court with equivalent procedures, sentencing powers and jurisdiction but with trauma-informed approaches embedded from the outset in order to improve the experience of complainers. A further alternative may be to establish specialist sexual offences branches within the High Court and the Sheriff and Jury Court. This was however not the recommendation of Lady Dorrian's Review which favoured the creation of a new dedicated specialist court distinct from the High Court and Sheriff Court.

Arguments in favour of creating a new specialist court

There are a number of relevant arguments advanced in favour of a specialist court which suggest there could be benefits to Scotland's criminal justice system from the introduction of a specialist sexual offences court.

Specialism already characterises the response of other parts of Scotland's criminal justice system to serious sexual offences including the investigation, preparation and prosecution of cases by Police Scotland and the Crown Office and Procurator Fiscal Service respectively.

- **Training for the judiciary, staff and practitioners** - Broadly speaking, the case for specialist courts centres around the opportunity to target the required training for all those involved in the court (including the judiciary, prosecutors, defence practitioners, court and support staff), to develop best practice in conducting trials in a manner which recognises the impact of trauma, reduces the risk of causing distress or re-traumatisation to complainers, enhances their opportunity to give their best evidence and improves the overall administration of justice. While it is possible such training could be given to anyone who may be involved in sexual offences cases, the targeting of such training which a specialist court would facilitate, and it being an essential requirement to participate in the model proposed by the Review, is a key suggested advantage.

  Developing skills and expertise in the management of these cases, having stand-alone court rules and procedures designed to support a specialist, trauma-informed approach and developed with the specific intention of reducing delay, achieving early disclosure of evidence, and encouraging communication between the Crown and the defence (all as proposed by the Review Group), would benefit complainers and may also lead to a reduction in overall delay and increased efficiency, benefiting others in the justice system including the accused, other witnesses and jurors.

- **Better efficiency in managing cases and improving the experience of complainers** - An evaluation specific to domestic abuse pilot courts introduced in Glasgow Sheriff Court was commissioned by the then Scottish Executive and took place from October 2004-October 2006. The Evaluation found that the court was effective, and had many benefits compared to traditional courts, including improved outcomes such as: a higher proportion of cases in which there was a guilty plea at some stage (81% compared to 73%); a higher proportion of guilty pleas at the first appearance (21% compared to 18%), a higher proportion of pleas changed to guilty at or before the intermediate diet (54% compared to 45%), a higher conviction rate (86% compared to 77%). The speed of processing cases was much faster in the domestic abuse court than the comparison courts. There was overwhelming support for a specialist court approach to domestic abuse amongst participants of all types and this evidence supported a decision by the judiciary to establish permanently the Glasgow domestic abuse court and others that followed.

- **Evidence from New Zealand's Specialist Sexual Offences Court** - Outwith Scotland, Lady Dorrian's Review noted that there were examples of specialist courts, or pilots of such courts, in South Africa, New South Wales and New Zealand.

  In New Zealand, a time limited pilot specialist court for sexual offences, including rape and attempted rape, was established in late 2016 in two court districts. The pilot developed and adopted guidelines for best practice that: used designated trained judges with an enhanced role in case management and more active control of cross-examination; used special measures more frequently; and adopted other measures to address the comfort and safety of complainers such as separate court entrances and meeting the judge, prosecutor and defence counsel before the start of the trial.

Sue Allison and Tania Boyer's report on the evaluation of the sexual violence court pilot court was published in 2019 and, whilst the evaluation noted there was scope for improvement, the key findings included:

- that pilot cases progressed more efficiently, faster and with fewer delays overall
- participants perceived that trial quality had improved, with fewer adjournments and better quality evidence
- complainers were generally better prepared for attending trial, reducing anxiety, and trials were managed in a way that did not cause them to be re-traumatised by the process
- the judiciary were more alert to unacceptable questioning and intervened more frequently
- firm trial dates were issued earlier, resulting in more and earlier guilty pleas
- that there was unanimous support among participants for the model to be developed nationally.

The specialist court has become a permanent feature in the two court districts in New Zealand which it was piloted with national expansion under consideration.

Arguments against creating a new specialist court

There are a number of relevant arguments which suggest the current court arrangements for dealing with sexual offences could continue, embedded by the new procedures, processes and training suggested by other recommendations within Lady Dorrian's Review including a greater emphasis on the pre-recording of evidence.

- **Perception of downgrading of serious sexual offences** - Some argue that the prosecution of the most serious sexual offences including rape and attempted rape belongs in the High Court to mark the seriousness of such offending. It is suggested the creation of any court which is perceived to be inferior to the High Court to hear these cases would downgrade the seriousness of that offending.

- **Perception that creating a specialist court would introduce a two-tier system for serious sexual offences** - Some concerns focus on the way the court is constituted, its jurisdiction and its sentencing powers. If some cases involving serious sexual offending are dealt with by the specialist court and some are not, then there is a risk that would create the perception of a two tier system of justice for similar types of offending. For example, the High Court has exclusive jurisdiction over murder so where such a charge appeared alongside a serious sexual offence, that case would still have to be heard in the High Court and not the specialist court. In other words, the specialist court would not have exclusive jurisdiction to hear serious sexual offence cases and some would continue to be heard elsewhere.

- **Suggestion that the aims of establishing a specialist court can be achieved within existing structures** - Some argue that the preferred approach is not to create a specialist court but to ensure that existing courts operating with the sentencing powers they hold can appropriately manage these cases and ensure that complainers can give evidence in a manner that is trauma informed. This argument was however addressed by the Review Group which suggested that cases which continue to call in the High Court would be presided over by a judge who was also appointed to sit in the specialist court, meaning they could bring their specialist training and experience to bear. The Review Group also acknowledged that the unlimited sentencing powers possessed by the High Court of Justiciary had not prevented its review from being necessary.

- **Limited impact on reducing delays in cases** - Operationally, given the number and complexity of cases involving serious sexual offences in Scotland, some argue that it may be unlikely that a specialist court would have an effect on delay in these cases. However, the expectation of the Review Group was that there would be a reduction in delays overall once such a court was operational as the specialism had the potential to assist the judiciary, staff and practitioners to be better equipped in dealing with complainers, enhance the experience of complainers, encourage greater sharing of information and to reduce delay.

  A pilot specialist sexual violence court in New South Wales, evaluated in 2005 (Cashmore J. & Trimboli L. - An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot) did not see significant impact on delay or case management, suggesting that the specialist approach alone is not adequate to tackle the problems with the management of these cases. It was however noted by those who carried out the evaluation that there was little to differentiate the pilot court from mainstream courts and problems arose because of the way in which the pilot was set up.

- **Impact on the judiciary** - While a matter for the judiciary, there may also be concern that a member of the judiciary who only sits in a sexual offences court may lose some aspect of their experience and skills in dealing with non-sexual offence cases.

Scottish Government response to the recommendation as to the principle of having a specialist sexual offences court

The Scottish Government is seeking views on the legislative changes that would be required before the recommendation of the Review to create a specialist court to deal with serious sexual offences could be implemented. We recognise that the key features of that specialist approach (including the expansion of pre-recorded evidence, judicial case management and the development of trauma-informed training), should be in place to serve as the foundation of the new court and enable it to operate as intended.

The Scottish Government further recognises that those steps, which are distinct from the operation of a specialist sexual offences court, should be progressed without delay so the benefits they bring can be materialised for as many complainers as possible, as soon as possible.

The establishment of a new specialist sexual offences court will require significant exploration and engagement across the justice sector to ensure that all opportunities for innovation and improvement are identified. Detailed consideration will have to be given to: how the court would interact with existing courts, procedures and legislation; the impact across the justice sector on resourcing; and opportunities for third sector involvement. Therefore, before any legislation establishing a specialist sexual offences court could be implemented, a number of important operational matters would need to be fully assessed.

Given the observations and conclusions of the Review on the experience of complainers, it is clear that where possible, the other necessary reforms identified should be progressed while potential development of a specialist sexual offences court is considered separately.

