

# Criminal Justice Committee

26th Meeting, 2023 (Session 6), Wednesday 25  
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 (covering Parts 1 to 3 of the Bill)

- **James Foulis**, Balfour Mason, member of the Family Law Association
- **Stuart Munro**, Convener of the Criminal Law Committee, Law Society of Scotland
- **Jonathan Campbell**, President, Edinburgh Bar Association

7. A submission on the Bill has been received from the [Law Society of Scotland](#). The section of the submission covering Parts 1-3 of the Bill, which are the subject of today's meeting, is reproduced below in the **Annex**. The full submission can be accessed online by using the link in this paragraph.

## Further reading

8. A SPICe briefing on the Bill [can be found online](#).
9. The responses to the Committee's call for views on the Bill [can be found online](#).
10. A SPICe analysis of the call for views, covering Parts 1 to 3, [can be found online](#).

## Previous evidence sessions

11. At previous meetings the Committee has taken evidence from—

### 27 September

- Cabinet Secretary for Justice and Home Affairs (to set the scene on the Bill).

### 4 October

- 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
- 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

12. The Official Reports of these meetings [can be found online](#).

**Clerks to the Committee  
October 2023**

## ANNEX – Submission

Extract from Submission from the Law Society of Scotland (relating to Parts 1 to 3)

[https://yourviews.parliament.scot/justice/victims-witnesses-justice-reform-bill/consultation/view\\_respondent?show\\_all\\_questions=0&sort=submitted&order=ascending&q\\_text=law+society&uuld=393332425](https://yourviews.parliament.scot/justice/victims-witnesses-justice-reform-bill/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=law+society&uuld=393332425)

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

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

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Parliament call for evidence about the Victims, Witnesses, and Justice Reform (Scotland) Bill. The committee has the following comments to put forward for consideration.

### General Comments

Over hundreds of years, the Scottish legal system has developed with the aim of ensuring that those who are guilty of a crime are convicted and acquitting those against whom guilt has not been established beyond reasonable doubt. For achieving this purpose, Scotland has an adversarial criminal procedure that sometimes is hostile with complainers and witnesses. The provisions of the bill look for improving the experiences of victims and witnesses within the criminal justice system, safeguarding the rights of the accused<sup>1</sup>.

The Policy Memorandum accompanying the bill acknowledges at paragraph 4 that there are differences in the terminology used to describe those who have experienced crime, particularly sexual offences. The Policy Memorandum uses a mix of terms, with the choice influenced by the context. The bill itself uses both ‘victim’ and ‘complainer’, with ‘victim’ defined in section 23(1) for the purposes of Part 1 of the bill as a person against or in respect of whom an offence or harmful behaviour by a child has been or is suspected to have been committed or carried out.

We recognise that the term ‘victim’ is widely used and understood in ordinary language. We also recognise that the term is already in use in legislation, for example on the context of the Human Rights Act 1998 and in the Bail and Release from

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<sup>1</sup> <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/policy-memorandum.pdf>

Custody (Scotland) Act 2023. We further recognise that the rights and experience of those who have experienced crime must be treated with respect.

The term ‘complainer’ is the language used in legal settings. This choice of terminology is intrinsically linked to the presumption of innocence, which in our view is the cornerstone of a civilised society that respects the rule of law. The principle that an accused person is presumed innocent until proven guilty must be maintained and respected. We are concerned that in a legal context and in legislation, categorising a complainer as a ‘victim’ prior to any conviction runs the risk of dismissing the presumption of innocence and conveys the message that an allegation equates to guilt. In our view the term ‘complainer’ is the language of the court, and must continue to be used as such.

Throughout our response, we have mirrored the language used in the bill but we reiterate the importance of correct terminology, particularly in the legal context and in legislation.

