

# Criminal Justice Committee

25th Meeting, 2022 (Session 6), Wednesday 4  
October 2023

## Victims, Witnesses, and Justice Reform (Scotland) Bill

### Note by the clerk

#### Background

1. The Committee is taking evidence on the [Victims, Witnesses, and Justice Reform \(Scotland\) Bill](#) at [Stage 1 of the Parliament's legislative process](#).
2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. The Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.
3. The Committee is adopting [a phased approach](#) to its consideration of the Bill, to divide the Bill into more manageable segments for the purposes of Stage 1

#### Topics to be covered

4. At today's meeting, the Committee will be taking evidence as part of the first phase of its scrutiny. This will cover the following provisions in the Bill (namely Parts 1 to 3)—

**Part 1**

**Establishment of a Victims and Witnesses Commissioner for Scotland**

Establishes an independent Commissioner for Scotland who is independent from the Scottish Government, and accountable to the Scottish Parliament.

**Commissioner's functions and powers:**

- Promote and support the rights and interests of victims and witnesses
- Must take steps to raise awareness and promote the interests of victims and witnesses
- Must monitoring compliance with the Standards of Service and the Victims' Code for Scotland
- Must promote best practice and a trauma-informed approach by criminal justice agencies and those who provide support services to victims
- Investigate whether criminal justice agencies have had regard to the interests of victims and witnesses in carrying out their functions, but not intervene in individual cases

## Part 2

### Trauma-informed practice

Creates a new legal requirement for criminal justice agencies to have regard to trauma-informed practice. The Victims and Witnesses (Scotland) Act 2014 already sets out range of general principles to which criminal justice agencies must have regard to. Part 2 adds trauma-informed approach to that list in the 2014 Act.

Creates a requirement for justice agencies to have regard to trauma-informed practice, and for Standards of Service they produce to cover trauma-informed practice

Empowers the courts to set rules and procedures on trauma-informed practice in relation to both criminal and civil business.

A requirement for the judiciary to take trauma-informed practice into account when scheduling both criminal and civil court business.

## Part 3

### Special measures in civil cases

Special measures are practical steps a court can take to help vulnerable litigants and witnesses to be in a courtroom setting with as little fear and distress as possible.

Currently under the law, no adult in a civil case is automatically treated as vulnerable or entitled to special measures. Special measures are also only available where evidence is being taken and witnesses are being cross-examined on it.

Part 3 of the Bill broadly split into the following areas:

It would extend a new approach to special measures found in the Children (Scotland) Act 2020 for certain family cases to civil cases more generally.

It would treat certain categories of witness as automatically vulnerable and would also allow special measures to help litigants in hearings where evidence is not being taken.

It would allow a court to prohibit a litigant from personally conducting their own case and cross-examining witnesses in civil cases.

5. Future meetings from November onwards will cover later Parts of the Bill. Further details of the Committee's phased approach [can be found online](#).

## Today's meeting

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

### Panel 1

**Ann Marie Coccozza**, Co-Founder, FAMS (Families and Friends Affected by Murder and Suicide)

**Dr Marsha Scott**, Chief Executive Officer, Scottish Women's Aid

**Sandy Brindley**, Chief Executive, Rape Crisis Scotland

**Kate Wallace**, Chief Executive, Victim Support Scotland

Panel 2

**Dr Louise Hill**, Head of Policy, Evidence and Impact, Children 1<sup>st</sup>  
**Bill Scott**, Senior Policy Advisor, Inclusion Scotland  
**Graham O'Neill**, Policy Manager, Scottish Refugee Council

7. Submissions on the Bill have been received from [Scottish Women's Aid](#), [Rape Crisis Scotland](#), [Victim Support Scotland](#) and [Children 1<sup>st</sup>](#). The sections of their submissions covering Parts 1-3 of the Bill, which are the subject of today's meeting, are reproduced below in the **Annex**. The full submissions can be accessed online by using the links in this paragraph.
8. FAMS has provided a statement providing information about its objectives and work, which can be found at the **Annex**.
9. Finally, Sandy Brindley, who is giving evidence on the Bill on behalf of Rape Crisis Scotland, has also provided a [personal submission on the Bill](#).

## Further reading

10. A SPICe briefing on the Bill [can be found online](#).
11. The responses to the Committee's call for views on the Bill [can be found online](#).
12. At last week's meeting the Committee took evidence from the Cabinet Secretary for Justice and Home Affairs to set the scene on the Bill. The Official Report, when published, [can be found online](#).

**Clerks to the Committee**  
**September 2023**

## **ANNEX – Submissions**

### **Extract from Submission from Scottish Women’s Aid**

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

SWA opposes the creation of such a post. When first proposed, we consulted our counterparts in England, Wales and Northern Ireland, and spoke with the Domestic Abuse Commissioner in England. All advised against the move. They asked why, given the close working between officials and ministers and the VAWG sector, we would put a third party between us and decision makers.

We are not persuaded the creation of a Victims’ Commissioner would add value to the work already being done across Scotland to support victims of crime, particularly in the area of violence against women. In addition, the very real possibility of unintended negative consequences for the VAWG sector, should a Commissioner be appointed without appropriate competence in the specialist area of domestic abuse and other forms of VAWG, are significant and threaten 20+ years of consensus building.

#### **Strong VAWG sector, differing from elsewhere**

The landscape and relationships in Scotland are distinctly different from those in the other UK nations, and introducing a third party between the national strategic intermediaries would dilute our impact while draining much needed resources from the government purse.

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

#### **VAWG Commissioner**

Should plans go ahead for such a Commissioner, a Commissioner for VAWG will be necessary to represent the very specific needs of victims of VAWG, which represent a significant number of Scotland’s victims and require specific and specialist responses.

#### **Ombudsman or Good Practice**

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

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

### **Financial Implications**

The Bill's Financial Memorandum demonstrates significant financing is required to implement the Commissioner role. In these financially straightened times, frequently emphasized by Women's Aid groups across the country, we would suggest that could be better utilised in supporting front-line services.

### **Additional Concerns**

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

#### **Section 2 – Functions**

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

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

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

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

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

### **Trauma Informed is not DA Informed & Best Practice**

SWA welcomes a trauma informed approach to many aspects of the workplace and people's practice. However, we continually need to emphasise that being “trauma informed” is not the same as being domestic abuse competent and one size of

approach does not fit all, particularly in relation to best practice in delivering services to women, children and young people experiencing gender-based abuse, particularly domestic abuse.

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

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

### **Avoiding a Conflict of Interest**

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

### **Section 3 – Civil Function**

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

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

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

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

### **Section 6 - Power to Work with Others**

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

### **Section 8 - Restriction on Exercise of Functions**

It is difficult to see how the Commissioner's function with the powers granted them under sections 10, 12, 16, 17 and 18 below, fit in with the existing criminal appeals process, existing complaints processes and pathways already in place covering the actions of the police, the Crown, legal profession, SCTS and judiciary, remembering also that the SPSO can adjudicate in certain circumstances and PIRC can review complaints involving Police Scotland. Once again, given the potential for duplication, clarification on the role of the Commissioner under this and the other sections is needed here in these matters, and any outcomes must be clearly communicated across all relevant sectors.

### **Section 10 - Carrying out Investigations**

This refers to the Commissioner's powers to investigate policy and practice of "*criminal justice agencies*" defined in section 23. While section 10(2) refers to evidence and information received, there is no detail on the circumstances under which such an investigation would take place or whether third parties such as victims themselves, and organisations supporting them, can call for the Commissioner to undertake such an investigation. We would welcome clarification of these matters; the section will require amendment accordingly to include these points.

## **Section 12 - Investigations; Witnesses and Documents**

Section 12 (1) provides that any person may be required to give evidence on any matter within the terms of reference of an investigation and produce documents. Clarification is needed on certain concerning aspects of this section. Firstly, it appears possible for the Commissioner to oblige victims, already traumatised by the failure of the criminal justice system, or those supporting victims, to give evidence in quasi-legal proceedings. Indeed, the Policy Memorandum, at paragraph 125 refers to this “...*Some concerns were raised in relation to requiring persons to give evidence in the course of an investigation, with the view that no-one should be compelled to do so, especially not victims (for whom doing so could be traumatising and compound the original trauma).*”

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

## **Sections 16 - Annual Report**

### **Section 17- Requirement to respond to annual report**

### **Section 18 - Publication of responses to annual report**

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

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

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



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

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

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

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

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

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

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

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

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

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

## **Section 24 – Principle of Trauma-based Practice**

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

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

We would like this duty increased to the more stringent and stronger duty to “**have due regard.**” Given that ‘have due regard’ means that in carrying out all functions and day to day activities, the statutory organisations must consciously consider the needs of victims. This is in line with the Scottish Government’s ambition to protect and realise human rights in Scotland<sup>5</sup>. This would, in turn, strengthen implementation duties but closer scrutiny and monitoring by Scottish Ministers and the Parliament, along with meaningful sanctions available for non-compliance is needed. These will be crucial in ensuring this works, as unfortunately, the existing regime is deficient in any meaningful way of ensuring that the Standards of Service are fit for purpose and that the Victims’ Code is adhered to.

## **Section 25 - Criminal Courts: Conduct of Proceedings**

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

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

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

### **Section 26 - Civil Courts: Conduct of Proceedings**

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

### **Sections 27- Scheduling of business in Scottish Courts**

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

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

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

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

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

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

SWA has consistently called for the meaningful extension of the provisions of the Vulnerable Witnesses (Scotland) Act 2004 ,and subsequent Victims and Witnesses (Scotland) Act 2014, to be automatically available to vulnerable parties and witnesses in civil proceedings involving domestic abuse, specifically the cross-posting into civil proceedings of the “deemed vulnerable witness” standard special measures automatically available to witnesses in domestic abuse cases under section 10 and 11 of the 2014 Act. It does not make sense that women experiencing domestic abuse should be allowed automatic access to this protection in criminal proceedings but then denied it in civil proceedings when faced with the same abuser. Complainers and

vulnerable witnesses in criminal proceedings are not a stand-alone, discreet group. It must be understood that women, children and young people experiencing domestic abuse who are vulnerable in criminal proceedings will also be subject to the same procedural risks, safety fears, intimidation and coercion by perpetrators in civil cases, even more so as highlighted in recent research<sup>6</sup> and their human rights and right to participate in court proceedings must be equally protected.

### Increasing the Protective Function

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

### Vulnerable Witness Proceedings

Section 4(3) of the 2020 Act inserts sections 11A and 11B into the 2004 Act and specifies circumstances where the court is to deem a person to be a vulnerable witness, irrespective of whether the person satisfies the definition of “vulnerable witness” in section 11(1) of the 2004 Act. In proceedings arising out of a children’s hearing (covered by the new section 11A of the 2004 Act), a person will be deemed to be a vulnerable witness where it is alleged in the statement of grounds that the person is the victim of specified conduct. The threshold is simply the fact that the statement of grounds alleges that the person is the victim of domestic abuse.

However, in proceedings where the court is considering making an order under section 11(1) of the 1995 Act (covered by the new section 11B of the 2004 Act), a person will be deemed to be a vulnerable witness **only** if the person is protected by a civil protection order from conduct by a party to the proceedings, or where the person is the victim or complainer in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings. Similar provision exists under section 8 of the Act to protect vulnerable parties in Child Welfare Hearings if they would be “deemed vulnerable” in terms of the test in section 11B above.