The Scottish Government is committed to fully considering how a specialist court might operate and is pursuing this both through the work of the Governance Group and by using this consultation to seek views on key aspects of the proposal which require legislative change in order for the court, as envisaged by Lady Dorrian's Review, to be established.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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

a) within the High Court
b) within both the High Court and the Sheriff and Jury Court
c) other – please provide details

Please give reasons for your answer.

Practical features of a specialist sexual offences court

Lady Dorrian's Review set out a number of further features of the court including its jurisdiction, sentencing powers and other matters:

a) A national jurisdiction in respect of serious sexual offences prosecuted on indictment

b) Procedures based on current High Court practice, revised to meet appropriate standards of trauma-informed practice

c) Those procedures to include judicial case management including Ground Rules Hearings and practises similar to those developed in High Court of Justiciary Practice Note No 1 of 2017 and No 1 of 2019

d) Presided over by a combination of High Court judges and sheriffs, who have received trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General

e) Sentencing powers of up to 10 years' imprisonment

f) Rights of audience available to members of the Faculty of Advocates, solicitor advocates, and prosecutors all of whom have received specialist trauma-informed training in dealing with vulnerable witnesses, including examination techniques, in accredited courses approved by the Lord Justice General

g) Scottish Courts and Tribunals Service administrative and support staff trained in trauma-informed practices expanding on services already provided in the evidence suites in Glasgow and Inverness

h) Pre-recording of the whole of a complainer's evidence as the default method of presenting the complainer's evidence

i) The right to independent legal representation (ILR) to allow complainers to oppose section 275 applications with appropriate public funding

j) In the event of complainers requiring to attend court measures adopted will be those which address the comfort and safety of the witness

k) Measures in respect of pre-instruction and charging of juries

l) Legal aid provision for the court including a dedicated table of legal aid fees

The following questions in this chapter seek views on particular aspects of the specialist court that would require to be set out in legislation.

Other standalone features which would apply broadly to all cases involving serious sexual offences, and not just those being heard in a specialist court were it to be created (such as (i) the right to independent legal representation to allow complainers to oppose section 275 applications), are considered in detail elsewhere in this consultation.

Jurisdiction of a specialist sexual offences court

Lady Dorrian's Review recommended that the court has national jurisdiction to hear solemn level cases where the primary charges are serious sexual offences. This would include charges of rape which currently, as a matter of law, must always be prosecuted in the High Court. The court would also have jurisdiction to deal with other non-sexual offending where charges appeared on the same indictment (for example, where an assault was charged along with a rape).

The Review noted that the High Court would still hear cases where the sexual offence featured alongside other serious offences such as murder, attempted murder or abduction or where an Order for Lifelong Restriction was anticipated to be a consideration upon conviction.

Currently, unless the matter is set out in legislation, prosecutors working for the Crown Office and Procurator Fiscal Service, acting with the delegated authority of the Lord Advocate or the Procurator Fiscal, make decisions on the appropriate forum for prosecution, taking into account a range of factors including the sentencing powers of the court. As noted above, while there is currently a requirement in Scotland that rape be prosecuted in the High Court, no similar rule applies in England and Wales where it is dealt with at Crown Court level.

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)?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Sentencing powers of a specialist sexual offences court

Currently, sheriffs have solemn sentencing powers of a maximum of five years' imprisonment whereas High Court judges are able to sentence up to life imprisonment (although both sheriffs and judges sentencing powers are subject to any maximum sentence specified by the legislation governing the particular offence an accused has been convicted of). Where a sheriff is sitting as a temporary judge in the High Court, for the purpose of dealing with High Court cases, they have the same sentencing powers as High Court judges.

Following a conviction, sheriffs may remit individual cases to the High Court for sentencing if they consider their powers to be insufficient.

Lady Dorrian's Review recommended that the specialist sexual offences court be given sentencing powers of a maximum of 10 years' imprisonment with the ability to remit individual cases to the High Court where this sentence limit is considered to be insufficient. Statistical evidence was cited by the Review which demonstrated that a sentencing power of 10 years would have captured more than 95% of sentences for sexual offences convicted on indictment for the period from 2016 to 2019.

However, the Review acknowledged that this was a sensitive aspect of their recommendation and that further consultation may be required.

To create a specialist court to deal with offences of rape, but with a maximum sentence lower than that which can currently be imposed by existing non specialist courts hearing those cases, is seen by some to be counter intuitive, regressive and may potentially undermine the credibility of the specialist sexual offences court.

The principal concern is that imposing a limit on the sentencing of serious sexual offences, beyond any already existing in legislation for specific offences, could be perceived as downgrading the seriousness of sexual offences. It is, however, important to note the recommendation would not mean sentences of more than 10 years could not be imposed in cases prosecuted in the specialist sexual offences court; however, any such sentence would require the case to be remitted to the High Court for sentence post-conviction.

There are also concerns that a sentencing limit of 10 years' imprisonment creates a two tier system whereby those cases which continue to be prosecuted in the High Court, whether because of the nature of other offences included on the indictment or another reason, would be perceived to be subject to a higher maximum sentence than those prosecuted in the specialist court. As noted above, this is not entirely accurate (as a case can be remitted) but nonetheless the perception may exist. This is perhaps most acute with rape which currently as a matter of law has to be prosecuted in the High Court.

Another aspect to the debate however is that the Scottish Sentencing Council is currently developing sentencing guidelines on sexual offences in relation to rape, sexual assault, and indecent images of children, which all judges will have to take into account when sentencing in a relevant case. Sentencing guidelines are

approved by the High Court and help to ensure sentences are consistent, fair and proportionate.

As a general point of principle, sentencing is for the court in any given case and this is based on the simple and compelling argument that it is the court that is aware of the full facts and circumstances of an offence. While remitting to a higher court for sentencing is a feature of current practice, it is not necessarily an approach that must be embedded at the outset of a new court structure.

Where a court finds an accused guilty, the starting premise is that the same court should follow through to sentence given they will have heard all the facts and circumstances. When a case is remitted, the court within which the conviction has arisen will provide a report on the facts and circumstances which informs the sentence to be imposed.

Exactly whether a specialist sexual court should be created with the knowledge that some sexual offence cases will always need to be remitted for sentencing to the High Court is a question to be carefully considered.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

a) unlimited
b) other – please provide details

Please give reasons for your answer.

Judicial appointments to a specialist sexual offences court

Lady Dorrian's Review recommended that the specialist court be presided over by High Court judges and sheriffs, noting that currently sheriffs can and do sit as temporary judges in the High Court (meaning that currently, a large number of High Court sexual offences cases are currently presided over by sheriffs sitting as temporary judges). The Review recommended that appointments to the court would be made by the Lord President upon satisfaction that the judge or sheriff had the

experience and had undergone necessary specialist training as determined by the Lord President.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Question 63: If you answered disagree to the previous question, who do you think should preside over the court?

a) sheriffs only
b) High Court judges only
c) other – please provide details

Please give reasons for your answer.

Legal professionals involved in specialist court cases

Lady Dorrian's Review recommended that possessing appropriate training consistent with the gravity of cases being heard by the court and their impact on complainers should be a requirement of all legal practitioners involved in the specialist court.

Specifically, the Review highlighted that the right of legal practitioners to appear in the High Court, where the most serious sexual offences cases are currently heard, comes with an associated requirement to 'undergo significant and rigorous training' on aspects of court procedure and practice and which reflects the severity of cases heard by the High Court. As such, Lady Dorrian's Review recommended that the level of training required of legal practitioners permitted to appear in the specialist court should match that of the High Court. This would mean that cases would be prosecuted by Advocate Deputes, who are advocates or solicitor advocates appointed by the Lord Advocate and the defence would be conducted by advocates or solicitor advocates.

Additionally, the Review also felt that this should be reinforced by a specific requirement for all those involved in cases within the specialist court to undergo trauma-informed training with a view to improving the experience of complainers.

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 be match those of the High Court?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer, including any specific training requirements that you think should be introduced.