We welcome many provisions of the bill that could impact positively in the public perception of our criminal justice system and the victims and witnesses’ experiences. Overall, that is the case of the establishment of the Victims and Witnesses Commissioner for Scotland, the implementation of the principle of trauma-informed practice and special measures in civil cases, and the establishment of independent legal representation for complainers when section 275 of the Criminal Procedure (Scotland) Act 1995 operates.

However, the provisions related to the change in the number of jurors, the creation of the Sexual Offence Court, and the implementation of the single-judge pilot for rape and attempted rape cases, raised significant concerns within the profession. We identify in some of the provisions potential threats to judicial independence and the rights of the accused.

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

[Please note our general comments on the Bill, not related to any specific consultation question, replicated within the organisational details section of this submission]

We support the establishment of the office of Victims and Witnesses Commissioner for Scotland as outlined in Section 1 and agree with the Commissioner’s general function at Section 2 to promote and support the rights and interests of victims and witnesses. We note that the proposed role has been extended from that set out in the consultation to include witnesses. In view of the broad range of activities which the Commissioner will have this role will need significant resources to be effective. The Scottish Ministers should confirm that the Commissioner will receive sufficient support to carry out the job.

In terms of Schedule 1 to the bill which makes further provision about the office, the Commissioner will be appointed by the King, following nomination by the Scottish Parliament, for a single term of up to 8 years.

The Commissioner will be independent of the Scottish Government, but accountable to the Scottish Parliament.

It is anticipated that the Commissioner's role will be extended by regulations to cover people involved in civil proceedings in terms of Section 3. This would cover a case where a person may initially be a victim in a criminal case and where a prosecution was unsuccessful, a civil action followed. On the basis that the role is extended by regulations under Section 3, we suggest that the definition of victim as set out at section 23 will require to be amended. We also suggest that before Scottish Ministers amend the Commissioner's general function by regulations to include the civil function, they should consult with persons who have knowledge and experience of civil proceedings.

In terms of Section 4 (1), the Commissioner, in exercising the general Section 2 function by engaging with victims and witnesses, may establish such groups as the Commissioner considers appropriate and must pay particular attention to groups of victims and witnesses who do not have other adequate means by which they can make their views known.

While we welcome this provision, we are unsure as to whether the focus at Section 4 (1) (b) should solely be on "adequate means". We are unclear as whether this meaning is confined to financial means or it has a wider meaning. We believe that this would be an overly cumbersome process in determining which groups the Commissioner must pay particular attention to. We suggest that regard could be given to victims of particular offences. We refer to the latest Scottish Government statistics on recorded crime in Scotland 2022 – 23 [<https://www.gov.scot/publications/recorded-crime-scotland-2022-23/pages/4/>]. The total number of crimes recorded by the police in Scotland in 2022 – 23 was 289,352. Crimes of dishonesty was the largest group accounting for 36%, non-sexual crimes of violence accounting for 24%, crimes against society accounting for 21%, damage and reckless behaviour accounting for 15%, and sexual crimes accounting for 5%. Consideration could be given to classification of groups of victims and witnesses on this basis.

With reference to the establishment of groups at Section 4 (1) (a), we make reference to our comments above. Factors such as the potential for duplication of effort with, for example, the Children and Young People's Commissioner Scotland (CYPCS) will have to be considered where the interests of children and young people as persons against whom offences have been committed may have been up until now separately represented.

We welcome the provision at Section 8 (1) which restricts the Commissioner in the exercise of any individual case. If the Commissioner exercised the function in that way, this could adversely affect the trial process.

We are content with Section 9 which sets out the detail for the preparation and publication of a 3-year strategic plan and the laying that plan before the Scottish Parliament.

Sections 10 to 13 of the bill deal with the Commissioner's investigatory powers.



Section 12 gives the Commissioner powers to collect evidence during an investigation. The Commissioner can require persons to give evidence or produce documents relevant to the investigation.

Section 12 restricts that power when the person would be entitled to refuse to answer or produce in proceedings in a Scottish court (subsection (3)) or where the person is a member of the Crown Office and Procurator Fiscal Service (COPFS) (subsection(4)). We question why there is no similar exemption for defence agents in relation to subsection (4).