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

Therefore, a woman experiencing domestic abuse will only automatically be considered to be a vulnerable witness for the purpose of special measures eligibility, firstly, in section 11 cases and then, within those, only where she met the qualification of possessing a civil protection order or the perpetrator has been convicted of a specified criminal offence or is being prosecuted for such an offence. This excludes women who, for whatever

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

reason, have not reported the abuse to the police or where there have been no criminal proceedings taken against the perpetrator, possibly due to issues around corroboration, or a conviction made.

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

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

This qualification and assessment are not in the interests of justice. A woman experiencing domestic abuse engaging in any civil proceedings, evidential or otherwise (be this, for example, an application for a protective order, a section 11 application or participation in applications by the police for a DAPO), should automatically be deemed vulnerable and therefore automatically eligible for use of a supporter, screen and/or CCTV as appropriate.

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

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

### **Section 30 - Vulnerable Witnesses**

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

The amendments will not further protect litigants who don't possess a protective order or where the other party has not been prosecuted or convicted for one of the specified offences. Crucially, therefore, despite the best intentions of the section, it will not specifically improve the position for women experiencing domestic abuse who are involved in civil actions generally and will not improve the existing situation for women involved in section 11 child contact proceedings.

The thresholds determining vulnerability and the continuing need for assessment will remain as a barrier to women seeking access to justice through the civil courts and protection from the further trauma of having to engage in the civil process and face their abuser. The only way to remedy this is to ensure that section 30 provides that in, not only section 11 proceedings but in any civil proceedings, women experiencing domestic abuse are given the same protection as they would be in criminal proceedings.

We are seeking the provisions of section 10 and 11 of the 2014 Act to be replicated for civil proceedings, so that in any civil case where domestic abuse is raised in the proceedings, the party raising these allegations and seeking protection, would be automatically deemed a vulnerable witness, with an automatic right to use standard special measures.

Mirroring the 2014 Act and section 271 of the Criminal Procedure (Scotland) Act 1995, as amended, this should also include rape and sexual assault, human trafficking and stalking, with the addition of honour-based abuse and forced marriage.

### **Section 31 - Prohibition on Personal Conduct of the Case**

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

Section 31 will apply this to child and vulnerable witnesses in all civil proceedings, and the presumption in favour of applying this special measure applies in a wider range of proceedings. While this, on the face of it, appears positive, access to this special measure will still, nonetheless, be subject to thresholds determining vulnerability, and the continuing need for assessment on the need for special measures, mentioned above. These will continue to act as barriers to women experiencing domestic abuse and gender-based violence, along with vulnerable witnesses generally, from accessing protection. Therefore, we are asking for the provisions of sections 10 and 11 of the 2014 Act, as mentioned above, to be replicated for this section also.

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

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

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

### **Section 33 - Vulnerable Parties**

This section expands another provision of the 2020 Act relating to vulnerable witnesses that requires the court **to consider** the use of special measures to reduce distress in

relation to certain vulnerable parties where distress may be caused by attending or participating in hearings in certain non-evidential court proceedings.

This was primarily intended under the 2020 to cover non-evidential hearings such as Child Welfare Hearings and the Bill amends the existing statutory provisions so that special measures for vulnerable parties will be available, in all non-evidential civil proceedings not just proceedings relating to children. Again, reiterating the comments made above, the existing provisions under the 2020 Act do not go far enough to protect women experiencing domestic abuse and gender-based violence and this expansion of the coverage will not improve the current deficiencies in the procedure. Therefore, we ask that this section also be amended in terms of the 2014 Act, as set out above.

## **Extract from Submission from Rape Crisis Scotland**

### **What are your views on Part 1 of the Bill which establishes a Victims and Witnesses Commissioner for Scotland?**

We support the creation of a statutory Victims and Witnesses Commissioner for Scotland and consider that this could enhance and protect the rights of victims and witnesses of rape and sexual violence. We would look forward to working closely with the Commissioner and support the creation of an advisory group that encompasses the voices of victim support organisations in Scotland.

Supporting survivors of sexual violence and rape have distinct needs and require specialised practice. We would welcome a specific focus and acknowledgement of this from within the Commissioner role.

The independence of the Commissioner is key to being able to challenge organisations like COPFS, the police or the court system, where required, and fight against structural barriers that exist. We are supportive of the independence of the Commissioner being incorporated within the provisions in the Bill.

We welcome a focus not just on the criminal justice system but also on the civil justice system. We see that all these functions could benefit survivors of sexual violence and rape. These survivors will potentially encounter a range of justice agencies and their experience is often not limited to the remit of the criminal justice system. Survivors we support can often be involved in several of these processes simultaneously and often do not view them as separate processes but as part of a bigger picture. The differences in procedure, rules of evidence and the repetition of their evidence to various professionals can heighten distress and risk further re-traumatisation. It is important that any Victim's Commissioner consider the system as a whole, as it is experienced by survivors.

We acknowledge that the Commissioner role would have a focus on the voices of victims and witnesses. It must centre these voices and experiences and be seen to do so. Engagement with survivors should go beyond consultation and empower survivors to directly shape policy and decision making.

### **What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts?**

'It made me wish that I had never reported in the first place. I would never recommend anyone report rape to the police following my experience and I think that says it all, had these things been in place I hopefully wouldn't feel like this.' (A survivor)

Many survivors using our services describe the process of going to court as more traumatic than the rape itself – this is not acceptable.

'I can say wholeheartedly that the trauma the trial caused me was ten-fold of the assault itself.' (A survivor)



Lady Dorrian's Review stated that, "The adoption of trauma-informed practices is a central way in which the experience of complainers can be improved". We are supportive of the introduction of specific provisions to incorporate trauma informed practice.

Complainers of serious sexual crime are by their nature amongst the most vulnerable category of witnesses who come before the courts. As stated by Burman and Brooks Hay; 'sexual offences have a profound and distinct impact on those who experience them' they are crimes which 'fundamentally challenge a victim's sense of dignity and autonomy with acts that remove power, control and dignity from them.' The importance of adopting a trauma-informed practice and embedding this within the workings of every aspect of the justice system cannot be overstated.

During our consultation process, a survivor commented:

'They don't understand trauma, they never asked what I needed'.

During the trial she had to view photos of her injuries, she had not been shown them before or warned that this would happen. This was a retraumatising experience that she felt could have been avoided by someone taking the time to discuss this with her and she knew what to expect. She reflected:

'If you feel safe you can talk about things and give better evidence.'

The court should have a clear duty to protect complainers of sexual violence during their involvement in the court system. To ensure that all parties, including defence counsel, show them respect and ensure that all possible is done to protect them from secondary traumatisation.

Survivors we spoke to were strongly in favour of trauma-informed training for everyone involved in the justice process. There were concerns about the quality and consistency of this training, and how it would be monitored. Survivors asked about what the consequences would be for those involved in the justice system who did not follow a trauma-informed practice.

'It's so important [to know] that trauma is not linear, it doesn't happen from A to Z. It would have been so helpful in court if that had been made clear to the defence. The defence made comments about the order of my evidence and said the prosecution had to tease it out of me, this made me feel ashamed and like I had let people down.' (A survivor)

"I would have liked everyone who had anything to do with my case to have been trauma informed. My main wish was that I was handled with sensitivity and care... the court officer who showed me my statement called it "a good read" I know his intention was not bad but in amongst everything that is the comment that stuck with me the most, that my experience was just a story to him." (A survivor)

"In terms of the legality side, it was a horrendous ordeal and completely traumatising - from the court dates being suspended and rescheduled, the actual trial itself... and the way I was perceived by all professionals involved, other than the lovely victim support

girls on the day of trial and of course Rape Crisis, as doing something wrong in speaking out.” (A survivor)

“Victims do not get enough warning about the process they are about to endure; I wouldn’t wish anyone to go through the awful experience I did. It’s left me with far worse trauma than what it did before I had gone through court.” (A survivor)

For survivors, this is important when considering the methods of cross examination often used to discredit and undermine their evidence. We have seen far too many examples of cruel and distressing cross examination of survivors which have been subject to judicial criticism. For example, in a notable case where a QC, referred to a survivor as a ‘wicked, deceitful, malicious, vindictive liar’ in his cross examination. The use of this line of questioning was criticised by the Lord President, Lord Carloway. In the case of *Macdonald v HMA*, it was found that; ‘during her cross examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became highly distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable.’ The court should be under an obligation to prevent this type of conduct and place an onus on the defence to adhere to trauma-informed standards. Cross examination is a means to test evidence and protect against miscarriages of justice, but this does not need to be at the expense of the fair treatment of the complainer.

‘It takes so much to report, to wait through preliminary hearings, trial and waiting on a verdict all the way to sentencing. It’s gruelling and exhausting. You do not expect defence teams to tell you that you are lying. I wouldn’t wish this upon anyone and I feel like the justice system should be more victim centred.’ (A survivor)

‘At present there is not enough support from the justice system for victims. I fully understand the term innocent until proven guilty however I feel that the victim is treated like the guilty party until proven innocent.’ (A survivor)

‘I feel that steps should be taken from the beginning of victim’s interaction with the justice process. Something replicating the ‘Bairns Hoose’ model used for children who have experienced crime I feel would be significantly beneficial in this context too. This would support in alleviating problems of secondary harm and providing the right support from the beginning to criminal justice intervention.’ (A survivor)

Survivors have very specific and varying needs. A flexible approach is required as well as an awareness of how trauma can affect survivors differently. It should be embedded into the whole culture, both the physical space and the working of all court participants; this should involve specific and detailed training.

A specific legislative reference to ‘trauma-informed practice’ would show a clear commitment to this. It would demonstrate to complainers of sexual violence how they will be treated within the criminal justice system. It will also give an unarguable standard that criminal justice agencies must adhere to.

However, the provisions in the Victims, Witnesses and Justice Bill do not go far enough to ensure the proper implementation of trauma informed practice. There needs to be a

specific commitment to improve the provision of information to complainers and a clear commitment to dispense with floating trial diets in rape and sexual offences cases.

'We are concerned about the use of 'trauma informed practice' as a buzzword that is often claimed and applied to a system without much tangible difference felt by survivors. Clear and concrete standards laying out exactly what this means in practice will be important in ensuring this can be delivered – for example, strict rules around case scheduling so that cases do not 'float' or are not adjourned routinely, and increased VIA capacity so that survivors can expect a consistent standard of support and information sharing.' (A Rape Crisis Centre)

'It is important the court / trial process does not continue to make the victims feel like victims. We suffer enough; the least we deserve is to be given the support, dignity and respect we absolutely deserve from the safety of an environment that is built to encourage nothing but honest truth.' (A survivor)

'I think that anyone working in the justice system should be trained by a panel of victims/ survivors of rape or abuse. I think they really need to see how the way we are treated affects us.' (A survivor)

### **Court Scheduling**

We are supportive of the specific inclusion of the need for trauma informed practice in relation to scheduling court diets but are concerned about the retention of floating trial diets. Court delays have been at unacceptable levels for some time, but we are acutely aware that the use of floating trial diets causes distress and trauma to survivors and are disappointed that steps have not been taken to envisage a new and improved way to deal with the scheduling of these trials.