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?

Chapter Eight: Single judge trials

Background

The Scottish Government's Vision for Justice in Scotland is bold. We are committed to making improvements to historical processes and systems where those are needed to ensure our criminal justice system is fit for purpose and reflects the needs of modern society. That means, where necessary, carefully assessing long held practices and procedures to ensure an evidence based approach to reform and to the delivery of justice.

Consistent with its 'clean sheet' approach, Lady Dorrian's Review considered the justifications for the continued use of jury trials for serious sexual offence cases and explored some of the concerns raised in Scotland, and elsewhere, about the role of juries.

The Review looked at alternative ways to conduct these trials noting that options included cases being decided by a panel of judges or a combination of a judge and a lay panel. In particular, the Review gave careful consideration to the model of single judge-only trials.

Existing use of juries in Scotland and elsewhere

There is no right to trial by jury in Scotland.

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

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

Whether an offence will be tried under solemn procedure (and therefore heard by a jury) depends on a number of factors. For some offences (for example, certain road traffic offences), legislation sets out that they have to be tried under summary procedure. Some types of offences, such as rape, can only be tried in the High Court, as set out in the section 3 of the Criminal Procedure (Scotland) Act 1995. This means, therefore, that all cases of rape and attempted rape are heard by a jury. Other offences can be tried under summary or solemn procedure and it is a matter for prosecutors to determine the appropriate forum for prosecution and thus whether a case proceeds before a judge/sheriff and a jury, or a sheriff/justice of the peace sitting without a jury. Statistics published by the Scottish Courts & Tribunals Service indicate that in 2019-20, 6,570 solemn cases (indictments) were registered in the High Court and Sheriff Courts while 98,496 summary cases (complaints) were registered in the Sheriff and Justice of the Peace Courts.

Most criminal court cases are concluded without evidence being led at a trial, for example, because the accused pleads guilty. However, the likelihood of a trial taking place is greater in solemn cases (particularly those dealt with in the High Court). Of all the trials that did go ahead in 2019-20, 1,632 (16%) were tried under solemn procedure while 8,489 (84%) were tried under summary procedure.

Scotland is not alone in trying criminal cases before a judge sitting without a jury. Indeed, many jurisdictions internationally do not include jury trials at all as part of their criminal justice systems and some provide for circumstances in which a jury trial is an option that an accused can choose.

Whilst all accused persons in Scotland have a right to a fair trial, that does not, as a matter of law, mean a right to a jury trial. That has been confirmed by the European Court of Human Rights, which has expressly ruled in Twomey, Cameron and Guthrie v United Kingdom and Callaghan v United Kingdom (2013) 57 E.H.R.R. SE15 that the right to a fair trial does not require that the determination of guilt be made by a jury.

Recommendation of Lady Dorrian's Review

The Review was not able to reach agreement on whether the jury system should be retained in serious sexual offence cases and members were strongly divided.

The report noted that the question ought to be examined in much greater depth and made the following recommendation:

> "Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply to and such other important matters should form part of that further consideration."

The context of conviction rates

In the context of its consideration of the retention of different juries, the Review addressed arguments that any such reform was motivated by an aim to increase the conviction rate in these cases. In its report, the Review noted that:

> "Accepting that the conviction rate is not necessarily a good indicator, nor can it be in any way a determining factor, at the same time it cannot be ignored. That the low rate of conviction in such cases was a cause for concern, potentially indicating an underlying problem with the deliberations and attitudes of juries has been recognised for some time…
>
> It remains the case that juries seem to return a significantly higher rate of acquittal in sexual offences than in other crimes. Scottish Government figures suggest that the conviction rate for rape is lower in Scotland than for any other crime. The conviction rate for all crime in 2018-19 was 87%. For rape and attempted rape, it was 47%. These figures of course both relate only to cases

which meet the threshold for prosecution. They indicate that the conviction rate for rape and attempted rape has been the lowest of all crimes in each of the last ten years. The figures cannot simply be ignored. The disparity is such that it cannot simply be explained away by poor prosecutorial decision making, rogue cases or the like."

Whilst conviction rates formed part of the context of the Review consideration of the issues, increasing the conviction rate for serious sexual offences was not the aim behind its recommendations.

The key question is not whether single judge trials would increase conviction rates, but whether they would mean that justice is better served in these cases.

Previous consideration

The use of singe judge trials for all solemn level serious offences, was previously considered during the development of what became the Coronavirus (Scotland) Act 2020 and a proposal was included within the draft legislation introduced to Parliament in March 2020. At that time, it was proposed as a temporary, emergency measure to ensure the continued operation of the criminal justice system in light of the developing Covid pandemic. The proposal proved to be controversial, in part because alternatives that took advantage of technology and/or physical distancing were seen to be more proportionate and appropriate solutions. The Scottish Government ultimately removed the proposal for single judge trials from the draft legislation voted on by Parliament.

The context in which Lady Dorrian's Review considered this matter was entirely different. The Review Group was established in early 2019 so did not look at single judge trials as a general measure to address concerns over the ability of jury trials to continue to safely operate throughout a pandemic, or as a way to mitigate the impact of the pandemic on the administration of justice. Rather, the model was considered as a potential and profound reform to improve the way in which a particular type of case, serious sexual offences, is dealt with in Scotland, irrespective of the pandemic.

The scope and aims of the proposal of single judge trials as considered by Lady Dorrian's Review and crucially the evidence to assess its merits, are fundamentally different to that previously considered by Parliament as part of emergency legislation.

Arguments in favour of removing juries and introducing single judge trials for serious sexual offences

- **Lower rates of conviction** - In the context of significant reform and development of law and practice in the investigation and prosecution of serious sexual offences over the last decade and beyond, juries continue to return verdicts of acquittal in a significantly higher rate for sexual offences than all other crimes.

Criminal Proceedings in Scotland statistics show that the overall conviction rate in Scotland for all crimes and offences in 2019-20 (i.e. the year after the figures quoted in the Review Group's report) was 88%, however for rape and attempted rape, it was 43%. The conviction rate for rape and attempted rape has been the lowest of all crimes since 2010, the earliest point at which comparable data is available. (It should be noted that the current, wider definition of rape was adopted by Scotland's criminal justice system in 2010 following the introduction of the Sexual Offences (Scotland) Act 2009. Before that a number of sexual assaults may have been classified as common assault with a sexual aggravation. Data prior to 2010 is, therefore, not a like for like comparison with that after 2010.)

Some argue that such longstanding disparity between conviction rates for rape and other offences cannot adequately be explained by deficiencies in the investigation or prosecution of these offences and instead, we must engage with fundamental underlying concerns about the deliberation process and the attitudes and influences of jurors carrying that out.

- **Evidence of jurors misunderstanding important legal issues** - The Scottish mock jury trial research – published in October 2019, was the largest of its kind in the UK, based on 64 mock trials involving almost 1,000 participants. The study found there were inconsistent views on the meaning and effect of the "not proven" verdict and how it differs from "not guilty". For example, some expressed a belief that an accused can be retried following a not proven verdict. Additionally, some jurors misunderstood other important legal concepts. For example, there was a belief that the accused needs to prove their innocence and misunderstanding of the fact that self-defence is a legitimate defence to an assault charge, even when the fact that the accused inflicted the injury is not in dispute.

  Although not examined within the jury research, another key and complex rule that the Scottish legal system requires jurors to engage with, particularly in sexual offences cases, is around the doctrine of mutual corroboration, also known as the 'Moorov Doctrine'. This allows the evidence of single witnesses to different incidents to provide mutual corroboration in certain circumstances. For example, in the Moorov case itself where an employer carried out a series of sexual assaults against female staff, it wasn't necessary for the complainers to have witnessed the assault on each other; each complainer's testimony about what happened to them was considered enough to corroborate the evidence of other complainers where the incidents were sufficiently similar in "time, character and circumstance" from which an overall course of criminal conduct could be inferred.

  Some argue that the interests of justice are not best served by requiring lay jurors to engage with, understand and apply complex legal principles such as Moorov.