Sections 14 and 15 deal with information gathering.

Section 14 gives the Commissioner power to require a criminal justice agency (see Section 23) to supply information to determine if the agency complies with the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) section 2 standards of service or the Victims' Code for Scotland under the 2014 Act.

Standing the exemptions to provide information at section 14(3) and (4), there is no enforcement mechanism for situations where the exemptions do not apply and the criminal justice agency refuses, or delays providing the information.

Section 15 makes it an offence for the Commissioner, the Commissioner's staff or an agent of the Commissioner to disclose information which is not authorised under section 15(3). We note that these provisions appear to be in line with offences of unauthorised disclosure in respect of other regulators.

Section 21(2) obliges criminal justice agencies to comply with a request under Section 21(1) to co-operate with the Commissioner in any way considered necessary for the purposes of the Commissioner's functions. Like Section 14 there is no enforcement mechanism provided in the event of non-compliance.

In our general comments above, we have raised concerns regarding the definition of a 'victim' for this Part of the bill as including those against whom is it suspected a crime has been committed. In our view, the appropriate terminology for someone who has experienced crime prior to any conviction is 'complainer'. Consideration should be given to revising the name of the Commissioner as established under Part 1 of the bill to the "Victims, Complainers and Witnesses Commissioner".

Also, if a person is initially identified in criminal proceedings, but whose name does not subsequently appear either in the complaint or indictment, we question whether that person is a victim for the purposes of this bill.

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

Part 2 introduces measures which are aimed at better supporting vulnerable victims and witnesses by seeking to embed the use of trauma-informed practice in both criminal and civil proceedings.

The Society is actively involved in promoting trauma informed practice

[<https://www.lawscot.org.uk/members/cpd-training/online-cpd/trauma-informed-training/>]. In this respect we collaborate with Scottish Government and others to develop trauma-informed training in practice areas such as criminal law, family law, child law and personal injury.

We also commented on trauma-informed practice during the consultation stage [<https://www.lawscot.org.uk/media/373400/22-08-19-crim-improving-victims-experiences-of-the-justice-system-consultation-response.pdf>].

Section 24 amends the 2014 Act to include the principle of trauma-informed practice as an additional principle. Placing this principle on a statutory footing should better focus court users. As this principle attracts recognition and respect, society should begin to deal with victims in the terms of the bill in a more trauma-informed and person-centred way. We encourage any measure which attempts to minimise trauma for those involved in the Scottish criminal justice system.

We are pleased that “trauma -informed practice” is defined in section 69 as “a means of operating that:

- recognises that a person may have experienced trauma.
- understands the effects which trauma may have on a person.
- 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 any recurrence of past trauma or further trauma”.

This new duty to have regard to trauma-informed practice will extend to justice agencies including COPFS, Scottish Courts and Tribunals Service (SCTS), Scottish Prison Service, the Parole Board for Scotland and Police Scotland.

Sections 25 and 26 of the bill allow for criminal court rules (section 25) and civil court rules (section 26) to be amended to allow both criminal and civil proceedings to be conducted in a way that accords with trauma-informed practice. We support these provisions and we believe that appropriate rules of court will focus the minds of court users to ensure that proceedings are conducted in a way that accords with trauma-informed practice.

Sections 27-29 would amend existing provisions to ensure that when arrangements are made for the efficient disposal of court business it should be done in a way that accords with trauma-informed practice. While we support this approach, the Scottish Government should explain how this will operate in practice.

We have supported the principle of trauma-informed practice, but the extent to which this principle will transform hearings and scheduling remains unclear. Examples considered in the policy memorandum (paragraphs 165-178) include reducing but not prohibiting the number of floating trials (trials due to commence either on the stated date or within four court days). We supported the measures included in Part 2 in previous responses, though expressed some concern around the detail.