'Having a fixed trial would be helpful. Timeframes were never upheld, which had a detrimental impact on my mental health. Survivors need timeframes to be respected.' (A survivor)

'Had I had a clear date and people communicating with me that were experienced in dealing with just victims of sexual violence, it would have made a huge difference. Everything was so uncertain.' (A survivor)

The impact of floating trials is very distressing for survivors. They are waiting day by day to find out if their case might call, to ultimately be told it will not go ahead, sometimes for months. We have supported survivors who have attended at court only to be told to leave. They have gone through the anguish of working up to doing something extremely difficult and preparing to relive their trauma and go through cross examination. It also has an impact on their jobs, education, and childcare.

'I was instructed by police not to receive any kind of therapy or counselling until the trial was complete or risk the case being thrown out at court' (A survivor)

Rape Crisis Centres from rural and island communities have reported to us the specific trauma that floating trials can cause to survivors they support. They have to travel significant distances and often wait for a long time in a hotel. On one occasion the

survivor was put in the same hotel as the accused. The impact of this is not just on the survivor attending court but on the provision of RCS advocacy services to other survivors as the advocacy worker who has travelled with them is not available to support other service users.

This is not trauma-informed practice. Survivors need to know, for emotional and practical reasons, when their case will call. Despite Lord Bonyon recommending in 2002 in his review of the High Court that rape cases should not be allocated to floating trial diets due to the distress caused to complainers, this happens routinely across Scotland. A completely new approach to court scheduling is required for sexual offences, and this should be developed as part of the new specialist sexual offence court which is being proposed. As a survivor stated:

'We have seen how fast governments can act when urgency is required - why can't you do the same thing for women?'

'The application of 'floating trials' was particularly tricky in this context as I was expected to travel at the last minute to attend court which was in itself very traumatic and disruptive and made it all the more difficult to give quality evidence. This impacted my ability to bring someone for support and meant I was unable to visit the court beforehand for the familiarity measures that someone residing in Scotland would have been offered. When I arrived for court, the case didn't start for nearly two full days due to being a juror short and general disorganisation. I was waiting on edge ready to be called with building anxiety whilst the defence was still entering evidence and visiting me to present it.' (A survivor)

## **Information Sharing**

Another important component of trauma informed practice should include a clear legislative requirement on the court and the COPFS to provide survivors with information regarding their case in a timely fashion. Survivors continue to tell us that they are not kept informed about what is happening with their case. Sometimes survivors are given information second hand as other witnesses have been notified before them. The accounts we hear show that there are vast inconsistencies in the level of service that survivors receive when it comes to information sharing. This restricts the ability of our services to advise survivors what they might expect.

'Improved communication is necessary. Communication was very poor, and I was let down on that.' (A survivor)

Survivors need to be given detailed and meaningful information regarding their rights, this should include things like their right to read their witness statement in advance of giving evidence, to be told of sensitive record or sexual history applications. This should also include information about the criminal proceedings itself, when the case will call, decisions to withdraw and the verdict. We routinely see that survivors are let down on this front and often when they do receive information the person giving it is unable to tell them what it means or advise what might happen next in the process. The RCS Survivor Reference Group (SRG) is a group made up of survivors of sexual violence, many of whom have experience of the justice system, whose perspectives

inform the work of Rape Crisis Scotland. We consulted with the SRG extensively about this bill.

In consultation sessions with the SRG, we found that failures in information sharing in the justice process were experienced by many members.

One survivor said the ‘accused always gets all the information, you are left in the dark. It has to be consistent, and everyone offered the same experience and service.’ Survivors agreed that they often are the ones needing to chase the information and that it would be helpful to receive an update that even just says there is no update. Someone described having to phone six different people just to be told that the case hadn’t gone ahead.

The way in which information was received made a big difference. One survivor said: ‘I got told through email that the case was dropped. I felt there was no protection from the perpetrator and didn’t know why it wasn’t going ahead. I had to chase and persevere for answers.’

A recurring theme was that not every survivor wanted the same way of receiving information on their case. The information sharing needs to be tailored to the needs of the survivor to be part of trauma informed practice.

We support not only the increase in advocacy services for survivors but the introduction of independent legal advice to assist survivors throughout a range of processes involved in the criminal justice system, giving legal advice on the complexities of this in a trauma-informed manner which supports them through the legal process.

‘Justice reform is needed urgently, after everything I have been put through by the justice system has deterred me from any future crimes that I may fall victim to in the future, which I am ashamed to say but it’s the truth. The trauma and stress that the victim endures outweighs the sentences given.’ (A survivor)

### **What are your views on Part 3 of the Bill which deals with special measures in civil cases?**

We welcome the intention of the Bill to rectify some gaps in the provision of special measures in civil cases. At present, Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 does not include provision of special measures for witnesses giving evidence at non-evidential hearings and does not prohibit cross examination of a witness by a perpetrator of abuse. We support the Bill’s aim to improve the situation for all civil cases, not just those in child contact cases as the, not yet implemented, 2020 act would do. However, whilst the Bill goes some way to resolve these matters, we do not feel that it goes far enough to protect the interests of survivors of rape and sexual violence within the civil courts.

### **Special Measures for Vulnerable Witnesses in Civil cases –**

We believe that the provisions for special measures in civil cases should be strengthened beyond that which is incorporated within the Bill.

We feel that the provision of special measures in civil cases should be more in line with those in the criminal justice system. In criminal cases, s271 of Criminal Procedure (Scotland) Act 1995 gives provision for witnesses in certain circumstances to be 'deemed' vulnerable. This includes those under 18 but also where the proceedings relate to; sexual offending, trafficking, domestic abuse, stalking, or there is a 'significant risk of harm' to the person by them giving evidence.

We believe that the provisions on civil cases should incorporate such a 'deemed' vulnerable quality where the civil proceedings incorporate assertions of rape or sexual violence. The provisions in the bill would only allow a witness/victim to be 'deemed' vulnerable if a 'non-harassment order, interdict or any similar order or remedy granted by a court' is in place or there is a conviction or ongoing prosecution of a 'relevant' offence relating to the parties. These provisions do not provide enough safety for victim/ survivors of rape and sexual violence. The Miss M case involved civil proceedings to claim damages against her rapists. Under these provisions the survivor in the Miss M case (and cases of that kind) would not have been automatically entitled to special measures. It is entirely unacceptable that the law would not provide such a basic protection in such obvious circumstances.

The Scottish Women's Rights Centre (SWRC) is regularly involved in civil proceedings where issues of gender-based violence are at the core of the case, these include family cases, employment tribunals, immigration proceedings and CICA cases alongside claiming damages. These clients are almost always inherently vulnerable because of the abuse they have experienced, and there are examples of cases where they have found it challenging to convince the court to grant special measures even where the content of the case involved such abuse. SWRC has experience of representing vulnerable parties where special measures have been refused despite there being ongoing allegations of serious domestic abuse and this being the core purpose of the court to determine them. In one instance where special measures were not granted and the witness was told to attend court, she was forced to accept a very reduced settlement to avoid doing so.

The requirement that to be 'deemed' vulnerable there must be a court order, conviction or ongoing prosecution presents a considerable barrier to justice for many of the survivors we support in civil cases. We would stress that conviction rates for these types of offences are considerably lower compared to the number of cases reported to the police and that many more go unreported to the police. The SWRC has found that obtaining a civil court order such as an interdict, is not an option for many of the women we support. It has seen a steady increase in the number of survivors representing themselves in civil cases due to the legal aid crisis and the decrease in solicitors willing to provide legal aid funded work. For those not entitled to legal aid, means testing for protective orders means that many women cannot meet the expense of obtaining such an order and are advised that the cost is not worth it.

This only serves to provide certain witnesses who have complied with parts of the criminal justice system with the use of these provisions. It doesn't consider the access to justice barriers faced in obtaining civil orders, it is not always the right decision for the police to be involved in proceedings – child contact cases often contain details of domestic abuse/ sexual abuse where the police have not been involved. It is

understandable that a survivor might not wish to go through the criminal justice process which is deemed inherently traumatising with low conviction rates but still see that the circumstances of the rape be relevant to the civil proceedings.

The rise in women representing themselves in civil proceedings also gives rise to concerns that witnesses are not 'deemed' vulnerable by the courts they will be at a disadvantage when trying to argue a vulnerable witnesses application in court.

Survivors engaging in civil justice processes require the use of special measures to ensure their protection and ability to give their best evidence. They should be extended to ensure that survivors of sexual violence are 'deemed vulnerable' by virtue of them being complainers of sexual violence.

Miss AB noted that, having received special measures, she believed that 'they should be offered automatically then the survivor could decide.' Survivors of sexual violence are inherently vulnerable because of their experiences; the psychological and emotional impact is immense. Any legal proceedings which involve the survivor having to face their perpetrator in court deserves the use of special measures. They should be deemed vulnerable and entitled to special measures, these should be in the form that the survivor feels most comfortable with and will assist them to give their best evidence.

### **Prohibition on Cross-Examination**

We would submit that this restriction should go further than the provisions in the bill allow for if it is to truly protect the interests of survivors of rape and sexual violence. We note that the policy intention, outlined by the Scottish Government, is 'to protect persons who have suffered abuse, such as domestic abuse, from being cross-examined by their abuser'. We would urge them to also consider that the needs and experiences of survivors of rape and sexual violence are distinct and specific, and the bill should give further consideration of their needs.

Rape and sexual assault survivors are frequently engaged with the civil courts in circumstances relating to their experiences of those crimes. This is no less traumatising and difficult a process than engaging with the criminal justice system and by comparison we frequently find that survivors are not afforded the same level of protection.

The prohibition on cross examination follows the same requirements as discussed above for special measures to be granted which causes significant barriers to justice for some survivors. We note that the survivors in civil damages cases, such as Miss M, Miss AB and Denise Clair, would not have been afforded the protection from cross examination automatically.

Our services have had multiple requests and an increase in enquiries regarding survivors who wish to pursue this course of action. Many of them feel that they have been let down by the criminal justice system. We note that in the three civil rape proofs that have taken place in Scotland, to date none of those survivors have received a penny of the compensation awarded to them. They have however, reported an increased sense of empowerment and validation. It has a potentially life changing impact on the life of a survivor to have a declaration in a court of law that the rape took

place. This has major social value in holding perpetrators of sexual abuse to account in a country where conviction rates have remained stubbornly low.

The survivors bringing these cases and engaging in the civil justice systems need to be afforded protections to ensure they can effectively participate. This should include ensuring that there are no circumstances where the defender in such an action would be able to cross-examine the survivor, they would not be able to conduct their own defence in this regard and would be required to instruct a solicitor or the court would be required to appoint one for them.

Miss M highlighted that at the start of the civil case she was advised that Stephen Coxen (found in those proceedings to have raped her repeatedly) could potentially represent himself, and this was a real concern for some time. She had to factor the idea that he might be able to face her in court and question her into her decision to continue with the case.

Survivors could find the experience of being cross-examined by their abuser intimidating, placing them at a disadvantage. It also gives the abuser the means to further control or commit further abuse. The civil justice processes should not be a facilitator for this and should actively seek to discourage this to stop their processes being used as a means of abuse. These protections should be obvious from the start and guaranteed to survivors.



## **Extract from Submission from Victim Support Scotland**

### **What are your views on Part 1 of the Bill which establishes a Victims and Witnesses Commissioner for Scotland?**

Victim Support Scotland are supportive of the creation of a Victims and Witnesses Commissioner for Scotland in Part 1 of the Bill. Our organisation and people we support have long been calling for a Victims and Witnesses Commissioner to be established in Scotland.