- **Belief in rape myths** – Rape myths might be defined as beliefs about rape (such as its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men

commit against women. Research on the influence of rape myths on jurors shows fairly consistently that such beliefs can impact how jurors perceive and weigh evidence. Studies referenced in the 2020 review 'What do we know about rape myths and juror decision making?' by Fiona Leverick have shown that myths around the influence of alcohol in rape cases, as well as misperceptions about the length of time between the alleged offence and a report being made, can affect the verdicts juries arrive at if belief in the myth is sufficiently widespread that the jury deliberation process cannot correct for it.

In her review, Fiona Leverick brought together the quantitative and qualitative research on the subject, concluding that:

> "The quantitative research demonstrates that mock jurors' scores on so-called 'rape myth scales' are significant predictors of their judgments about responsibility, blame and (most importantly) verdict. The qualitative research indicates that jurors frequently express problematic views about how 'real' rape victims would behave and what 'real' rape looks like during mock jury deliberations and that even those who score relatively low on abstract rape myth scales can express prejudicial beliefs when deliberating in a particular case."

- **Anecdotal information from experienced members of the judiciary** given to the Review Group, that in their experience, juries do not always convict in rape cases in which, in the judge's view, there is evidence of sufficient quality and quantity to do so. This indicates that the verdicts of juries are not always reflective of an objective evaluation of the evidence made in accordance with the applicable law as directed by the judge. The Review Group noted that some members of the judiciary commented that this was a particular concern in rape cases involving a single complainer. The available conviction data does not provide a more detailed breakdown according to aspects of cases such as the number of complainers, however there is significant concern that the conviction rate in singe complainer cases may be below, and perhaps well below, the average noted above of 43%.

- **The effect of trauma** – The demeanour and presentation of a victim of a serious sexual offence may be counter intuitive because of the trauma endured and the stress caused by the process of recounting that trauma in evidence. Judges can be trained on that concept to a degree that is not possible to deliver to individual jurors in individual cases. Without an appropriate understanding of the effect of trauma on victims and witnesses, jurors risk misinterpreting its impact and drawing ill-founded conclusions as to the credibility or reliability of a witness.

- **Reduction in length of trial, improvements in efficiency of trials and reduction in delays** - It was estimated by members of the Review Group that trials without juries may take around half the time because court time would no longer be needed for procedures around the selection of the jury or dealing with issues arising for individual jurors once the trial is underway. The conduct of both the prosecution and the defence is also expected to be more focused. These efficiencies would have a positive impact on those involved in the

individual cases and the criminal justice system as a whole in terms of freeing up court time to reduce delay in cases coming to trial.

Delays in cases coming to trial are said to give rise to a greater risk of secondary victimisation for complainers in cases involving serious sexual offences than for other sorts of trials. The reasons for this include the distinct, profound and enduring impact of serious sexual offences, the sensitive and distressing nature of the offences and the re-traumatisation that some complainers report as a result of lengthy trial procedures.

These concerns have become more acute given the impact of the Covid pandemic on the justice system and the backlog of cases which has accrued. Whilst justice partners are working collectively to implement measures to reduce the backlog and significant funding has been provided by the Scottish Government to support those measures, it is clear that cases are taking longer to conclude and that it will take a number of years for time periods to return to pre-pandemic levels (which many considered were in themselves excessive).

In a recent study carried out by Michele Burman and Oona Brooks Hay (University of Glasgow and the Scottish Centre for Crime & Justice Research) looking at the implications of delays caused by the pandemic, it was noted that some victim-survivors of rape and serious sexual assault described themselves as "living in limbo, with 'no road map' for how to continue in the criminal justice process or in their life more generally". Delays can have far reaching consequences for the ability of complainers to function in all aspects of their lives and may also pose a threat to well-being by "postponing their psychological recovery indefinitely while also requiring them to retain the detail of distressing events in preparation for going to court and give evidence."

Reductions in delay are clearly also of significant benefit to accused persons, particularly those held on remand.

- **Conduct of the trial** – The Review Group noted that experience suggests that in the absence of a jury, when the audience is a judge trained to focus on the substance and power of the evidence and not the style or power of the advocacy, or irrelevant matters raised during the course of the trial, solicitors and advocates may be more focussed and less confrontational leading to an improved experience for the complainer and other witnesses, providing a greater opportunity for them to give their best evidence and therefore better serving the interests of justice. This may further assist in minimising the re-traumatisation that complainers in sexual offences may experience as a result of the trial process.

- **Reasons for verdicts** – Juries do not provide reasons for their verdicts which can be distressing and frustrating for those involved in a case including victims and accused. A move to judge-only trials could involve a requirement for judges to provide written reasons, which would enhance the transparency of the verdict reached.

- **Reduction in disruption** caused to jurors, their families and employers and removing the potential opportunity for distress to jurors sometimes caused by these types of cases.

Arguments against removing juries in serious sexual offence cases

- **Lower conviction rates may be caused by a number of factors** including the quality and strength of cases, and the fact that sexual offences often take place in private. Some suggest that the low conviction rate may be a reflection that prosecutors proceed to trial in these difficult and sensitive cases despite weak prospects of success. Others have indicated that many other countries also experience lower conviction rates for serious sexual offences and that may be because of the nature of these cases; independent evidence is often difficult to obtain and without it, meeting the standard of proof of being satisfied beyond reasonable doubt can be challenging.

  Beyond anonymous anecdotal evidence cited by the Review Group, there is no evidence to suggest that single judge trials would increase the conviction rate.

- **Juries serve an important function by bringing a diverse accumulation of knowledge and experience** to the assessment of evidence and witnesses in these type of cases. This applies as much to sexual offences as to any other type of crime. Sexual offences commonly involve considerations of consent and assessments of an accused's reasonable belief that there was consent. Juries are well equipped to make those assessments based on the evidence presented and with the assistance of directions from the judge on points of law.

- **Removing juries for serious sexual offences introduces an unjustified level of disparity in the treatment of cases within the criminal justice system** where some solemn cases would be heard before a jury and some would not. Removing juries for serious sexual offences risks undermining their role in making decisions in other cases. Many indictments feature charges involving both sexual offending and non-sexual offending which draws the issue into sharp focus as consistent decisions would have to be made on whether those cases would be heard by a jury or a judge alone.

- **Relying only on judges to make these important decisions reduces diversity** – As noted within the Review, all judges are university educated and well paid. The Judicial Office for Scotland publishes diversity statistics on the gender and age of Scottish judges. The latest Judicial Office for Scotland publication on diversity statistics demonstrates that sheriffs and judges are most likely to be male (70% of all appointments) and aged over 50 (85% of all appointments). More detailed demographic information was collected as part of the Judicial Attitudes Survey in 2020 to which 79% of salaried judges in Scotland responded. Of those Scottish judges who self-identified their ethnicity within the survey, only 2% identified as non-white.

- **Judges themselves are not immune to prejudice or unconscious bias**. Inappropriate views of individual jurors can be challenged by others in the group (and the jury research supported that this does happen), decisions by a single judge would not be subject to that same challenge.

- **There is a confidence and legitimacy in jury verdicts** that comes both from the number of jurors (15) and the random selection process. The near anonymity that juries enjoy is also an important safeguard to ensure that verdicts can be reached without fear of retribution or public backlash.

- **Jury decision making provides an authentic opportunity to participate in the criminal justice system**. It is an important civic duty that should not be reduced or diminished.

- **Judges may be prone to 'case hardening'**, a term which is used to describe an element of judicial cynicism, developed as a result of repeatedly hearing the same or similar lines of defence being argued. Some argue that judges' ability to look objectively at the evidence in each individual case may diminish over time because of that.

- The mock jury research cited by those in favour of removing these cases from juries is constrained by **the nature of the mock jury process and the relatively low number of scenarios considered** – in relation to serious sexual crime, only one rape scenario, presented in a one hour trial, was examined. Although that scenario was subject to 32 deliberations involving 431 jurors, the single scenario tested does not tell us how jurors would react to cases involving serious sexual offences which engaged different issues.