Overall, we support the objective of embedding the concept of trauma-informed practice in the justice system. It is important, however, to recognise the following points:

- The definition of trauma-informed practice set out at Section 69 is (perhaps necessarily) vague. There is a risk that the term will be interpreted in different ways by different judges, giving rise to uncertainty.
- While all those who come before the courts should be treated with respect and dignity, the court process is an adversarial one. An entirely justified focus on trauma-informed practice should never divert courts from the proper pursuit of justice: establishing guilt or innocence on the basis of the evidence.
- Achieving a properly trauma-informed system requires much more than legislative change. It also requires resources and changes in practice. The experiences of court users are just as likely to be improved by judicial consistency (having pre-trial hearings conducted by the same judge), effective communication (such as having a dedicated point of contact for complainers to be informed about the progress of a case) and avoiding delay (such as by ensuring early disclosure of evidence to the defence, thereby avoiding postponements).

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

Part 3 introduces new provisions around the use of special measures in civil cases, including prohibitions on self-representation in particular types of case (Section 31), and the establishment of a register of solicitors to represent instead in such cases. (Section 32).

We supported these measures in our previous responses [<https://www.lawscot.org.uk/media/373400/22-08-19-crim-improving-victims-experiences-of-the-justice-system-consultation-response.pdf>], although there remain issues around how the register will operate: who will administer the register, what criteria will be required for inclusion, whether the register will be for civil cases generally, or sub-divided into categories of work, how solicitors will be paid for this work etc. We note that solicitors in this new register will be appointed by the court. We agree that the court should have the power to appoint a solicitor in such circumstances as parties may struggle to find their own legal representation. Accordingly, we agree that such a register should exist where self-representation is precluded, although we acknowledge that a potential pitfall may come down to funding.

There is a duty on Scottish Ministers to consult with both the Society and with the Faculty of Advocates before making regulations to establish this registration process. We believe that Scottish Ministers should be under an obligation to report on the outcome of the consultation.

Section 32 (4) inserts a new Section 22E in the 2004 Act. Section 22E provides for Scottish Ministers establishing and maintaining a register of solicitors who may be appointed by a court under Section 22B of the 2004 Act (prohibition on personal conduct of case) as inserted by Section 4 (5) of the Children (Scotland) Act 2020.

We note that when making these regulations Scottish Ministers must include the detail of the requirements a person must satisfy to be included on the register (including training and qualification requirements) and the processes for including and removing a person from the register (including appeal rights).

However, Scottish Ministers have a discretion to include in the regulations a. that the register may be divided into parts by reference to type, subject matter or category of civil proceedings, b. the remuneration of solicitors appointed under Section 22B(6) including expenses and outlays such as counsel's fees and c. the conferring the duty of maintaining the register on a person.

We believe that regulations setting out of both solicitors' remuneration and conferring the duty of maintaining the register on a person should not be discretionary but should be mandatory. We would also welcome some detail regarding the operation of payments and who it is anticipated will be responsible for maintaining the register.

Section 33 repeals amendments made by the Children (Scotland) Act 2020 and substitutes provisions extending the availability of special measures in non-evidential hearings to civil cases generally. We agree that special measures should be extended to non-evidential hearings. It is wholly inappropriate for special measures to apply only in evidential hearings. Parties should be afforded protection by way of special measures throughout the civil process.

#### **10. Are there provisions which are not in the Bill which you think should be?**

While we welcome some of the aspects of the bill in terms of vulnerable witnesses, we question why the bill provides no scope for improving the treatment of vulnerable accused [<https://www.lawscot.org.uk/media/362501/vulnerable-accused-persons-report-final.pdf>]. This is a matter upon which we reported in 2019, and which has been subject of extensive academic and third sector interest: see for instance, the Equality and Human Rights Commission's inquiry paper, 'Inclusive Justice: A System Designed for All' [<https://www.equalityhumanrights.com/en/publication-download/inclusive-justice-system-designed-all>] published in 2020. We still believe that review of this area is required.