In 2021, VSS published 'Making the Case the for a Victims Commissioner for Scotland'<sup>7</sup>, outlining our position on the role and the scope of its powers. Several of the recommendations VSS made are reflected in the provisions within Part 1 of the Bill. However, we believe that further steps can be taken to ensure the Commissioner is upholding and fulfilling the rights of victims and witnesses across Scotland.

#### **1.1 Functions**

VSS are supportive of provisions within the Bill which require the Commissioner to engage with victims and witnesses and persons providing victim support services as part of its general function. Engagement with victims and witnesses, and the organisations which support them, is crucial to ensuring their voices are at the forefront of any advocacy undertaken on their behalf.

#### **Standards of Service**

We are also supportive of provisions within the Bill which require the Commissioner to monitor compliance with standards of service set and published in the Victims and Witnesses (Scotland) Act 2014<sup>8</sup>. Whilst the standards of service are set and published by relevant criminal justice agencies, there is no existing model of accountability to ensure these are adhered to. Feedback from people affected by crime tells us that the agencies accountable to the standards of service are regularly found not to be compliant with them. People with lived experience have told us that they feel there is no one to help when these standards are not being met. To promote the effectiveness of standards of service, it is essential that compliance is monitored, and criminal justice agencies are held accountable to the standards set.

#### **Victims' Code for Scotland**

VSS are also supportive of provisions within the Bill which require the Commissioner to monitor compliance with the Victims' Code for Scotland.<sup>9</sup> As with the Standards of Service, all too often we are told by people affected by crime that their rights as victims have not been upheld. One person who had experienced domestic abuse explained that they felt perpetrators have more rights than victims. They added:

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<sup>7</sup> Making the case for a Victims' Commissioner for Scotland - Victim Support Scotland

<sup>8</sup> Victims and Witnesses (Scotland) 2014 Act

<sup>9</sup> Victims' Code for Scotland

*“It’s a bad day when the victims of domestic violence have less rights than the person doing damage to them.”*

It is concerning that, despite the Victims’ Code being enshrined in legislation for almost a decade, victims still feel their rights are not being fulfilled. To ensure the Victims’ Code is effective, it is vital that victims’ rights are upheld by criminal justice agencies and any other body they may encounter as a victim. VSS believe that the Commissioner’s power to monitor compliance with the Victims’ Code will assist in promoting and upholding the rights of victims in Scotland.

However, our organisation believes that it is not only criminal justice agencies who should be held accountable to the fulfilment of rights under the Victims’ Code for Scotland. People affected by crime may engage with numerous public bodies as a victim, including local authorities for housing needs and the Children’s Hearing System. For example, one person who experienced domestic abuse told us:

*“The Commissioner should interact with organisations outside the justice system e.g., housing. In housing, victims of domestic abuse are being taken advantage of and there needs to be somebody who can talk to these issues.”*

As such, our organisation would recommend extending the monitoring of compliance with the Victims’ Code to a wider range of public bodies, including but not exclusively, Children’s Hearings and Housing.

Another key influence over the realisation of victims’ rights are legislators. Legislation can have serious and long-term consequences for the fulfilment of victims’ rights. As such, our organisation would recommend extending the function of the Commissioner to monitoring legislative compliance with the Victims Code for Scotland.

## **Trauma-Informed Practice**

VSS is also supportive of the provision within the Bill which requires the Commissioner to promote best practice, in particular trauma-informed practice, by criminal justice agencies and persons providing victim support services.

We strongly believe that trauma-informed practice should be embedded within the criminal justice system, to prevent further trauma to people who come into contact with it. People with lived experience tell us that they believe the Commissioner should be responsible for holding to account agencies and services found to be engaging in poor trauma-informed practice.

We would seek clarification on what, if any, action can be taken by the Commissioner where it is found that criminal justice agencies or support services are not demonstrating best practice.

## **1.2 Civil Functions**

VSS are supportive of provisions within the Bill which enable Scottish Ministers to amend the Commissioner’s general function to include the civil function.

We understand that people affected by crime may still have to engage in civil proceedings in relation to the offence. For example, women who have experienced gender-based violence may have to attend civil court for child contact disputes. A 2021 study, *Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings*,<sup>10</sup> carried out by Edinburgh Napier University found significant disparities in understandings of domestic abuse in civil courts compared with criminal practice. Women's rights groups have raised concerns that victims of domestic abuse are having their human rights breached in civil court.<sup>11 12</sup>

In this context, it is vital that a Victims' and Witnesses Commissioner for Scotland can promote and advocate for the rights of victims, regardless of whether they are going through civil or criminal proceedings as a victim of crime.

### **1.3 Engagement**

VSS are supportive of provisions within the Bill which enable the Commissioner to engage with groups of victims and witnesses. We are also supportive of the requirement of the Commissioner to prepare and review a strategy for engaging with victims, witnesses and victim support organisations.

As part of our consultation response, VSS engaged with members of our Support for Families Bereaved by Crime (SFBC) family reference group, comprised of people with lived experience. Members of the reference group told us they wished to see a greater commitment to working with victims and witnesses. They recommended engagement with working groups of people with lived experience and ensuring that panel and/or advisory groups included victims with lived experience of the criminal justice system.

The reference group also recommended the creation of a register of victims and family members bereaved by crime who wished to engage with the Commissioner. They proposed a variety of engagement was carried out with people registered including focus groups and surveys. They recommended providing people with lived experience with options on how they wished to engage. For example, a choice of attending online or in-person feedback sessions. People with lived experience emphasised that choice of engagement was important to ensure victims and witnesses were heard and felt their experiences were validated. They also felt the register should be operated in such a way that members are kept updated with work of the Commissioner and how their feedback will be used to promote the rights of victims and witnesses in Scotland.

Another person with lived experience of domestic abuse recommended the Commissioner attend pre-existing working groups as well as setting up their own.

Engaging with victims and witnesses is vital to ensure the work of the Commissioner derives from the lived experience of people affected by crime. Only through actively and regularly engaging with victims and witnesses can the Commissioner effectively

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<sup>10</sup> Edinburgh Napier University, *Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings*, (2021).

<sup>11</sup> The Scotsman, *Experts and campaigners warn plight of domestic abuse victims and their children ignored in Scottish courts*, (2021).

promote and uphold their legislative rights. As such, VSS would recommend consideration of feedback from people with lived experience regarding the type of engagement they wish to see from a future Victims and Witnesses Commissioner for Scotland.

VSS would support further statute obligations on the Commissioner to engage with victims and witnesses. For example, including a requirement in the legislation that any advisory group should be comprised of persons with lived experience and persons providing support to victims.

#### **1.4 Restriction on exercise of functions**

VSS acknowledges that whilst provisions within the Bill allow for the Commissioner to consider individual cases and drawing conclusions about them for the purpose of exercising a function, they may not exercise any function in relation to an individual case.

Whilst we understand the rationale behind this decision, feedback from people affected by crime indicates that there is an appetite for the Commissioner's functions to extend to cover individual cases where appropriate.

Some members of the VSS SFBC family reference group expressed that it was not ideal, however they understood the limitations on this function. Others suggested a caseworker role for the Commissioner which would enable them to manage individual cases.

There are examples of Commissioners being able to investigate individual cases within Scotland and internationally. For example, The Children and Young People Commissioner in Scotland may conduct individual investigations into whether “a service provider had regard to the rights, interests and views of a child or young person in making a decision or taking an action that affected that child or young person.”<sup>13</sup>

There are limitations on the CYPC's power to investigate individual cases, for example, if another body can investigate it. However, it is important that this function is available to the Commissioner, particularly where there may be unique cases that do not fall within the jurisdiction of another public body.

In Australia, the Victoria Victims of Crime Commissioner has powers to investigate complaints regarding non-compliance with their victims' code.<sup>14</sup> We believe this is an example of best practice in terms of ensuring the functions of the Commissioner are effective in upholding and promoting the rights of victims and witnesses.

As such, we would recommend expanding the function of the Commissioner to include the ability to investigate individual cases of non-compliance with the Victims Code for Scotland where it does not fall within the jurisdiction of another body.

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<sup>13</sup> Commissioner for Children and Young People (Scotland) Act 2003 – Scottish Parliament

<sup>14</sup> The Commissioner's Role – Victims of Crime Commissioner

VSS also welcomes the clear outlining of restrictions on the functions of the Commissioner, a provision we recommended in the previous Scottish Government consultation, 'Improving Victims' Experiences of the Justice System.'<sup>15</sup>

However, we would encourage the Scottish Government to ensure this information is accessible and comprehensive to ensure victims and witnesses are easily able to understand what the Commissioner can and cannot do. Again, the Victoria Victims of Crime Commissioner provides an example of best practice in this regard, with the powers of the Commissioner clearly outlined.<sup>16</sup>

## **1.5 Strategic Plan**

VSS are supportive of provisions which require the Commissioner to prepare and publish a strategic plan in respect of each three-year period. This timeframe for the strategic plan is in line with those required by the Victims Commissioner of Northern Ireland<sup>17</sup> and the Victims Commissioner for England and Wales.<sup>18</sup>

VSS would however recommend implementing a requirement for the Commissioner to consult with victims, witnesses and persons providing support to victims of crime when consulting on the draft. It is essential that the strategic plan is in line with the needs of victims and witnesses in Scotland and that they have a voice in its preparation.

People affected by crime have also highlighted to us that the report should be accessible and written in plain English, avoiding jargon. The SFBC reference group noted that the recommended register of victims and witnesses could provide feedback to contribute to the preparation of the report.

## **1.6 Additional Feedback from Victims**

Alongside commenting on provisions within the Bill, members of our SFBC reference group also provided feedback regarding additional functions and provisions they would like to see included in Part 1 of the Bill.

- Commissioner's functions extended to monitor media reporting of criminal cases.
  - Working alongside IPSO to hold media outlets to account for any breaches of the Editor's Code of Practice.
  - Particular issues surrounding victims right to privacy.
- Recruitment was identified as a key priority, reference group members emphasised that extensive training and accountability were required.
  - Believe victims and witnesses should be advising on the interview panel for the Commissioner and their staff.

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<sup>15</sup> Improving Victims' Experiences of the Justice System – Scottish Government

<sup>16</sup> The Commissioner's Role – Victims of Crime Commissioner

<sup>17</sup> Victim and witness strategy and victims of crime commissioner consultation report – Department of Justice

<sup>18</sup> Victims' Commissioner for England and Wales Strategy: June 2019 to June 2022 – Victims Commissioner

- Importance of speaking to victims and witnesses to identify all the intersections that need to be included.
  - For example, housing, financial impact of crime, media etc.
- Robust staffing and funding required to ensure Commissioner can effectively perform all their functions.
- A single point of contact at the Commissioner's office for victims and witnesses was identified as a priority.
- Members raised concerns regarding Freedom of Information Act being a barrier to the Commissioner performing their function.
  - Have experienced issues obtaining access when enquiring about FOIs.
  - A good relationship with the Information Commissioner would be expected to overcome any obstacles.

**What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts?**

*“Trauma informed practice is important. There’s no way you can feel better about what has happened, but you can feel more supported and comfortable. There should be acknowledgement, for example, that this court case is going to stay with someone for the rest of their life.”*

Individual who had experienced sexual assault

People affected by crime have consistently highlighted the traumatising impact of navigating the Scottish criminal justice system. Many have highlighted that the process of going through court can often be as traumatising as the crime itself.

The Vision for Justice Scotland sets out the Scottish Government's aim to have “effective, modern, person-centred and trauma-informed approaches to justice in which everyone can have trust”.