- All of the difficulties and concerns identified with juries by the Review Group could arguably be mitigated by **better education of jurors and potential jurors** rather than eliminating them altogether.

Scottish Government response to the Review's recommendation to pilot single judge trials for serious sexual offences

The Scottish Government is committed to the delivery of meaningful access to justice across society and the proper administration of justice in cases which come to court. In light of the Review and its recommendations, that commitment includes engaging with fundamental questions on the suitability of well-established structures, practices and concepts in our criminal justice system.

The Review was clear that a broader debate on the issues raised by judge-only trials was required. This consultation seeks to gather views to progress that debate.

The Governance Group set up to progress the recommendations has established a working group to further consider and explore some of the issues identified including what other information, research and evidence may be needed to assist the consideration of any pilot.

The responses to this consultation will be considered by the Scottish Government alongside the work of the Governance Group.

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Question 68: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

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?

Strongly agree
Somewhat agree
Neutral
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Question 70: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

Question 71: What do you consider to be the key potential benefits of single judge trials for serious sexual offences? Please select all that apply.

a) removal of potential bias of the jury

b) removal of concerns around rape myths

c) greater efficiency of court process including reduced trial length

d) improved court experience of the complainer

e) greater public confidence in the decision making, including the application of legal principles

f) other – please provide details

g) I do not believe that judge-only trials convey any benefits for serious sexual offences

Please give reasons for your answer.

Question 72: What do you consider to be the key concerns and challenges of single judge trials for serious sexual offences? Please select all that apply.

a) less public confidence in the justice system
b) lack of diversity reflected in the pool of decision makers
c) removal of civic participation in the criminal justice system
d) undermining the use of juries for non-sexual offences
e) other – please provide detail
f) I do not have any concerns

Please give reasons for your answer.

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. Please select all that apply.

a) evaluation of requirement for written judgments to be prepared
b) specific training for judges
c) other – please provide details
d) none, I don't think there are any safeguards that could be put in place

Please give reasons for your answer.

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?

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?

Question 76: Are there any other matters relating to singe judge trials that you would like to offer your views on?

Chapter Nine: Impact Assessments

As we develop the proposals in this consultation, we will carry out impact assessments. The aim of these assessments is to identify issues that may affect some groups more than others and to consider how we will address these issues. The assessments also explore what impacts the proposals will have on matters such as privacy, business and the environment. In addition, we need to ensure the proposals comply with the European Convention on Human Rights (ECHR).

This chapter seeks views on the potential impacts of proposals in this consultation.

The questions on the potential impacts of the proposals are broken down in line with the formal assessments carried out by the Scottish Government, which are:

- Compliance with ECHR
- Equality Impact Assessment
- Child Rights and Wellbeing Impact Assessment
- Fairer Scotland Duty Assessment
- Islands Community Impact Assessment
- Data Protection Impact Assessment
- Business and Regulatory Impact Assessment
- Strategic Environmental Assessment

We recognise that some proposals will have much greater impacts than others and that there may be some areas where there are minimal impacts. We also recognise that there will be commonality in terms of the impacts across different proposals.

Given this, when answering the questions below it would be helpful if you could set out the specific proposals to which you are referring when describing any impacts which you think should be considered.

Human Rights

The Human Rights Act 1998 incorporated the European Convention on Human Rights (ECHR) into UK law. It means that public authorities, such as the Scottish Government, must not act in a way which is incompatible with the rights set out in the ECHR. It is therefore vital that we consider how the proposals will impact on human rights.

Question 77: Do you have any views on potential impacts of the proposals in the chapters of this consultation on human rights?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Equalities

The Public Sector Equality Duty requires the Scottish Government and other public bodies when they are exercising their functions to have due regard to the need to:

- eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Equality Act 2010

- advance equality of opportunity between people who share a relevant protected characteristic and those who do not

- foster good relations between people who share a relevant protected characteristic and people who do not share it

For the purposes of the Public Sector Equality Duty, a 'relevant protected characteristic' means age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Equality Act 2010 sets out nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Public Sector Equality Duty includes a requirement for the Scottish Government and other public bodies to have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Equality Act 2010.

Question 78: Do you have any views on potential impacts of the proposals in the chapters of this consultation on equalities and the protected characteristics set out above?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Children's rights

The UN Convention on the Rights of the Child (UNCRC) is an international treaty which sets out the fundamental human rights of all children. Part 1 of the Children and Young People (Scotland) Act places a duty on the Scottish Ministers to (a) keep under consideration if there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements and (b) If they consider is appropriate to do so, take any of the steps identified by that consideration.

All new legislation and policy that is developed by the Scottish Government must consider the impacts on the rights and wellbeing of children up to the age of 18.

Question 79: Do you have any views on potential impacts of the proposals in the chapters of this consultation on children and young people as set out in the UN Convention on the Rights of the Child (UNCRC)?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Fairer Scotland Duty

The Fairer Scotland Duty came into force on 1 April 2018 and places a legal responsibility on named public bodies, including the Scottish Government, to actively consider how they can reduce inequalities of outcome caused by socio-economic disadvantage when making strategic decisions.

This means that as well as considering the impact on people with protected characteristics, the Scottish Government must consider how any proposals will impact on people depending on their economic background. For example, if proposals would have a specific impact on people with low incomes or who live in a deprived area.

Question 80: Do you have any views on potential impacts of the proposals in the chapters of this consultation on socio-economic equality?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Island communities

Section 7 of the Islands (Scotland) Act 2018 states that a relevant authority – which includes the Scottish Ministers – must have regard to island communities when carrying out its functions.

Scotland's islands face particular challenges around distance, geography, connectivity and demography, so it is important that this is considered when developing the proposals in this consultation. It is also important that we ensure that the islands receive fair and equitable treatment and that policy outcomes are tailored to their unique circumstances.

Question 81: Do you have any views on potential impacts of the proposals in the chapters of this consultation on communities on the Scottish islands?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Data protection and privacy

Data protection and privacy impact assessments help the Scottish Government to assess the risks of proposed legislative changes that are likely to affect the way in which personal data is used.

Question 82: Do you have any views on potential impacts of the proposals in the chapters of this consultation on privacy and data protection?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Business

A Business and Regulatory Impact Assessment (BRIA) is used to analyse the cost and benefits to businesses and the third sector of any proposed legislation or regulation, with the goal of using evidence to identify the proposal that best achieves policy objectives while minimising costs and burdens as much as possible.

Question 83: Do you have any views on potential impacts of the proposals in the chapters of this consultation on businesses and the third sector?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Environment

In Scotland, public bodies including the Scottish Government are required to assess, consult on, and monitor the likely impacts their plans, programmes and strategies will have on the environment. This helps to better protect the environment, aims to ensure that any development is sustainable and increases opportunities for public participation in decision-making.

Question 84: Do you have any views on potential impacts of the proposals in the chapters of this consultation on the environment?

Yes
No
Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

Glossary

Term	Definition
Accused	A person charged with committing a crime.
Advocate / Solicitor Advocate	A lawyer who has had extra training so that they can appear in all the courts in Scotland. Lawyers who are not advocates are not qualified to appear in the High Court.
Advocate Depute	A lawyer who prosecutes cases and who is appointed by the Lord Advocate.
Appeal	A challenge to a conviction and/or sentence.
Appellant	A person challenging a conviction and/or sentence.
Charge	The crime that the accused is believed to have committed.
Civil case	Court proceedings that are not criminal prosecutions.
Common law	A system of laws based on customs and court decisions rather than on written laws made by parliament. Offences which are created through written laws are known as 'statutory offences'.
Complainant	The alleged victim in a criminal charge in England and Wales.
Complainer	The alleged victim in a criminal charge in Scotland.
Contempt of court	Behaviour that interferes with court proceedings or possible outcome of a court case.
Conviction	When a person pleads guilty or is found guilty of a crime.
Cross-examination	When a witness is questioned in court by other lawyers after giving their evidence-in-chief. For example, when a Crown witness is questioned by the lawyer representing the accused.
Crown	Another name for the Crown Office and Procurator Fiscal Service.
Crown Office and Procurator Fiscal Service (COPFS)	The organisation responsible for the prosecution of crime and investigation of deaths in Scotland.
Defence (lawyer/counsel)	The lawyer who represents the accused.
Diet	A court hearing.
Evidence	What a witness says when they are asked questions in court. (Evidence can also be physical items that are used in the case, including documents, clothing, and photographs, but references to evidence in this consultation relate to what is said in court).

Term	Definition
Evidence by commissioner	When a witness gives their evidence in advance of the trial. This is filmed and then played during the trial.
Evidence-in-chief	When a witness is questioned in court by the person who has asked them to come to court. This is when a complainer or Crown witness is questioned by the prosecutor.
First diet	A hearing in a Sheriff Court case when the Crown and defence lawyers tell the court if they are ready for the case to go to trial.
Floating trial	A High Court case where the date and location of the trial can vary.
High Court	The supreme criminal court of Scotland, where the most serious criminal cases are heard.
Indictment	A document listing the charges against the accused.
Judge	The legal expert who is in charge of court proceedings.
Judiciary	The collective name for the judges and panel members who sit in the courts of Scotland and make decisions about criminal and civil cases.
Justice of the peace	The judge who is charge of court proceedings for less serious crimes. They are not legally qualified but sit with a legal advisor.
Jurisdiction	The power a court has to hear cases and decide what will happen in the case.
Lord Advocate	The senior Scottish Law Officer who is the head the Crown Office and Procurator Fiscal Service. The Lord Advocate is also a Minister in the Scottish Government.
Lord Justice Clerk	The second most senior judge in Scotland.
Lord Justice General	The most senior judge in Scotland, who holds this title and also the title of Lord President. The title of Lord Justice General relates to criminal business and the title of Lord President relates to civil business.
Lord President	The most senior judge in Scotland, who holds this title and also the title of Lord Justice General. The title of Lord Justice General relates to criminal business and the title of Lord President relates to civil business.
Legislation / statute	The laws passed by the Scottish Parliament and the UK Parliament.
Offender	A person who has been convicted of committing a crime.

Term	Definition
Open justice	A principle that requires criminal proceedings to be conducted in a transparent way and allow public scrutiny.
Perjury	A crime that is committed if a person deliberately lies when giving evidence in court.
Person centred	When the person is placed at the centre of the service, their needs are understood and they can participate effectively in proceedings.
Practice note	A document issued by a member of the judiciary which sets out a practice that a court is going to take or inform practitioners such as lawyers about a practice that the court expects them to take.
Preliminary hearing	A hearing in a High Court case when the Crown and defence lawyers tell the court if they are ready for the case to go to trial.
Prior statement	A witness's account of their evidence which is given in advance of a trial. This is usually in a written witness statement or in a recorded interview.
Procurator Fiscal	A lawyer who works for the Crown Office and Procurator Fiscal Service.
Prosecutor	A lawyer who presents the case against the accused.
Scottish Courts and Tribunals Service (SCTS)	An independent body that provides administrative support to the Scottish courts, judges and tribunals.
Sheriff	The judge who is charge of court proceedings in the Sheriff Court.
Sheriff principal	The head of each of Scotland's six sheriffdoms (areas) who are responsible for managing the business in the sheriff courts in their own area.
Solemn proceedings / procedure	Court proceedings for more serious offences. In Scotland, solemn cases are heard by a judge and jury.
Solicitor	Another name for a lawyer.
Summary proceedings / procedure	Court proceedings for less serious offences. In Scotland, summary proceedings are heard by sheriff or justice of the peace sitting without a jury.
Statutory offence	Offences which are created through written laws.
Survivor	Can be used instead of 'victim'. The term 'survivor' is commonly used when speaking about victims of sexual offences.

Term	Definition
Trauma informed	Providing a service that recognises the impact that trauma can have on a person and that puts in place measures to avoid re-traumatisation.
Trial / Trial diet	The proceedings that take place in court if an accused pleads not guilty. The court hears evidence about the alleged crime and at the end of the trial a judge or jury will decide if the prosecutor has proven the guilt of the accused or not.
Victim	A person who has been directly affected by a crime.
Waiving anonymity	When complainers in sexual offence cases have a legal right to anonymity and they choose not to use this right.
Whole system approach	An approach where organisations work together to make improvements to the justice system as a whole.

Annex A: Victims and Witnesses (Scotland) Act 2014

The principles set out in sections 1 and 1A of the Victims and Witnesses (Scotland) Act 2014 are (emphasis added):

- that a victim or witness should be able to **obtain information** about what is happening in the investigation or proceedings
- that the **safety** of a victim or witness should be ensured during and after the investigation and proceedings
- that a victim or witness should have access to appropriate **support** during and after the investigation and proceedings
- that, in so far as it would be appropriate to do so, a victim or witness should be able to **participate** effectively in the investigation and proceedings
- that victims should be treated in a **respectful, sensitive, tailored, professional** and **non-discriminatory** manner
- that victims should, as far as is reasonably practicable, be able to **understand** information they are given and **be understood** in any information they provide
- that victims should have their **needs** taken into consideration
- that, when dealing with victims who are children, the **best interests of the child** should be considered, taking into account the child's age, maturity, views, needs and concerns
- that victims should be **protected** from—
  - (i)secondary and repeat victimisation
  - (ii)intimidation
  - (iii)retaliation

Annex B: Complainer anonymity – approaches in different jurisdictions

This Annex sets out how law in different jurisdictions around the world is understood to operate in the area of complainer anonymity. It is not intended to be a detailed description of the law in other countries.

England, Wales and Northern Ireland

The law provides for protection of complainant identity as soon as an "allegation" has been made that a sexual offence has been committed against a person. This is lifetime anonymity with the law contained in the Sexual Offences (Amendment) Act 1992 ("the 1992 Act")[1]. The offences covered by the 1992 Act generally constitute sexual offences and can be described as wide ranging.[2] The prescribed list of offences covered by the 1992 Act are contained in section 2 and include rape and the majority of the offences contained in Part 1 of the Sexual Offences Act 2003[3], amongst others.

The effect of the 1992 Act is that after an allegation of a sexual offence is made, a person is prohibited from publishing "any matter" during a complainant's lifetime if it is likely to lead members of the public to identify them.[4] This includes in particular:

- his/her name
- his/her address
- the identity of any school or other educational establishment attended by him/her
- the identity of his/her place of work
- any still or moving pictures of him/her

Publication is widely defined and includes any speech, writing, relevant programme or other communication in whatever form addressed to the public at large or to any section of the public. As such, it is understood social media postings would be covered as well as publication through more traditional forms of media, for example a hard copy newspaper.

The relevant sexual offences to which the ban on the publishing of identifying information applies are set out in section 2 of the 1992 Act[5], and include offences such as rape, assault by penetration, sexual assault and child sex offences.

As section 1 prohibits the publication of any matter when it is "likely to lead" to the identification this also covers what has been termed 'jigsaw identification'.

[1] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[2] Automatic reporting restrictions also extend to an offence of human trafficking under section 2 of the Modern Slavery Act 2015: Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[3] Sexual Offences Act 2003 (legislation.gov.uk)
[4] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[5] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)

This refers to the situation where the identity of a person protected by a reporting restriction order may be disclosed as a result of different media reports, none of which breach the terms of any order or statutory provision individually, but which taken together enable the protected person to be identified.

In most cases this may not be an issue, but particular difficulties arise in relation to sexual offences alleged to have been committed against persons within the same family. For example, where publication of information refers to an unnamed defendant convicted of raping his daughter and publication of separate information refers to the name of the defendant, the daughter could be identifiable to the public in breach of the automatic prohibition protecting victims of sexual offences.

This means an assessment requires to be made as to whether the particulars of a publication could prompt speculation and lead to identification.