This includes an acknowledgement that the experiences of people affected by crime which have resulted in their involvement with the justice system are often traumatic. It is therefore vital that the processes within the system minimise further trauma or re-traumatisation.

Victim Support Scotland believes that a general principle of trauma-informed practice should be applied to all criminal justice agencies with this duty clearly set out as legislation to ensure services can be held to account. As such, we are supportive of provisions within the Bill which incorporate the principle of trauma-informed practice into our criminal justice system.

Recommendation Seven from the Transforming Services for Victims and Witnesses study, which identified that trauma-informed training and principles should be the standard practice, was considered as having the potential to have the greatest impact on victims and witnesses. However, evidence suggested that this recommendation would also be the most challenging to implement consistently across the board. We are hopeful that provisions within the Bill will set a precedent for transformative change

to the criminal justice system by ensuring every part is operating from a trauma-informed perspective.

## **2.1 Importance of trauma-informed practice**

People affected by crime have consistently highlighted to VSS the ways in which interacting with criminal justice agencies and navigating the system has retraumatised them. We see this throughout people's journeys through the criminal justice system, from the first point of contact with Police to notifications of prisoner's release.

One person affected by crime told us:

*"The way we were treated (by the Police) was dismissed. They didn't understand where we were on my trauma journey. There was no respect because I was not the original one to step forward. We were told we weren't victims because we didn't step forward."*

Survivor of sexual assault.

Another person who experienced and witnessed abuse as a child highlighted the difference between agencies which adopt a trauma informed approach and the impact this had on their experience. When speaking of their experience in court, they told VSS:

*"The way the prosecutor handled the questioning was a complete farce, asking me questions in a way that made it look like I was lying."*

In contrast, they stated that other forums such as the Child Abuse enquiry have been "brilliant" in how they are run. They are very "trauma informed." For example, they let you meet with counsel in contrast with the court experience. They stated:

*"In a court situation where you are being picked apart and you're always thinking at some point you'll get a chance to speak, and you can't."*

Trauma is complex and can impact everyone differently and at different stages in the aftermath of being impacted by crime. In the development of the NES trauma-informed justice knowledge and skill framework, one witness with lived-experience said:

*"It's not a cut and dry, "This is how trauma is" because it affects everybody different. Don't expect everybody just to be over it in the first couple of months...trauma affects people differently and there's no time limit on it."*

It is therefore vital that regardless of where a victim of crime may be in their journey, every justice agency they come into contact with is operating from a trauma-informed approach to minimise the risk of retraumatisation.

## **2.2 Requirement for Justice Agencies to have regard for Trauma-Informed Practice**

In May 2023, the Scottish Government launched The Trauma-Informed Justice: A Knowledge and Skills Framework, developed by NHS Education Scotland. The framework provides criminal justice agencies with the tools to develop and deliver trauma-informed practice training to their workforce. The work developed directly from discussions at the Scottish Government's Victim's Taskforce. VSS was a key partner and presented at the official launch on the importance of implementation of the framework to create meaningful change in the justice system for victims and witnesses and how to support this.

Following the launch of the taskforce, Victim Support Scotland expressed that introduction of the framework must be followed by implementation and a robust system of monitoring and evaluating. It is a positive step that provisions in the Bill expand on the first steps taken in the launch of the framework by creating a requirement for justice agencies to have regard to trauma informed practices.

## **2.3 Requirement for the Standards of Service to include standards on trauma-informed practice.**

VSS are supportive of provisions within the Bill which require criminal justice agencies to include standards on trauma-informed practice within the Standards of Service.

As we have noted, embedding trauma-informed practice in the operation of criminal justice agencies is vital to improving the experiences of victims and witnesses in Scotland. The requirement for criminal justice agencies to include trauma-informed practice within the standards of service is an important step in achieving this.

However, as previously discussed in our response to Part 1 of the Bill, these standards can only be impactful if they are effectively monitored, and agencies are held accountable to complying with the standards.

As such, it is essential that a Victims and Witnesses Commissioner for Scotland is able to monitor compliance with the standards of service and can hold justice agencies accountable when failures to do so are identified.

We have also previously highlighted in our response to Part 1 of the Bill that criminal justice agencies are not the only public bodies victims will come into contact with. People affected by crime have also highlighted the benefits of local authorities and the Children's Hearing System adopting a trauma-informed approach. Again, it is important that not only do these agencies adopt a trauma-informed approach, but that compliance can be monitored and enforced by the Commissioner.

## **2.4 Trauma-Informed Practice in Criminal and Civil Court Proceedings**

VSS are supportive of provisions within the Bill which allow for conduct of matters of the court in Criminal and Civil proceedings to be conducted in a way that accords with trauma-informed practice.



Feedback from victims of crime highlights that the conduct of the defence can often be one of the most traumatising parts of the justice process. This is particularly the case in cases of rape and sexual violence.

One person affected by crime told us:

*“When giving my own evidence the defence was doing dramatic pauses. I felt patronised by the defence in the way that she talked to me, and that she shook heads at the Sheriff when we came back into the room (after investigating a point which I could have clarified, if asked to do so.)*

*I had a feeling that the Sheriff wasn’t at all interested, there was a lack of respect and empathy. My relative who was also a witness got a feeling of that too (she felt that the Sheriff spoke to her as if she was a school child).*

*Because of this experience (of the justice system) I would say I would give the justice system a wide berth. And I’m confident and articulate, and not afraid of the perpetrator. What about people where this is not the case? The literature says that witnesses are ‘at the heart’ but I did not at all feel that way. I feel totally disillusioned by the process. I feel very strongly it is worthless using these words in oratory and guidelines or documents if the actual experience of witnesses does not match.”*

Person who experienced domestic abuse

Whilst legislation such as the Rape Shield Laws exist to provide a degree of protection in court proceedings for victims of sexual crimes, research has found that in practice the defence’s conduct is often left unchallenged. The Equality and Human Rights Commission Report, The use of sexual history and bad character evidence in Scottish sexual offences trials, found that the little evidence available on the operation of these laws suggested that “prosecutors rarely challenge the introduction of sexual history and bad character evidence.”

It is essential that victims are not left feeling as traumatised by court proceedings as the crime itself. As such, we are supportive of provisions within the Bill which enable the courts to set rules designed to ensure that criminal proceedings are conducted in accordance with trauma-informed practice.

Regarding Section 26, we have previously highlighted in our response to Part 1 of the Bill the need for Civil Courts to operate in accordance with trauma-informed practice. This includes family law solicitors in child contact disputes with a domestic abuse indicator. As such, we are supportive of provisions which allow courts to establish trauma-informed practice in proceedings.

## **2.5 Trauma-Informed Practice in Scheduling of Business in Scottish Courts**

VSS are supportive of provisions within the Bill which require the judiciary to consider trauma-informed practice when criminal and civil court business is being programmed.

We understand the significant impact court backlogs and frequent adjournments have had on people affected by crime.

One person affected by crime told us:

*“This is the fourth time it’s (the trial) been adjourned. The complete exhaustion I feel is overwhelming, I just want this to be done. I feel like I have to put my whole life on hold until the next time, only to be told that its once again adjourned. How do you plan for life like that?”*

Individual who used VSS support services

Another person who had experienced abuse highlighted the impact adjournments have had on their feeling of safety. They said:

*“The last court case my abuser had to attend was pushed, they were free and came home, because I hadn’t put any further restrictions, but no one had called me to say that was happening. The court cases kept getting pushed (back) and pushed (back), and every week I had that anxiety, hearing keys rattling (at the door), thinking they were coming back that day.”*

Individual who used VSS support services

As of July 2023, the average time between pleading diet and evidence led trial is 43 weeks for the High Court, compared to the pre-COVID level of 22 weeks and 41 weeks for sheriff solemn, compared to the pre-COVID level of 11 weeks.

These timescales are having a significant impact on people affected by crime who tell us they feel they are stuck in limbo until the trial, reliving the incident repeatedly through fear they may forget details. This can be extremely traumatising for victims and prevents them from being able to move forward in the aftermath of a crime. As such, addressing the court backlog should be a key priority in creating a trauma-informed justice system.

## **2.6 Floating Trials**

VSS notes that the Bill’s Policy Memorandum acknowledges: “The Bill could have prohibited, or placed new restrictions on, the use of floating criminal trials. Requiring the use of fixed trial dates could have had the benefit of providing increased certainty to complainers, witnesses and accused people.

It could also help justice agencies to plan their own services more proactively. For example, if a trial date were known at an early stage, COPFS could more easily allocate an Advocate Depute to the case well in advance.”

The Memorandum goes onto state that the Scottish Government considered it was not in the interest of the policy objective due to the flexibility floating trials provide the use of them in reducing the backlog.

VSS are strongly opposed to the use of floating trials and believe the use of them to be in direct opposition to trauma-informed principles. Our objection to the use of floating trials is highlighted in Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report. Recommendation 8 noted VSS and Rape

Crisis Scotland's support for fixed trials in the new sexual offences court. It noted our concerns that: "a floating trial model was seen as not being truly compliant with trauma-informed practice for vulnerable witnesses."

People with lived experiences have consistently advised of the trauma floating trials can cause. Not only are they disruptive in terms of allowing for time off work, travel and childcare but they can also leave the victim in a state of anxiety as they prepare for the trial. The victim and/or witness prepares themselves for the trial, experiencing the anxiety and trauma that can come with this, only to be told it will not be going ahead that day. They are then forced to do this repeatedly until their case is called.

Whilst we acknowledge the desire to reduce the backlog, this cannot be achieved by utilising a method which victims tell us is traumatising, distressing and disruptive. It is counterproductive to attempts to reduce retraumatisation and is not in line with trauma-informed practice.

VSS strongly calls on the government to end the use of floating trials.

## **2.7 Information Sharing**

The way information is communicated, expressed, and whether information is shared at all following a crime has been consistently highlighted as a key issue in people's experiences with the criminal justice system.

People supported by VSS have highlighted that throughout their journey through the criminal justice system they did not understand what was happening at different stages. Feedback provided shows that victims and witnesses feel they are often given insufficient information or are provided with information in a format they do not understand.

One person affected by crime told us:

*"You are bombarded with so much info, and so much jargon, it is very hard to explain to others around you even if (you) understand it yourself."*

A key aspect of creating a trauma-informed justice system is ensuring that people affected by crime understand what each stage involves and what will be asked of them.

People affected by crime must feel empowered to understand the criminal justice system to enable them to advocate for themselves and participate in each stage.

As such, VSS would recommend that as part of creating a trauma-informed justice system, all justice agencies are required to review their information sharing protocols to ensure these are compliant with trauma-informed practice.

This includes ensuring information is readily available to victims, accessible and jargon-free. It also means ensuring victims have a choice over how they receive information to ensure this is not causing further trauma. It is vital that access to and

administration of information is improved across criminal justice agencies to ensure they are operating from trauma-informed principles.

**What are your views on Part 3 of the Bill which deals with special measures in civil cases?**

Victim Support Scotland are supportive of the principle of extending special measures in civil cases. As previously highlighted in our response to Parts 1 and 2 of the Bill, it is essential that civil courts operate from a trauma-informed practice due to the same vulnerabilities of victims who may engage in proceedings. A key aspect of implementing this principle is to ensure special measures are available to all vulnerable witnesses. In civil cases, this is particularly relevant for people who may have experienced abuse or sexual harm. However, we do not believe the Bill in its current iteration goes far enough to support vulnerable witnesses in civil proceedings.