Another example where care is needed is any publication of information referring to someone's school or workplace if their age is published which could prompt speculation likely to lead to identification. Conversely, naming a large educational established, for example a university, when stating the victim is a student there, will not in itself usually be likely to identify him or her.

When does anonymity cease to apply?

Although the restriction on publication of material that would identify the complainant applies for the whole of a person's lifetime from when the allegation was made, there are circumstances in which the restriction can be lifted. The main exceptions are understood to be where:

- the complainant chooses to reveal his or her identity by written consent
- the complainant's identity is reported as part of subsequent (and separate) criminal proceedings, for example if the complainant were subsequently to be prosecuted for perjury or perverting the course of justice
- the court lifts the restriction (following an application by the defendant) on either of the following grounds –
    - to persuade defence witnesses to come forward and if the court does not lift the restriction the conduct of the applicant's defence at the trial is likely to be substantially prejudiced
    - to help obtain evidence in support of an appeal and that otherwise the appellant is likely to suffer substantial injustice
    - the court is satisfied that the restriction is a "substantial and unreasonable restriction" on the reporting of the trial and it is in the public interest to remove or relax it

The right of the complainant to give written consent to waive their anonymity operates as a defence to the statutory offence of breaching anonymity in section 5 of

the 1992 Act. A complainant must be over the age of 16 to be able to consent to waive their anonymity and it must be ensured that nobody has “interfered unreasonably” with their “peace or comfort” to secure their consent. The law in England, Wales and Northern Ireland therefore guards against someone being pressured into giving consent and makes clear that any child under 16 is regarded as too immature to understand the consequence of being publically identified in this context.

It is only the complainant who has a right to waive anonymity under the 1992 Act. This does not, for example, extend to family members.

It is important to understand that the 1992 Act does not protect Scottish complainers. The 1992 Act does apply to Scotland, but only to prevent Scottish publishers from identifying complainants in sexual offence cases elsewhere in the UK.

United States of America

The United States is, quite unusually, an example of a common law model which does not regulate the media through legislation.

As a result of the constitutional right to a free press enshrined in the First Amendment, it is understood for many years the U.S. Congress and the courts have favoured expanding reporters’ rights and the rights of a free press over personal privacy.

This is recognised by Dr Tickell in his research in a forthcoming piece in the Edinburgh Law Review, which explores the international picture of complainer anonymity, where he provides, “of the common law jurisdictions considered, only the united states of America has set its face against any kind of criminal liability arising from the faithful reporting of court proceedings, on 1st Amendment free expression grounds.”[6] Dr Tickell further observed, “No state law has yet been upheld by the Supreme Court which attempts to introduce the kind of reporting restrictions we see across the rest of the common law world.”[7]

The First Amendment therefore enshrines the primacy of free speech and the public’s ‘right to know’ over competing rights of privacy and anonymity.

Other international jurisdictions generally either provide for a statutory automatic right to anonymity or provide the court with the power to order such reporting restrictions in sexual offence cases upon application.

Accordingly, it can be said the current position in Scotland, where specific provision is absent in this regard, is out of step with what is the status quo both across the remainder of the United Kingdom and republic of Ireland, and many countries internationally.

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[6] How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LETHERSPEAK, Andrew Tickell, forthcoming piece in EdinLR: Edinburgh Law Review : (euppublishing.com)

[7] ibid

This has been recognised by Dr Tickell, who noted when examining international practice:

> "Of the other jurisdictions considered, the following automatically impose reporting restrictions in sexual cases: England and Wales, Northern Ireland, the Republic of Ireland, New Zealand, Victoria, the Australian Capital Territory, Tasmania, New South Wales, Queensland, South Australia, Western Australia, Hong Kong, India, Singapore, and Bangladesh."[8]

Tasmania, Australia

In the Australian state of Tasmania, it is understood complainant anonymity was first provided for by section 194K of the Evidence Act 2001[9] ("the 2001 Act").

Section 194K of the 2001 Act prohibited publishing the identity or material likely to identify a victim/ complainant and any witness or intended witness (other than the defendant) in respect of certain listed sexual offences. The only exception to this prohibition was in the event of a court order where it was considered in the public interest to do so.

This meant that even where a complainant was an adult at the time of the publication and had consented to being publically identified, this was not possible without a court permitting it.

As a result of the operation of this law, calls for law reform increased in recent years. This is because of the challenges of navigating through the court process to seek the necessary court order to waive anonymity.

The #LetHerSpeak Tasmania Campaign reported the difficulties of the court process, describing it as, "…costly, stressful, time consuming, disempowering and, at times, re-traumatising." Survivors maintained that, "law should be reformed to bring it into alignment with other jurisdictions so that survivors are not financially penalized or emotionally burdened in order to be able to tell their stories."[10]

The Evidence Amendment Bill 2020 was introduced in response to the calls for reform, which inserted a new section 194K into the 2001 Act. The new section 194K prohibits the publishing of identifying information, or the causing of identifying information to be published, in relation to any proceedings in any court involving a qualifying criminal offence.[11]

Like England, Wale and Northern Ireland, the right of the complainant to give written consent to waive their anonymity operates as a defence to the statutory offence of breaching anonymity under the new section 194K. By virtue of the defence, the identity of a victim may be published with the permission of the victim or with the

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[8] ibid
[9] View - Tasmanian Legislation Online
[10] eroc-marque-submission-may.pdf (marquelawyers.com.au)
[11] View - Tasmanian Legislation Online

permission of the court. Certain requirements have to be met in order for the victim to give permission, including they must be 18 years old at the time they give consent and at the time the identifying information is published. They must also consent in writing and have understood at the time the consent was given, that he or she may be identified, or identifiable, as a result of the publication of the identifying information. They must also not have been coerced into consenting to the publication. Information identifying the complainant can only be released after the criminal court case is complete.

The legislation provides identifying information in relation to a person includes the name, address, school and place of employment. The prohibition on 'jigsaw identification' is also provided for by prohibiting "any other reference or allusion that identifies, or is likely to lead to the identification of, the person; and a picture or image of the person."[12]

'Publish' is defined widely and means to make available to the public, or a section of the public, by any means, including but not limited to –

(a) publication in a newspaper, journal, periodical, book or other document

(b) broadcast by radio, television, wireless or other telegraphy

(c) publication or broadcast, by means of the internet, in any format

(d) in print, or electronic, communication meant for one or more persons

(e) public exhibition, spectacle or event

(f) such other prescribed means of making information available to the public

India

Automatic anonymity for victims of sexual offences is enshrined in the law of India, which operates a model of absolute prohibition unless the complainer in writing agrees to waive their anonymity.

Under the Indian Penal Code[13], anyone who prints or publishes the name or any matter which may make known the identity of a complainer of a qualifying sexual offence, which includes rape, shall be punished with imprisonment for a term of up to two years and fine.

There are some limited exceptions to this prohibition. It does not extend to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:

[12] ibid, section 194K(9)
[13] Section 228-A (Disclosure of identity of the victim of certain offences etc.); sub section (1)

- by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation, or

- by, or with authorisation in writing of, the victim, or

- where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organization[14]

There have been increasing calls in India to allow for sexual offence complainers to be able to waive their anonymity and 'go public.' One notable example is a 2012 Delhi case, which was widely reported internationally. Case studies exploring the anonymity debate in the context of the Delhi case have remarked:

> "The extreme violence of the assault turned the case into an overnight firestorm both within the country and in the international press. Despite this publicity—which only increased when she died of her injuries—and the guilty conviction of all five men, the Indian press did not publish her name. Instead, they predominately referred to her as "Nirbhaya," meaning fearless one, or as the Delhi braveheart. Her name was omitted from press coverage not because people did not know who she was—"the train of media persons and politicians to her home made clear almost every person in the vicinity … knew where she lived and what her real name was"—but because to publish her name would be against the law (Bhatnagar, 2016)."[15]

In this case parents of the victim openly came forward and disclosed the name of the victim to an international publication. However, because the parents provided their daughter's name to a journalist and did not give written authorisation through the channels specified by the law set out above, the victim's identity was still artificially hidden by the media in India through fear of legal sanction, even while her name and face was publically available on the internet.