**3.1 Why Special Measures in Civil Cases Matter**

People affected by crime have highlighted the distressing and traumatising impact a lack of special measures in civil proceedings can have. Some victims may have also engaged with the criminal justice system as part of their case prior to attending civil proceedings. In these instances, they report confusion and dissatisfaction that the measures extended to them in criminal proceedings were not available in the civil court.

One individual supported by VSS had been taking her ex-partner to court through a civil case as well as there being criminal cases against him previously that had meant she had been referred to Victim Support Scotland. She had found the support from VSS in the court and community ‘fantastic’.

However, she was dismayed to find out that she could not have the special measure of a supporter with her in the civil case on the day of court as she had accessed in the criminal court. She highlighted that criminal cases are often linked with civil cases, especially in some areas such as domestic abuse, and individuals require emotional and practical support in both sets of processes.

Staff and volunteers working with individuals affected by crime in VSS court-based support services have also highlighted the disparity between trauma-informed support in criminal and civil proceedings. One VSS staff member told us:

*“Justice agencies have in the past not always recognised that the need for support when giving evidence in a civil case was as important to vulnerable witnesses as in criminal cases. It is very confusing for the same people who are receiving special measures and recognition that they were vulnerable for criminal cases they were involved in, but not in civil ones. Not trauma informed at all.”*

To improve the experience of victims and witnesses in Scotland it is essential that vulnerable witnesses can access special measures in all court proceedings.

### 3.2 Vulnerable Witnesses

Section 30 of the Bill amends Section 11B of the Vulnerable Witnesses (Scotland) Act 2004 to include civil proceedings. Section 11B will “*require civil courts to treat certain witnesses as vulnerable if there is a civil protection order in place to protect them from abuse by a party to the proceedings or if the witnesses are the victim, or alleged victim, of an offence for which a party to the proceedings is being prosecuted or has been convicted.*”

Whilst we are supportive of the extension of access to special measures, current provisions within the Bill are extremely limited and are lacking in trauma-informed principle.

The requirement for a civil protection order to be ‘deemed as’ vulnerable presents a significant barrier to victims of crime accessing special measures. The Policy Memorandum outlines the objectives of the provisions as seeking to protect people who have experienced abuse. However, such a requirement excludes victims who have not reported the crime.

The 2018/20 Scottish Crime and Justice Survey found that just under a sixth (16%) of people who experienced partner abuse in the 12 months prior to the interview said that the police came to know about the most recent (or only) incident. Under the proposed provisions, a woman experiencing domestic abuse would have to have reported the abuse and seen it go through criminal proceedings before being deemed as vulnerable. VSS does not believe this is trauma-informed and is concerned that it will fail to fulfil the policy objective which is to protect victims of abuse in civil proceedings.

Similar issues are reflected in the requirement for the witness to be the victim, or alleged victim, of an offence for which a party to the proceedings is being prosecuted or has been convicted. Figures published by Rape Crisis Scotland from the Criminal Proceedings in Scotland 2019-2020 figures show that in 2020-21 there were 2,176 rapes and attempted rapes reported to the police. However, this resulted in only 152 prosecutions and 78 convictions. The low conviction and prosecution rates for rape and attempted rape present a significant barrier to survivors accessing special measures in civil proceedings. This is of grave concern particularly as an increasing number of survivors are pursuing civil proceedings as a result of the low prosecution and conviction rates. As such, provisions to extend special measures to civil proceedings could in fact create more barriers for victims who currently face significant obstacles in accessing justice.

Whilst witnesses are able to make an application to the court for special measures to be considered if it is likely to reduce distress, this is conditional on the approval of the court. VSS do not believe this is in line with trauma-informed practice and creates further barriers to victims and witnesses accessing vital support.

VSS would recommend replication of provisions in Sections 10 and 11 of the Victims and Witnesses (Scotland) Act 2014. These provisions define vulnerable witnesses as:

- children (i.e. those under age 18 at the date of the commencement of the proceedings in which the hearing is being or is to be held);

- adult witnesses whose quality of evidence (as defined in section 271(4) of the 1995 Act) is at significant risk of being diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or due to fear or distress in connection with giving evidence;
- victims of alleged sexual offences, human trafficking, an offence the commission of which involves domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence;
- witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.

Importantly, Section 11 deemed vulnerable witnesses are automatically entitled to use standard special measures.

We believe that in order to remove the above noted barriers, these provisions must be replicated in civil proceedings in order to meet the policy objectives of Part 3 of the Bill.

### **3.2 Prohibition on Personal Conduct of Case**

Section 31 of the Bill makes provisions which allow civil courts to prohibit a person conducting their own civil case and carrying out personal cross-examination. VSS are supportive of this provision within the Bill and the policy objective to prevent people who have experienced abuse from being cross-examined by their abuser in civil court.

However, we understand that the trauma caused by cross-examination is not confined to cases involving abuse in civil proceedings. One person affected by crime told us:

*“The power to prohibit personal cross-examination in civil proceedings is good, as defence lawyers will go for the jugular. In my own case I approached lawyers about taking my case to civil court and one lawyer said they would advise against it as the perpetrator and lawyer would make my life hell for some years.”*

Individual who had experienced stalking

While we are supportive of the restriction on personal cross-examination as a special measure, we are concerned that the above noted barriers will prevent some victims from accessing this in civil proceedings. The same threshold for being ‘deemed’ as vulnerable also exists for the prohibition on personal conduct of case. As such, we would reiterate our concerns relating to Section 30 of the Bill and believe requirements should reflect those stipulated in Section 10 and 11 of the Victims and Witnesses (Scotland) Act 2014.

### **3.3 Vulnerable Parties**

Section 33 of the Bill extends the availability of special measures in non-evidential hearings to civil cases generally. These provisions require the court to consider the use of special measures where this is likely to reduce distress in non-evidential proceedings where vulnerable parties may experience distress as a result of participating in proceedings.

As above, we would express concerns relating to the accessibility of these measures and would recommend amending provisions to reflect those in Section 10 and 11 of the Victims and Witnesses (Scotland) 2014 Act.

## Extract from Submission from Children 1st

### What are your views on Part 1 of the Bill which establishes a Victims and Witnesses Commissioner for Scotland?

“Just because we’re children, doesn’t mean we don’t have strong feelings and don’t understand things.”

Girl, age 8, [Sharing Stories for Change Report](#) for Children 1st Bairns Hoose Project

Children 1st support the proposal to establish a Victims and Witnesses Commissioner for Scotland, as children experience extremely distressing experiences as victims or witnesses. However, children and young people need to have their experiences fully understood by this role, and a Commissioner should not be brought in – at considerable expense – to act as a substitute for real action in improving the experiences of victims and witnesses, such as consistently scaling up the Bairns Hoose model following the opening of Scotland’s first Bairns Hoose by Children 1st and our partners in North Strathclyde.

Article 12 of the United Nations Convention on the Rights of the Child (the UNCRC) says that children have the right to be listened to and taken seriously. Article 13 of the UNCRC sets out a right to receive information, as part of freedom of expression. However, children and young people who are victims or witnesses often report not feeling heard – either by the people they meet or by the system overall. The UNCRC underpins the Barnahus model, and the European Barnahus Quality Standards informed [Scotland’s Bairns Hoose Standards](#), which were published in May 2023. These set out the rights-respecting approach that should be taken towards child victims and witnesses in Scotland. The Victims and Witnesses Commissioner for Scotland must have all this work – the UNCRC, the European Barnahus Standards and the Scottish Bairns Hoose Standards – right at the centre of their work.

Children and young people account for a significant proportion of people who are victims and witnesses, but this is not always recognised. Often, children are overlooked or forgotten, or fall between different definitions of a child, with children aged 16 and 17 overlooked far too often as they are categorised as adults. For example, the Scottish Crime and Justice Survey reports on experiences “after the age of 16”, and the Recorded Crime in Scotland statistics say that “The specific age of the victim cannot generally be determined from the data supplied by Police Scotland.” The UNCRC is clear that a child is defined as someone under the age of 18, and that children are entitled to special protections on account of their age.

We also recognise the concerns raised by other organisations such as Scottish Women’s Aid<sup>19</sup>, on the basis that there is already a confident and experienced network of organisations who provide advocacy at an individual and national level. The role of the new Commissioner will have clear crossover with the existing post of the Commissioner for Children and Young People in Scotland. The Victims and Witnesses

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<sup>19</sup> [SWA-Improving-Victims-Experiences-of-the-Justice-System-Consultation-Response.pdf \(womensaid.scot\)](#)



Commissioner for Scotland must add value to this existing work and provide value for money. This is particularly important given that system improvements are often not implemented effectively because of a lack of resource. The Commissioner should not absorb funds at the expense of practical improvements that will directly improve victims and witnesses' experiences.

We would note that victim support organisations are missing from the list of specific 'persons' outlined in Section 6, who the Commissioner may work with in exercising their functions. Including victim support organisations in this list, as well as ensuring their inclusion in the advisory group, would be a sensible start to ensuring respect and collaboration is there from the outset. The development of the Strategic Plan outlined in Section 9, and the annual plan outlined in Section 16 should include consultation with victim support organisations, to ensure that the Commissioner's work is fully informed by the sector at large and with recognition that children represent a substantial proportion of victims.

While it may not be possible for a Commissioner to intervene or advocate in specific cases while they are working through due process, there should be a role for the Commissioner to offer clear and accessible information that will help victims and witnesses and their families to navigate whichever system is relevant to them. The lack of readily available or understandable information is one of the most frustrating parts of victims and witnesses current experience. This is out of step with Article 13 of the UNCRC, and the Bairns Hoose Standards that were published this year. The criminal and civil justice systems are full of language that is difficult to understand for adults as much as for children, confusing processes and unanswered questions. While the children's hearing system is currently being considered for redesign, it can also feel similar. Supporting work to address this information gap needs to be a priority for the Commissioner.

Children 1st also believe that it is important that the Commissioner has clear oversight of legislation that has been enacted relating to victims. We are extremely concerned that large amounts of important legislation and policies are being introduced without any clear mechanisms, intention, or resources to implement in full. Changes for children outlined in the Children (Scotland) Act 2020 offer one example where significant portions of that Bill remain unimplemented. Indeed, Part 3 of the Victims, Witnesses and Justice Reform (Scotland) Bill seeks to extend sections of the Children (Scotland) Act 2020 that are not yet in force meaning layers of unimplemented legislation are now building on top of each other. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 makes way for crucial improvements in the availability of the option for children to pre-recorded evidence (such as Evidence on Commission), but this is still only at the early stages of being phased in. Without implementing legislation, we do not help victims and witnesses.

On this point more widely, while we are aware of a number of areas of law that have been passed but not brought into force through our own work, we would support the Scottish Parliament or the Scottish Government taking forward a review of legislation not in force to understand the true scale of this backlog.

The Bill proposes that the Victims and Witnesses Commissioner's remit is limited to the criminal justice system. While the Policy Memorandum does set out that it is the

Scottish Government's intention that in future this remit could be extended to cover those involved in civil proceedings and those whose case is to be managed by the children's hearing system, we believe the remit should cover all these systems from the outset. The reality is many victims' experience justice through the civil justice system or the children's hearing system. This is not because their experience is particularly different to someone whose case might be pursued through the criminal justice system, but because the consequence of a case being heard by the criminal justice system is significant, barriers to criminal processes can be high and decisions are often (rightly) made to divert cases away from it. This feels particularly important considering the Children (Care and Justice) (Scotland) Bill that is currently working its way through parliament which will result in a significant extension of the remit of children's hearings. From the perspective of victims and witnesses, limiting the remit of the Victims and Witnesses Commissioner would only serve to underline the hierarchy.

### **What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts?**

*"When I went to court, I had to sit in an empty box room with no windows, no sweets or anything and a few broken toys. I was 9 years old. If you're coming from dealing with something terrible you don't want to come to somewhere broken when you already feel broken. It's good to know kids and come to the Bairns Hoose and it's a safe place."*

Jasmin, age 18, visiting Scotland's first Bairns Hoose in North Strathclyde.

### **Bairns Hoose as trauma-informed justice**

Children have for far too long told us that the systems of child protection and justice that were designed to protect them often caused more distress and harm.

Scotland's first Bairns Hoose opened in August 2023, as a place where children can experience trauma-informed justice and protection 'under one roof'. While the Bairns Hoose model is set out in more detail below, a tour of the Bairns Hoose, guided by the voices of the children and young people we support and who have influenced the way in which the Hoose was built, can be found [here](#).

This follows change that started more than 10 years ago when a review of justice led by Lord Carloway highlighted the unacceptable suffering of children and young people within justice and called for "clear sky thinking" and the modernisation of a system that failed to protect children from brutal cross examination, disjointed and delayed processes. The Evidence and Procedure Review that followed, published in 2015, said that "It is now widely accepted that taking the evidence of young and vulnerable witnesses requires special care, and that subjecting them to the traditional adversarial form of examination and cross-examination is no longer acceptable." This review said this is because

"recounting traumatic events is especially distressing for children, and can cause long-term damage", and traditional methods used in court are not a good way to elicit clear, accurate evidence.<sup>20</sup>

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<sup>20</sup> [evidence-and-procedure-full-report---publication-version-pdf \(scotcourts.gov.uk\)](#)

Therefore, it is through our experience, alongside the overwhelming research evidence, that we believe children should not have to attend criminal and civil courts unless absolutely and unavoidably necessary. Children should be included in the planning and decision making for how they share their experience. They should also be spared the trauma of repeating their stories over and over, should have co-ordinated support in one place and should be supported to avoid having to go to frightening and overwhelming courts. All children should have someone to support them through the process and to explain what is going to happen. This is what a Bairns Hoose will offer.

### **The system as it stands**

We still regularly see evidence that current civil and criminal justice processes create additional trauma and delays recovery. It's important to note, this experience extends right throughout the system from the moment of disclosure to after a trial concludes. At the moment, children are processed through a complex system that asks them to share their trauma over and over – sometimes [up to 14 times](#).

We continue to see examples of children and young people experiencing real distress because of the system.

*One young person who had been sexually assaulted had to give evidence at High Court and shared her experience of being cross examined. It was highly traumatic, as well as having to see the man in court, and have her name called over a tannoy system as “a witness”. She also was unprepared for hearing his name on the tannoy and this caused anxiety and flashbacks. She was accused by the defence agent of being promiscuous and asked, “why didn’t you scream and run out of the house?” Afterwards she reflected on being made to feel that she was guilty and questioned at what stage was she allowed to be the victim, not the witness.*

Sharing Stories for Change report, September 2021

Our [Sharing Stories for Change](#) research shows that the place in which ‘talking’ takes place is very important to children and young people, and had a significant impact on whether they were able to talk. Sometimes it was surprising how the basic needs of families were overlooked: for example, not having anything to eat or drink, being cold and uncomfortable. From the name of the accused ringing out around court buildings over a tannoy when cases are called, to the complete inability of most court buildings to confidently offer separate exits and entrances to victims so that they do not have to run into the accused, children and families tell us that court buildings feel unsafe and untrustworthy.

Exhausting delays mean that fear and anticipation surrounding a victims or witnesses’ experience lasts years, and repeated adjournments mean that anxiety and stress build repeatedly up to a court date, only to be sent away without any progress having been made.

This has a long-term impact on children’s lives, and can lead to a lack of sleep, anxiety, fear, flashbacks, missing school. Limited and sporadic changes will not be

enough to change this, however well intentioned. This is why we need transformational change for children.

If we had really thought about giving children the best possible opportunity to give their evidence, we would never have designed what we have now. The key principles of trauma-informed practice, as outlined in the [Care Inspectorate's Trauma-informed Practice Toolkit](#), are safety, trustworthiness, choice, collaboration and empowerment. As it stands, the justice system falls short on all fronts.

### **Duties to be trauma-informed**

Children 1st are supportive of any measures that increase awareness and understanding of trauma and its impact in the justice system. We welcome the Scottish Government's recognition that trauma is a significant issue for the justice system to consider. However, with our experience to hand, we would strongly argue that trauma informed practice will not happen through surface level wording. Change must go to the very core of Scotland's justice system. It also cannot be delivered through legislation alone – resource, and political will are also needed.

One of the challenges for creating a trauma sensitive process for victims and witnesses is that the spaces and places used for courts have been designed specifically to embody a sense of 'the weight of the law', with symbols of power and formal processes.

In our view being 'trauma- informed' is not enough: we must move towards significant culture change where our systems and processes are trauma sensitive and those people who work alongside children and families are aware of the actions that they can take and the changes they can make. Rather than simply being 'informed' we need to create a supportive environment that means systems and processes can respond sensitively and compassionately to those who have experienced trauma and harm. Those working within these systems need to know what to do with the information they have gained by being trauma-aware, so that they can become trauma responsive. As one Mum told us:

*"Like they could dae it fae another room like they put the weans in another room, you don't have to actually be in the court room. I think they should get a different way to deal with it but everybody is different, some people want to face the person that's done this to them and be that strong person so each to their own **but I think they should have a more versatile way of doing it.**"*

Sharing Stories for Change report, September 2021

The court system was never designed to be trauma-informed, and the infrastructure right through to the buildings themselves create a sense of disempowerment and fear, which is a big part of why victims report the experience of going to court can be worse than experiencing the original harm. A trauma-informed system must involve infrastructure including buildings, processes, roles and responsibilities. One young woman told us:

*“I think I’d make it more like relaxing, as much as it’s you’re not going to be relaxed, even if it’s something small, you’re not going to be relaxed. And I think making that room more, as comfortable as you can make it, or so comfortable, as comfortable as you can make it for people so that they don’t feel as like cold.”*

## **Sharing Stories for Change report, September 2021**

Consistently scaling up the Bairns Hoose model right across Scotland would support the level of system change we believe is required to see trauma-informed justice and care and protection.

### **Benefits of trauma-informed practice**

The current timescales for court cases are unacceptable, and a clear barrier to a trauma-informed approach. The court case backlog existed long before the pandemic but delays lasting years have now been normalised. Audit Scotland report that “Average waiting times for the most serious cases have more than doubled since the pandemic. They currently stand at between 43 and 53 weeks. Some of these crimes disproportionately affect women and children.”<sup>21</sup> These delays have a destabilising and traumatising impact for children and families involved. One family we supported told us:

*“Basically, from start to finish, it was January 2019 when it was reported, and it was July this year [2021] he was found guilty. That’s a long time. You know walking about, she saw him in the town once and that kind of, you could see the physical impact as we drove along the street. She burst into tears, she absolutely burst into tears. Totally lost it. She was like “I cannae cope with this. I cannae cope that he’s standin’ there, looking like a normal life” and she is trying to grab all these little pieces of her life and try and pull them all together so she can be stable again. So yeah, it’s a been a long, long journey. It could have been a short story. It could have been a very short journey.”*

### **Aileen - a parent’s story from December 2021**

It is important to recognise that improving trauma-informed practice will, in many cases, involve improving the efficiency of the justice system overall. For example, delays to court trials mean that inperson testimony is taken long after the events in question. This often means that memories are less clear, and testimony can become confused. While this is no fault of the person giving evidence, it increases feeling of self-blame, and worries about getting questions “wrong”. Pre-recording evidence for trial can mean that testimony is taken closer to the time of relevant events and is not eroded by the impact of time.

Avoiding undue delay is a key tenant of trauma-informed approach to a Bairns Hoose. As set out in the European PROMISE Barnahus Quality Standards:

*“avoiding undue delay between reporting and the forensic interview can make it easier for a child to tell their story and remember details, thus improving the quality and value of the child’s testimony. It may also reduce risk that the child is exposed to pressure to*

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<sup>21</sup> [Criminal courts backlog \(audit-scotland.gov.uk\)](https://www.audit-scotland.gov.uk/publications/criminal-courts-backlog)

*withdraw statements. It also enables an early assessment of potential protection needs without contaminating the evidential value of the child's statement. This in turn ensures that there is no delay in protecting the child from further exposure to violence. A medical exam done in a timely manner may help physical findings of violence be recognized and documented to guide both treatment processes and judiciary proceedings. It may also allow therapeutic services to start earlier."*

## **Right to Recovery**

A trauma-informed response also means upholding children's right to recovery, as set out in Article 39 of the UNCRC. This states that:

*"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."*

Too often, the right to recovery is forgotten, and children and young people and their families are not properly supported to process what happened, and to move forward. Making sure children and young people have direct access to recovery support during and after their justice process is just as important to trauma-informed justice as making changes to avoid additional hurt through the court experience.

Our Sharing Stories for Change research found that:

*"For many children and young people supported by Children 1st workers and Women's Aid workers, they described the kindness and emotional support provided as being very important for their recovery. Feeling safe, being listened to and feeling in control were especially valued amongst children and young people in support services. The 'being there' whenever this was needed by families was especially important. There were key milestones for families when a child or young person had been hurt, harmed or witnessed a crime and support was required: for example, at the start of the very complex process, when decisions were made by police and COPFS, when people may have been arrested and bailed, when court proceedings were underway, when verdicts were reached.*

*"However, in learning from children and families there could be many different events that required additional support– for example, returning to school, any community knowledge about what has happened, moving home, changing family relationships and friendships. It was emphasized that for many families, having someone they trust who they can turn to at any stage was critical."*

## **Bairns Hoose for child victims and witnesses**

Our work to build and co-ordinate Scotland's first Bairns Hoose demonstrates the level of transformational system change we believe is required to genuinely improve child victims and witnesses' experiences and achieve trauma-informed practice throughout the justice system. The Bairns Hoose is a purpose-built venue for children and young

people who are victims or witnesses of crime.<sup>22</sup> It is designed to reduce feelings of anxiousness, fear and a lack of support and control that are so often associated with victims and witnesses' experiences of justice. It has been built with children and young people, and for them.

Children and young people told us about how their senses made a big difference to their experience, reduce trauma and support their emotional regulation so that they could share their story. They told us that thinking about this could help reduce stress, and this has been thought about throughout the Bairns Hoose. They told us they wanted to see a soft, comfortable textures like cushions, blankets and rugs to help them feel comfortable in the space. The space includes soft colours, and lighting with views to the garden, with calming smells, and drinks and snacks available whenever families want. There is a water fountain outside, and sound proofing throughout, so that the space doesn't feel overwhelming.