This case, the media response in India and the increasing calls for survivors of sexual offences or their family members to be free to 'go public' if they so wish chimes with the #letherspeak campaign in Tasmania discussed above. Each of these movements raise important questions about the absolute nature of a prohibition on publication of identifying information in sexual offence cases and the balance to be struck in order to preserve the autonomy of survivors/relevant third parties to speak out and 'tell their story' in the public interest.

[14] For the purpose of this section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government
[15] Reporting on Sexual Assault in India - Center for Media Engagement - Center for Media Engagement

New Zealand

In New Zealand complainant anonymity in sexual offence cases is provided for in section 203 of the Criminal Procedure Act 2011 ("the 2011 Act") which provides for 'automatic suppression' of the identity of a complainant in specified sexual offence cases.[16]

Section 203 applies where a person is accused or convicted of certain offences under the Crimes Act 1961, which are sexual offences[17]. Anonymity is automatic in these cases and it is explicitly stated that, 'the purpose of this section is to protect the complainant.'[18]

Section 203 provides that no person may publish the name, address or occupation of the complainant unless the complainant is aged 18 years or older and there is a court order which permits publication.

It is important to note that, while only the name, address or occupation of the complainant is referred to as being suppressed under section 203, the interpretation section of the Act makes clear that, 'name in relation to a person, means the person's name and any particulars likely to lead to the person's identification'.

In terms of the waiver process, the court must make an order where the complainant applies for such an order and the complainant is aged 18 years or older, whether or not they were 18 or older when the offence took place. The court must be satisfied that the complainant understands the nature and effect of their decision to apply for the order.

The identity of the defendant is not generally automatically suppressed (although there will be automatic defendant anonymity where the case relates to incest or sexual conduct with a dependent family member, for the purpose of protecting the complainant).

However, it is possible in some cases for an order to be made under section 200 of the 2011 Act[19], which allows for an order to be made to suppress the identity of the defendant in certain specified circumstances, including if publication would be likely to lead to the identification of another person whose name is suppressed by order or by law or endanger the safety of any person. If such an order is in place, then it is not possible for the complainant to apply to waive their anonymity if that would lead to the identification of the defendant. If someone publishes the name, address,

[16] Criminal Procedure Act 2011 No 81 (as at 01 April 2021), Public Act 203 Automatic suppression of identity of complainant in specified sexual cases – New Zealand Legislation

[17] Automatic anonymity applies to a person accused or convicted of an offence against any of sections 128 to 142A or 144A of the Crimes Act 1961.

[18] Criminal Procedure Act 2011 No 81 (as at 01 April 2021), Public Act 203 Automatic suppression of identity of complainant in specified sexual cases – New Zealand Legislation

[19] Criminal Procedure Act 2011 No 81 (as at 21 December 2021), Public Act 200 Court may suppress identity of defendant – New Zealand Legislation

occupation or other information in breach of section 203, they have committed an offence and will face penalties under section 211 of the Criminal Procedure Act[20].

Canada

The current law surrounding complainer anonymity in Canada is provided for in section 486.4 of the Criminal Code.[21]

The Criminal Code sets out both a mandatory and discretionary order making power upon application to the court for anonymity in sexual offence cases and which category the application falls under depends on the age of the victim or witness.

For victims or witnesses aged 18 years or over, section 486.4 subsection (1) provides a discretionary order making power by the court to prohibit the publication of any information that could identify the victim or witness in any document, broadcast or any way in which identifying information could be transmitted in relation to a number of what can generally be categorised as sexual offences or offences with a sexual element.

For victims and witness under 18, special rules apply. Section 486.4 subsection (2) provides for a mandatory order making power by the court upon application by the victim, witness or prosecutor. For Victims and witnesses under 18, there is an obligation on the court to inform them of their right to apply for an order restricting publication under section 486.4 at the earliest opportunity and if such an application is made, the order must be granted.

The orders for anonymity therefore rely on an application being made to the court by the victim, witness or prosecutor in order for reporting restrictions to take effect. Where no application is made, however, section 486.5 retains a discretionary order making power by the court to make an order if the court – in Canada referred to as the 'judge' or 'justice' - is of the opinion it is in the "interest of the proper administration of justice" to do so.

An application under section 486.4 must be done in writing to the court and notice of the application must be provided to the prosecutor, the accused and any other person affected by the order that the court specifies. An application for an order must also set out the grounds on which are relied upon to establish that the order is necessary for the proper administration of justice and a hearing may be held to determine whether the order should be made. The Code sets out a non-exhaustive list of various factors to be considered by the court in determining whether to make an order, including:

[20] Criminal Procedure Act 2011 No 81 (as at 05 October 2021), Public Act 211 Offences and penalties – New Zealand Legislation

[21] Canada_Criminal Code.pdf (legislationline.org)

- the right to a fair and public hearing

- whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed

- society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process

- the impact of the proposed order on the freedom of expression of those affected by it

Where an order is made and it is breached, a person is guilty of an offence punishable on summary conviction[22] to a fine of up to $5000 or up to two years less a day imprisonment or both.[23]

Summary of anonymity protections for sexual offence complainers

Jurisdiction	Legislation or policy	Automatic or upon application?	Able to be waived by complainer	Identifying information prohibited	Penalties for individuals[24]
England, Wales and Northern Ireland	Legislation	Automatic when an 'allegation' is made of a qualifying offence	Yes, prescribed exceptions to the general anonymity rule which includes the written consent of the complainer and following a court order in certain situations	"Any matter" during a complainant's lifetime if it is likely to lead members of the public to identify them. This includes a non-exhaustive list, in particular: the name; address; identity of any school or other educational establishment attended; place of work; and any still or moving pictures.	Unlimited fine
Tasmania, Australia	Legislation	Automatic when court proceedings have been	Yes, through operation of statutory defence, but	name, address, school and place of employment and any other	A fine not exceeding 60 penalty units[25] or imprisonment for a

[22] Section 486.1(1), Canada_Criminal Code.pdf (legislationline.org)
[23] Section 787(1), ibid
[24] Different penalties are generally provided for in respect of corporations
[25] A penalty unit value is **adjusted every year based on** consumer price index (CPI) movements in the previous year

Jurisdiction	Legislation or policy	Automatic or upon application?	Able to be waived by complainer	Identifying information prohibited	Penalties for individuals[24]
		raised in respect of an alleged qualifying offence	only after a recent change in law. Prior to April 2020, a court order was required	reference or allusion that identifies, or is likely to lead to the identification of, the person; and a picture or image of the person	term not exceeding 12 months, or both.
India	Legislation	Automatic when an allegation is made of a qualifying offence	Yes, if the complainer in writing agrees to waive their anonymity.	Name or any matter which may make known the identity of any person against whom a relevant offence is alleged or found to have been committed	Imprisonment for up to 2 years and a fine
New Zealand	Legislation	Automatic when an allegation is made of a qualifying offence	Yes, through court order upon application by the complainer aged 18 or older	Name, address, or occupation and any particulars likely to lead to the person's identification'	For knowingly or recklessly publishing, imprisonment not exceeding 6 months; for publishing, a fine not exceeding $25K
Canada	legislation	Upon application to the court by victim, witness or prosecutor, with the court retaining both mandatory powers (aged under 18) and discretionary powers (aged over 18)	n/a[26]	Any information that could identify the victim or a witness in any document or broadcast or transmitted in any way, in proceedings in respect of the prescribed sexual offences.	On summary conviction a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or both

[26] The Canadian Criminal Code does not contain an explicit power either for the complainer, the court or any other party e.g. prosecutor, to revoke or set anonymity side. However, see R v Adams [1995] 4 S.C.R. 707 for judicial interpretation of the powers of the court to revoke anonymity once an order has been made: R. v. Adams - SCC Cases (scc-csc.ca)

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Full name or organisation's name

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

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