As well as the environment created by the actual building, the Bairns Hoose seeks to provide a trauma-informed response through focussed multi-agency working that means the number of times children have to re-tell and re-live their experiences is reduced as far as possible, and they are able to move forwards through recovery work. Children 1st believe that this is a clear example of what trauma-informed practice really means. **While we can't always stop bad things happening to children and young people, we can do everything in our power to help them to recover.**

The Scottish Government have made a commitment to the Bairns Hoose model, through Pathfinders which will be launched in Autumn 2023.<sup>23</sup> However, this Bill seems to overlook the experiences of children, and the work to introduce Bairns Hoose across Scotland. The lack of clear connection to legislation and financing for the Bairns Hoose approach within this Bill is disappointing, as we are clear that Bairns Hoose is essential to ensuring children experience a true trauma-informed approach.

While we are encouraged by the Scottish Government's recent announcement that a programme of Pathfinders will soon be funded, the work to introduce Bairns Hoose to Scotland is still in its infancy. Moving this model beyond North Strathclyde, where Children 1st now offer and operate a high quality Hoose which is the first of its kind in Scotland and scaling it with consistency will take real resource and leadership.

## Legislation Already Passed

The legislative backdrop to the Bairns Hoose model in Scotland offers a good example of why a combination of legislation, resource and practice change are needed to create meaningful change towards being trauma informed. We are clear that legislation has an important part to play, but alone it is not enough. The key legal requirements for a Bairns Hoose - the ability to pre-record evidence - is already technically possible. Yet despite being technically possible, this option is significantly underused, even for children and young people - who are well recognised as some of the most vulnerable participants of the justice system.

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<sup>22</sup> More detail about the Bairns Hoose can be found here: [Bairns Hoose | Children 1st | Children 1st.](#)

<sup>23</sup> [Programme for Government 2023 to 2024 - gov.scot \(www.gov.scot\)](#)



This is deeply frustrating, given the widespread, cross-party agreement that pre-recording evidence should be available to children. Children 1st have long argued that children should not be required to attend court, unless absolutely and unavoidably necessary. In 2016, former Justice Secretary Michael Matheson said “children should be spared the trauma of giving evidence in a formal court environment. Indeed, I want to eliminate the need for all children to attend court at all during the trial.”<sup>24</sup> During the passage of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, the Scottish Parliament’s former Justice Committee said that enabling children to provide their evidence in advance of the trial “is an important step forward in increasing the greater use of pre-recording, which the Committee agrees will reduce the distress and trauma caused to child witnesses as well as improve the quality of justice.”<sup>25</sup> Legislation was passed to “enable all of the child witness’s evidence to be given in advance of the hearing”, unless specific exemptions applied<sup>26</sup>.

This should have resulted in a significant expansion in the use of pre-recorded evidence for child victims and witnesses. Yet research conducted by the University of Edinburgh evaluating Bairns Hoose published in March 2023 clearly shows that despite pre-recorded evidence being technically available to ensure children do not have to attend court, and while some improvement might be recognised in High Court cases, **“the requirement [to attend court] remained in almost all cases”**.<sup>27</sup> Sometimes, evidence is pre-recorded and the impression is created that the child will not need to attend court. Later, for reasons that are not clear, children are told they still need to give evidence in court. This can create even more distress and confusion.

Allowing children to pre-record their evidence and avoid the need for attending court has widespread support - from the Scottish Government, across political parties and the general public, as well as in legislation. It is therefore difficult to see why evidence shows that children are still being asked to attend court. It is clear that fully embedding trauma-informed practice will take much more time, resource and possibly further legislative developments to make practical improvements, including the Bairns Hoose, a reality. Legislation is only ever part of the picture, and we would welcome a greater interrogation of the planned resourcing for trauma-informed practice from the Scottish Government and other relevant agencies.

We would also point to the research conducted through the University of Edinburgh into victims’ and witnesses experiences of court in relation to domestic abuse, which showed that most participants felt that new laws (that are in force) were underused.<sup>12</sup> This also showed that “most parents/child witnesses reported that harm to children was insufficiently recognised; they felt perpetrators were not held accountable for the impact that domestic abuse had on children and that children’s safety and specific needs/vulnerabilities were inadequately addressed. Many victims felt that abuse of a third party – for example, family and friends – had not been taken account of adequately throughout the process.” Attention and energy needs to be directed towards getting legislation that has already been passed implemented to make the intended difference.

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<sup>24</sup> [Getting it right for child witnesses - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>25</sup> [Stage 1 Report on the Vulnerable Witnesses \(Criminal Evidence\) \(Scotland\) Bill \(azureedge.net\)](https://www.azureedge.net)

<sup>26</sup> [Vulnerable Witnesses \(Criminal Evidence\) \(Scotland\) Act 2019 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>27</sup> [North Strathclyde Bairns Hoose Evaluation Phase One Report, March 2023 \(ed.ac.uk\)](https://ed.ac.uk)



Using pre-recorded evidence more often and reducing the overall timeframe cases take to be processed through courts are essential to the system's overall ability to embed trauma-informed practice, and to the success of the work in the Bairns Hoose. This could be addressed more specifically in this Bill, as well as by fully implementing the provisions of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 relating to the presumption for pre-recorded evidence. Out of court options to pre-record or live link evidence are essential to a trauma-informed approach.

**Other system changes:**

Other system level changes that we believe are necessary to realise trauma-informed practice include:

- Bureaucratic issues like legal aid and representation should be in place before the day of trial but often lead to last minute adjournments. Cases should not fail or be adjourned because of failures to submit evidence or make disclosures. Mechanisms should be in place with both the COPFS and the SCTS to ensure that where paperwork means a case cannot progress forward, victims and witnesses are told in good time, and well before they have travelled to a court building.
- Children and their families should not be asked to attend court, unless absolutely and unavoidably necessary. Pre-recording evidence should be available without the need for applications for specific measures, for all under the age of 18.
- If court attendance ever is required, or is the preference of those involved, more attention must be given to making sure that victims and witnesses feel safe attending. With the best will in the world, and even despite the best efforts from Victims Information and Advice (VIA) services or Victim Support Scotland, it is often impossible for people guarantee an exit or entry into the building that means they feel safe from the accused or their family. It's possible to request a separate entrance to the accused, but many court buildings are simply unable to facilitate that – either with any separate entrance at all, or with separate entrances being easily identifiable and in close proximity to the main entrance. This is best avoided by ensuring that pre-recording evidence is available to more victims and witnesses, but where victims and witnesses feel unsafe and do need to attend court, there should be specific arrangements in place – agreed and shared with the family in advance – that ensure victims and witnesses are confident in their safety.
- When parents are required to give evidence in court, families may need to arrange childcare. When children are required to give evidence alongside their carer, it is often not anticipated that after they testify, they will be unable to join their parent or carer until after they themselves have testified. The lack of consideration of childcare requirements – or the emotional impact of being separated from loved ones while others testify - creates difficult situations for children and families. This should be factored into court scheduling, and families should be supported to ensure that safe childcare arrangements are available at all times.
- Court-related correspondence and communication is delivered in a way that is often incomprehensible for adults, never mind children, and there are rarely opportunities to ask questions about what happened and why. We are aware of efforts to review

COPFS correspondence with the aim of making these child-friendly. Despite these well-intentioned efforts, the correspondence remains retraumatising in its style and wording. While the effort to improve correspondence is welcome, in our view this work to develop victim and witness friendly and centred, easy read correspondence is better led by organisations with expertise in creating trauma sensitive care and support, with the ability to ensure that victims and witnesses can participate, give feedback and be supported to help develop new, improved process, in a person centred and trauma sensitive way.

### **The proposals in the Bill**

In terms of the specific proposals contained in the Bill, Children 1st would favour a stronger framing of the duty to have regard to trauma-informed practice, and for this to apply more extensively than the list of organisations included by virtue of Section 24. We note that the duty to have regard to trauma-informed practice only applies to the Lord Advocate, Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland.<sup>28</sup> This does not include the judiciary, or the children’s hearing system. We would favour a clear, shared and equal duty to be applicable for all those involved in the justice system. This is particularly important given the expanding remit of the Children’s Hearing System, currently in legislation in the Scottish Parliament. The need to only “have regard” is also, in our view, too limited and easy to set aside in the face of other considerations like capacity, resource and existing practice. We would favour a stronger framing, such as a duty to “have due regard”, and for this to extend to all agencies involved in the provision of justice services.

It is also concerning that many of the most significant changes required from the Scottish Courts and Tribunals Service, the Crown Office and Procurator Fiscal Service and Police Scotland appear without clear commitments and costings in the financial memorandum. We appreciate that a level of independence is required in the way that these decisions are made, but it is entirely possible that this Bill will pass without any clear understanding of what will follow and how much this will cost. Changes to the SCTS estate and to COPFS processes “cannot be quantified”. We believe this Bill is the right opportunity to offer parliament some sense of how and when public funding might be needed to support the changes needed in this Bill, and this should be clarified further as the Bill goes forward.

As well as urgently implementing the full provisions from the Victims and Witnesses (Criminal Evidence) (Scotland) Act 2019, we believe that more accountability is needed about whether and when children are being asked to attend court, and why. We believe that too often, children are being asked to attend court because of system habits rather than because it’s actually needed in that case. Robust accountability is needed around this, including regular reporting on how often pre-recorded options are offered to children and young people, and what pre-recording options actually look like. Children should always be able to pre-record their evidence in a Bairns Hoose.

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<sup>28</sup> [Victims and Witnesses \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

**What are your views on Part 3 of the Bill which deals with special measures in civil cases?**

As outlined in our response to Part 2 on trauma-informed practice, it is frustrating to see an extension of measures that have not yet appeared in practice for children and young people following the Children (Scotland) Act 2020. It is important that children and young people do not see further delay to the implementation of provisions that are already in law for them.

When special measures are discretionary, we find that often there is a high bar to access them. We have supported people who have been asked to provide evidence – such as a letter from CAMHS or their GP - to justify why they need special measures. This means judgements are being made about their ‘vulnerableness’, based on what might be an arbitrary detail.

In our view, special measures should be available to those who need them. Creating barriers to accessing special measures can mean the system misses opportunities to support victims and witnesses in a trauma-informed way.

## **Information about FAMS**

FAMS are volunteer lead, grassroots charity based in North Lanarkshire. Originally created in November 2013 in memory of Paul Gerard McGilvray with the specific aim of supporting the mental health & wellbeing of adults, children and young people affected by trauma, following the death of a loved a through Homicide and Culpable Homicide. However, over the last 10 years the charity has been supporting victims of multiple traumatic crimes including Incest, Child Sex Abuse and Domestic Abuse.

Funding permitting, FAMS provide a range of Trauma Informed Intersessions including various counselling modalities, holistic therapies and lived experience peer support groups and befriending. Our services can be accessed either face2face, telephone or via video platforms.

As crime is a 'family affair', and its ripple effect touches all ages! FAMS have forever adopted a family/community approach, delivering various social events all year round i.e. children's Christmas party and pantomime, Halloween etc. In addition, the charity often provides daily support to families in distress by accompanying them during High Court trials. As and when required, home visits are made to reach families or individuals too traumatised to leave their home. It is not uncommon for FAMS to be supporting families throughout their Criminal Justice journey, from immediately after the crime, leading up to and through the court case and subsequent appeals.

Ann Marie Coccozza is one of FAMS three co-founders and the aunt of Paul Gerard McGilvray, (20) who was murdered August 2004. She is also an adult survivor of prolonged and prolific childhood neglect, violence and crime including physical, mental and sexual abuse, rape and incest. She has an ACE score of 10.

Ann Marie has first-hand, personal involvement of the impact of crime and years of experience supporting others navigate the Criminal Justice System. Her views are current and crucial.

ALEX B LINDSAY  
FAMS Trustee (Secretary)